Plaintiffs Permitted to Add Defendants to Foreign Exchange Class Action Based

July 10, 2018

Late last month, the Court of Appeal of Ontario released its decision in *Mancinelli v Royal Bank of Canada*.[1] In it, the Court dealt with a situation that is becoming increasingly common in class actions: the plaintiffs in a class action alleging a conspiracy settle with one or more defendants and, as part of the settlement, obtain the cooperation of the settling defendant(s) who provide them with documents (and sometimes testimony) relating to the claim. In *Mancinelli*, the Court had to decide whether the plaintiffs could add additional defendants to their claim, based upon information contained in the "evidentiary proffer" received from the settling defendants. The proposed new defendants argued that the plaintiffs' proposed claims against them were statute-barred under the *Limitations Act, 2002* and the *Competition Act*.

On September 11, 2015, the appellants commenced a class action against sixteen groups of financial institutions alleging a price-fixing conspiracy in the foreign exchange or foreign currency market between January 1, 2003 and December 31, 2013.

On July 20, 2016, the appellants brought a motion to amend the claim to add two additional financial institutions as defendants to the action. The appellants' position was that they only learned of the involvement of these institutions after reviewing the evidentiary proffer of a group of settling defendants, which they received on May 24, 2016. The appellants argued before the motions judge, Justice Perell, that this was the first time they learned of the proposed new defendants' involvement in the alleged conspiracy, despite previously having conducted their own investigations, which included a review of publically available documents.

The motion turned on when the claim against the proposed new defendants was discoverable (*i.e.* when the plaintiffs knew or ought to have known that they had a claim against the new defendants). If the plaintiffs ought to have discovered their claims against the new defendants at the time they issued their claim, then those claims would have been statute-barred. If, however, the claims only become discoverable after the plaintiffs received the evidentiary proffer, then the claim would not be statute-barred.

Justice Perell accepted that the appellants did not know that they had a claim against the proposed new defendants until they obtained the evidentiary proffer. However, Justice Perell also found that the appellants failed to take all the steps that a reasonable

person(s) in the same or similar circumstances would have taken to identify the proposed new defendants as alleged co-conspirators. He found that with reasonable due diligence, the appellants would have been able to establish the identity of these proposed new defendants before the limitation period expired. In other words, while the plaintiffs did not in fact "know" that they had claims against the proposed new defendants, they "ought to have known". In particular, Justice Perell reasoned that the appellants ought to have "acted more like the investigation arm of a regulator and conduct a meaningful investigation."

The Court of Appeal disagreed and found that Justice Perell erred by:

- setting too high an evidentiary threshold on the appellants' motion;
- finding (without an evidentiary foundation) that the appellants through the exercise of due diligence could have identified the proposed new defendants; and
- failing to determine with sufficient precision when the appellants ought to have discovered their claim against the proposed new defendants.

The Court of Appeal set aside Justice Perell's decision and ordered that the appellants be permitted to amend their statement of claim to add the respondents as defendants to the action.

The decision is important because:

- It serves as a sobering reminder to organizations that think they have "dodged a bullet" by being left out of a class action – if one of the named defendants settles and cooperates with the plaintiffs, the organization may yet be added to the action at a later date.
- It clarifies that plaintiffs have a low evidentiary threshold to meet on a motion to add defendants to a claim and that a plaintiff's explanation for seeking to add defendants after the claim has been issued will be considered generously.

[1] Borden Ladner Gervais LLP acts for one of the defendants in the action.

By

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