

CITATION: Mancinelli v. Royal Bank of Canada, 2016 ONSC 6953

COURT FILE NO.: CV-15-536174

DATE: 20161109

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN
PRINCIPATO, DOUGLAS SERROUL,
LUIGI CARROZZI, MANUEL BASTOS and
JACK OLIVEIRA in their capacity as THE
TRUSTEES OF THE LABOURERS'
PENSION FUND OF CENTRAL AND
EASTERN CANADA, and CHRISTOPHER
STAINES

Plaintiffs

-- and --

ROYAL BANK OF CANADA, RBC
CAPITAL MARKETS LLC, BANK OF
AMERICA CORPORATION, BANK OF
AMERICA, N.A., BANK OF AMERICA
CANADA, BANK OF AMERICA
NATIONAL ASSOCIATION, THE BANK
OF TOKYO MITSUBISHI UFJ LTD.,
BANK OF TOKYO-MITSUBISHI UFJ
(CANADA), BARCLAYS BANK PLC,
BARCLAYS CAPITAL INC., BARCLAYS
CAPITAL CANADA INC., BNP PARIBAS
GROUP, BNP PARIBAS NORTH
AMERICA INC., BNP PARIBAS
(CANADA), BNP PARIBAS, CITIGROUP,
INC., CITIBANK, N.A., CITIBANK
CANADA, CITIGROUP GLOBAL
MARKETS CANADA INC., CREDIT
SUISSE GROUP AG, CREDIT SUISSE
SECURITIES (USA) LLC, CREDIT SUISSE
AG, CREDIT SUISSE SECURITIES
(CANADA), INC., DEUTSCHE BANK AG,
THE GOLDMAN SACHS GROUP, INC.,
GOLDMAN, SACHS & CO., GOLDMAN
SACHS CANADA INC., HSBC HOLDINGS
PLC, HSBC BANK PLC, HSBC NORTH
AMERICA HOLDINGS INC., HSBC BANK

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)
) *David Sterns, Kirk Baert and Ronald
Podolny* for the Plaintiffs

)
) *Katherine L. Kay and Eliot N. Kolers* for the
Defendants UBS AG, UBS Securities LLC
and UBS Bank (Canada)

)
) *Laura F. Cooper and Zohaib Maladwala* for
the Defendants, BNP Paribas Group, BNP
Paribas North America Inc., BNP Paribas
(Canada), and BNP Paribas

)
) *Linda Plumpton* for the Defendants, Bank of
America Corporation, Bank of America,
N.A., Bank of America Canada, and Bank of
America National Association

)
) *Allan Coleman and Robert Carson* for the
Defendants, Royal Bank of Canada and RBC
Capital Markets LLC

)
) *Andrew Gray and Aria Laskin* for the
Defendants, Barclays Bank PLC, Barclays
Capital Inc., and Barclays Capital Canada
Inc.

)
) *Jessica Kimmel* for the Defendants, The
Bank of Tokyo Mitsubishi UFJ Ltd., and
Bank of Tokyo-Mitsubishi UFJ (Canada)

)
) *Linda Fuerst and Michael Brown* for the
Defendants Citigroup, Inc., Citibank, N.A.,
Citibank Canada, and Citigroup Global
Markets Canada Inc.

)
) *Donald B. Houston* for the Defendants

REASONS FOR DECISION

1. Introduction

[1] The Plaintiffs, Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos and Jack Oliveira, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada and Christopher Staines sue 16 groups of financial institutions; namely: Royal Bank of Canada, RBC Capital Markets LLC, Bank of America Corporation, Bank of America, N.A., Bank of America Canada, Bank of America National Association, The Bank of Tokyo Mitsubishi UFJ Ltd. Bank of Tokyo-Mitusubishi UFJ (Canada), Barclays Bank PLC, Barclays Capital Inc., Barclays Capital Canada Inc., BNP Paribas, BNP Paribas (Canada) BNP Paribas Group, BNP Paribas North America Inc., Citibank, N.A., Citibank Canada, Citigroup Global Markets Canada Inc., Citigroup Inc. Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, Credit Suisse Securities (Canada), Inc., Deutsche Bank, AG, The Goldman Sachs Group, Inc. Goldman, Sachs & Co., Goldman Sachs Canada Inc., HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., HSBC Bank Canada, J.P.Morgan Canada, JPMorgan Chase Bank National Association, JPMorgan Chase & Co., J.P.Morgan Bank Canada from style Morgan Stanley, Morgan Stanley Canada Limited, Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., Royal Bank of Scotland PLC, Société Générale S.A., Société Générale (Canada), Société Générale, Standard Chartered PLC, UBS AG, UBS Securities LLC and UBS Bank (Canada).

[2] The Plaintiffs allege that over an 11-year period the Defendants conspired to manipulate more than two dozen currencies through several means including by price-fixing bid/ask spreads and manipulating benchmark currency rates.

[3] The Plaintiffs have reached early settlements with three groups of defendants: (1) UBS AG, UBS Securities LLC and UBS Bank (Canada); (2) BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas (Canada), and BNP Paribas; and (3) Bank of America Corporation, Bank of America, N.A., Bank of America Canada and Bank of America National Association. While the point is unsettled, it appears that the Settling Defendants' Canadian market share with respect to the impugned transactions is around 15%.

[4] The settlements are subject to court approval, and if the Settlement Agreements are approved: (1) UBS has agreed to pay \$4,950,000; (2) BNP has agreed to pay \$4,500,000; and (3) Bank of America has agreed to pay \$6,500,000 to settle the class action. The Settling Defendants agree to co-operate with the Plaintiffs in the prosecution of the action against the non-Settling Defendants.

[5] The Plaintiffs seek court approval of the Settlement Agreements.

[6] Class Counsel also seeks approval of fees and disbursements in the amount of \$3,987,500 in fees and \$156,103.41 in disbursements. The requested fee represents 25% of the three Settlement Agreements.

2. Factual Background

[7] On February 13, 2014, several actions in connection with the alleged manipulation of the FX Market were consolidated in the Southern District Court of New York before the Hon. Lorna Schofield.

[8] In the U.S. litigation, settlements have been achieved with nine defendant groups. The following chart summarizes the U.S. settlements:

Defendant Group	Settlement Amount (USD)	Substantially All Settlement Terms Reached	Settlement Agreements Signed
Bank of America	\$187,500,000	April 7, 2015	October 1, 2015
Barclays	\$384,000,000	March 31, 2015	September 30, 2015
BNP Paribas	\$115,000,000	June 5, 2015	October 1, 2015
Citigroup	\$402,000,000	March 27, 2015	October 1, 2015
Goldman Sachs	\$134,500,000	April 10, 2015	October 1, 2015
HSBC	\$285,000,000	June, 2015	September 30, 2015
JPMorgan Chase & Co.	\$104,000,000	June 10, 2015	October 1, 2015
RBS	\$255,000,000	May 7, 2015	October 2, 2015
UBS	\$141,075,000	February 12, 2015	October, 2015

[9] On November 11, 2014, in the United States, the Commodity Futures Trading Commission in the United States held that UBS had manipulated certain FX benchmark rates, including the 4 p.m. WM Reuters fix, and aided and abetted certain traders at other banks in respect of the same conduct. The same day, Britain's Financial Conduct Authority (the "FCA") found that UBS failed to properly control its Zurich voice trading operations in the G10 spot FX Market, with the result that traders in this part of its business were able to behave in a manner that put UBS's interests ahead of the interests of its clients, other market participants and the wider UK financial system. Further on November 11, 2014, the Office of the Comptroller of the Currency of the United States of America (the "OCC") found significant inadequacies in Bank of America's procedures including compliance risk assessment, transaction monitoring, compliance testing, risk and profitability reporting and employee supervision.

[10] On November 12, 2014, the Swiss Financial Market Supervisory Authority (“FINMA”) found, in an investigation report over an extended period of time, UBS’s employees in Zurich attempted to manipulate FX benchmark rates. In addition, FINMA found that UBS employees acted against the interests of UBS’s clients and that risk management, controls and compliance in its FX business were insufficient.

[11] On May 20, 2015, in the United States, the Department of Justice (“DOJ”) found that UBS engaged in deceptive currency trading and sales practices in conducting certain FX Market transactions as well as collusive conduct in certain FX Markets. On the same day, the United States Federal Reserve held that UBS lacked adequate governance, risk management, compliance and audit policies and procedures to ensure that the firm’s Covered FX Activities complied with safe and sound banking practices, applicable U.S. federal and state laws and regulations, including policies and procedures to prevent potential violations of the U.S. commodities, antitrust and criminal fraud laws, and applicable internal policies. The Federal Reserve further found that FX spot traders at UBS routinely communicated with FX traders at other financial institutions through chat rooms on electronic messaging platforms accessible by traders at multiple institutions. On the same, the Federal Reserve found that: (i) Bank of America lacked adequate firm-wide governance, risk management, compliance and audit policies and procedures, (ii) FX traders in the spot market at the Bank routinely communicated with FX traders at other financial institutions; and (iii) Bank of America’s deficient policies and procedures prevented Bank of America from detecting and addressing misconduct by the Bank’s FX traders.

[12] UBS and Bank of America have paid more than USD\$1.3 billion, and USD\$455 million in fines to regulatory authorities. UBS, BNP and Bank of America Corporation each agreed to pay in excess of USD\$100 million to settle the U.S. litigation.

[13] In Canada, Christopher Staines commenced this action on September 11, 2015 and on October 6, 2016, the Statement of Claim was amended to add the Labourers’ Pension Fund of Central and Eastern Canada as a plaintiff. The Plaintiffs assert numerous common law and statutory claims against 47 defendants resident in Canada, New York, the United Kingdom, Germany, Japan, France, and Switzerland.

[14] The litigation will be complex and high-risk with serious issues about whether the claims are certifiable as a class proceeding and serious issues about liability, about how to calculate damages, and about the effect of releases given in the U.S. proceedings. The case involves allegations of manipulation of the FX Market and FX benchmarks over many years by many of the world’s largest financial institutions acting in secret. It is the first “benchmark rigging” case to be brought in Canada. Although other benchmark rigging cases have been commenced outside of Canada, no case has yet been certified in any jurisdiction. It is anticipated that the litigation will be vigorously defended.

[15] There are no material differences between the Staines Retainer Agreement and The Labourers Fund Retainer Agreement. Their lawyers agreed to pursue the action on a contingency fee basis. The Retainer Agreements provide for a sliding scale of counsel fees depending on the stage of the litigation. If recovery in the action occurs at an early phase of the litigation no matter how much Class Counsel had spent in time, money and other resources, Class Counsel fees would be based on a lower percentage. On the other hand, if recovery occurs later, Class Counsel

fees would be based on a higher percentage.

[16] The Plaintiffs' lawyers have not applied to either the Class Proceedings Fund or a third party for funding. Class Counsel are financing disbursements and have provided indemnities for costs consequences to the Plaintiffs.

[17] A related action was commenced in Québec by Christine Béland. The two proceedings are being brought by the same counsel team. Justice Claude Bouchard, the coordinating judge of class actions in Québec City, will hear a corresponding settlement approval motion in the Québec proceeding on November 15, 2016. The settlements are conditional on approval by the Ontario and Québec courts.

[18] Siskinds LLP, Sotos LLP, Koskie Minsky LLP and Camp, Fiorante, Matthews Mogerman LLP are co-counsel in the Ontario Proceeding. These firms are working cooperatively with Siskinds Desmeules s.e.n.c.r.l., counsel in the Québec proceeding.

[19] In the spring of 2016, UBS contacted Class Counsel. UBS was extensively involved in foreign exchange trading and was the immunity applicant in an industry-wide probe into alleged rigging of currency markets in the U.S. Settlement negotiations began and an agreement was signed on May 20, 2016. It required UBS to pay \$4,950,000 and to provide substantial, early cooperation in the prosecution of the litigation.

[20] Class Counsel also undertook settlement negotiations with BNP and Bank of America.

[21] A settlement with BNP was signed on July 27, 2016. It provides that BNP will pay \$4,500,000 in compensation for the class. Comparing BNP's share of the Canadian FX Market to that of UBS, the amount to be paid by BNP is significantly greater than that to be paid by UBS which had a significantly greater market share but was the first to settle. The BNP agreement contains similar cooperation provisions to those contained in the UBS agreement.

[22] A settlement with The Bank of America was signed on July 29, 2016. It provides for the payment of \$6,500,000 in compensation for the class. Considering Bank of America's share of the Canadian FX Market as compared to UBS and BNP, the settlement was an increase over the amounts paid by those two Settling Defendants. The Bank of America agreement contains similar cooperation provisions to those contained in the UBS and BNP agreements, including an obligation to provide an evidentiary proffer.

[23] Based on self-reported data published in *Euromoney*, a subscription-based service that tracks global market shares of the FX Market for major financial institutions, each of UBS, BNP and Bank of America's share of the global FX Market as of 2013 were 10.11%, 3.08% and 2.52%, respectively. UBS, which was the first to settle, paid \$495,000 for every 1% of its FX Market share. BNP and Bank of America paid \$1,785,714.28 and \$2,110,389.61 respectively for every 1% of their FX Market share.

[24] The proposed representative plaintiffs have Class Counsel to seek approval of the Settlement Agreements. Class Counsel recommend the settlements.

[25] Class Counsel have committed substantial resources to this action, including over 2,896 lawyer hours (with a time value of over \$1,539,922) and out-of-pocket disbursements exceeding \$156,000.

[26] The parties seek an order barring any claim for contribution or indemnity against the Settling Defendants. The proposed bar orders provide that if the court ultimately determines that a right of contribution and indemnity exists between co-conspirators, the Plaintiffs and settlement classes shall restrict their joint and several claims against the Non-Settling Defendants. Should the court determine that no such rights exist, the settlement Class Members will be entitled to advance the entirety of their claims subject only to a reduction for the value of the settlement payments received.

[27] On August 16, 2016, this action was certified as against the Settling Defendants for settlement purposes only.

[28] Notice of the proposed settlement was given in accordance with the order of this court. There were two objectors. The first objector, who previously worked in the financial industry, has objected to the amount of the settlement and has stated his belief that the Settling Defendants are not being penalized sufficiently for their conduct. The second objector has objected to the quantum of the settlements is too low and does not take into consideration the emotional, mental and physical cost of the plaintiffs.

3. Settlement Approval

[29] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[30] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra*, at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[31] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[32] The case law establishes that a settlement must fall within a zone of reasonableness.

Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[33] It appears that these early settlements will help both to finance and also to advance the prosecution of the action against the non-Settling Defendants, which is productive for both Class Counsel and the Class Members.

[34] Like the objector, I was concerned that at this early juncture of this class proceeding, there was insufficient information about the amount of the settlements being reasonable having regard to the actual damages allegedly suffered by the Class Members, which has not yet been quantified.

[35] Nevertheless, having regard to the information that was available from the proceedings in the United States and having regard to the Defendants' minority share of the Canadian market and keeping in mind the very significant litigation risks and also the value to be attributed to the Settling Defendants' co-operation in prosecuting the claims against the non-Settling Defendants who command 85% of the marketplace, I am satisfied that the amount of these early settlements is fair and reasonable. I will, however, expect more information about the methodology of the Plaintiffs calculation of damages if there are more settlements.

[36] Having reviewed the motion record and having regard to the various factors used to determine whether to approve a settlement, I am satisfied that the three settlements should be approved.

4. Class Counsel Fee

[37] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) at para. 13; *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.) at para. 25.

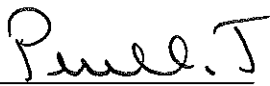
[38] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith v. National Money Mart*, *supra*; *Fischer v. I.G. Investment Management Ltd.*, *supra*, at para. 28.

[39] In my opinion, having regard to the various factors used to determine whether to approve the fees of Class Counsel, the fee request in the immediate case should be approved.

5. Conclusion

[40] For the above reasons, I approve the three settlements and Class Counsel's fee request.

[41] Order to go as asked.



Perell, J.

Released: November 9, 2016

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SUPERIOR COURT OF JUSTICE**

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JOSEPH S. MANCINELLI, CARMEN PRINCIPATO,
DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS
and JACK OLIVEIRA in their capacity as THE TRUSTEES OF
THE LABOURERS' PENSION FUND OF CENTRAL AND
EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC,
BANK OF AMERICA CORPORATION, BANK OF AMERICA,
N.A., BANK OF AMERICA CANADA, BANK OF AMERICA
NATIONAL ASSOCIATION, THE BANK OF TOKYO
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CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC,
HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK
USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE &
CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA,
JPMORGAN CHASE BANK NATIONAL ASSOCIATION,
MORGAN STANLEY, MORGAN STANLEY CANADA
LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS
SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V.,
ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE
S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ
GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS
SECURITIES LLC and UBS BANK (CANADA)

Defendants

REASONS FOR DECISION

PERELL J.