CITATION: Di Filippo and Caron v. Bank of Nova Scotia et al, 2019 ONSC 3282
DATE: 20190604

Court File No. CV-15-543005

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JULIUS DI FILIPPO AND DAVID CARON

Plaintiffs

- and -

THE BANK OF NOVA SCOTIA, SCOTIA CAPITAL (USA) INC., BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL CANADA INC., BARCLAYS CAPITAL INC, BARCLAYS CAPITAL PLC, DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES LIMITED, DEUTSCHE BANK SECURITIES, INC., HSBC BANK CANADA, HSBC BANK PLC, HSBC HOLDINGS PLC, HSBC SECURITIES (CANADA) INC., HSBC USA INC., HSBC SECURITIES (USA) INC., LONDON GOLD MARKET FIXING LTD., SOCIÉTÉ GÉNÉRALE S.A., UBS AG, UBS BANK (CANADA), AND UBS SECURITIES LLC

Defendants

Proceeding under the *Class Proceedings Act, 1992*, SO 1992, c 6

Court File No. CV-16-551067

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JULIUS DI FILIPPO AND DAVID CARON

Plaintiff

- and -

THE BANK OF NOVA SCOTIA, SCOTIA CAPITAL (USA) INC., DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES LIMITED, DEUTSCHE BANK SECURITIES, INC., HSBC HOLDINGS PLC, HSBC BANK PLC., HSBC BANK CANADA, HSBC SECURITIES (CANADA) INC., HSBC USA INC., HSBC SECURITIES (USA) INC., UBS AG, UBS SECURITIES LLC, UBS BANK (CANADA), THE LONDON SILVER MARKET FIXING LIMITED, BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL CANADA INC., BARCLAYS CAPITAL INC., AND BARCLAYS CAPITAL PLC

Defendants

Proceeding under the *Class Proceedings Act, 1992*, SO 1992, c 6

BEFORE: Justice Edward P. Belobaba

COUNSEL: *David Sterns, Louis Sokolov and Mohsen Seddigh* for the Plaintiffs

Caitlin R. Sainsbury and Pierre N. Gemson for Deutsche Bank Defendants

Andrea Laing for Bank of Nova Scotia Defendants

Adam S. Goodman for HSBC Defendants

Peter Osborne for Societe Generale Defendants

HEARD: April 30 and May 29, 2019

Gold and Silver Price-Fixing Class Actions

Settlement with Deutsche Bank

[1] These are two proposed class actions against certain financial institutions and organizations that allegedly engaged in price-fixing practices in the international gold and silver markets.

[2] The plaintiffs are Julius Di Filippo, who lives in Toronto, Ontario and David Carron who resides in Kelowna, British Columbia. The plaintiffs say they and the class members they represent sustained losses when they traded in certain gold and silver instruments because of the defendants' alleged manipulation of the London-fixed gold and silver prices.

[3] The defendants in the Gold Action (CV-15-534005), broadly speaking, are the Bank of Nova Scotia, Barclays, Deutsche Bank, HSBC, Societe Generale, UBS, and London Gold Market Fixing Ltd. The defendants in the Silver Action (CV-16-551067) are the same financial institutions (minus Societe Generale) and London Silver Market Fixing Ltd.

[4] The plaintiffs have reached a settlement with the Deutsche Bank defendants. The settlement amount is $5.47 million, consisting of $3.35 million in the Gold Action and $2.12 million in the Silver Action.

[5] The plaintiffs bring this motion for the approval of these settlements and for the approval of class counsel's legal fees and disbursements.

One objector

[6] There is one objector. The objector has written directly to this court voicing two concerns: (i) that class counsel should not be paid their legal fees before any monies are distributed to class members; and (ii) the $5.47 million settlement is a "token amount" that should not be approved.

[7] I will respond to the objector's concerns in reverse order. In doing so I will explain why I am approving both the "token" settlement amounts and class counsel's request for the payment of their legal fees.

Settlement approval

[8] The applicable law on settlement approval in Ontario is well established. The court must be satisfied that the proposed settlement is fair and reasonable and in the best interests of the class. The key question is whether the settlement falls within a zone of reasonableness.[1]

[9] The objector's stated concern about the rather paltry or "token" amount of the settlements is a concern that was initially shared by this court. How can one justify a $5.47 million settlement with Deutsche Bank as fair and reasonable when in each of the actions the damages claim against all of the defendants, jointly and severally, was $1 billion – that's a billion with a "b"?

[10] I asked the plaintiffs to provide the court with additional information that would justify such a modest settlement amount and they agreed to file a further affidavit.

[11] The plaintiffs provided two reasons, both compelling.

[12] ***The foreign-exchange parallel.*** The analogous actions against the Deutsche Bank defendants in the U.S. settled for a total of US$98 million (US$60 million for the Gold Action and US$38 million in the Silver Action.) The American settlements were judicially approved as falling "within a range of reasonableness." Given the usual (population-based) 10 per cent comparison, this would have resulted in a US$9.8 million settlement amount. Why then C$5.47 million?

[13] The plaintiffs' explanation is as follows. Trading in gold and silver instruments primarily takes place in one of two ways – either via over-the-counter trades based in London, England or by way of exchange-traded futures contracts on the New York COMEX futures market. As a result, the vast majority of trades in gold and silver instruments do not relate to Canada. Deutsche Bank took the position that the appropriate settlement amount should be significantly less than 10% of the U.S. settlement, and more in the 3.5 to 5 per cent range that was used in the foreign-exchange cases such as *Mancinelli v. Royal Bank of Canada et al.*[2]

[14] In *Mancinelli*, which is being litigated by the same class counsel and involves many of the same defendants, the defendants argued that the major foreign exchange trading hubs were located outside of Canada and the trading activity from those

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[1] *Dabbs v. Sun Life Assurance,* (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.).

[2] *Mancinelli v. Royal Bank of Canada et al*, 2016 ONSC 6953.

centres would not be captured by a Canadian action. The approved settlements therefore ranged between 3.5 and 4.8% of the parallel U.S. settlements.

[15] Here, the gold and silver settlement agreements provide for a total payment of approximately US$4.25 million by Deutsche Bank. These settlement amounts are about 4.33% of the US$98 million that Deutsche Bank paid to resolve the U.S. gold and silver cases. The Canadian settlement amounts are thus consistent with the settlement range in the foreign exchange case discussed above.

[16] ***The value of an "ice breaker" settlement.*** The more important reason for accepting a "token" settlement amount requires the reminder that the settlements with Deutsche Bank consists of a money payment (C$5.47 million) *and* a promise of future co-operation.

[17] The settlement agreements herein are the first settlements in the gold and silver price-fixing actions. Such settlements are commonly referred to as "ice breaker" settlements. In a "ice breaker" settlement and in particular, in class proceedings alleging secret price fixing conspiracies, this court has held that the first settling defendant's agreement to cooperate with class counsel is one of the most significant and valuable features of the settlement. This is because the settlement will: (a) assist in advancing the claims against the non-settling defendants; and (b) encourage settlements with those other defendants.[3] Indeed, this court has noted that the non-monetary benefit of having one alleged conspirator cooperate with the plaintiffs is of "inestimable value" in price-fixing litigation.[4]

[18] I am satisfied on the evidence before me that the "ice breaker" settlement agreements in the present case were motivated primarily by cooperation from Deutsche Bank, which was one of three banks in the silver market that convened daily to produce a benchmark rate and was one of four "fixing banks" in the gold market. The agreement on the part of the plaintiffs to accept what may be a "token" monetary settlement amount is more than outweighed by the importance and potential benefits of the non-monetary co-operation component.

[19] The settlements are therefore approved as fair and reasonable and in the best interests of the class members.

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[3] *Fanshawe v. Sony*, 2018 ONSC 2629, at para. 18.

[4] *Ali Holdco Inc v. Archer Daniels Midland Company*, 2010 ONSC 3075, at para. 29; see also *Osmun v. Cadbury Adams Canada Inc*, 2010 ONSC 2643, at paras. 36-37 and *Park v. Nongshim Co. Ltd.*, 2019 ONSC 1997, at para. 64.

Legal fees approval

[20] This court has routinely approved "interim fee awards" in early-stage settlements with one defendant where the action continues as against the other defendants.[5] In cases where the settlement class is defined to include all persons, and not just those who were impacted by the actions of the settling defendants, there is no concern that an interim fee award will impose an excessive or unfair burden on some members of the class.[6]

[21] This court has noted that an interim fee award is a salutary measure that will help promote early settlement.[7] An interim fee award is also in keeping with sound business practice in that most paying clients expect to be billed and to pay on an ongoing basis.[8]

[22] In practical terms, the payment of an interim fee award will lessen the significant financial burden that is typically assumed by class counsel in complex and demanding price-fixing conspiracy cases such as the actions at bar. This is turn will motivate class counsel to continue to devote their best efforts to the cause which is a consequence that is indisputably in the best interests of the entire class.

[23] I therefore accept and continue the practice of interim fee awards.

[24] I also accept and approve the legal fees request that is before me. Based on the retainer agreements, class counsel are entitled to the requested 25 per cent contingency fee plus disbursements and taxes. As discussed in *Cannon,*[9] and as further refined in *Brown,*[10] this contingency fee amount is presumptively valid on the facts herein and should be approved.

[25] I therefore approve the following:

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[5] See, for example, *Urlin Rent A Car v. Furukawa Electric et al*, 2016 ONSC 5736 and *Nutech Brands Inc v. Air Canada*, 2009 CanLII 7119 (SCJ).

[6] *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, at para. 13.

[7] *Ibid.* at para. 14.

[8] *Ibid.* at para. 15.

[9] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[10] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

(i) class counsel's legal fees in the Gold Action in the aggregate amount of $753,831.21 plus disbursements of $347,927.82 (including interest) and applicable taxes;

(ii) class counsel's legal fees in the Silver Action in the aggregate amount of $477,436.29 plus disbursements of $297,247.36 (including interest) and applicable taxes; and

(iii) the payment of $104,698.78 to the consulting lawyers to be taken from the payments to class counsel.

Disposition

[26] The settlement agreements with the Deutsche Bank defendants are approved. As ice-breaker settlements, they are fair and reasonable and in the best interests of the class.

[27] Class counsel's request for the payment of their legal fees and disbursements is also approved.

[28] Order to go accordingly.

Justice Edward P. Belobaba

Date: June 4, 2019