

April 26, 2022

Di Filippo & Caron v. Bank of Nova Scotia et al

CV-15-543005 / CV-16-551067

- *Mr. Mogerma, Mr. Jones, Mr. Sterns, Mr. Fung and Mr. Seddigh* for Ps
- *Ms. Kay and Mr. Smith* for UBS
- *Mr. Evans and Mr. Goodman* for HSBC
- *Mr. Fabello, Mr. Gotowiec, Ms. Shelley and Ms. Koopman* for BofA / Merrill Lynch
- *Ms. Cseh, Mr. Pollack and Ms. O’Sullivan* for Morgan Stanley
- *Mr. Agarwal, Mr. Eizenga, Mr. Davis and Ms. Babwani* for JP Morgan
- *Mr. DiMatteo* for BNS (observing)
- *Ms. Jackson* for LSMF and LGMF (observing)
- *Ms. Harper* for Barclays Bank (observing)
- *Ms. Kras* for Societe General (observing)

Heard: April 22, 2022 via Zoom video

Two proposed class actions alleging a multi-bank conspiracy to manipulate pricing in the London gold and silver Fix auctions – Parallel U.S. proceedings were commenced in 2014 - The proposed class actions herein were commenced in 2015 and early 2016 – After several pleadings amendments to the core conspiracy claim and six years after the actions were filed, Ps bring this motion to add new party defendants and to amend pleadings to add non-conspiracy “manipulative conduct”, in particular non-collusive (individualized) “spoofing” allegations - Ds oppose on various grounds, including provincial and federal limitation periods.

Rulings: Ps’ motions to amend pleadings and add new defendants are dismissed. This Endorsement is deliberately abbreviated but will be fully understood by counsel for the parties.

Reasons: I advised all counsel at the outset of the hearing that Ps’ motion to add and amend raises deeper judicial concerns than just limitation periods. To now add a new damages-claim focussing not just on the alleged multi-bank conspiracy but on the unrelated¹ individual and intra-bank-only misconduct of some traders (i.e. the non-conspiracy spoofing allegations) will make an already complicated conspiracy proceeding unwieldy and unmanageable. I advised counsel that I was inclined to order under s. 12 of the CPA that Ps should pursue the non-conspiracy trader-misconduct claims in a separate (parallel) proceeding, albeit under the new CPA. Given that this motion was argued primarily on limitations and not on the larger unmanageability problem and given that the result achieved herein is *de facto* the same, I will confine my rulings accordingly.

UBS and HSBC (existing parties, amend pleadings): I am mindful of the caselaw that suggests that limitation issues should generally be deferred where discoverability is disputed. However, I agree with the submissions of Ms. Kay and Mr. Evans that the proposed amendments (re non-collusive spoofing) are indisputably time-barred. One, they allege new facts re non-collusive, intra-bank spoofing and propose a new cause of action. Two, Ps’ counsel on their own evidence (namely,

¹ Mr. Mogerma advised that class counsel have or will soon have an expert’s report explaining how non-collusive/intra-bank spoofing by some traders can be connected to the multi-bank conspiracy claim but this report was not before the court and the suggested connection is not self-evident – hence my concern re manageability.

Mr. Seddigh's affidavit of March 27, 2018 re the January 29, 2018 CFTC Press Release and Spoofing Orders filed on the certification motion) had actual knowledge of said allegations against UBS and HSBC at least two years and seven months before they served the October 29, 2020 notice of motion herein. Even with the Covid-related limitations pause, I agree that the proposed amendments are clearly time-barred as against UBS and HSBC.

BofA / Merrill Lynch (add new defendant): I agree with the submissions of Mr. Fabello that the motion to add BofA/Merrill Lynch is clearly time-barred. Ps' counsel on their own evidence (namely Mr. Podolny's affidavit of February 17, 2018 and Mr. Seddigh's affidavit of March 27, 2018) had actual knowledge at least as of March 27, 2018 that BofA or Merrill Lynch had been added to the U.S. proceedings and/or were otherwise potentially involved in the impugned conspiracies re the precious metals Fix auctions. Mr. Fabello also pointed to the wide-spread media reports and the publicly available information (easily accessible on Google or PACER) that would have been known to class counsel as far back as December 2016. It is sufficient for me, however, to focus only on the affidavits of February 17 and March 27, 2018 that show class counsel had actual knowledge of BofA or Merrill's possible involvement and potential liability in the precious metals (including the gold and silver) Fix auctions more than two and a half years before this motion to add was served.

Morgan Stanley (add new defendant): I agree with the submissions of Ms. Cseh that the motion to add Morgan Stanley is clearly time-barred. Here again, Ps' counsel on their own evidence (namely Mr. Seddigh's affidavit of March 27, 2018) had actual knowledge that Morgan Stanley was one of the banks being targeted in the Swiss WECO investigation of big-bank collusion in precious metals auction-pricing. Included in the Seddigh affidavit is the WECO Press Release of September 28, 2015 and related media stories naming Morgan Stanley as one of the targets of the investigation and potentially implicating them in the impugned conspiracy. As Ms. Cseh noted, Ps' counsel knew "the who and the what" more than two and a half years (at the very least) before serving this motion.

J.P. Morgan (add new defendant): JP Morgan was never a defendant in the US proceeding, indeed was never mentioned by anyone as being involved in the big-bank conspiracy scandal re the gold and silver Fixes. Ps ask nonetheless that they be added in the Canadian conspiracy proceedings because of the CFTC Order of September 29, 2020 — that named and fined certain individual JPM traders for *intra-bank non-conspiracy* misconduct. Nothing about *inter-bank* collusion or conspiracy. I agree with Mr. Agarwal that JP Morgan is not proper party defendant to the existing conspiracy actions and that the joinder test under Rule 5 has not been satisfied.

Ps' motion to add and amend is therefore dismissed in its entirety.

Costs: Counsel have advised of the parties' agreement that no costs will be sought or awarded on this motion.

Signed: *Justice Edward Belobaba*