Court of Appeal File No.:
Superior Court File No.: CV-12-9780-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

MARK MCDONALD of Grant Thornton (British Virgin Islands) Limited and HUGH DICKSON, of Grant Thornton Specialist Services (Cayman) Ltd., acting together herein in their capacities as Joint Liquidators of Stanford International Bank Limited

Plaintiffs
(Appellants)

- and -

THE TORONTO-DOMINION BANK

Defendant
(Respondent)

NOTICE OF APPEAL

THE APPELLANTS APPEAL to the Court of Appeal for Ontario from the judgment of the Honourable Justice Conway of the Ontario Superior Court of Justice (Commercial List) dated June 8, 2021, made at Toronto, Ontario (the **Judgment**).

THE APPELLANTS ASK for:

1. An order setting aside the Judgment dismissing the action and, in its place, granting judgment against the respondent, The Toronto-Dominion Bank (**TD Bank**).

2. If necessary, an order directing Conway J. to fix damages as of the date of TD Bank's liability, as determined by this Court.

3. In the alternative and only to the extent necessary, an order directing a new trial.

4. An order that TD Bank shall pay the costs of the appeal and all costs of the action.

5. An order that TD Bank shall pay prejudgment and post-judgment interest.

6. Such further and other orders as this Honourable Court may deem just.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

Background

1. Robert Allen Stanford (**Stanford**) perpetrated a long-standing, multi-billion dollar fraud against Stanford International Bank Limited (**SIB**), an Antiguan offshore bank of which he was the sole ultimate owner and Chairman of the Board. Stanford perpetrated his fraud against SIB with the help of a small group of other insiders.

2. TD Bank provided the U.S. dollar correspondent account that Stanford required to defraud SIB. Conway J. found that the account was a "necessary means" for Stanford to perpetrate his fraud and that the fraud would have stopped if TD Bank had simply closed the account.

3. TD Bank did not close the account. Instead, TD Bank maintained the account from 1991 until it was ordered to freeze the account by an order of a U.S. court in 2009. At that time, the fraud was publicly exposed. Stanford was later convicted and sentenced for his crimes.

4. The appellants were subsequently appointed as joint liquidators of SIB (the **Joint Liquidators**). The Joint Liquidators now act on behalf of SIB for the benefit of SIB's Canadian and international creditors, who are also victims of Stanford's fraud.

5. The Joint Liquidators' action is comprised of SIB's claims against TD Bank in knowing assistance in breach of fiduciary duty and negligent performance of a service. The trial of those claims began on January 11, 2021 and continued over 43 days before Conway J.

The Trial was Procedurally Unfair, which Impacted the Outcome

6. Conway J. erred in law by permitting the trial of the Joint Liquidators' claims to proceed in a manner that was contrary to law and her own explicit procedural ruling rendered at the outset of trial. As a result, evidence was incorrectly admitted into the trial record, and then incorrectly relied on by Conway J. to make legal and factual findings that led to her incorrect conclusions on the duty and standard of care issues, and to the dismissal of the Joint Liquidators' claims.

7. At the outset of trial, Conway J. made her first procedural ruling under rule 53.07 of the *Rules of Civil Procedure*. Her first procedural ruling set the fundamental ground rules of the adversarial trial process between the Joint Liquidators and TD Bank.

8. As TD Bank as defendant had declined to undertake to call as witnesses *any* of its relevant current or former employees, the ground rules set by Conway J. permitted the Joint Liquidators to call and cross-examine those employees under rule 53.07. All of the relevant current and former employees were aligned in interest with TD Bank. They did not cooperate or prepare with the Joint Liquidators, but instead did so with TD Bank's lawyers.

9. Importantly, in her first procedural ruling, Conway J. expressly acknowledged but rejected TD Bank's position that it could later "re-call" in defence the very same current and former TD Bank employees to be first called as witnesses by the Joint Liquidators. Conway J. instead limited TD Bank's lawyers to re-examination of those witnesses only.

10. The Joint Liquidators relied on the ground rules of the adversarial trial process set by Conway J.'s first procedural ruling to form their trial strategy and present their case. Over the next 27 days of trial, the Joint Liquidators called and cross-examined 10 current or former TD Bank employees, and called 10 other fact witnesses and four expert witnesses.

11. In accordance with Conway J.'s first procedural ruling, TD Bank had the opportunity to then re-examine all of the current or former TD Bank employees called as trial witnesses by the Joint Liquidators, and Conway J. at times even granted TD Bank's lawyers the right to re-examine by way of cross-examination (*i.e.*, leading questions).

12. After the Joint Liquidators put in and closed their case, Conway J. reversed her first procedural ruling and rendered a second, contradictory procedural ruling based on her own novel and legally incorrect interpretation of rule 53.07 that neither party had advanced.

13. Conway J.'s second procedural ruling permitted TD Bank to "re-call" as its own witnesses and examine-in-chief the very current and former TD Bank employees that the Joint Liquidators had previously called as their witnesses, and that TD Bank had previously had the opportunity to re-examine in accordance with Conway J.'s first procedural ruling.

14. TD Bank took advantage of the second procedural ruling and "re-called" such witnesses in defence, the result of which was that the "re-called" witnesses testified at trial twice and on behalf of both parties to the action. As a result, TD Bank was able to meet with, prepare and examine-in-chief witnesses who had already been cross-examined by the Joint Liquidators. It did so to the detriment and prejudice of the Joint Liquidators and their trial strategy undertaken in reliance on Conway J.'s first procedural ruling.

15. Conway J.'s second procedural ruling rendered after the Joint Liquidators had closed their case contradicted and eviscerated both her first procedural ruling made at the outset of trial, on which the Joint Liquidators' trial strategy was based, and rule 53.07. The second procedural ruling rendered rule 53.07 effectively meaningless, and provided TD Bank

significant advantages that are impermissible under the *Rules of Civil Procedure* and the well-established procedural and evidentiary rules of trial process.

16. Conway J.'s second procedural ruling was incorrect and a marked departure from the principles of trial process and fairness. It was manifestly unfair and prejudicial to the Joint Liquidators, and amounted to an error of law by Conway J. in her role as trial judge.

17. Since it was an error of law to permit testimony of the "re-called" current and former TD Bank employees, the resulting testimony of those witnesses was properly inadmissible, as were those significant parts of the opinions of TD Bank's liability expert that were based on such inadmissible evidence.

18. However, consistent with her late-trial second procedural ruling that the testimony of the "re-called" witnesses would be "critical to the factual findings that I will have to make", Conway J. repeatedly relied on such testimony to make findings that led to her conclusions on the duty and standard of care issues, and to her dismissal of the Joint Liquidators' claims.

TD Bank Owed SIB a Duty of Care

19. Conway J. erred in law by concluding that TD Bank's relationship with SIB was not sufficiently proximate to give rise to a duty of care. At law and on Conway J.'s own findings of fact, TD Bank owed SIB a duty of care.

20. Conway J. noted that banks have an established "duty to exercise reasonable care and skill in performing all banking services with its customer" and have an established "duty to 'exercise care and skill as a reasonable banker would consider requisite to ensure that what is suspicious or questionable is queried' in order to prevent or avoid use of the bank's facilities in a manner that appears 'unusual or out of the ordinary course of business.'"

21. SIB was TD Bank's customer. However, Conway J. concluded that the established duties owed by banks to their customers "in performing all banking services" did not apply to TD Bank's bank-customer relationship with SIB. This conclusion was an error of law. The duties of banks to their customers based on established categories of proximity applied to TD Bank's relationship with its customer, SIB.

22. Conway J. also failed to consider whether TD Bank's relationship with SIB was analogous to an established category of proximity. This failure was another error of law. At the very least, TD Bank's relationship with SIB gave rise to an analogous category of proximity sufficient to give rise to TD Bank's duty of care to its customer, SIB.

23. Instead, Conway J. concluded that a full proximity analysis was required. However, the analysis undertaken by Conway J. was based on further errors of law, as it failed to apply the relevant legal test and principles, lacked adequate reasoning, and led her to apply

irrelevant criteria in considering a duty of care that was not alleged and cannot exist under any proper application of Canadian negligence law.

24. On her "full proximity analysis", Conway J. concluded that TD Bank's undertaking "did not extend to protecting SIB from insider abuse, unless there were clear indicia to put the bank on notice that the account was being used for nefarious purposes or that fraudulent conduct might be an issue." On this basis, she found no proximity and no duty of care.

25. Conway J.'s conclusion on her "full proximity analysis" is contrary to the well-established objective standard of negligence. The incorrect "clear indicia to put the bank on notice" threshold imported a subjective knowledge standard akin to recklessness or willful blindness into the proximity analysis for a novel duty of care. This threshold incorrectly rendered negligence a subjective fault-based cause of action, which it plainly is not.

26. Conway J.'s conclusion on her "full proximity analysis" also failed to focus as required on the nature of the relationship between the parties. When properly applied, proximity cannot arise only upon some "indicia" or some other event external to the parties' relationship but is rather a function of the very nature of that relationship. At the very least, Conway J. incorrectly conflated the analysis required for the duty of care and standard of care.

27. Moreover, on Conway J.'s findings of fact regarding the nature of TD Bank's relationship with SIB, that relationship was sufficiently proximate to give rise to a duty of care.

28. Conway J. found as a fact that TD Bank's undertakings in its relationship with SIB included "to act as SIB's agent" (a clear indicator of proximity), "to comply with the banking procedures that applied to the operation of a correspondent account", and "to provide correspondent banking services to SIB."

29. However, contrary to a proper full proximity analysis, Conway J. did not consider whether TD Bank's undertakings found as a matter of fact gave rise to sufficient proximity to establish a duty of care, or the purposes of, and reliance on, those undertakings.

30. Fact and expert witnesses confirmed that one purpose of TD Bank's undertaking "to comply with the banking procedures that applied to the operation of a correspondent account" was the protection of TD Bank's correspondent bank customers such as SIB, including from the risk of insider abuse of the very nature that occurred here. Such protection formed part of TD Bank's undertaking "to provide correspondent banking services to SIB", and TD Bank's correspondent banking customers relied on TD Bank for such protection as part of those services. On this basis, TD Bank was in a sufficiently proximate relationship with SIB to give rise to a duty of care.

31. Having incorrectly found that the relationship between TD Bank and SIB was not sufficiently proximate, Conway J. did not go on in her duty of care analysis to consider the issues of foreseeability or any relevant policy considerations.

32. However, and importantly, Conway J. found (in her causation analysis) that SIB's actual losses caused by Stanford's fraud perpetrated using TD Bank's correspondent facilities were a foreseeable result of TD Bank's relationship with SIB (another clear indicator of proximity). The only relevant policy considerations support the finding of a duty of care. Accordingly, on a proper full proximity analysis, TD Bank owed SIB a duty of care.

The Standard of Care Analysis is Incorrectly Divorced from Any Proper Duty of Care

33. Conway J. erred in law in her analytical approach to the standard of care issue. Her analytical approach failed to account for the relationship between the duty and standard of care elements of negligence, and thus rendered her analysis of the standard of care element meaningless and resulted in an incorrect conclusion on that element.

34. A correct standard of care analysis requires the trier of fact to identify a relevant and properly-defined duty of care to be applied to the standard of care analysis.

35. If the duty of care is not identified or is improperly defined, the resulting standard of care analysis is incorrect. In those circumstances, the trier of fact cannot evaluate whether, on

the objective standard applicable to a negligence claim, the defendant acted reasonably vis-à-vis the particular duty of care owed to the plaintiff.

36. Conway J. failed to identify any relevant duty of care that she was applying to her standard of care analysis. This was an error of law that caused her overall standard of care analysis to become improperly divorced from the duty of care that TD Bank owed to SIB.

37. Conway J. also ultimately concluded that TD Bank was not negligent because she found as a fact that "TD Bank did not know or have any reason to suspect that [Stanford] was engaged in fraudulent behaviour".

38. It therefore appears that, when analyzing the standard of care, Conway J. at least at times applied her legally flawed and non-existent duty of TD Bank to protect "SIB from insider abuse [if] there were clear indicia to put the bank on notice that the account was being used for nefarious purposes or that fraudulent conduct might be an issue".

39. To the extent Conway J.'s standard of care analysis assessed such a legally flawed and non-existent duty of care, that analysis again incorporated a subjective knowledge standard akin to recklessness or willful blindness that has no place in a negligence claim. This was an error of law.

40. Had Conway J. correctly found, and applied to her standard of care analysis, either an established or analogous duty of care or, alternatively, a novel duty of care based on her own findings regarding TD Bank's undertakings (or otherwise), the correct result would have been a finding that TD Bank fell below the applicable standard of care.

41. In the alternative, if TD Bank had a duty of care to protect SIB from insider abuse if "there were clear indicia to put the bank on notice that the account was being used for nefarious purposes or that fraudulent conduct might be an issue", on the admissible evidentiary record, there were such clear indicia, TD Bank was on notice, and TD Bank did not act as a reasonable bank in response. TD Bank therefore breached its duty of care owed to SIB.

TD Bank Fell Below the Standard of Care

42. Conway J. made further errors of law or mixed fact and law, and made palpable and overriding factual errors, in concluding that TD Bank met the standard of care. Correcting those errors based on applicable principles of law and the admissible evidentiary record leads to the conclusion that TD Bank fell below the standard of care.

43. To reach her conclusion that TD Bank met the standard of care, Conway J. permitted TD Bank's expert to usurp the role of the key fact witnesses and the trial judge by uniformly accepting the expert's opinions despite those opinions being directly contradicted by the

relevant evidentiary record and effectively retracted by the expert on cross-examination. Doing so was an error of law, or an error of mixed fact and law.

44. Former TD Bank employees who were personally involved in relevant events at potential dates of TD Bank's liability testified at trial under cross-examination and re-examination. Their testimony regarding those events was clear and uncontroverted. Notably, these particular witnesses were not "re-called" by TD Bank.

45. Based on the testimony of those former TD Bank employees, the only available conclusion is that TD Bank fell below the applicable standard of care by maintaining the U.S. dollar correspondent account that Stanford used to perpetrate his fraud.

46. However, Conway J. ignored, downplayed, or simply improperly rejected relevant fact evidence that did not support her conclusion that TD Bank met the standard of care. She did so often without explanation or analysis, and by considering events in isolation rather than cumulatively as was required.

47. Contrary to her judicial fact-finding role, Conway J. instead incorrectly based important *factual* conclusions on the *opinion* evidence of TD Bank's expert. In an important and telling finding, Conway J. rejected the factual evidence of TD Bank's original relationship

manager on a key point because TD Bank's *expert* testified that the relationship manager "may have been mistaken" in giving that evidence.

48. Conway J. accepted the opinions of TD Bank's expert over the testimony of the former TD Bank employees despite elsewhere finding those former employees to be credible and relying on their testimony when it supported her other conclusions.

49. Conway J. also accepted the opinions of TD Bank's expert over the testimony of the former TD Bank employees despite the expert conceding under cross-examination that the former TD Bank employees who were directly involved at the potential liability dates were best placed to inform the Court how TD Bank should have conducted itself at those times. Those concessions of TD Bank's expert were explicit and unchanged on re-examination.

50. To conclude that TD Bank did not fall below the standard of care, Conway J. disregarded the concessions TD Bank's expert made under cross-examination. She instead based her standard of care conclusion on the earlier opinions of TD Bank's expert to which the expert testified in chief, despite those opinions having been effectively (if not explicitly) retracted by the expert on cross-examination.

51. In addition, Conway J. did not determine or articulate any applicable standard of care to which TD Bank was required to adhere. Her conclusions were instead unmoored from any particular standard of care and generally lacked any meaningful analysis.

52. Conway J.'s conclusions on the standard of care issue amounted to uniform acceptance of the conclusory opinions of TD Bank's expert in chief that everything that TD Bank did was always reasonable. This approach amounted to an error of law.

53. Conway J. also erred in law by relying on evidence resulting from her incorrect second procedural ruling (discussed above) to support her factual finding central to her standard of care conclusion, and made palpable and overriding factual errors by failing to acknowledge, analyze and apply critical and uncontroverted evidence that did not support her conclusion that TD Bank fell below the standard of care.

54. More generally, Conway J.'s quite brief reasons for judgment, rendered following 43 days of trial and more than 700 pages of written argument, in a matter of this magnitude, do not do justice to the evidentiary record, nor to the arguments advanced by the Joint Liquidators, many of which are ignored.

55. Conway J. also made similar and overlapping palpable and overriding errors of fact in dismissing the Joint Liquidators' knowing assistance claim and, in respect of that claim, erred in law by merging the concepts of recklessness and willful blindness.

56. Such further and other grounds as counsel may advise.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Rule 61 of the *Rules of Civil Procedure*.

2. Section 6 of the *Courts of Justice Act*.

3. The Judgment appealed from is final.

4. The Joint Liquidators do not require leave to appeal.

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