COURT OF APPEAL FOR ONTARIO

CITATION: McDonald v. Toronto-Dominion Bank, 2022 ONCA 788
DATE: 20221117
DOCKET: C69642

Fairburn A.C.J.O., Sossin and Favreau JJ.A.

BETWEEN

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)

Lincoln Caylor, Maureen M. Ward, Nathan J. Shaheen, Alexander C. Payne, Shaan P. Tolani and Thomas Feore, for the appellants

Geoff R. Hall, Junior Sirivar, Christine Wadsworth, Alison Bond, Erin Chesney and Jacob Klugsberg, for the respondent

Heard: April 20, 2022

On appeal from the judgment of Justice Barbara A. Conway of the Superior Court of Justice, dated June 8, 2021, with reasons reported at 2021 ONSC 3872.

**Fairburn A.C.J.O.:**

## A. OVERVIEW

[1] Robert Stanford is serving a 110-year sentence for perpetrating the second largest Ponzi scheme in history. He and three others used Stanford International Bank Ltd. ("SIB") as a vehicle to defraud the bank's customers of over seven billion dollars.

[2] SIB was an offshore bank solely owned by Mr. Stanford. He established it in the mid-1980's in Montserrat under another name. In the early 1990's, the bank was migrated to Antigua and Barbuda ("Antigua") and was renamed SIB. The bank's primary business was the sale of high-yield certificates of deposit to high-net-worth purchasers located outside of Antigua.

[3] The Toronto Dominion Bank ("TD Bank") acted as SIB's primary U.S. dollar correspondent bank from 1991 until SIB's collapse in 2009. As a correspondent bank, TD Bank was responsible for receiving funds from and disbursing funds to purchasers of SIB's certificates of deposit.

[4] Upon SIB's collapse, it was placed into liquidation. The Joint Liquidators commenced an action on behalf of SIB against TD Bank, claiming: (1) it was liable to SIB for knowing assistance in breach of fiduciary duty; and (2) it was negligent in the provision of services.

[5] Following a 43-day trial, the Joint Liquidators' action was dismissed.[1] As for the knowing assistance claim, the trial judge found that TD Bank had no actual knowledge of the fraud and was not reckless or wilfully blind. As for the negligence claim, she concluded that there was insufficient proximity to give rise to what would have been a novel duty of care.

[6] The Joint Liquidators appeal only from the dismissal of the negligence claim. They submit that the trial judge erred in both the duty of care and standard of care analysis. They also contend that the trial judge erred in permitting an unfair trial process by making a flawed procedural ruling.

[7] For the reasons that follow, I would dismiss the appeal.

## B. BACKGROUND

[8] Mr. Stanford is a U.S. citizen. Before getting into the offshore banking business in 1985 he was a failed gym operator, having declared bankruptcy after accumulating $13 million in personal debts.

[9] By 1994, Mr. Stanford had moved his offshore bank from Montserrat to Antigua and renamed it SIB. As an "offshore bank", SIB's customers had to be

---

[1] There was also a separate action heard at the same time: "The Dynasty claim". This action was brought by some of the purchasers of the certificates of deposit. While they originally based their claim in both knowing assistance and negligence, at trial the Dynasty plaintiffs narrowed their claim to knowing assistance. That claim failed. The Dynasty claim forms no part of this appeal.

located outside of Antigua. This required SIB to use a correspondent bank. The trial judge described correspondent banking services as follows:

> Correspondent banking involves the provision of services by one bank (the correspondent bank) to another bank (the respondent bank) to facilitate the movement of funds, exchange of currencies, and/or settlement of obligations. A correspondent bank effectively acts as the respondent's agent or conduit, executing and/or processing payments or other transactions for the respondent and its customer. Typically, a correspondent banking relationship occurs when a correspondent bank in one jurisdiction provides services to a respondent bank in another foreign jurisdiction.

[10] The correspondent banking services provided by TD Bank were critical to SIB's operation. Without a correspondent bank, SIB would have been unable to send, receive or hold any funds from international customers. Accordingly, one witness at trial described a U.S. dollar correspondent account as the "lifeblood" of SIB's ability to operate.

[11] SIB also relied upon the services of its related Texas-based Stanford Financial Group ("SFG"). The SFG had more than 100 Stanford-owned entities and employed thousands of people across the world. One of its entities, the "Stanford Group Company", was registered with the U.S. Securities and Exchange Commission ("SEC").

[12] SIB was highly "successful" in selling its certificates of deposit. That success is reflected in the lightning rise in sales, from U.S. $97 million in 1991 to U.S. $7.4 billion in 2008.

[13] It was all a façade.

[14] As the trial judge explained, the scheme put together by Mr. Stanford and three others was “elaborate, highly sophisticated, and tightly concealed.” Mr. Stanford and James Davis (SIB’s Vice-President and Controller) led customers to believe that SIB earned consistently high investment returns, which allowed it to pay guaranteed high returns and fund all redemption requests. To do this, they reported misleading investment types and invented fictitious investment balances.

[15] Using a classic Ponzi setup, Mr. Stanford and Mr. Davis misappropriated near incomprehensible sums of money from SIB’s assets, leaving redemption requests from old customers to be paid by the incoming funds from new customers. In large measure, the scheme went undetected because of the structure of SIB’s investment portfolio, which Mr. Stanford divided into three tiers. While the first two tiers were legitimate and known by everyone, there was a secret third tier that consisted of illiquid and risky investments. Only Mr. Stanford, Mr. Davis and the two other perpetrators, officers of other Stanford Group companies, knew about the third tier. Ultimately, the third tier contained at least U.S. $2 billion of personal loans to Mr. Stanford.

[16] While there was a risk that SIB’s auditor or the Financial Services Regulatory Commission in Antigua would uncover the scheme, Mr. Stanford took care of that risk by bribing the SIB auditor and the chair of the regulator. These bribes resulted

in the auditor providing yearly, unqualified opinions about SIB's financial health and the regulator turning a blind eye instead of undertaking its normal review and audit function.

[17] The Ponzi scheme continued undetected until the financial crisis hit in 2008. At that point, SIB customers started to make redemption requests at increasing numbers. The scheme folded in on itself because it was impossible to make good on those increasing requests.

[18] At the time of its collapse, only approximately U.S. $678 million in identifiable or traceable assets remained in SIB, a small fraction of the U.S. $7.4 billion owed to its customers.

[19] The SEC filed charges against Mr. Stanford, Mr. Davis and the other two perpetrators alleging a massive fraud. All four received prison sentences. SIB was placed into liquidation. Ultimately, the Joint Liquidators were appointed to replace the original receiver-managers.

## C. THE TRIAL JUDGE'S REASONS

[20] The Joint Liquidators commenced an action on behalf of SIB against TD Bank in August 2011, claiming damages in the amount of U.S. $5.5 billion. They also sought an accounting and disgorgement of profits.

[21] The trial involved 29 fact and expert witnesses, as well as thousands of documents. Ten of the witnesses were former and current TD Bank employees.

[22] In lengthy and considered reasons, the trial judge made numerous findings of fact, including that TD Bank employees had no reason to believe that Mr. Stanford or the insiders were operating a Ponzi scheme or engaging in any fraudulent behaviour. The trial judge found that there was no “indication that insider abuse was occurring at SIB” and that “there were no transactional or operational matters that raised any issues on the part of the TD Bank employees.”

[23] The trial judge dismissed the knowing assistance claim. As this conclusion is not under appeal, I will be brief. She held as follows:

> Although it is now known that Mr. Stanford was a fraudster, there is no basis to conclude that TD Bank knew or suspected that Mr. Stanford was breaching his fiduciary duty to SIB but continued to allow him to use TD Bank’s banking facilities. Nor is there any basis to conclude that TD Bank bec[a]me aware of the need to inquire about whether Mr. Stanford was defrauding SIB but chose not to ask questions.

[24] The trial judge also dismissed the Joint Liquidators’ negligence claim. This conclusion is under appeal.

[25] The trial judge found that the negligence claim could not succeed because the Joint Liquidators had failed to establish the “required proximity to give rise to the novel duty of care proposed in this case.” In the alternative, the trial judge concluded that even if there was a duty of care, the Joint Liquidators had failed to prove a breach of the standard of care.

[26] In the event she was wrong in disposing of the negligence claim on those bases, the trial judge went on to address other issues. She found that if TD Bank had been liable for either knowing assistance or breach of a duty of care, she would have concluded that causation had been established. She also would have rejected TD Bank's limitations defence.

[27] The trial judge concluded her reasons with the following:

> Hindsight is 20/20. While we now know that Mr. Stanford was a fraudster who operated a Ponzi scheme, TD Bank did not know or have any reason to suspect that he was engaged in fraudulent behaviour at the time.
>
> These actions seek to hold TD Bank responsible for Mr. Stanford's wrongdoing. Applying the legal principles to the facts of this case, and viewing the evidence from the perspective of the facts known to TD Bank prior to 2009, I have concluded that there is no basis at law for TD Bank to be held liable for that wrongdoing.

## D. ANALYSIS

[28] With the context set, I now turn to the three overarching issues raised by the Joint Liquidators on appeal.

### Issue #1: Did the trial judge err in her duty of care analysis?

[29] As noted, the trial judge concluded that the Joint Liquidators failed to establish "the required proximity to give rise to the novel duty of care proposed in this case."

[30] On appeal, the Joint Liquidators submit that the trial judge made several errors in her duty of care analysis. They contend that she erred by failing to find that the relationship between TD Bank and SIB fell within an established or analogous category of proximity. And, in the alternative, if a full proximity analysis was required, she erred in concluding that the required proximity between the parties had not been established. According to the Joint Liquidators, the trial judge went off course in her proximity analysis by finding that sufficient proximity could only exist if TD Bank had subjective knowledge of the fraudulent scheme and by incorrectly defining the duty of care.

[31] TD Bank accepts that the duty of care issue raises a question of law and so no deference is owed to the trial judge. The sole question is, did she get it right? As I will explain, the answer is yes.

**(1) Did the trial judge err in finding that the relationship between TD Bank and SIB did not fall within an established or analogous category of proximity and so a full proximity analysis was required?**

**(a) Background**

[32] Under the *Anns/Cooper* framework, establishing a duty of care requires a two-step analysis: *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L); *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 28. At the first stage, the court asks whether the defendant owes the plaintiff a *prima facie* duty of care

by considering proximity and foreseeability: *Cooper*, at para. 30; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 20; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, 450 D.L.R. (4th) 181, at para. 20. If a *prima facie* duty is established, the analysis moves to the second stage where the question is whether there are residual policy considerations that may negate the imposition of a duty of care: *Livent*, at para. 37.

[33] According to the Supreme Court's decision in *Livent*, in cases like this one, where it is alleged that there was negligent performance of a service, it is more useful to consider proximity before foreseeability, because whether an injury is reasonably foreseeable will depend upon the scope of the relationship of proximity: at para. 24.

[34] At the proximity stage of the analysis, the overarching question is whether the parties are in "'such a close and direct' relationship that it would be 'just and fair having regard to that relationship to impose a duty of care in law'": *Livent*, at para. 25, citing *Cooper*, at paras. 32, 34; *Maple Leaf,* at para. 63.

[35] A full proximity analysis is not required in every case. If a relationship falls within a previously established category, or within an analogous one, proximity will be shown. In these circumstances, so long as the injury is reasonably foreseeable,

the first stage of the duty of care analysis will be complete: *Livent*, at para. 26; *Maple Leaf*, at para. 23.

[36] Conversely, if a relationship does not fall within an established or analogous category, a full proximity analysis is required: *Livent*, at para. 29; *Maple Leaf*, at para. 31. As will be discussed more below, in cases of pure economic loss arising from negligent performance of services, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance: *Livent*, at para. 30; *Maple Leaf*, at para. 32.

[37] The Joint Liquidators submit that the relationship between TD Bank and SIB falls within the recognized category of proximity between a bank and its customer in respect of the provision of banking services. At the very least, TD Bank's relationship with SIB is said to fall within an analogous category of proximity, as TD Bank's correspondent banking relationship with SIB had the typical features of a bank-customer relationship except that SIB was an offshore bank.

**(b) Discussion**

[38] In my view, the trial judge correctly concluded that the relationship between TD Bank and SIB did not fall within an established or analogous category of proximity.

[39] In *Livent*, the court acknowledged that in the past it had on occasion defined established categories of proximity in broad terms but warned that "[p]roximate

relationships will not always … be identified so generally”: at para. 27. Depending on the nature of the relationship, a relationship of proximity may only inhere for “particular purposes or in relation to particular actions”: *Livent*, at para. 27; *Maple Leaf*, at para. 30.

[40] Indeed, courts are cautioned to “avoid identifying established categories in an overly broad manner because … residual policy considerations are not considered where proximity is found on the basis of an established category”: *Livent*, at para. 28. Accordingly, courts are advised to “be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized”: *Livent*, at para. 28; *Maple Leaf*, at para. 65. Similarly, courts are advised, at para. 28 of *Livent*, to look beyond the mere identity of the parties:

> … [A] finding of proximity based on a previously established or analogous category must be grounded not merely on the identity of the parties but upon examination of the particular relationship at issue in each case.

[41] Considering whether a relationship fits within an established or analogous category also involves considering “the scope of activity in respect of which proximity was previously recognized”: *Livent*, at para. 52. The reason that the scope of activity is significant is that “the proximity analysis not only determines the *existence* of a relationship of proximity, but also delineates the *scope* of the

rights and duties which flow from that relationship": *Livent*, at para. 31 (emphasis in original).

[42] The Supreme Court affirmed these principles in *Maple Leaf*, reiterating at para. 65, that "[m]erely because particular factors will support a finding of proximity and recognition of a duty within one aspect of a relationship and for one purpose to compensate for one kind of loss does not mean a duty will apply to all aspects of that relationship and for all purposes and to compensate for all forms of loss." Thus, "to ground an analogous duty, the case authorities relied upon by the [plaintiff] must be shown to arise from <u>an analogous relationship and analogous circumstances</u>" (emphasis added).

[43] Thus, *Livent* and *Maple Leaf* signal that broad categories based merely on the identity of the parties are insufficient. Rather, to find a relationship of proximity, a more particularized approach is required, especially where it comes to cases of pure economic loss.

[44] Turning to this case, the trial judge correctly recognized that the mere fact that proximity has been recognized as existing in a bank-customer relationship for one purpose is insufficient to conclude that proximity exists between the same parties for all purposes. She detailed prior cases in which banks had been found to owe duties to customers with respect to the opening and ongoing operation of bank accounts and explained why they were distinguishable. She found that the

Joint Liquidators were seeking to impose a novel duty of care and so a full proximity analysis was required:

> At its essence, the Joint Liquidators are seeking to impose a duty of care to protect the bank's customer from insider abuse. They submit that at some point, the risk of insider abuse increased to such a level that the bank had a duty to review the relationship, shut down the account, and cease providing services to the customer.
>
> The Joint Liquidators have not presented the court with any case that establishes a duty of this nature. As noted above, all of the cases that have imposed a duty of care on a bank relate to basic procedures on account opening and operational matters during the course of the banking relationship.
>
> What the Joint Liquidators are proposing is a novel duty of care and one that requires a full proximity analysis under the *Livent* framework.

[45] The Joint Liquidators take issue with the trial judge’s conclusion that the proximate relationship in this case is novel, and her discussion of proximity in terms of a duty “to protect the bank’s customer from insider abuse”, which they say amounts to conflating duty and standard of care. In their submission, the relationship between TD Bank and SIB is at the very least analogous to prior cases recognizing a proximate relationship between a bank and its customer: *Toronto-Dominion Bank v. 1633092 Ontario Ltd.*, 2019 ONSC 1473, at para. 80; *Dr. Robert Grossman v. The Toronto-Dominion Bank*, 2014 ONSC 3578, at para. 31; *Toronto Dominion Bank v. Whitford*, 2020 ABQB 802, at para. 133.

[46] I recognize, as did the trial judge, that there are a number of cases, including the three cited by the Joint Liquidators, where banks have been found to owe duties to their customers: *Lee v. Canadian Imperial Bank of Commerce*, 2001 CarswellOnt 3019 (S.C.), at para. 25; *Good Mechanical v. Canadian Imperial Bank of Commerce* (2005), 49 C.L.R. (3d) 183 (Ont. S.C.), at para. 34; *Don Bodkin Ltd. v. Toronto Dominion Bank* (1993), 14 O.R. (3d) 571 (Gen Div.), aff'd (1998) 40 O.R. (3d) 262 (C.A.), at para. 24; *Oak Incentives Group Inc. v. Toronto Dominion Bank*, 2011 ONSC 3245, at para. 80, aff'd 2012 ONCA 726.

[47] However, like the trial judge, I disagree with the Joint Liquidators that there is an all-encompassing category of proximity between banks and their customers in relation to "banking services". This broad characterization is at odds with the Supreme Court's admonition in *Livent* and *Maple Leaf* to look beyond the mere identity of the parties.

[48] To accept such a broad category would be to ignore that banks undertake an extremely broad range of different activities for very different purposes: banks cash cheques, transfer funds, prepare bank drafts and issue certified cheques, offer bank accounts, issue credit cards, underwrite mortgages, exchange currency, offer investment products and advice, provide safety deposit services, and a host of other "banking services". Therefore, to define the relationship of proximity as simply that of a "bank-customer" relationship is to ignore the reality that banks and their customers are not engaged in a one-size-fits-all relationship.

[49] Furthermore, I agree with the trial judge that this case is unlike prior cases where banks have been held to owe duties to their customers in carrying out a range of different activities for different purposes, for example, securing loans (*1633092 Ontario Ltd.*, at para. 80), executing bank drafts (*Good Mechanical*, at para. 34), responding to customer inquiries (*Oak Incentives,* at para. 80), following customer instructions (*Don Bodkin*, at para. 24) and cashing cheques (*Dr. Robert Grossman*, at para. 31). None of these cases establish that a bank has a proximate relationship with a client that extends to monitoring the client for the purpose of detecting internal fraud.

[50] This case is different than prior authorities that suggest that a bank may be liable to a customer where the bank fails to question suspicious banking transactions: see, for example, *Groves-Raffin Construction Ltd. v. Canadian Imperial Bank of Commerce* (1975), 64 D.L.R. (3d) 78 (B.C.C.A.). Here there was no allegation there were any suspicious banking transactions. Rather, it was alleged that there were other "facts and circumstances" that ought to have put TD Bank, which was responsible for transfers between SIB and its customers, on notice of the risk of internal fraud by SIB insiders. Yet, the trial judge found, despite such allegations, that there was no reason to suspect fraud:

> Mr. Stanford's fraudulent scheme was elaborate, highly sophisticated, and tightly concealed. Only four insiders participated in it. They hid the scheme from the approximately 100 employees at SIB, including the most senior ones, who thought they were working at a

> legitimate financial institution. Mr. Osborne, testified that he did not believe it when he heard the news that his employer was involved in a fraudulent scheme. Indeed, it was not until 2009 that a regulator, the SEC, took any action with respect to the Stanford Group.
>
> …
>
> Eight former and two current employees of TD Bank testified at trial. They all testified that they did not know that Mr. Stanford was operating a Ponzi scheme nor did they have any reason to suspect it. They felt shocked, distressed and betrayed to learn that their long-time customer was involved in a fraudulent scheme. As Mr. Muzaffar explained, it was similar to the feeling he had on learning the news of 9/11.
>
> I accept their evidence. I find that the TD employees had no reason to believe that Mr. Stanford and the insiders were operating a Ponzi scheme or engaging in fraudulent behaviour. <u>There is nothing in the evidence to suggest that the TD Bank employees had any indication that insider abuse was occurring at SIB. I also find that there were no transactional or operational matters that raised any issues on the part of TD Bank employees</u>. They all testified, credibly, that they had no concerns about SIB or its accounts and that the relationship worked well. [Emphasis added.]

[51] As for the Joint Liquidators' submission about conflation of duty and standard of care, I recognize that in distinguishing prior case law, the trial judge could be read as talking about the content of the duty of care (i.e., the standard of care). For instance, the trial judge says, at para. 153, that: "the nature of the duty relates to the operation of the account or the use of the bank's facilities. That includes carrying out the customer's instructions properly or questioning suspicious transactions involving transfers in or out of the account."

[52] As this court has recognized, a duty of care "is not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm": *Rausch v. Pickering City*, 2013 ONCA 740, at para. 37. What "conduct is required to satisfy the duty is a question of the appropriate standard of care": *Rausch*, at para. 38.

[53] That said, despite some of her language, I read the trial judge as recognizing that adopting an overly broad characterization of an established category of proximity – one that fails to consider the scope of the activity in respect of which proximity was previously recognized – may result in a premature imposition of a *prima facie* duty of care: *Livent*, at para. 52.

[54] In any event, at the end of the day, the trial judge was correct in concluding that the relationship between TD Bank and SIB did not fall within an established or analogous category and so a full proximity analysis was required.

**(2) Did the trial judge err in conducting her full proximity analysis?**

**(a) Introduction**

[55] As noted, in cases of pure economic loss arising from negligent performance of a service, the proximity analysis is driven by two factors: the defendant's undertaking and the plaintiff's reliance: *Livent*, at para. 30; *Maple Leaf*, at para 32. Where the defendant undertakes to provide a service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take

reasonable care: *Livent*, at para. 30; *Maple Leaf*, at para. 32. It is "these corollary rights and obligations [that] create a relationship of proximity": *Livent*, at para. 30; *Maple Leaf*, at para. 32.

[56] The Joint Liquidators submit that, conducted properly, a full proximity analysis confirms that there was a relationship of proximity between TD Bank and SIB because TD Bank undertook to provide correspondent bank services and SIB had the right to rely on TD Bank to do so with reasonable care. They contend that the trial judge erred in finding that sufficient proximity could only exist if TD Bank had subjective knowledge of the fraudulent scheme. They also contend that she erred in conflating duty and standard of care.

**(b) Discussion**

[57] In my view, the trial judge did not err in concluding that the Joint Liquidators failed to establish the required proximity.

[58] The trial judge found that as a correspondent bank, TD undertook the following role:

> In terms of TD Bank's undertaking, it was to provide correspondent banking services to SIB. TD Bank undertook to act as SIB's agent for the purpose of receiving and disbursing funds to purchasers of the [certificates of deposit]. It undertook to process those payments (primarily by wire transfer), to account to SIB for the funds that flowed through the account, and to comply with any directions provided by SIB. TD Bank undertook to comply with the banking procedures that applied to the operation of a correspondent account.

[59] As found by the trial judge, the purpose of TD Bank's undertaking was to act as SIB's agent for the purpose of transferring funds to and from SIB and its customers.

[60] The trial judge went on to find that TD Bank did not undertake to monitor the internal operations of SIB or to protect against 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 in issue." As discussed below, the Joint Liquidators point to this comment about "clear indicia" to argue that the trial judge erred by injecting a subjective knowledge component into the proximity analysis.

[61] Given the nature of the bank's undertaking, the trial judge concluded that there was no "basis for SIB to reasonably rely on TD Bank to protect it from insider abuse", which was essentially what the Joint Liquidators alleged. As the trial judge noted, "[a]t its essence, the Joint Liquidators are seeking to impose a duty of care to protect the bank's customer from insider abuse."

[62] This was an entirely fair description of the Joint Liquidators' rather extraordinary position before the trial judge. The Joint Liquidators had submitted that "at some point, the risk of insider abuse increased to such a level that the bank had a duty to review the relationship, shut down the account, and cease providing services to the customer." Indeed, during closing submissions, the trial judge

asked for clarification of the Joint Liquidators' position: "What is it? You help me with your best shot." The answer was as follows:

> And I go back to the risk, and I'll articulate the risk and the purpose. And I say, without repeating all the submissions I made there, the risk based on the submissions from TD Bank, is an accepted risk of insider abuse.
>
> It's a risk in all relationships, corporate relationships. And my point then is that, well, that's the risk to look out for. What merits – then you turn to the circumstances, and that risk would have been available right – acknowledged right from day one when the account was opened. SIB was a sole owner so the insider abuse is a known accepted risk. And then the submissions I made on that was, to know that that's the risk I say, like every other – this risk is one to your customer, one you're aware of, and one – once the circumstances escalate to a degree then you have that duty to protect the customer from this known risk. [Emphasis added.]

[63] Given the mismatch between the undertaking and reliance, the trial judge concluded that the Joint Liquidators had not established "the required proximity to give rise to the novel duty of care proposed in this case". To hold otherwise would expand TD Bank's responsibilities well beyond what it undertook as a correspondent bank. It agreed to provide correspondent banking services; it did not, in the words of the trial judge, "assume the role of a regulator, auditor or insurer."

[64] The trial judge's analysis is consistent with *Livent* and *Maple Leaf*, which recognize that a plaintiff's entitlement to rely on the defendant "operates only so

far as the [defendant's] undertaking goes": *Maple Leaf*, at para. 35; *Livent*, at para. 31. In other words, reliance by the plaintiff that "falls outside of the scope of the defendant's undertaking of responsibility – that is, of the purpose for which the representation was made or the service was undertaken – necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care": *Livent*, at para. 31; *Maple Leaf*, at para. 35. Here, it is simply not believable that SIB detrimentally relied on TD Bank to effectively protect SIB from itself. Monitoring SIB's internal operations so as to protect SIB from internal abuse fell well outside the scope of the proximate relationship and therefore outside TD Bank's duty of care.

[65] As noted, the Joint Liquidators contend that the trial judge's proximity analysis is flawed for two main reasons.

[66] First, they contend that the trial judge erred in finding that sufficient proximity to give rise to a duty of care could only exist if TD Bank had subjective knowledge of the fraudulent scheme. This, says the Joint Liquidators, is contrary to the reasonable, objective fault standard applicable to negligence claims and amounts to clear legal error.

[67] In support of this submission, the Joint Liquidators point to the trial judge's comment about the need for "clear indicia to put the bank on notice" in the following passage about the nature of TD Bank's undertaking:

> There is nothing about the bank's undertaking that would support the novel duty proposed by the Joint Liquidators, whether at the account opening or operating stage. The nature of TD Bank's undertaking to operate a correspondent account did not extend to monitoring the internal operations of SIB. It 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 in issue. [Emphasis added.]

[68] In a similar vein, the trial judge later surmised that if, in another case, there were "clear indicia that an account is being used for nefarious purposes or that fraudulent conduct might be in issue," proximity may well be established.

[69] According to the Joint Liquidators, the only plausible interpretation that can be given to the impugned comments about "clear indicia" to put the bank on notice is that the trial judge erroneously required TD Bank to be subjectively aware, or at least reckless or wilfully blind, to the fraudulent scheme before proximity could be made out.

[70] In my view, the impugned passages need to be read in context. As noted above, the trial judge found as a matter of fact that there were no clear indicia to put the bank on notice. As she concluded, this was an "elaborate, highly sophisticated, and tightly concealed fraud", there was no indication that internal abuse was occurring at SIB, and there were "no transactional or operational matters that raised" suspicion. As I read the trial judge's impugned comments in light of these factual findings, I understand her to be saying that a different factual

scenario could lead to a different analysis and, therefore, a different conclusion. There is no basis to suggest that the trial judge erred by making this observation.

[71] Second, the Joint Liquidators submit that the trial judge conflated duty and standard of care by basing her full proximity analysis on the content of the duty of care (i.e., the standard of care). How a bank is required to respond to “clear indicia” necessarily engages the applicable standard of care. This error is said to undermine her proximity analysis.

[72] I would reject this argument for the same reasons I rejected the subjective knowledge argument. As I read the trial judge’s comments about “clear indicia”, they are of no moment because they were made in reference to factual scenarios that were not before the court.

[73] In conclusion, there is no reason to interfere with the trial judge’s conclusion that the Joint Liquidators failed to establish the required proximity. Given the scope of TD Bank’s undertaking, it was not reasonable for SIB to detrimentally rely on TD Bank to monitor SIB for the purpose of protecting it from insider fraud.

**Issue #2: Did the trial judge make legal or factual errors in concluding that, if there were a duty of care, there would have been no breach of the standard of care?**

[74] Given my conclusion on duty of care, the Joint Liquidators' negligence claim fails and so there is no need to address the issue of standard of care. Even so, like the trial judge, I will go on to consider it, for the sake of completeness and clarity.

[75] There was a good deal of expert evidence led at trial, all of which was directed at whether, assuming a duty of care was found, TD Bank fell below the standard of care.

[76] TD Bank called one expert witness on liability, Sara Joyce, an Ontario lawyer and former Canadian banker with over 35 years of experience in the Canadian banking industry. Ms. Joyce was qualified as an expert in international and correspondent banking, including account operating, know your client principles, due diligence and anti-money laundering standards, and the standard of care applicable to a Canadian bank providing correspondent banking services to foreign banks between 1991 and 2009.

[77] The Joint Liquidators called two expert witnesses on liability, Jonathan Winer and Ross Delston, both attorneys in the United States with widespread experience. Mr. Winer was qualified as an expert on international banking standards and Mr. Delston was qualified as an expert on financial compliance

matters. Neither was qualified to provide opinion evidence regarding the interpretation or application of the laws of Canada or Ontario, as neither had expertise related to Canadian banking practices or the Canadian regulatory regime.

[78] The trial judge also heard evidence from several current and former TD Bank employees.

[79] The trial judge carefully assessed all of the evidence, including the expert evidence, in determining whether TD Bank would have fallen below the standard of care if it had owed a duty of care to SIB. Her reasons explain why she preferred the evidence of Ms. Joyce over the evidence of Mr. Winer and Mr. Delston. They also explain why she put little weight on the evidence given by former TD Bank employees Stephen Cullen and Martin Doyle. In the end, she concluded that, if TD Bank had owed a duty of care to SIB, there was no breach of the standard of care.

[80] The Joint Liquidators contend that the trial judge made at least four legal and factual errors in how she approached the standard of care, including that she erred in: (1) injecting a subjective element into her standard of care analysis; (2) disregarding the evidence of Mr. Cullen and Mr. Doyle; (3) uniformly accepting Ms. Joyce's evidence; and (4) providing inadequate reasons.

[81] In response, TD Bank submits that the Joint Liquidators raise questions of fact or questions of mixed fact and law, and so this court can only interfere if the

trial judge committed an extricable legal error or a palpable and overriding error, which she did not do.

**(1) Did the trial judge err by suggesting that TD Bank had to have subjective knowledge of the fraudulent scheme to fall below the standard of care?**

[82] According to the Joint Liquidators, the trial judge's erroneous view that the duty of care rested on TD Bank's subjective knowledge of the fraud led her to erroneously believe that the standard of a reasonable banker also depended upon subjective knowledge of the fraudulent scheme. They suggest that, in assessing whether there was a breach of the standard of care, the trial judge must have erroneously "asked herself whether TD Bank had reason to suspect … that Stanford was perpetrating his fraudulent scheme, or at least whether a reasonable bank would have had reason to suspect that was the case." This, they say, was the wrong approach, given the objective reasonableness standard applicable to negligence claims.

[83] I do not accept that the trial judge injected a subjective element into the standard of care analysis for two reasons.

[84] First, the Joint Liquidators' point of departure on this alleged error has already been rejected: as previously explained, the trial judge did not erroneously inject a subjective knowledge standard into the duty of care analysis.

[85] Second, the Joint Liquidators' argument is predicated on an assumption that is not borne out by the reasons. Their argument proceeds on the assumption that the trial judge must have asked herself whether TD Bank had reason to suspect that Mr. Stanford was perpetrating a fraud. However, nowhere in her reasons, spanning over 50 paragraphs on this point, does the trial judge say this. To the contrary, she assessed the evidence, including the expert evidence as to what a reasonable bank ought to have done, made findings of fact, and ultimately concluded that TD Bank, in its capacity as a correspondent bank, acted reasonably in the circumstances.

**(2) Did the trial judge err in her treatment of evidence with respect to the 1999 FinCEN Advisory and the 2002 Philadelphia Inquirer article?**

[86] The Joint Liquidators take issue with the trial judge's treatment of evidence related to a 1999 advisory directed at U.S. banks and a 2002 newspaper article mentioning Mr. Stanford.

[87] The advisory in question was issued by the U.S. Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") in April of 1999 and was withdrawn just over two years later in August 2001. The Advisory advised U.S. banks to give enhanced scrutiny to all financial transactions routed into or out of Antigua.

[88] The Advisory arose from the fact that the government of Antigua had weakened its money-laundering legislation and changed the supervision of its offshore financial services sector by vesting authority in a new body. It warned that the board of directors for that new body included “representatives of the very institutions the Authority is supposed to regulate”. Although the Advisory did not say so, Mr. Stanford was briefly one of those representatives. He was appointed to the Board in 1998 but resigned shortly thereafter.

[89] As for the newspaper article in question, it was published in the Philadelphia Inquirer on August 28, 2002. It was titled “Offshore banker is Torricelli key donor” and focussed on Mr. Torricelli, a U.S. politician, and referred to contributions that Mr. Stanford had made to a defence fund for legal proceedings in which Mr. Torricelli was involved.

[90] The article stated that three years before, Mr. Stanford had become embroiled in a bitter dispute with U.S. authorities who said he was using his financial and political clout to subvert banking laws in Antigua. The article noted that Mr. Stanford's name was never mentioned in the Advisory, but that U.S. officials confirmed they were referring to Mr. Stanford. The article noted that Mr. Stanford had stepped down from the board of the regulator and that the U.S. officials had backed off and the conflict had died down. The article quoted a lawyer who had been retained by Mr. Stanford, who said that Mr. Stanford had helped to clean up the industry by enacting rules that would discourage money launderers.

[91] The Joint Liquidators submit that the trial judge erred in disregarding Mr. Cullen’s evidence related to the FinCEN Advisory and Mr. Doyle’s evidence related to the Philadelphia Inquirer article on the basis that they testified with “hindsight knowledge” that Mr. Stanford was a fraudster. They also submit that the trial judge made palpable and overriding errors in failing to find that a reasonable bank would have obtained and investigated the FinCEN Advisory, and that, having done so, would have stopped providing correspondent banking services to SIB.

[92] In response, TD Bank contends that the Joint Liquidators simply disagree with the trial judge that no weight can be given to certain answers provided by Mr. Cullen and Mr. Doyle, which is not an appropriate basis for appellate intervention.

**Stephen Cullen and the FinCEN Advisory**

[93] Mr. Cullen was TD Bank’s Director of Trade Finance and Correspondent Banking for the Latin America and Caribbean region from 1989 to 2000. He managed up to 100 correspondent bank account relationships and was the relationship manager personally responsible for the correspondent services that TD Bank provided to SIB beginning in 1991.

[94] Despite being aligned in interest with TD Bank, Mr. Cullen made certain admissions while under cross-examination that were helpful to the Joint Liquidators’ case. Specifically, he testified about the effect of the FinCEN Advisory.

[95] Mr. Cullen testified that he never became aware of the FinCEN Advisory or any of the media reports relating to it. However, he also testified that a reasonable bank would have obtained the FinCEN Advisory, and that, having done so, should have taken steps to investigate the Advisory. According to him, these steps would have included locating the resulting media reports linking the Advisory to Mr. Stanford. He also testified that had TD Bank known of the FinCEN Advisory, it could have made inquiries of SIB and other Antiguan banks and institutions. Had TD Bank learned of Mr. Stanford's connection to the FinCEN Advisory at that point, he would have "probably closed the [SIB] account".

[96] After accurately reviewing Mr. Cullen's evidence, this is what the trial judge had to say about it:

> I place little weight on this evidence. There are too many contingencies built into his answer. It was given over 20 years after the fact with the hindsight knowledge that Mr. Stanford was a fraudster. Mr. Cullen admitted that the FinCEN Advisory had to do with money laundering issues, not fraud and there was evidence at trial that Mr. Stanford portrayed himself publicly as a supporter of the fight against money-laundering and regulatory reform in Antigua.
>
> It is difficult at this time to know what answers Mr. Cullen would have received to his inquiries and what the result would have been. By the time the advisory was issued, Mr. Stanford had stepped down from the board. It is speculative to say what Mr. Cullen might have done if he had known about the FinCEN Advisory, made inquiries, and found out that Mr. Stanford was no longer sitting on the board. It is also speculative to say what TD Bank

> would have done in light of the fact that no Canadian advisory was issued to Canadian banks at the time.

[97] The Joint Liquidators submit that there was no basis for the trial judge to reject Mr. Cullen's evidence about the FinCEN Advisory when she accepted his evidence on other issues and when the evidence amounted to admissions of key facts against TD Bank's interests with which he was aligned. They suggest that the trial judge effectively singled out Mr. Cullen (and Mr. Doyle) by taking issue with their hindsight knowledge and ignoring that every expert witness testified at trial with hindsight knowledge.

[98] I do not accept these submissions. It was entirely open to the trial judge to reject Mr. Cullen's evidence on this point. She did so in a clear and reasoned manner. This is the very work of a trial judge and it does not lie to an appeal court to redo that work. It lies to an appeal court to defer to those reasoned factual findings.

[99] Not only was it open to the trial judge to reject Mr. Cullen's hindsight view as to what he might have done had he received the FinCEN Advisory based upon the multiple "contingencies" built into his answers, but it was also open to the trial judge to resolve the expert evidence on the FinCEN point exactly as she did.

[100] The Joint Liquidators' expert witnesses were, as the trial judge put it, "critical that TD Bank did not receive the FinCEN Advisory or have systems in place" to bring it to their attention. They said that if it had been brought to their attention, TD Bank should have terminated the relationship with SIB.

[101] Ms. Joyce disagreed, testifying that she had never received a FinCEN Advisory directly during her career as a Canadian correspondent banker. She also testified that the FinCEN is not a standard-setting institution but a "crime enforcement agency" that issues "periodic pronouncements on certain topics to U.S. banks." Moreover, she testified that while the Advisory may have caused questions to be asked, it would not have, as the other experts suggested, necessarily resulted in the termination of the relationship with SIB. She noted that, at the time, TD Bank was already taking steps to check payments and look for suspicious activity.

[102] In the end, the trial judge accepted Ms. Joyce's evidence over that of the other experts. She found that it was reasonable for TD Bank not to have received the FinCEN Advisory and closed the SIB accounts in 1999. She concluded that the Joint Liquidators had not proven on a balance of probabilities that TD Bank fell below the standard of care with respect to the FinCEN Advisory.

[103] It was open to her to make these findings. She gave reasons for doing so, including that Ms. Joyce was a Canadian banker when the Advisory was issued. I see no error of law or fact as it relates to that reasoned conclusion.

**Martin Doyle and the Philadelphia Inquirer article**

[104] The Joint Liquidators make a similar argument when it comes to the evidence of Martin Doyle, who was also aligned in interest with TD Bank.

[105] Mr. Doyle led the Anti-Money Laundering Governance Group ("AML Group") established by TD Securities in 2000. He was the point person for "Know Your Customer" from 2000 to 2007. The main function of the AML Group was to conduct name screening for sanctions using online search tools.

[106] Mr. Doyle testified about the 2002 Philadelphia Inquirer article. While a couple of TD Bank employees who reported to Mr. Doyle received that article in an email from a junior correspondent banker at TD Bank, they did not forward the email or article to Mr. Doyle.

[107] When shown the article at trial, Mr. Doyle testified that the contents of the article were inconsistent with his conclusion around that time that Mr. Stanford's reputation was unsullied and that there was no reason to be concerned.

[108] When the employees who had received the article back in 2003 were asked about it at trial, they could not recall the particular circumstances surrounding its review. One of them testified, though, that it seemed to involve a story from three

years earlier (when the FinCEN Advisory was issued) and that since that time, as mentioned in the article, Mr. Stanford had stepped down from the agency regulating the offshore bank and seemed to be trying to “help”.

[109] Mr. Doyle testified that had the article been brought to his attention, it would have warranted further investigation and that if there was any reason to believe that the statements were true, it would have, as the trial judge put it, “opened up discussions on whether to recommend the exit of the relationship closing the account.”

[110] As she did with Mr. Cullen’s evidence, the trial judge rejected Mr. Doyle’s evidence as to what he would have done had he known about the Philadelphia Inquirer article back in 2003. As the trial judge said: “Again, this evidence suffers from the same frailties as Mr. Cullen’s evidence about the FinCEN Advisory. It is speculative, has too many built-in contingencies, and is made with the benefit of hindsight.”

[111] On this point the trial judge again accepted Ms. Joyce’s evidence over that of the other experts. She gave reasons for doing so. In her view, the article contained “rumours”, “gossip” and four-year-old information, and it related to the FinCEN Advisory that had long been withdrawn. While Ms. Joyce agreed that Mr. Doyle was in a better position than she to speak to how TD Bank would have responded to the article, her point, as accepted by the trial judge, was that in light

of the content of the article, sending it to the AML Group was nothing more than an option.

[112] The trial judge accepted this evidence and concluded that there was no breach of the standard of care:

> I accept Ms. Joyce's evidence. Among other things, she recognized the fact that the information in the article was years old by the time [the two TD employees] received it. She recognized the position that they were in and the fact that they were not required to send the article to Mr. Doyle. The [Joint Liquidators] have not proven, on a balance of probabilities, that TD Bank fell below the standard of care with respect to the Philadelphia Inquirer Article.

[113] It was open to the trial judge to come to the factual conclusions she did, all of which informed her ultimate conclusions relating to the standard of care. I would defer to those findings.

### (3) Did the trial judge err in uniformly accepting TD Bank's expert opinion evidence?

[114] The Joint Liquidators argue that the trial judge made two related errors in uniformly accepting TD Bank's expert opinion evidence given by Ms. Joyce.

[115] First, they claim that Ms. Joyce testified outside of her expertise and improperly commented upon the credibility and reliability of other witnesses.

[116] Second, they allege that the trial judge crossed the line by accepting Ms. Joyce's evidence over the "fact evidence" that was elicited from Mr. Cullen and Mr. Doyle.

[117] Respectfully, there is no merit to these claims.

[118] As evidenced by the absence of any objection to Ms. Joyce's evidence at trial, she stayed within the appropriate bounds of her expert opinion. The few examples cited by the Joint Liquidators are entirely benign, likely informing why there was no objection taken by experienced counsel present when the evidence was given.

[119] Nor did the trial judge cross the line. She did what she was called upon to do: determine the facts. It is unsurprising that, in assessing the conduct of a Canadian bank providing correspondent banking services, the trial judge found the evidence of an expert Canadian correspondent banker more credible than the evidence of expert U.S. attorneys.

[120] This court is not the forum in which to try the case. That has already happened.

**(4) Are the trial judge's reasons inadequate?**

[121] The Joint Liquidators suggest that the trial judge's reasons on standard of care are inadequate, leaving this court and parties to speculate as to how she arrived at her conclusion on the critical issues.

[122] I disagree. There is simply no basis to suggest that the reasons on any of the issues in this case, including the standard of care, are inadequate.

[123] Trial judges have an obligation to provide reasons. Reasons provide a level of accountability for all judicial decisions. They serve to justify the result, explain how the result was achieved, tell the party that lost why they lost, allow for informed consideration as to whether an appeal should be taken, and allow for effective appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55; *R. v. M. (R.E.)*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 11, 35.

[124] The reasons in this case achieve all of these purposes. The trial judge meaningfully grappled with the extensive evidentiary record and the positions of the parties, and she thoroughly explained how she reached her findings that informed her conclusion. While the Joint Liquidators may take objection to the reasoning, there is no basis to find that the reasons lack or do not permit meaningful appellate review.

**Issue #3: Did the trial judge err in interpreting and applying r. 53.07 of the *Rules of Civil Procedure,* resulting in trial unfairness?**

[125] The Joint Liquidators take issue with a procedural ruling made at the close of the Joint Liquidators' case ("the second ruling"). The trial judge permitted TD Bank to recall a number of witnesses to testify, despite the fact that they had already been cross-examined by the Joint Liquidators under r. 53.07 of the *Rules*

*of Civil Procedure*, R.R.O. 1990, Reg. 194, which addresses calling adverse parties as witnesses. The Joint Liquidators say that the trial judge's second ruling contradicted her earlier ruling under r. 53.07 (the "first ruling") and that her second ruling was based on an incorrect interpretation of r. 53.07. The result, they say, was to permit an unfair trial process.

[126] TD Bank submits that the second ruling was correct and caused no prejudice to the Joint Liquidators.

[127] As I will explain, I do not accept that the trial judge's second ruling was incorrect or that it resulted in trial unfairness.

**(a) Background**

[128] To understand the Joint Liquidators' objection to the second ruling, it is necessary to understand the scope of the first ruling.

**The First Ruling**

[129] Before any witnesses were called at trial, the Joint Liquidators sought an undertaking from TD Bank to call ten of its current and former employees. TD Bank would not provide the undertaking, and so the Joint Liquidators sought to summon and cross-examine those witnesses pursuant to r. 53.07.

[130] Where a witness is summoned under r. 53.07, they may be (1) cross-examined by the party who called them or by any other party who is adverse in interest (r. 53.07(5)), and (2) re-examined by any other party who is not entitled to cross-examine under r. 53.07(5) (r. 53.07(6)).

[131] TD Bank was opposed to the Joint Liquidators cross-examining any former employees. It argued that r. 53.07 only applies to current employees and so if the Joint Liquidators wished to examine former employees as witnesses at trial, they were required to summon and examine those witnesses in chief.

[132] The trial judge rejected TD Bank's position. She found that the rule applied to former employees. She concluded that it was in the interests of justice to permit the Joint Liquidators to cross-examine the witnesses pursuant to r. 53.07 and to allow TD Bank to re-examine them.

[133] The trial judge also rejected TD Bank's secondary argument that if the witnesses were subject to cross-examination pursuant to r. 53.07, the bank should be permitted to conduct additional examination of them, not limited to re-examination. In rejecting that argument, the trial judge made the following comment, which the Joint Liquidators rely upon to argue that the second procedural ruling was inconsistent with the first:

> If TD Bank had wanted to control the presentation of evidence from those witnesses, it could have undertaken to call them as TD Bank witnesses, but it chose not to do so. TD Bank may, therefore, conduct re-examination of the witnesses only.

**The Second Ruling**

[134] Once the Joint Liquidators closed their case, TD Bank sought to recall three of the witnesses who had already testified pursuant to the first procedural ruling. I refer to these witnesses as the "recall witnesses."

[135] The Joint Liquidators opposed TD Bank's request to have the recall witnesses testify. They maintained that the trial judge's first procedural ruling precluded this approach and that permitting the recall witnesses to testify again would "eviscerate the effect of Rule 53.07" and "result in irreparable prejudice" to the Joint Liquidators. In addition, the Joint Liquidators said that once TD Bank decided not to undertake to call any of its employees, it "relinquished the ability to examine them in-chief and control the presentation of their evidence to the Court."

[136] In response, TD Bank argued that r. 53.07 did not preclude them from recalling the witnesses. And, the failure to permit them to testify further would leave a distorted factual picture for the trial judge, since two of the recall witnesses were examined for less than 30 minutes each and only on minor points, and the third recall witness had not been taken to key documents.

[137] The trial judge concluded that there is "nothing" in r. 53.07 that "states that an adverse party who does not give an undertaking to call a witness forfeits the right to call that witness" after that witness' initial testimony. The trial judge went on:

> According to the operation of the rule, the consequences of not giving the undertaking are that the opposing party may summons the witness and may cross-examine the witness, a right that the opposing party would not otherwise have for its own witness. The rule does not state that the adverse party must give the undertaking or lose the right to subsequently call the witness… If the rule had the consequence of also prohibiting the adverse party from calling the witness, it would have stated so explicitly.

[138] Ultimately, the trial judge decided that she would not resolve "all theoretical abuses of the rule" and tailored her ruling to provide a just outcome in this case. That outcome was to allow the recall of the witnesses while at the same time directing TD Bank not to duplicate evidence that the recall witnesses had previously given. This arrangement, she concluded, would mitigate any prejudice arising from the recall and allow the court to have a complete evidentiary record.

**(b) Discussion**

[139] The Joint Liquidators submit that the trial judge's second ruling "eviscerated both her first procedural ruling… on which the Joint Liquidators' trial strategy was based, and rule 53.07." In particular, they point to the following errors:

- She gave r. 53.07 a "novel and legally incorrect interpretation", one that led to prejudice to the Joint Liquidators, which could not be mitigated by cross-examination or otherwise.
- She unfairly reversed her first ruling, where she had said that TD Bank could have "undertaken to call [the witnesses] … but it chose not to do so" and therefore, TD Bank was confined to "re-examination of the witnesses only".

[140] In the Joint Liquidators' submission, the testimony resulting from the second ruling was inadmissible, as were parts of the opinion evidence proffered by Ms. Joyce. Accordingly, the trial judge erred in relying on such testimony in dismissing the Joint Liquidators' claims.

[141] I reject this ground of appeal for several reasons.

[142] First, there is nothing in the wording of r. 53.07 that precludes a party from recalling a witness after refusing to undertake to call that witness in the first place. And, notably, r. 53.01(3) provides that "[t]he trial judge may at any time direct that a witness be recalled for further examination." That is what happened in this case.

[143] Second, pursuant to r. 1.04(1), r. 53.07 is to be construed liberally in order to secure "the just, most expeditious and least expensive determination" of every proceeding based on its merits. To adopt the Joint Liquidators' interpretation would, as illustrated by this case, be at odds with r. 1.04(1), as it would undermine the truth-seeking function of the trial. As the trial judge noted, the recall witnesses were "key witnesses": their evidence was "critical" to the factual findings she had

to make. It was “important to receive their oral evidence… to make a just determination.”

[144] Third, contrary to the Joint Liquidators’ submission, the second ruling does not render r. 53.07 “effectively meaningless”. Their submission ignores the purpose of the rule: it permits a plaintiff to call as a witness a person opposed in interest but whose evidence is critical to the plaintiff’s case without being limited to direct examination, which is unlikely to be an effective way to prove a party’s case in the circumstances: Peter Sankoff, *Law of Witnesses and Evidence in Canada*, at para 11:31; see also *Granitile Inc. v. Canada* (1998), 41 C.L.R. (2d) 115 (Ont. Gen. Div.), at para. 23. Here, the rule fulfilled its clear purpose: it allowed the Joint Liquidators to elicit evidence through cross-examination from adverse witnesses in building their case.

[145] Fourth, the trial judge’s interpretation prevents strategic behaviour that could deprive the finder of fact of relevant evidence. For instance, if the Joint Liquidators were correct in their interpretation of r. 53.07, then there would be nothing to stop a plaintiff from strategically summoning a witness, asking a single question, and then having that witness placed on, as the trial judge put it, “ice”. Given the rules of re-examination, tied as they are to what is elicited during examination in chief, this interpretation would not only prevent the witness from giving their evidence, but it would deprive the finder of fact of that evidence.

[146] Fifth, contrary to the Joint Liquidators' submission, the trial judge's two procedural rulings are reconcilable. While the trial judge initially refused to allow TD Bank to "conduct additional examination of [the adverse] witnesses not limited to re-examination", that was a ruling that was applicable to the Joint Liquidators' case in chief. That ruling did not preclude TD Bank from seeking permission to recall those same witnesses when it turned out that the evidence elicited from them during the case in chief did not touch on areas necessary to the defence and to provide the trier of fact with critical facts.

[147] In the end, the trial judge navigated a carefully balanced path. She tailored her ruling to limit the examination of the recall witnesses to areas not previously covered in their testimony. She also provided the Joint Liquidators with the right to exercise full cross-examination and to call reply evidence should they choose to do so. They exercised the first right and chose not to exercise the second. There was nothing unfair or prejudicial about this procedure.

[148] This ground of appeal must fail.

## E. CONCLUSION

[149] I would dismiss the appeal.

[150] Pursuant to the agreement between the parties, costs on the appeal are awarded to TD Bank in the amount of $150,000, all inclusive.

Released: “November 17, 2022 JMF”

“Fairburn A.C.J.O.”<br>I agree. Sossin J.A.”<br>I agree. L. Favreau J.A.”