

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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

Plaintiffs

- and -

THE TORONTO-DOMINION BANK

Defendant

**UNOFFICIAL TRANSCRIPTION OF
ENDORSEMENT OF CONWAY J. DATED OCTOBER 6, 2016**

TD brings this motion for a stay of the JL's action, temporarily, pending the SCC's decision in the *Livent v. Deloitte & Touche* appeal, for which leave has been granted. The appeal is scheduled to be heard in Feb 2017.

TD argues that the JL's action, as presently constituted, engages the same issues that are to be decided in *Livent* – namely, whether creditor losses can be recovered in an action brought by liquidators through the corporate vehicle and whether the "deepening insolvency" theory of damages is permissible under Canadian law. TD argues that the pending discovery process in the JL's action, which will be expensive and time consuming given its expansive scope, should be suspended until the SCC has determined those legal issues, as the SCC's decision may undermine or even eliminate the basis for the JL's action.

The test to be applied on this stay motion is not the *RJR MacDonald* test but rather the interests of justice test – see *Astrazeneca Canada Inc. v. Mylan Pharmaceuticals ULC* 2011 FCA 312, as adopted by the Ont CA in *Korea Data Systems (USA) Inc. v. Amazing Technologies Inc.*, 2012 On CA 756.

I do not consider that it is in the interests of justice to grant the stay, for the following reasons:

1. The appeal is to be heard in Feb 2017. There is no certainty as to when the SCC will release its decision, although I expect it will be on the longer side given the complex corporate issues at stake and the lack of time sensitivity in the appeal. It will, no doubt, be a long wait from now.

2. The JL's action is at the discovery stage. This is not a situation where a trial or hearing is set to occur and it would preserve the court's resources to wait until the SCC decision is released. There is no reason the litigation cannot proceed in the ordinary course and move on to productions and oral discovery. I note that the cases relied on by TD applied to pending hearings.
3. The fact that discoveries are expensive and inconvenient is not a basis for TD to claim prejudice if the stay is not granted: see *Navionics v. Nautical Data International Inc.* [2006] OJ No. 5396 (SCJ), at para 30.
4. There are numerous issues before the SCC in the *Livent* case, only part of which is the damages issue. It is uncertain as to whether the SCC will even get to address that particular issue, nor is it entirely clear what the impact of any such decision will be on the JL's action. I note that *Livent* involves different parties than in this case and completely different factual scenarios. I am not persuaded that there is a sufficient direct nexus between *Livent* and this case that warrants a stay of this duration.

TD has not met its onus of establishing that the JL's action should be temporarily stayed. The motion is dismissed. As agreed by counsel, costs are fixed at \$25,000 payable by TD to the JLs.

Conway J.