

**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 joint liquidators of
Stanford International Bank Limited

Plaintiffs

- and -

THE TORONTO-DOMINION BANK

Defendant

FRESH AS AMENDED STATEMENT OF DEFENCE

Response to the Fresh As Amended Statement of Claim

1. The Toronto-Dominion Bank (“**TD Bank**”) admits the allegations contained in paragraphs 8, 26, 27, 28, 30, 36, 37, 42, 43, 59 (first sentence only; the second and third sentences are denied), 69, 84 (first sentence only; the balance is denied), 86 (first and second sentences only; TD Bank has no knowledge in respect of the third and fourth sentences), 92, 93, 115, 116, 118, 119, 120, 121, 122, 123, 246, 247, 248, 295, 305, 306, 307, 312, 314, 315 and 335 of the Fresh as Amended Statement of Claim.

2. TD Bank denies the allegations contained in paragraphs 1-7, 16, 20-25, 29, 31-35, 41 (second sentence only; TD Bank has no knowledge in respect of the first sentence), 44, 59 (second and third sentences only; the first sentence is admitted), 60, 70-83, 84 (other than the first sentence, which is admitted), 85, 87-91, 94, 95, 96 (third sentence only; TD Bank has no

knowledge in respect of the first and second sentences), 112 (second and third sentences only; TD Bank has no knowledge in respect of the first sentence), 117, 139, 140, 144-172, 210-213, 242-245, 249-294, 301-304, 308, 309, 310, 311, 313 and 316-330 of the Fresh as Amended Statement of Claim.

3. TD Bank has no knowledge in respect of the allegations contained in paragraphs 17, 18, 19, 38, 39, 40, 41 (first sentence only; the second sentence is denied), 45-58, 61-67, 68, 86 (third and fourth sentences only; the first and second sentences are admitted), 96 (first and second sentences; the third sentence is denied), 97-111, 112 (first sentence only; the second and third sentences are denied), 113, 114, 124-138, 141-143, 173, 209, 214-241 and 296-300 of the Fresh as Amended Statement of Claim.

The legal framework

4. The plaintiffs (the “**Joint Liquidators**”) purport to assert two claims against TD Bank:

- (a) a negligence claim on behalf of Stanford International Bank Ltd. (“**SIB**”) (the “**SIB Negligence Claim**”); and
- (b) a knowing assistance claim on behalf of SIB (the “**SIB Knowing Assistance Claim**”).

5. With respect to the SIB Negligence Claim:

- (a) As a matter of law, the SIB Negligence Claim is not well founded. TD Bank did not owe SIB any duty to detect or warn SIB of any fraud committed by SIB or its principals.

- (b) In the alternative, if such a duty would otherwise arise, SIB and its successors are barred from asserting it on the basis of *ex turpi causa*. It would be perverse to hold TD Bank liable to SIB for failing to warn SIB that SIB was committing a fraud.
- (c) In the further alternative, if such a duty arises and SIB and its successors are not barred from asserting it on the basis of *ex turpi causa*, SIB was contributorily negligent for its failure to detect the fraud of its principals, and for its failure to put in place appropriate mechanisms to safeguard its investors from being defrauded. TD Bank's liability, if any, on the basis of the SIB Negligence Claim must be reduced by the degree of fault attributable to SIB's contributory negligence.

6. With respect to the SIB Knowing Assistance Claim:

- (a) As a matter of law, the SIB Knowing Assistance Claim is not well founded. A fraudster cannot sue another party for knowingly assisting a fraud or a breach of fiduciary duty it has itself committed.
- (b) In the alternative, if in law the SIB Knowing Assistance Claim can be asserted, SIB and its successors are barred from asserting it on the basis of *ex turpi causa*. It would be perverse to hold TD Bank liable to SIB for knowingly assisting in SIB's own fraud or breach of fiduciary duty.
- (c) In the further alternative, if such a duty arises and SIB and its successors are not barred from asserting it on the basis of *ex turpi causa*, SIB was contributorily negligent for its failure to detect the fraud of its principals, and for its failure to put in place appropriate mechanisms to safeguard its investors from being

defrauded. TD Bank's liability, if any, on the basis of the SIB Knowing Assistance Claim must be reduced by the degree of fault attributable to SIB's contributory negligence.

- (d) In any event, as a matter of law knowing assistance requires that a defendant have actual knowledge, or is wilfully blind, or is reckless, to a fraud or breach of fiduciary duty committed by another party. For the reasons set out below, TD Bank had no such actual knowledge and was not wilfully blind or reckless, meaning that it cannot be liable for knowing assistance.

Limitations Defence

7. On February 16, 2009, a U.S. District Court in Dallas, Texas issued an order (the "**Freeze Order**") freezing the worldwide assets of SIB on the basis that SIB had engaged in a Ponzi scheme fraud.

8. From the time of the issuance of the Freeze Order onwards, it was publicly and generally known that SIB had engaged in a fraud.

9. Prior to the Freeze Order, TD Bank had provided correspondent banking services to SIB and related entities. This fact was also generally known as of February 2009.

10. In the months following the Freeze Order, a number of pieces of litigation were commenced worldwide in respect of the matter. In Canada, the litigation included proceedings brought by Bennett Jones LLP, currently counsel for the Joint Liquidators, and proceedings against TD Bank:

- (a) on February 25, 2009, Bennett Jones LLP commenced a putative class action in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Limited (as a representative plaintiff) v. SIB*, Court File No. 0901-02821);
- (b) on April 6, 2009, the Joint Liquidators' predecessors, also appointed by the Eastern Caribbean Supreme Court, brought an *ex parte* motion before a bankruptcy registrar of the Québec Superior Court seeking recognition under the *Bankruptcy and Insolvency Act* of the bankruptcy proceedings in the Eastern Caribbean Supreme Court (under the style *Stanford International Bank Ltd. and Stanford Trust Company Ltd. (Receivership of)*, Court File No. 500-11-036045-090);
- (c) on April 17, 2009, Bennett Jones LLP, acting for a group of plaintiffs known as the "Dynasty Plaintiffs", commenced a fraud action against Allen Stanford, the owner of SIB, in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. Stanford*, Court File No. 0901-05677);
- (d) on April 17, 2009, the Dynasty Plaintiffs also commenced a Norwich application against TD Bank in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 0901-05717), with Bennett Jones LLP acting for the Dynasty Plaintiffs;
- (e) on April 24, 2009, the Attorney General of Ontario commenced a proceeding in the Ontario Superior Court of Justice under the *Civil Remedies Act*, S.O. 2001, c. 28 in respect of approximately \$20 million of SIB's funds that were on deposit with TD Bank at the time of the Freeze Order (under the style *Attorney General of*

Ontario v. The Contents of Various Financial Accounts Held With The TD Bank and TD Waterhouse (in rem), Court File No. CV-09-8154-00CL);

- (f) on June 19, 2009, the United States Department of Justice issued a press release announcing that Robert Allen Stanford, the Chairman of SIB, and several other SIB executives had been indicted on fraud and obstruction charges related to SIB's Ponzi scheme fraud; and
- (g) after the Dynasty Alberta Action and the Dynasty Alberta Norwich Application were stayed by the Alberta Court of Queen's Bench on the basis of *forum non conveniens*, on July 29, 2009, the Dynasty Plaintiffs, represented by Bennett Jones LLP, reinstituted the Dynasty Alberta Norwich Application by bringing an application in the Ontario Superior Court of Justice (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 09-8300-00CL).

11. As a result, a reasonable person with the abilities and in the circumstances of the Joint Liquidators first ought to have known of a potential claim against TD Bank on the date of the Freeze Order, or in the alternative no later than February 25, 2009, or in the alternative no later than April 6, 2009, or in the alternative no later than April 17, 2009, or in the alternative no later than April 24, 2009, or in the alternative no later than June 19, 2009, or in the alternative no later than July 29, 2009.

12. Accordingly, since this action was not commenced until August 22, 2011, it is statute barred and ought to be dismissed. TD Bank pleads and relies on the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

The Freeze Order

13. The Freeze Order was a complete surprise to TD Bank. It was the first time that TD Bank knew, or could reasonably have known, that Mr. Stanford and SIB had engaged in a Ponzi scheme fraud. The fraud had been perpetrated by a small number of SIB insiders led by Mr. Stanford himself. The fraud was hidden from everyone else, including TD Bank, other financial institutions, regulators, and even senior SIB executives who were not part of the small inner circle around Mr. Stanford that committed the fraud.

The history of dealings between TD Bank and SIB prior to the Freeze Order

14. Between 1991 and the Freeze Order, TD Bank provided certain services with three sets of Stanford-related entities: (i) SIB, an Antiguan-based offshore bank that was not permitted by Antiguan law to deal with local Antiguan customers; (ii) Bank of Antigua, a local retail bank in Antigua that was owned by Mr. Stanford; and (iii) Caribbean Sun Airlines and Caribbean Sun Airlines, Antiguan-based airlines that operated in the Caribbean.

15. TD Bank knew that Mr. Stanford, SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines were affiliated with the Stanford Financial Group (“SFG”), which was based in Houston, Texas and conducted most of its activities in the United States. TD Bank believed that SFG was regulated by U.S. regulators, which provided comfort to TD Bank in its dealings with SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines.

16. As detailed below, TD Bank provided three broad types of services to SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines: (i) correspondent banking; (ii) discretionary investment management services; and (iii) trade finance and treasury services.

Correspondent banking

17. TD Bank's first dealings with any Stanford-related entity was in 1991. At the time, Bank of New York had offices in Canada. Through those offices, Bank of New York provided correspondent banking services to a number of customers in the Caribbean, including Bank of Antigua. Bank of New York decided to close its Canadian offices, which meant closing the correspondent bank accounts maintained at those offices. Bank of New York agreed to introduce TD Bank to its correspondent banking customers in the Caribbean, so that those customers would continue to have access to correspondent banking services after Bank of New York closed its Canadian offices. One of the customers that Bank of New York introduced to TD Bank was Bank of Antigua. TD Bank did not pay Bank of New York to acquire the book of business.

18. As a result of the introduction by Bank of New York, TD Bank opened correspondent banking accounts for Bank of Antigua. TD Bank did not breach any KYC and AML ("KYC") or anti-money laundering ("AML") standards that were applicable at the time.

19. Several months later, TD Bank opened correspondent banking accounts for SIB (known at the time as Guardian International Bank). Again TD Bank did not breach any KYC and AML standards that were applicable at the time. Contrary to the allegations in paragraph 75 of the Fresh As Amended Statement of Claim, there was no allowing of SIB to "access [TD Bank's] services through the 'side door' and not the 'front door'".

20. Bank of Antigua and SIB operated correspondent banking accounts with TD Bank in both Canadian and U.S. dollars. Contrary to the Fresh As Amended Statement of Claim, in the early 1990s there was nothing unusual or improper about Bank of Antigua and SIB maintaining U.S. dollar correspondent banking accounts with TD Bank.

Discretionary investment management services

21. In 1997, SIB opened an account with Private Asset Management (“**PAM**”), which was part of TD Asset Management. TD Bank did not breach any KYC and AML standards that were applicable at the time. PAM provided discretionary investment management services to SIB.

John Pepperall of PAM was the main customer contact for the SIB account at the beginning of the relationship and Perry Mercer of PAM transitioned into being the main customer contact.

22. In 2002, Bank of Antigua opened an account with PAM. TD Bank did not breach any KYC and AML standards that were applicable at the time. PAM also provided discretionary investment management services to Bank of Antigua. Mr. Mercer was again the main customer contact.

23. Initially, both the SIB account and the Bank of Antigua account at PAM were invested in 100% equities. However, in or around 2004 or 2005, at the request of SIB and Bank of Antigua, both portfolios were shifted to a more balanced portfolio which included equities, fixed income assets, and cash investments.

24. Also in approximately 2005, PAM was merged with Private Investment Counsel (“**PIC**”), which was part of TD Waterhouse. The accounts of SIB and Bank of Antigua were moved to PIC shortly thereafter in 2006. Mr. Mercer continued to be responsible for the accounts, and remained responsible until the Freeze Order. Mr. Mercer communicated with Zack Davis concerning the SIB and Bank of Antigua accounts from 2005 to 2009.

Trade finance and treasury services

25. TD Bank also provided some trade finance and treasury services, including foreign exchange services and some fully cash collateralized letters of credit to Bank of Antigua and Caribbean Star Airlines and Caribbean Sun Airlines.

The conduct of the relationship

26. Throughout the relationship, and as referenced above, TD Bank engaged in appropriate AML scrutiny to ensure that funds being transmitted to and from SIB and Bank of Antigua were not the proceeds of crime. AML standards changed over time and became more stringent, especially after September 11, 2001. At all material times, TD Bank did not breach any then-applicable AML standards.

27. Among other things, after approximately 2000 all wire transfers to and from SIB and Bank of Antigua were “scrubbed” by checking names against lists of known money launderers. At no point was there ever a positive hit arising from such scrubbing (aside from hits that were determined to be false positives).

28. It appears in retrospect that Mr. Stanford and the small group of insiders perpetrating the fraud were careful to ensure that SIB and Bank of Antigua were not handling funds for money launderers, and that this was part of the *modus operandi* of the fraud. Mindful that Antigua was a higher risk jurisdiction for money laundering and would therefore be closely scrutinized for AML issues by TD Bank and other financial institutions with which they dealt, it appears that Mr. Stanford and his small group of insiders were scrupulous to ensure that funds flowing to and from SIB and Bank of Antigua were not the proceeds of illicit activities. With the focus on AML issues and finding no problems in that regard, TD Bank did not have any suspicion, or any

reason to suspect, that the risk associated with SIB was not AML risk but rather the risk that it might be a Ponzi scheme fraud.

29. Throughout the relationship, TD Bank undertook appropriate KYC and AML due diligence. Over the years TD Bank met with personnel from SIB, Bank of Antigua, and SFG on a number of occasions, including meetings in Toronto, Montreal, Houston, Memphis, and Antigua. These meetings took place at appropriate intervals, and contrary to the allegations at paragraph 157 of the Fresh As Amended Statement of Claim were substantive meetings at which TD Bank learned about the operations of SIB, Bank of Antigua, and SFG – to the extent that such operations were not actively concealed by Mr. Stanford and the small circle around him.

30. At no time prior to the Freeze Order did TD Bank ever learn that SIB maintained a secret set of alleged investments that were illiquid, non-existent, or overinflated in supposed value. It knew nothing of Mr. Stanford's "football" which apparently kept records of these secret investments. Nor was there any basis upon which TD Bank should have learned of these secret investments or the football. The Joint Liquidators plead at paragraph 105 of the Fresh as Amended Statement of Claim that the contents of these secret investments were unascertainable even to SIB's "employees, executives and directors", all the while maintaining the contradictory claim that the fraud ought to have been ascertained by TD Bank.

Events leading up to the Freeze Order

31. In late 2008, SIB began making large withdrawals from its accounts at TD Bank and PIC. At the time the international financial crisis was under way, and many financial institutions around the world were facing liquidity problems. In these circumstances, there was nothing

unusual about the withdrawals, and the fact that withdrawals were being made did not cause TD Bank to suspect that there might be a fraud.

32. On February 12, 2009, a few days before the Freeze Order, TD Bank had a conference call with SIB to discuss recent press reports that SIB was having financial difficulties. TD Bank was told that SIB was facing a liquidity crisis and was liquidating assets in a measured way in order to meet its liquidity needs. At the time, in the midst of the world-wide financial crisis, SIB was not the only customer of TD Bank that was facing liquidity problems. TD Bank was left with the impression that SIB was facing serious financial difficulty, but did not suspect fraud and had no reason to do so.

33. As previously noted, when the Freeze Order was made a few days later and allegations of fraud were levelled at Mr. Stanford and SIB, it was a complete surprise to TD Bank, just as it was to SIB's own senior executives who were not in Mr. Stanford's inner circle.

There were no red flags

34. To TD Bank's knowledge up until the Freeze Order, SIB, Bank of Antigua and Caribbean Star Airlines and Caribbean Sun Airlines operated legitimate businesses:

- (a) Based on the information known, and reasonably knowable, to TD Bank, SIB operated as a fund of funds, pooling investors' funds in a portfolio of assets, including those assets managed by PAM and then PIC. It offered investors in CDs rates of return that were higher than the rates of return offered by U.S. banks, but the rates were understandable as blended returns over time. The CDs provided investors the certainty of fixed returns in the face of market fluctuations,

even if in the long run direct investment in the equity markets would have provided them with greater returns.

- (b) Based on the information known, and reasonably knowable, to TD Bank, Bank of Antigua was a legitimate local bank that provided retail banking services to residents of Antigua. Indeed, Bank of Antigua was exactly that, and has never been implicated in SIB's fraud.

35. To the extent that TD Bank requested or was provided financial statements for SIB and its affiliated entities, they were not requested or provided for the purpose of conducting an audit or assisting any third parties with making investment decisions. TD Bank was not obliged to fulfil any of these functions as a result of providing banking services to SIB.

36. TD Bank could not have uncovered SIB's fraud. TD Bank managed only a small portion of SIB's investments, and had no way of knowing what SIB's investment portfolio was aside from the assets that PAM and then PIC managed. In retrospect, it is now known that SIB misstated its actual investments and its actual investment returns, so even if TD Bank had requested further information than it possessed it would not have received accurate information. At the time, TD Bank had no more basis than anyone else to know that SIB was misstating its assets or its investment returns.

37. The various facts identified in the Fresh As Amended Statement of Claim as supposed red flags about SIB were assembled by the Joint Liquidators after-the-fact, using 20-20 hindsight and possessing the knowledge that SIB had been a Ponzi scheme fraud. Without 20-20 hindsight and without possessing the knowledge that SIB had been a Ponzi scheme fraud, there were no red flags at the material time. In particular:

- (a) TD Bank had no knowledge, actual or constructive, of Mr. Stanford's prior history before the opening of the correspondent banking accounts of Bank of Antigua and SIB in 1991.
- (b) TD Bank had no knowledge, actual or constructive, of the fact that certain U.S. banks had refused to provide correspondent banking services to SIB, if that was even the case. In fact a number of reputable banks aside from TD Bank did provide correspondent banking services to SIB, including HSBC Bank plc, Société Générale, and Trustmark National Bank.
- (c) TD Bank had no reason to terminate or alter the long-term relationship with SIB and its affiliates, even as SIB grew in size beyond its initial scope.
- (d) While the volume of business transacted by SIB increased significantly over time, at no time did this increase cause TD Bank concern or indicate to TD Bank that Mr. Stanford and SIB were engaged in a Ponzi scheme fraud. Nor ought it to have. Every outward indication was that SIB was a successful enterprise that was growing.
- (e) While Ponzi schemes have been around for a long time, the world did not have experience with multi-billion dollar Ponzi schemes undertaken by large financial firms until the collapse of Bernard Madoff's Ponzi scheme in December 2008, about two months prior to the Freeze Order. In assessing TD Bank's interactions with SIB, Bank of Antigua, Caribbean Star Airlines and Caribbean Sun Airlines and SFG between the early 1990s and the Freeze Order, it is important not to use post-Madoff knowledge of the possibility that large financial firms may engage in multi-billion dollar Ponzi schemes and apply it to a pre-Madoff time period.

- (f) There is nothing inherently unusual or suspicious about transfers in round dollar amounts. There are many legitimate reasons for round-dollar transfers. Indeed, most bank-to-bank transfers of funds, such as between SIB's correspondent banking accounts and SFG, are in round-dollar amounts.
- (g) The fact that SIB placed funds with PAM and then PIC was not a red flag. TD Bank was aware that SIB used outside investment managers, of which TD Bank was one. Such use of sub-advisors is not unusual in the industry.

The standard of care

38. The various standards that the Fresh As Amended Statement of Claim terms "Applicable Standards" were not in fact standards that define any duty of care owed by TD Bank to SIB's customers. Among other things:

- (a) The OSFI Standards (as that term is defined in paragraph 246 of the Fresh As Amended Statement of Claim) do not define any duty of care owed by banks but instead represent OSFI's interpretation of Canadian banking regulations.
- (b) The Basel Standards (as that term is defined in paragraph 249 of the Fresh As Amended Statement of Claim) are standards for bank regulators, not for banks.
- (c) The FATF Standards (as that term is defined in paragraph 251 of the Fresh As Amended Statement of Claim) are standards for governments, not for banks.
- (d) The Wolfsberg Standards (as that term is defined in paragraph 252 of the Fresh As Amended Statement of Claim) are not binding on anyone, and do not define any duty of care owed by banks.

Instead, to the extent any duty of care arises in law, the applicable standard of care was the standard of a reasonable and prudent Canadian bank providing correspondent banking, discretionary investment management, trade finance and treasury services at the applicable time, as the standard changed from time to time. At all material times, TD Bank met that standard.

Perry Mercer never sat on any SIB advisory board

39. Contrary to the suggestion made at paragraph 41 of the Fresh As Amended Statement of Claim, Perry Mercer never served on any SIB advisory board. If such an advisory board existed, Mr. Mercer was never a member and never attended any meetings of it. Contrary to the suggestion made at paragraph 169(d) of the Fresh As Amended Statement of Claim, neither TD Bank nor Mr. Mercer knew at the time that SIB was representing that Mr. Mercer was a member of a SIB advisory board.

40. Furthermore, contrary to the allegations made at paragraphs 96 and 169(d) of the Fresh As Amended Statement of Claim, Mr. Mercer was not a “long-time friend” of Jim Davis. In fact, Mr. Mercer had only met Mr. Davis on a few occasions, and knew him only in a professional capacity, not as a “friend”.

Conclusion

41. TD Bank therefore requests that this action be dismissed with costs.

May 9, 2016

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Proceeding commenced at Toronto

FRESH AS AMENDED
STATEMENT OF DEFENCE

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