CITATION: Wide v. TD Bank, 2015 ONSC 6900
COURT FILE NO.: CV-12-9780-00CL
DATE: 20151109

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: 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

BEFORE: Conway J.

COUNSEL: *Geoff R. Hall* and *Junior Sirivar*, for The Toronto-Dominion Bank, moving party

Lincoln Caylor, *Maureen M. Ward* and *Nathan J. Shaheen,* for Marcus Wide and Hugh Dickson (in their capacities as Joint Liquidators of Stanford International Bank Limited), responding parties

HEARD: September 16 and 17, 2015 and written submissions

ENDORSEMENT

[1] Stanford International Bank Limited ("**SIB**") was an offshore bank headquartered in Antigua. It sold approximately $8 billion in purported high-yield certificates of deposits ("**CDs**") in what turned out to be one of the largest Ponzi schemes in history. That scheme was orchestrated primarily by SIB's Chairman Allen Stanford ("**Stanford**") and Chief Financial Officer James Davis ("**Davis**").

[2] On February 16, 2009, the U.S. Securities and Exchange Commission (the "**SEC**") filed civil charges in the U.S. District Court for the North District of Texas (Dallas Division) against, among others, SIB, its related entities, and Stanford and Davis on the basis of an alleged massive ongoing fraud. That day, the court granted an order (the "**Freeze Order**") preventing SIB and its related entities from carrying on business.

[3] The Toronto Dominion Bank ("**TD**") was SIB's main correspondent bank from the early 1990s to its collapse in 2009. TD maintained accounts for SIB through which the funds flowed between SIB and its investors for the purchase and redemption of CDs.

[4] On August 22, 2011, the plaintiffs, as joint liquidators of SIB (the "**Joint Liquidators**"), commenced an action against TD on behalf of SIB and its customers. The claim seeks damages of USD$5.5 billion for negligence and knowing assistance.

[5] TD brings a summary judgment motion to dismiss the claim as statute barred, on the basis that the Joint Liquidators' claim against TD was discoverable before August 22, 2009, more than two years before the action was commenced.

[6] For the reasons that follow, the motion is dismissed.

Background

[7] On February 16, 2009, the Freeze Order was granted. The court found that there was good cause to believe that SIB, Stanford and Davis and others[1] (the "**Stanford defendants**") used improper means to obtain investor funds and assets, and issued a temporary restraining order against the Stanford defendants. The court appointed Ralph Janvey (the "**U.S. Receiver**") as receiver over the assets of the various Stanford defendants.

[8] On February 19, 2009, the SEC issued a press release stating that it had charged the Stanford defendants with conducting a fraudulent, multi-billion dollar investment scheme. The matter quickly attracted widespread international publicity.

[9] On February 19, 2009, the Antiguan Financial Services Regulatory Commission appointed Nigel Hamilton-Smith and Peter Wastell (the "**Former Officeholders**") as receiver-managers of SIB. The Former Officeholders, based in the United Kingdom, arrived in Antigua on February 20, 2009, accompanied by their U.K. legal counsel. They were met with chaos and deluged with thousands of calls and emails from SIB customers.

[10] The Former Officeholders proceeded to investigate the financial affairs of SIB, try to restore order, and identify and protect SIB assets in financial institutions around the world. The Former Officeholders had virtually no funding to operate SIB's estate. Therefore, they concentrated on stabilizing the estate and accessing funds belonging to SIB in accounts in foreign jurisdictions.

[11] The Former Officeholders learned about SIB's banking relationship with TD almost immediately. SIB accounting staff told the Former Officeholders that TD was the main correspondent bank for SIB and gave them various details about the SIB accounts at TD.

[12] Investor litigation over the collapse of SIB started in short order. On February 25, 2009, a putative class action was brought by Dynasty Furniture Manufacturing Ltd. against the Stanford defendants in Canada (the "**Dynasty Action**"). Dynasty's counsel sent the Former Officeholders a copy of the statement of claim on March 6, 2009.

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[1] The Stanford defendants were SIB, Stanford Group Company, Stanford Capital Management, LLC, Messrs. Stanford and Davis, and Laura Pendergest-Holt.

[13] The Former Officeholders quickly determined that SIB was insolvent and on April 15, 2009, they were appointed as joint liquidators of SIB. That order authorized them to bring proceedings against third parties in Antigua and Barbuda and/or in foreign jurisdictions. However, because of their limited funding, the Former Officeholders' priority continued to be to "follow the cash" and secure assets of SIB in accounts around the world, rather than to investigate or pursue claims against any third parties.

[14] According to the plaintiffs' expert, Mr. Tacon, a U.K.-trained insolvency expert, the priorities and work streams developed by the Former Officeholders were consistent with what could have been expected from a reasonable liquidator. He states that the discovery and pursuit of third party claims could not reasonably have been expected under the circumstances at that time.

[15] On April 17, 2009, Dynasty and others commenced an action against TD in Alberta for a *Norwich* order to examine SIB banking records held by TD (the "***Norwich* Action**"). Their counsel provided a copy of the *Norwich* claim to the Former Officeholders on April 17, 2009. It refers to the Dynasty Action and states that "TD Bank acted as correspondent banks [sic] for [the Stanford defendants] and thereby became involved in the tortious acts of those companies so as to facilitate the wrongdoings alleged in the [Dynasty Action]."

[16] On June 19, 2009, the United States Department of Justice issued a press release announcing that Stanford and several other SIB executives had been indicted on fraud and obstruction charges related to the Ponzi scheme.

[17] On August 26, 2009, Dynasty and others commenced an action against TD seeking damages in connection with TD's provision of correspondent banking services to SIB (the "**Dynasty TD Action**"). That action was later assigned to the Joint Liquidators in 2011.

[18] On August 27, 2009, Davis pleaded guilty to the fraud and further details about the nature, extent and duration of the fraud became available publicly (the "**Davis Guilty Plea**").

[19] The Former Officeholders had sought recognition to act in Canada shortly after their appointment as liquidators, as did the U.S. Receiver. On September 11, 2009, the Quebec Superior Court of Justice appointed the U.S. Receiver's representative, Ernst & Young Inc., as interim receiver of SIB's Canadian assets.

[20] The Former Officeholders were removed as liquidators by court order in Antigua on June 8, 2010. On May 12, 2011, the Joint Liquidators became the successors to the Former Officeholders. They sought authorization to bring a claim against TD in Canada in the place of Ernst & Young. On August 19, 2011, the Joint Liquidators were authorized by the Quebec Superior Court to bring a claim against TD in Canada on behalf of SIB and its customers.

[21] On August 22, 2011, the Joint Liquidators commenced this action against TD.

The Claim Against TD

[22] As noted above, the Joint Liquidators claim against TD in negligence and knowing assistance. The Joint Liquidators assert two claims – one on behalf of SIB as TD's customer and one on behalf of SIB's customers (non-customers of TD).

[23] Essentially, the claim alleges that as SIB's correspondent bank from the 1990s to 2009, TD failed to act in accordance with the standard of care applicable to a reasonable banker. The plaintiffs allege that TD failed to conduct proper due diligence before it started providing banking services to an Antiguan off-shore bank, and compounded its negligence by continuing to provide banking services to SIB for 20 years. They allege that TD ignored public information and red flags that should have led it to terminate SIB's access to TD's facilities, report the conduct of Stanford and others to the appropriate authorities, and/or freeze SIB's accounts. The claim further alleges that TD is liable for providing knowing assistance in the breaches of duties and breaches of trust by Stanford and others.

[24] The plaintiffs' claim is premised on the central allegation that Stanford and Davis and a small cabal of other insiders orchestrated a scheme to loot SIB of several billion dollars of its assets (the "**SIB Looting**"). The plaintiffs claim that as a result of its negligence, TD missed numerous opportunities to reveal and stop the scheme by which the SIB Looting took place and, as a result, SIB and its customers suffered at least $5.5 billion in damages.

The Limitations Issue and Applicable Legal Principles

[25] Section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B (the "**Act**") sets out the basic limitation period, namely that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[26] Pursuant to s. 5(1) of the Act, a claim is discovered on the earlier of,

> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[27] Under s. 5(2) of the Act, a person with a claim is presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[28] The parties agree that in this case, the earliest date that the limitation period could have run is February 16, 2009, when the Freeze Order was issued. There is no suggestion that the plaintiffs' predecessors knew or ought to have known of a potential claim against TD before that date.

[29] The critical date for limitations purposes is August 22, 2009, two years before the date the claim was issued. If the claim ought to have been discovered before that date,[2] the plaintiffs' claim is out of time. If it was after August 22, 2009, the claim survives.

[30] The parties acknowledge that the Joint Liquidators were not in office from February 16, 2009 to August 22, 2009 – it was their predecessors, the Former Officeholders (first as receiver-managers and then as liquidators) who were in office, and it is the Former Officeholders' knowledge that is relevant in this case.[3] [4]

[31] The issue on this motion, therefore, is whether a potential claim against TD was discoverable by the Former Officeholders on or before August 22, 2009.

[32] Section 5(1)(b) of the Act codifies the long-standing discoverability doctrine that a limitation period will begin running not from the date a cause of action was actually discovered, but rather from the date that it should reasonably have been discovered. As stated by the Ontario Court of Appeal in *Lawless v. Anderson*:

> The principle of discoverability provides that "a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the exercise of reasonable diligence.
>
> Determining whether a person has discovered a claim is a fact-based analysis. The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation begins to run....[5]

[33] Discoverability does not require perfect knowledge of a potential claim. Rather, discovery of "sufficient facts" or *prima facie* grounds giving rise to a claim will commence the

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[2] TD concedes that there is no evidence that the Former Officeholders had actual knowledge of a potential claim against TD before August 22, 2009.

[3] See also s. 12 of the Act. If a person claims through a predecessor, the limitation period starts to run from the date the predecessor first knew or ought to have known of the matters in s. 5(1)(a).

[4] While the claim is two-fold (brought by the plaintiffs on behalf of both SIB and its customers), TD acknowledges that functionally it is the knowledge of the Former Officeholders that is relevant for discoverability purposes in this case.

[5] 2011 ONCA 102, at paras. 22-23, quoting *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.) at p. 170.

limitation period: see *Kowal v. Shyiak*, 2012 ONCA 512, at para. 18; *Coutanch v. Napoleon Delicatessen,* [2004] 72 O.R. (3d) 122 (C.A.), at para. 26. When a defendant raises a limitations issue, the onus is on the plaintiff to prove that the claim was commenced in a timely manner: *McSween v. Louis*, [2000] O.J. No. 2076 (C.A.), at para. 37.

Analysis

[34] TD submits that the Former Officeholders ought to have known that SIB had a claim against TD before August 22, 2009. TD relies on the following evidence: (a) news of the alleged fraud was widespread as early as February 16, 2009; (b) the Former Officeholders knew early on that TD was the main correspondent bank for SIB; (c) the Dynasty plaintiffs had sued TD in the *Norwich* Action; (d) the Former Officeholders were appointed as liquidators of SIB in April 2009 and had a mandate to pursue claims by SIB against third parties; and (e) Mr. Hamilton-Smith, one of the Former Officeholders, stated that by April 20, 2009, they had gained a deep understanding of SIB's business and that by May 15, 2009 his own findings were consistent with the SEC's allegations that SIB was involved in a massive Ponzi scheme.

[35] The plaintiffs have tendered a great deal of evidence on this motion with respect to the situation faced by the Former Officeholders between February 16 and August 22, 2009.[6] The plaintiffs argue that there was no obvious evidence of wrongdoing by TD when the Former Officeholders arrived in February 2009. Further investigation of a potential claim against TD would have been required. The plaintiffs argue that given the mayhem and lack of funding that existed at the time, it was reasonable for them not to have investigated potential third party claims under the circumstances. They rely on Mr. Tacon's expert opinion to support their position.

[36] I am not deciding this motion on the basis of that argument. Rather, I am dismissing this summary judgment motion because the issue of discoverability is a genuine issue for trial. I cannot fairly and justly adjudicate, based on the record before me, whether the claim against TD was discoverable by the Former Officeholders before August 22, 2009. Further, it would not be in the interest of justice for me to use the fact finding powers under Rules 20.04(2.1) and (2.2) to resolve this issue: *Hyrniak v. Mauldin* 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 66-68.

[37] The analysis of whether the claim against TD was discoverable before August 22, 2009 is not as simple as TD suggests. For example, the fact that the Former Officeholders knew that a Ponzi scheme was alleged and that TD was the correspondent bank is not determinative of whether they ought to have known of any potential wrongdoing on the part of TD. Likewise, the fact that a *Norwich* order was sought against TD is not determinative – those types of orders are commonly sought from a bank to obtain evidence for use in a claim against another third party wrongdoer.

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[6] Their evidence includes affidavits from (a) Mr. Wiltshire (U.K. counsel who accompanied the Former Officeholders to SIB's Antigua office in February 2009); (b) Omari Osborne and Beverly Jacobs, Manager of SIB's accounting department and Vice President of Client Support, respectively, during that period; and (c) Mr. Wide, one of the Joint Liquidators. As noted above, they rely on the expert evidence of Mr. Tacon.

[38] In this case, the plaintiffs' claim is premised on the allegation that the SIB Looting occurred and that TD should have taken steps to prevent it. Whether the Former Officeholders ought to have known prior to August 22, 2009 that there was a potential claim against TD will entail numerous factual inquiries. These may include, for example, what the Former Officeholders ought to have known during that period about: the role TD played in SIB's operations; how involved TD was with SIB's principals; what the mechanics of the Ponzi scheme were; who at SIB was involved in conducting the Ponzi scheme;[7] and what part TD played in facilitating the conduct of this Ponzi scheme.

[39] This analysis, in turn, will engage numerous other factual inquiries. For example, what was the effect of the Former Officeholders not having access to the financial and banking documents held by the U.S. Receiver? According to the plaintiffs, these were the only records that could have revealed the details of how the fraud was undertaken. The plaintiffs argue that without access to those records, the Former Officeholders could only have learned these details on the date of the Davis Guilty Plea.[8]

[40] The Davis Guilty Plea occurred on August 27, 2009, within the two year limitation period. At that point, the details of the fraud were made publicly available, including the extent, nature and duration of the fraud.[9] A factual inquiry is required as to how relevant or necessary the information in the Davis Guilty Plea was in order for the Former Officeholders to have discovered that SIB (TD's customer) had a potential claim against TD.[10] I note that TD has previously taken the position in other SIB-related litigation that the limitation period started on the date of the Davis Guilty Plea. While this is not an admission for purposes of this proceeding, it reinforces the fact that the information contained in the Davis Guilty Plea may be highly relevant to the limitations analysis in this case.

[41] These factual inquiries and determinations cannot possibly be made on this record. I accept the plaintiffs' submission that the evidence is varied, complex, includes expert evidence and goes to central issues of who knew what, when they knew it and what ought to have occurred in Antigua in 2009. A determination of these issues will require multiple findings of

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[7] In the Davis Guilty Plea, it was admitted that the fraud was perpetrated primarily by Stanford and Davis, who were responsible for managing SIB's assets in the United States and who deliberately concealed the fraud from SIB employees.

[8] The U.S. Receiver's own evidence on this motion was that even with the access he had to those records they were so complex and disorganized that it was difficult to piece together a complete picture of the Stanford operations and identify and pursue third party claims. .

[9] I note that the U.S. Court of Appeal for the Fifth Circuit concluded that there was no evidence before it to indicate that the U.S. Receiver could reasonably have known about the true nature and duration of the Ponzi scheme before the date of the Davis Guilty Plea.

[10] TD argues that the fact that the Dynasty plaintiffs brought an action against TD on August 26, 2009 – the day before the Davis Guilty Plea – demonstrates that the information in the Davis Guilty Plea is irrelevant to discoverability. I reject that submission. The issue of discoverability looks at when the plaintiffs' claim in this action was discoverable, not when the Dynasty plaintiffs' claim was discoverable (and on which there is no evidence before me). The Davis Guilty Plea may well be relevant to discoverability of the plaintiffs' claim, regardless of the timing of the Dynasty TD Action.

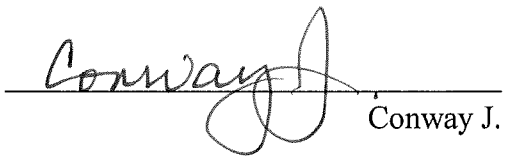
fact. In my view, the issue of when the Former Officeholders ought to have known that SIB had a potential claim against TD cannot be fairly adjudicated on this motion and is a genuine issue for trial. Given the overlap in the evidence on discoverability and the merits of the action,[11] I decline to order a mini-trial, as suggested by TD.

Decision

[42] TD's motion for summary judgment is dismissed.

[43] I will remain seized of this matter as the case management judge. The parties are to arrange a 9:30 appointment before me to determine next steps and set a timetable for this action.

[44] If the parties are unable to agree on costs of this motion, written submissions not exceeding 3 pages (double spaced) may be made by the plaintiffs within 15 days and by TD within 10 days thereafter.



Conway J.

Date: November 9, 2015

[11] In particular, there will be overlap in the evidence about the fraud, how and by whom it was conducted, and the banking relationship between SIB and TD.