CITATION: 1194388 Ont. Inc. v. The Toronto-Dominion Bank, 2014 ONSC 215
COURT FILE NO.: CV-11-423312
DATE HEARD: January 9, 2014
ENDORSEMENT RELEASED: January 21, 2014

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1194388 ONTARIO INC. (formerly known as TWO-TYME RECYCLING INC.) v. THE TORONTO-DOMINION BANK

BEFORE: Master R. Dash

COUNSEL: Tim Hudek, for the plaintiff

Martin Greenglass, for the defendant

REASONS FOR DECISION

[1] This is a motion by the plaintiff to further amend an amended statement of claim. The defendant opposes the motion on three bases: (a) that the plaintiff is attempting to withdraw an admission, (b) that the plaintiff is asserting a new cause of action after expiry of a limitation period and (c) that the motion is an abuse of process as it contradicts prior affidavit evidence and a finding of fact judicially determined.

BACKGROUND

[2] Until 2003 the plaintiff corporation was solely owned by members of the Woods family. A group of investors (the "Investors") then acquired a minority interest, which by 2006 grew to a controlling interest. At about that time the banking facility for the plaintiff was moved from the defendant bank ("TD") to HSBC, although the account at TD was not closed because of an outstanding line of credit. The Investors had at one time been told by the Woods family that several members of that family, including Darlene Woods ("Darlene"), were authorized to conduct banking transactions at TD, although the Investors had never been shown a banking resolution or bank signature cards. Although it is a matter of dispute, TD claims it had never been told (until 2009) of the Investors or the change in control. The Investors never gave the bank any updated banking resolution.

[3] In or about May 2009 the Investors discovered that that the Woods family had been defrauding the plaintiff since 2006 by continuing to deposit receivables at the TD, not recording the deposits in the plaintiff's books and records and then misappropriating the funds for themselves. Almost all of the fraudulent banking was done by Darlene. The fraud was confirmed

when the Investors obtained the company's bank statements that July from TD. The Woods had also destroyed much of the plaintiff's paper records and documents and deleted data from the computers' hard drives.

[4] On August 11, 2009 the Investors commenced action CV-09-384829 in the name of the plaintiff company against members of the Woods family (the "Fraud Action"). On August 12, 2009 Perell J. granted a Mareva injunction including an order for TD to provide the Woods' personal bank account statements, which statements were received a few weeks later. They showed that the misappropriated funds had all been dissipated. On October 22, 2010 Hoy J. granted the plaintiff partial summary judgment against the Woods, including $608,494 against Darlene for fraudulent conversion. The plaintiff has been unable to realize on the judgment. Several affidavits were filed by one of the Investors, Christopher Rotter ("Rotter"), during the course of the Fraud Action and they shall be referred to later in these reasons. Rotter is also the plaintiff's affiant on the motion before me in this action.

[5] As noted, Darlene had destroyed all of the plaintiff's records including those regarding the TD account, and although the Investors had in July 2009 received the plaintiff's bank statements from TD, they had never had the opportunity to inspect other banking records, such as banking resolutions or authorized signature cards.

[6] On November 19, 2010, plaintiff's counsel wrote to TD and advised them of the fraud and the judgment. He suggested that TD had not kept up-to-date records or ensured it had proper authorizations and that material change in banking activity were indicative of fraud and should have raised a red flag. He advised TD of the theft of records by the Woods which was hampering their investigation. He requested that TD provide documents including account agreements and banking resolutions of the plaintiff as well as other documents to better understand the bank's position.

[7] TD did not provide the requested documents. They did not even respond to or acknowledge the letter. No reason is given. Although the defendant's counsel on this motion suggests in argument that the documents were not sent because TD had no proof that the requesting party had a right to the plaintiff's bank records, there is no evidence of that before me on this motion. Even if that were the reason, that is no excuse for not making further enquiries of the requesting lawyer or advising him of the reason why the records would not be sent. It is certainly no excuse for simply ignoring the letter.

THE ACTION

[8] On March 30, 2011 the plaintiff commenced the current action against TD. The claim was pled in negligence and breach of duty to the plaintiff by failing to notify it of suspicious activity or to verify that such suspicious activity was authorized and by failing to maintain updated records and follow its own policies respecting authorizations for corporate accounts, which if followed would have detected the fraud at an early stage. The claim was also based on knowing assistance of the Woods' breach of trust, knowing receipt of misappropriated funds, conversion and a claim was advanced for punitive damages.

[9] The action has proceeded through productions and examinations for discovery. In February 2012 the defendant served its affidavit of documents which included some of the banking documents that the plaintiff had been seeking. The defendant included in its productions a bank "signature card" that bears the signature of three members of the Woods family, but not that of Darlene. The plaintiff claims that is the only production relating to authorized signing officers. The defendant also produced a document entitled "change in officers and directors of incorporated company" listing Darlene, her husband Ronald and two other family members as officers, signed by Darlene and Ronald, but of course this does not indicate who were the "signing" officers of the plaintiff. Later, in response to undertakings, the defendant produced an electronic record respecting the plaintiff's officers and directors, but again there is no reference to authorized signing officers.

[10] At examinations for discovery, plaintiff's counsel stated "I think it's becoming an issue whether Darlene had signing authority on this account" and requested, inter alia, that the defendant produce all transaction records signed by Darlene. Defendant's counsel refused to permit plaintiff to ask questions relating to Darlene's status as an authorized signatory because it was not pleaded that Darlene was not an authorized signing officer. Defendant's counsel stated: "Then go amend your pleadings before you ask the question" although he later stated he would oppose the motion to amend on limitations grounds.

THE MOTION

[11] That has led to the motion before me to amend the statement of claim. The amendments include the withdrawal of causes of action in knowing receipt and conversion and of the claim for punitive damages. Those amendments are not opposed by the defendant subject to payment of costs thrown away. Other minor amendments are also not opposed.

[12] What is opposed are amendments that purport to allege that Darlene was not an authorized signing officer and that TD breached its duties owing to the plaintiff by permitting Darlene to transfer and withdraw the plaintiff's funds when it had no banking resolution or signature card permitting Darlene to do so. There are also pleadings establishing the date of discovery of this information and why it could not have been discovered earlier.

[13] The proposed amendments include deletion of Darlene's name in paragraph 9 of the existing statement of claim that pleads that there were four signatories to the plaintiff's bank account, including Darlene. The defendant submits this amounts to withdrawal of an admission. The remaining amendments involve allegations that Darlene was not an authorized signing officer and are consequent to the amendment to paragraph 9.

WITHDRAWAL OF AN ADMISSION

[14] Although rule 26.01 provides in mandatory language that the court shall, at any stage of an action, grant leave to amend a pleading unless non-compensable prejudice would result, there must be compliance with rule 51.05 if the amendment involves withdrawal of an admission. Rule 51.05 provides: "An admission…in a pleading may be withdrawn on consent or with leave of the court."

[15] I must ask myself two questions. Does the amendment involve withdrawal of an admission? If so, has the moving party met the test for the court to grant leave to withdraw the admission?

[16] Paragraph 9 of the statement of claim currently reads: "TTR had a corporate bank account with the TD Bank at the Barrie Branch to which Ronald, Darlene, Ralph and Patricia were signatories…" ("TTR" is a reference to the plaintiff corporation.) By way of amendment the plaintiff seeks to delete the word "Darlene". The defendant claims this amounts to withdrawal of an admission – an admission that Darlene was a signatory to the bank account. Most of the remaining impugned paragraphs are consequent to this amendment. Indeed, for the statement of claim to be consistent, the remaining amendments cannot be made unless the court permits the amendments to paragraph 9.

[17] To be an "admission" the statement in the pleading must be "an unambiguous deliberate concession to the opposing party."[1] It must be "an intentional concession to the other side and not simply the result of words chosen in the claim."[2] Customarily, admissions in a pleading "are made boldly and baldly and they are, in general, specific and identifiable as admissions."[3] It would be rare to find an admission in a statement of claim, although it could be found if clearly stated.[4] In fact, all of the cases referenced by both parties where a pleading has been held to be an admission have been in a statement of defence that admits a fact pled in a statement of claim.

[18] Until February 2012 the Investors had no reason to doubt that Darlene was an authorized signing officer. This is what Ronald Woods told them as early as 2003 and the Investors assumed it was true. They never looked at the banking resolutions and of course after the fraud was discovered in 2009, the Woods destroyed the company's banking and corporate records. In the action against the Woods, both Rotter and another of the Investors swore affidavits that Ronald and Darlene were signing officers of the company, and as such misappropriated monies belonging to the company for their personal use.

[19] Similarly, in this action the plaintiff pleaded that Darlene and other members of the Woods family were signing officers as a fact in support of its claim that the defendant bank breached its duty of care by failing to warn of suspicious activity and by knowingly assisting the Woods in their breach of trust. In my view the plea that Darlene was an authorized signing officer was not a necessary fact to found the claims as currently pleaded. It was rather a fact pleaded by way of background, and not by way of admission. As the fact was stated in the statement of claim, and not in a statement of defence, there was no claim by the bank that Darlene was an authorized signing officer to which the the plaintiffs admitted by way of response. There was no element of deliberate concession to the bank's position.

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[1] *Hughes v. Toronto Dominion Bank*, [2002] O.J. No. 2145, 21 C.P.C. (5th) 388 (S.C.J. – Master) at para 10; *Griffiths v. Canaccord Capital Corp.*, [2005] O.J. No. 4897 (Div. Ct.) at paragraph 19; *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, 2011 ONSC 1670, [2011] O.J. No. 1143 (S.C.J.) at paragraph 18 and 19

[2] *Belsat Video Marketing Inc. v. Zellers Inc.*, [2003] O.J. No. 3168 (S.C.J. – Master) at paragraph 13

[3] *Zellers Inc. v. Group Resources Inc.*, [1995] O.J. No. 5, 21 O.R. (3d) 522 (Gen. Div.) at para 43.

[4] *Belsat Video*, supra, at paragraph 13-14; *Canadian Premier*, supra, at paragraph 22

[20] Neither party has provided me with a copy of the bank's statement of defence in this action. In the defendant's factum however, its counsel references the bank's defences as including a plea that all the transactions were done by persons who were listed as authorized signing officers (in addition to the transactions not being suspicious and other substantive defences). Clearly the parties agreed in the original pleadings that Darlene was an authorized signing officer. The defendant could be taken as having admitted, in its statement of defence, the plaintiff's allegation in the statement of claim. That does not make the allegation in the statement of claim an admission.

[21] If I am wrong and the statement that Darlene was an authorized signing officer was an admission, rather than a statement of background fact, a three-part test has been developed in the jurisprudence for the moving party to meet before leave is granted to permit withdrawal of the admission. There appears to be two lines of authority as to the second part of the test. Some cases set the test as requiring the moving party to show (a) the proposed amendment raises a triable issue, (b) the admission was made inadvertently or the solicitor was wrongfully instructed and (c) the withdrawal of the admission will not cause injustice to the other parties.[5]

[22] In my view, the better assertion of the test, and the version explicitly recognized by the court of appeal is as follows:

> A party seeking to withdraw an admission must establish that:
>
> (i) There is a triable issue with respect to the amendment;
>
> (ii) There is a reasonable explanation for the change in position; and
>
> (iii) There is no prejudice to the other party that cannot be compensated by costs.[6]

[23] In my view the amendments raise a triable issue: Was Darlene, at the time of the fraudulent transactions, an authorized signing officer of the plaintiff company and if not, is the defendant bank liable to the plaintiff because it permitted an unauthorized person to conduct banking transactions in the name of the plaintiff? The plaintiff pleads that the new cause of action is founded on breach of duty of care. The defendant characterizes it as breach of contract.

[24] While the affidavits of the Investors in the Fraud Action swearing that Darlene was an authorized signing officer will be an evidentiary hurdle to overcome, it will be a issue for the trial judge whether to accept any explanations that the Investors' prior inconsistent statements

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[5] *Philmor Developments (Richmond Hill) Ltd. v. Steinberg*, [1986] O.J. No. 2550 (S.C.O. – Master) at paragraph 22, affirmed [1986] O.J. No. 2321 (H.C.J.); *BNP Paribas (Canada) v. Donald S. Bartlett Investments Ltd.*, 2012 ONSC 5315, 113 O.R. (3d) 151 (S.C.J.) at paragraph 22, affirmed [2012] ONSC 5604, [2012] O.J. No. 4806 (Div. Ct.)

[6] *Canadian Premier Life*, supra, at paragraph 28; *Hughes*, supra, at paragraph 8; *Antipas v. Coroneos*, [1988] O.J. No. 137 (HCJ); *Szelazek Investments Ltd. v. Orzed*, [1996] O.J. No. 336 (C.A.); *147619 Canada Inc. v. Chartrand*, [2006] O.J. No. 1877 (C.A.) at paragraph 3. In *Antipas*, Saunders J. was "troubled" by the "narrowness" of the second branch of the test requiring proof of inadvertence as it could lead to an injustice and it should be sufficient if the moving party furnished a "reasonable explanation of the change of position". That change in the jurisprudence was accepted by the Court of Appeal in both *Szelazek* and in *Chartrand*.

were based on an incorrect assumption resulting from no more than accepting Ronald Woods assertion to them as to the authorized signing officers. (I consider later in these reasons if contradiction of the prior statements made under oath amounts to an abuse of process.)

[25] The defendant also argues there can be no triable issue since the plaintiff, a corporation, must be taken to know who its own proper signing officers were. In my view that argument has little merit in light of the change in control of the company in 2006. The persons who had, or should have had knowledge whether Darlene was an authorized signing officer were the very persons who defrauded the persons who assumed control of the corporation. While it might have been imprudent of the Investors not to examine the banking resolutions before they were destroyed by the Woods in 2009, that does not imbue them with actual knowledge. While the Woods family may have had institutional knowledge, the Investors, who now own the plaintiff corporation, do not. Indeed, the defendant's affiant in paragraph 5(a)(ii) of his affidavit in response to this motion recognized that although the named plaintiff is the corporation, "the underlying factual situation described in the statement of claim is in reality one where one group of shareholders is claiming damages as result of such group being defrauded by a different group of shareholders." In any event, at best, it raises another evidentiary hurdle in determining the triable issue.

[26] The defendant also argues defences such as waiver and estoppel. For example the plaintiff does not complain that Darlene had no authority to conduct the banking transactions that were genuine and not part of the fraud. Again the defendant can raise these defences at trial.

[27] The plaintiff has also satisfied the second branch of the test, whether it be that the admission was made inadvertently or that the plaintiff has provided a reasonable explanation for its change in position.

[28] The inadvertence or change in position from the statement of claim as currently drafted is explained as follows. At the time the statement of claim was drafted, the Investors had assumed that Darlene was an authorized signing officer because Ronald Woods told them so, they had not seen the banking resolutions, the Woods family destroyed the corporate and banking records in 2009 and the defendant bank ignored their request for complete banking records made in November 2010. It was only when the defendant produced all of its records pursuant to its obligations under Rule 30 in this action, in February 2012, that the plaintiff discovered that the bank's only signature card failed to include the signature of Darlene. Until that time the plaintiff had no reason to raise any issue respecting Darlene's authority. In my view that is a reasonable explanation for the change in position. While the absence of Darlene's signature on the authorized signature card is not absolute proof that Darlene was not an authorized signing officer, and while the bank has other inconclusive evidence to the contrary, that is an evidentiary issue for trial. It is however sufficient excuse for now permitting the issue to be raised in the pleading.

[29] Aside from the issue of withdrawal of an admission, amendments to a statement of claim based on information and evidence that became available to the plaintiff only during the discovery process are typically permitted in the absence of prejudice that cannot be compensated

by costs.[7] The proposed amendments herein are made to bring the statement of claim is line with facts that the plaintiff discovered only upon receipt of the defendant's productions. In a perfect world of course, a plaintiff would have had access to and reviewed all relevant documents before drafting its statement of claim, but that is not the case when some documents are solely in the possession of the defendant. "The governing principles of our rules as set out in rule 1.04(1) is not furthered if parties are not allowed to correct mistakes in a pleading if a full exploration of the facts and documents reveals them. As stated by Saunders J. in Antipas…if there is a triable issue, a party should be able to withdraw an admission upon furnishing a reasonable explanation for the change in position."[8]

[30] The defendant has not raised any issues of prejudice that cannot be compensated for by costs and additional discovery. All defences to the new plea can still be raised. Although discoveries are complete, the action has not been set down, and I can order additional discovery on the amendments as a term of this order. Any costs thrown away can be compensated for by an award of costs.

[31] In conclusion, I am of the view that the statement in paragraph 9 that Darlene was an authorized signing officer of the plaintiff is not an admission within the meaning of rule 51.05 and in the alternative, if it did constitute an admission, the plaintiff has met the test to withdraw the admission and in my view it is just that they permitted to do so. Once paragraph 9 is amended, the remaining impugned paragraphs that are consequent to that amendment should also be permitted.

ADDING NEW CAUSE OF ACTION AFTER EXPIRY OF LIMITATION PERIOD

[32] Although rule 26.01 provides that the court shall allow amendments at any stage of an action unless prejudice would result that could not be compensated for by costs or an adjournment, "rule 26.01 does not contemplate the addition of unrelated statute-barred claims by way of amendment to an existing statement of claim. Conceptually, this should be treated no differently than the issuance of a new and separate statement of claim that advances a statute-barred claim."[9] A new cause of action cannot be added to a statement of claim by way of amendment if the limitation period has expired. The doctrine of special circumstances no longer applies to permit the addition of time barred claims.

[33] The plaintiff concedes that the new plea that the bank permitted transactions to be conducted by someone who was not an authorized signing officer amounts to a new cause of action. This is because the plaintiff relies on facts not pleaded in the existing statement of claim, including the plea that Darlene was not an authorized signing officer, to found the new basis for liability against the defendant.[10]

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[7] *University Students' Council of the University of Western Ontario v. Association of Student Councils (Canada)*, [2001] O.J. No. 1049 (S.C.J.) paragraphs 97-98
[8] *Hughes*, supra, paragraph 8
[9] *Frohlick v. Pinkerton Canada Ltd.*, [2008] O.J. No. 17, 88 O.R. (3d) 401 (C.A.) at paragraph 24
[10] *Ascent Inc. v. Fox 40 International Inc.*, [2009] O.J. No. 2964 (S.C.J.) at paragraph 3

[34] The issue then is whether the limitation period for asserting this new cause of action has expired. Under section 4 of the *Limitations Act*[11] "a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered." Section 5 of the *Limitations Act* provides that a claim is discovered on the earlier of the day on which the plaintiff actually knew that loss had occurred and that it was caused or contributed to by the acts of the defendant and the "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" those matters.

[35] If the motions court determines on the evidence before it that the plaintiff actually knew of the facts making up the cause of the action, in this case that Darlene was not an authorized signing officer, more than two years before the motion to amend was brought, such that there is no triable issue as to that knowledge, the motion to amend must be denied.

[36] If the issue is due diligence rather than actual knowledge, then the plaintiff has an evidentiary burden to explain what was done to ascertain the facts constituting the new cause of action and why those facts could not have been known earlier with due diligence. If the plaintiffs provide a reasonable explanation on proper evidence as to why the essential facts were not known or obtainable with due diligence within two years of moving to amend the statement of claim, such that the court determines there is a triable issue of fact or credibility on the discoverability allegations, the court will normally permit the amendments with leave to plead a limitations defence. It is only if the court is convinced on the evidence before it that the essential facts were actually known at the earlier date or that there is no issue of fact or credibility on discoverability then the amendments would be denied.[12]

[37] As explained earlier in these reasons, the plaintiff, as represented by the Investors who gained ownership of the plaintiff company, did not have actual knowledge until February 2012 that Darlene was not an authorized signing officer, or at least that the bank did not have proper documentation to that effect.

[38] The defendant argues that the corporation must be taken to have always known who its proper signing officers were and thus the plaintiff had actual knowledge whether or not Darlene was an authorized signing officer. As explained earlier, despite the corporation being the nominal plaintiff, the real plaintiffs who suffered a loss were the Investors. The persons who had, or should have had knowledge whether Darlene was an authorized signing officer were the very persons who defrauded the persons who assumed control of the corporation and who brought this action in the corporation's name. The Woods family had destroyed the corporate records and the bank ignored requests to provide their copies.

[39] I reference the wording in section 5 of the *Limitations Act* that the relevant date is the date upon which a person "in the circumstances of the person with the claim" knew or ought to have known the material facts. While the Woods family, who owned the plaintiff corporation until 2006 and continued to engage in banking transaction at TD until 2009, would have had full knowledge of the banking situation, the Investors were in fact the persons with the claim as they

[11] *Limitations Act, 2002*, S.O. 2002, chapter 24, Schedule B
[12] *Pepper v. Zellers* (2006), 83 O.R. (3d) 648 (C.A.) at paragraph 18

owned a controlling interest on the date the statement of claim was issued. Therefore the "circumstances of the person with the claim" were such that they did not have institutional knowledge of the corporations' signing officers, nor could they have had between 2009 when the records were destroyed and February 2012 when the bank made production of documents that included only one signature card and that card did not include Darlene.

[40] As a result, the plaintiff did not have actual knowledge that Darlene was not an authorized signing officer until February 2012. As this motion was served on October 25, 2013, the claim was made within two years of the date that the material facts constituting the cause of action were actually discovered.

[41] Whether they should have known at a much earlier date is another matter and that raises the issue of discoverability. The question is when a reasonable person, with the abilities and in the circumstances of the plaintiff ought to have known of the facts material to the new cause of action.

[42] The plaintiff has provided an explanation on proper evidence as to why the material fact that Darlene was an authorized signing officer at the time of the fraudulent transactions, was not obtainable with due diligence within two years before the motion was served i.e. before October 25, 2011.

[43] Although the Investors obtained control of the plaintiff in 2006 the fraud was not discovered until 2009. Until that time the Investors would have had no reason to investigate any irregularities with the ongoing banking arrangement at TD. At the time the fraud was discovered the Investors had been told by Ronald Woods that he and Darlene were authorized signing officers. With that knowledge they commenced the Fraud Action and then this action based on the bank's negligence in not detecting and reporting suspicious circumstances. As averred by Rotter on this motion, "one of the assumptions in the statement of claim is that Darlene was a signing officer on the TD account." In my view, it is arguable, and a triable issue that the Investors had no reason to investigate whether Darlene was in fact an authorized signing officer. It simply was not an issue.

[44] The plaintiff would have discovered or at least been able to raise a question as to Darlene's lack of signing authority before the statement of claim was issued but for the fact that after the fraud was discovered in 2009, the Woods destroyed all paper and electronic records of the company. Although TD had provided bank statements as to transactional activity by the summer of 2009, those statements did not provide information as to authorized signing officers. The plaintiff could also have discovered the material facts at a much earlier date if TD had responded to the plaintiff's request for account agreements and banking resolutions made on November 19, 2010. There has been no suggestion by the defendant as to what further steps the plaintiff could have taken by way of due diligence other than to commence this action and await the bank's productions in the action.

[45] I am satisfied that there is at least a triable issue as to when the plaintiff ought, with proper diligence, to have discovered the cause of action. In my view therefore the amendments

should be permitted with leave to the defendant to plead a limitations defence. The trial judge will then be in a position on a full evidentiary record to determine if the limitation period had expired before the amendments were sought.

ABUSE OF PROCESS

[46] The defendant also argues that the motion should be dismissed on the basis of abuse of process on two grounds.

[47] Firstly, TD claims that the issue of whether Darlene was an authorized signing officer has already been judicially determined by Justice Hoy in her reasons for decision dated October 22, 2010 on a summary judgment motion in the Fraud Action. TD argues that it is an abuse of process for the plaintiff to retry this issue as they were a party to the Fraud Action.

[48] That would be an argument strongly militating against permitting the amendments if in fact Justice Hoy had determined that issue. It is clear however that she did not do so. In support of her determination that the Woods family had defrauded the plaintiff, she stated in paragraph 6 of her reasons: "Only Darlene and Ron Woods and Ralph and Patricia Woods were signatories on the TD account."

[49] It is clear to me that Justice Hoy was not called upon to make a judicial determination whether Darlene was a signatory. There was no issue between the parties in the Fraud Action whether Darlene was an authorized signing officer. It was simply assumed to be the case and Justice Hoy made a statement to that effect as part of the background facts. She did not "determine" that Darlene was an authorized signing officer.

[50] Secondly, the defendant says where the withdrawal of an admission results in a party taking a different position in the current action from that taken by the same party in other litigation, particularly where the prior position was in the form of a sworn statement, the change in position itself would be an abuse of process and not permitted. In support it relies on the case of *BNP Paribas*.[13] That was a decision concerned with the second branch of the test to be satisfied in permitting the withdrawal of an admission. In that case the defendant, as plaintiff in earlier litigation had relied on the validity of a guarantee to give him status to bring that action, but then when he was sued on the guarantee in another action, attempted to resile from that position and plead that the guarantee was not valid. The court queried "how he could have inadvertently made that admission that the guarantee was enforceable."[14] The court relied on an earlier case that held that no authority had been provided "that allows a party to amend a pleading in a manner that is inconsistent with a prior sworn statement in the same proceeding. Let alone doing so *absent a compelling reason*".[15] (emphasis added)

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[13] *BNP Paribas (Canada) v. Donald S. Bartlett Investments Ltd.* (2012), 113 O.R. (3d) 151 (S.C.J.) at paragraphs 24 and 32-34, affirmed [2012] O.J. No. 4806 (Div. Ct.) at paragraph 13

[14] *BNP*, supra, at para. 24.

[15] *BNP* at paragraph 32 quoting *Tarkalas v. Zographos*, [2006] O.J. No. 794 (S.C.J. – Master), affirmed [2008] O.J. No. 1047 (Div. Ct.)

[51] The prior affidavits of Rotter and the other Investor and the position taken by them in the Fraud Action, that Darlene was an authorized signing officer, are not in my view a barrier to these amendments based on abuse of process. Firstly, the jurisprudence relied upon were concerned with withdrawal of an admission. I have already ruled that the statement that Darlene was an authorized signing officer was not an admission. Further, I have ruled that the plaintiff has provided an acceptable explanation as to why they swore in the earlier action and why they originally pleaded in this action that Darlene was an authorized signing officer. Unlike the guarantor in *BNP*, who would have had direct knowledge whether the guarantee was valid, the Investors in this case relied on assumptions of which they had no direct knowledge. They assumed that Darlene was an authorized signing officer because they were told this by Ronald Woods, they had never seen the banking resolutions, the company's records were destroyed by the Woods and the bank ignored a request for copies of banking resolutions and signing authorities. Further it was not a fact in issue in the Fraud Action where the statement was sworn, but a background fact. It would not be just to deny this amendment based on abuse of process when the prior inconsistent statements were made based on assumptions that were rooted in advice given to the Investors by the very persons who defrauded them.

[52] The amendments are not defeated based on abuse of process.

CONSEQUENTIAL ORDERS

[53] Since I am permitting the amendments with leave to the defendant to plead a limitations defence, further discoveries will be required. This means that the action likely cannot be set down for trial by July 1, 2014, the date set out in a status hearing order. The parties agree that if the amendments are permitted I should extend that deadline to August 31, 2014.

[54] The defendant also claims it will incur costs arising out of the new cause of action pleaded in filing an amended statement of defence and attending further discoveries on the amendments. Clearly the plaintiff will be responsible for the costs of an amended defence. The plaintiff argues it should not be responsible for the re-attendance at discovery since its counsel attempted to ask questions on the issue at the discovery of the defendant's representative on April 12, 2012 but the defendant's counsel refused to permit the question because it was not pleaded that Darlene did not have signing authority. Plaintiff's counsel was told: "Then go amend your pleading before you ask the question." While it would have saved a second trip to the examiner's office had defendant's counsel permitted the questions to be answered, possibly under objection, I cannot fault defendant's counsel for refusing questions that were not relevant to the issues as framed by the existing pleadings, particularly when the amendments were to be opposed and there was no certainty they would have been permitted. Further, plaintiff's counsel knew of the issue two months before the discoveries and could have sought the amendments in advance or sought to delay the discoveries.

[55] The defendant suggests $2,500 would compensate it for these additional costs arising out of the amendments to add the new cause of action. That is a reasonable sum in all the circumstances.

[56] The defendant further seeks its costs thrown away of having responded to the causes of action in knowing receipt and conversion and to punitive damages, all of which are being withdrawn by the amendments sought on this motion. The defendant seeks a further $2,500 for those past costs thrown away. The plaintiff does not oppose such term, subject to any rights of set off if costs of the motion are awarded to the plaintiff.

COSTS OF MOTION

[57] The plaintiff was successful on the motion as leave to amend the statement of claim as requested has been granted. The defendant concedes that the plaintiff should have its costs of the motion if the amendments are granted. The plaintiff claims its full indemnity costs are $19,283, but seeks costs on a partial indemnity scale in the amount of $8,816.The motion became somewhat complex by the defendant raising issues of withdrawal of an admission, expiry of a limitation period and abuse of process. The issue was important to the plaintiff to bring the pleadings in line with what it had discovered during the discovery process. Although the partial indemnity rate claimed is reasonable, if not modest, the hours for preparation are somewhat excessive. In my view costs of $6,500 inclusive of disbursements and HST is fair and reasonable and should have been within the reasonable contemplation of the defendant who raised these somewhat complex issues.

ORDER

[58] I hereby order as follows:

(1) The plaintiff has leave to amend the amended statement of claim in the form of the amended amended statement of claim attached as Schedule “A” to the notice of motion.

(2) The defendant has leave to deliver an amended statement of defence within 20 days of service of the amended amended statement of claim and to plead a limitations defence therein.

(3) The deadline for setting the action down for trial under rule 48.14(5) is extended to August 31, 2014.

(4) The plaintiff shall pay to the defendant costs thrown away of the amendments within 30 days fixed in the sum of $5,000.

(5) The defendant shall pay to the plaintiff costs of this motion within 30 days fixed in the sum of $6,500.

(6) The costs thrown away payable to the defendant may be set off against the costs of the motion payable to the plaintiff.

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Master R. Dash

DATE: January 21, 2014