

CITATION: Deposit Insurance Corp. of Ontario v. Malette, 2014 ONSC 2845
COURT FILE NO.: 01-CV-215966CM
DATE: 20140506

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Deposit Insurance Corporation of Ontario, Plaintiff

AND:

Nicol Malette, Camille Malette and Suzanne Clouthier, Defendants

BEFORE: Mr Justice Graeme Mew

COUNSEL: *Brendan Van Niejenhuis*, for the Plaintiff

Alan Honner, for the Defendant Nicol Malette

HEARD: 5 May 2014

ENDORSEMENT

(Motion for Partial Summary Judgment pursuant to Rule 20.01)

[1] The plaintiff is the successor in interest to the Caisse Populaire d'Iroquois Falls (the "Caisse"), which collapsed in 1997.

[2] Nicol Malette was a director of the Caisse and the proprietor, with his spouse Camille Malette, of a monument, funeral home and granite business operating in various locations in northern Ontario. The Malettes and their eight companies were customers of the Caisse.

[3] Suzanne Clouthier was the General Manager of the Caisse at all times material to this proceeding.

[4] Through a series of loan arrangements which resulted in funds being received by the Malette companies, many of which loans have been determined in criminal proceedings against Mr. Malette and Ms. Clouthier to have been fraudulent, it is claimed that the Caisse suffered losses of \$15,045,876.

[5] Various efforts have been made by the plaintiff or its predecessor to recover its losses.

[6] In 2003, a summary judgment motion was brought in this action against all three defendants. This resulted in a finding of liability against Ms. Clouthier. The question of damages was deferred to the trial of the action. A judgment was subsequently obtained against Ms. Clouthier from which there has been no recovery. Nor is there ever likely to be any recovery from that source. However, the motions court judge, Madam Justice Swinton,

concluded on the basis of the record before her and the then applicable threshold for summary judgment, that the determination of other issues, including the Malettes' liability to the plaintiff, required a trial.

[7] A claim was separately asserted against the auditors of the Caisse. That claim was settled for a global sum of \$7,000,000.

[8] In 2004, Ms. Clouthier entered a guilty plea to defrauding her employer and was sentenced to three-and-a-half years in jail.

[9] Mr. Malette was charged with fraud over \$5,000 contrary to section 380(1) of the *Criminal Code of Canada*. He pleaded not guilty and in 2008, following a trial before Mr. Justice Nadeau sitting without a jury, he was convicted and sentenced to 15 months in jail. The trial judge concluded that "restitution in these circumstances is unrealistic".

[10] The plaintiff now brings a further summary judgment motion seeking judgment against Mr. Malette only for \$2,411,300. Counsel for the plaintiff advises that if the plaintiff obtains this relief, it will for all practical purposes bring this action to an end against all defendants.

[11] Two principal grounds are advanced in support of the motion.

[12] First, the finding by Nadeau J. (and subsequently upheld by the Court of Appeal) that Mr. Malette was guilty of fraud beyond a reasonable doubt in relation to certain "shareholder loans" advanced by the Caisse in amounts exceeding \$3,000,000. A re-litigation of this finding would be *res judicata* and an abuse of process.

[13] Second, by restricting the damages sought to an amount which gives the defendant the full benefit of the doubt with respect to any debatable sums, and in the absence of any responding evidence challenging the plaintiff's numbers, there is no longer any genuine dispute over damages.

[14] Given these factors and the expanded scope of summary judgment since the 2010 amendments to Rule 20, the plaintiff's position is that there is no longer any issue requiring a trial.

[15] Mr. Malette argues that Nadeau J.'s reasons do not make it clear when the defendant's conduct "slipped into fraud". During his remarks on sentencing, Nadeau J. noted that whereas Ms. Clouthier's fraud was "sophisticated and well-planned" involving a series of 73 loans, Mr. Malette only slipped into fraud after Ms. Clouthier had commenced and exacerbated her fraudulent scheme. In the civil context this is said to raise triable issues as to which loans were fraudulent and, hence, what the correct measure of damages would be.

[16] Mr. Malette also relies on Nadeau J.'s statement that, considering the fraud committed by Ms. Clouthier, "it remains impossible to precisely quantify the amount for which Nichol Malette is accountable both as a principal to fraud on [the members, creditors and insurers of the Caisse] and as a party in aiding and abetting the fraud by [Ms. Clouthier]."

[17] In determining whether summary judgment is available, the threshold question is whether or not there is a genuine issue requiring a trial. No genuine issue for trial will exist:

[W]hen the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

(*Hryniak v. Mauldin* 2014 SCC 7 at para. 49)

To reach a fair and just determination, the summary judgment process must give “the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute” (*Mauldin* para. 50)

[18] For the reasons that follow, I am confident that a trial is not necessary to resolve the dispute between the parties. The matter can be fully determined on the evidentiary record before the court. My conclusion on the appropriateness of a summary disposition at this stage is reinforced by the plaintiff’s concessions on damages and counsel’s advice that the determination of this motion will have the practical effect of ending this litigation.

[19] To establish the tort of civil fraud:

“...[a] plaintiff must establish that the defendant made a false statement of fact; the representation was made with knowledge of its falsity; the representation was made with the intention that it should be acted upon by the plaintiff; there was reliance on the representation by the plaintiff; and damage was caused by such reliance.”

Deloitte & Touche Inc. v Malette, unreported decision of Swinton J., 2 January 2003 at para 24; *Harland v Fancsali* (1994), 21 O.R. (3d) 798 (Div. Ct.) at 801-2.

[20] The decision of Nadeau J. to convict Mr. Malette turned on his finding that, as a director of the Caisse, Mr. Malette had an obligation to disclose his conflict of interest regarding the “shareholder loans” that his companies benefitted from when those loans were presented for approval by the board of the Caisse. Nadeau J. held, in part (at paras 25-26 and 29):

“I find that such a continuing non-disclosure by Nicol Malette constitutes evidence of both the *actus reus* by "other fraudulent means" as well as the *mens rea* of his fraud on these victims. I do not believe Nicol Malette when he claims such ignorance of the law.

I am satisfied on this evidence, including the testimony of Nicol Malette, that he failed to disclose his conflict of interest and also that his failure to disclose was deliberate in the sense that his failure to act was committed with the knowledge that the economic interests of the Caisse were being put at risk. I am also satisfied that Nicol Malette's failure to disclose his material interest in these shareholder loans (after the initial twelve director loans), and the subsequent loans he made personally and with these companies in excess of the Caisse lending limits, did cause deprivation to the Caisse or certainly

affected the risk of deprivation. This Court finds that Nicol Malette was required, both by these statutes and his fiduciary duty to the Caisse, to disclose to the Caisse board his interest in these loans.

...

Although it is not legally necessary that Nicol Malette profit personally from these loans in order to be guilty of this offence of fraud, I find there is no doubt from his arrogation that Nicol Malette did profit from these loans. The inferences from the evidence are overwhelming that the loans scheme provided a substantial benefit to Nicol Malette. There were also the 'effectively unsecured' loans he made personally and with these companies. These monies advanced to Nicol Malette's companies were obviously a direct benefit to Nicol Malette, as even his testimony suggested.”

[21] The weight to be attached to Nadeau J.'s findings will depend on such factors as the similarity of the issues to be decided, the identity of the parties and, because of the differing burdens of proof, whether the prior proceedings were civil or criminal: *British Columbia (A.-G.) v Malik*, 2011 SCC 18 at para 42; *Del Core v Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.).

[22] The plaintiff's expert in the present case, Joanne Chenail-Trépanier, a Chartered Accountant and Certified Fraud Examiner, who conducted a financial investigation of the Caisse, was also a key participant in the criminal trial. Similarly, Mr. Malette and Ms. Clouthier are key participants in both the civil and criminal proceedings. Furthermore, Mr. Malette was convicted applying the criminal standard of proof beyond a reasonable doubt. These factors all favour Nadeau J.'s findings being accorded a great deal of weight.

[23] The modern doctrine of abuse of process also militates against a re-litigation of Mr. Malette's culpability for defrauding the plaintiff: *Malik, supra*, paras 40-48.

[24] The findings of Nadeau J. mirror the essential elements of the civil tort of fraud:

- a. Mr. Malette's non-disclosure of his interest in the loans to the Caisse board constituted a false statement of fact ("A failure to disclose equals concealment of a material fact, equals an express misrepresentation": G.H.L. Fridman et al, The Law of Torts in Canada, 3rd ed., (Toronto: Carswell, 2010) at 711, citing *Johnson v Erdman* (2002), 226 Sask. R. 81 (Q.B.)).
- b. His continuing non-disclosure also constituted evidence of the *mens rea* of his fraud and, hence, intent. Nadeau J. rejected Mr. Malette's claims of ignorance of his statutory responsibilities to disclose under the *Credit Unions and Caisses Populaires Act*, R.S.O. 1990, c. C.44, s. 69(1) and the *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c. 11, s. 146.
- c. He knew that, by his non-disclosures, the economic interests of the Caisse were being put at risk.

- d. He knew that the shareholders' loans scheme implicated over sixty shareholders involving more than \$3,000,000 in loans from the Caisse (reasons of Nadeau J, para 22) and, hence, that reliance on his representation by non-disclose caused damage to the plaintiff.

[25] On behalf of Mr. Malette it is, as already noted, submitted that Nadeau J. stated that it was impossible to precisely quantify the amount for which Mr. Malette was accountable both as a principal to fraud and as a party in aiding and abetting the fraud by Ms. Clouthier. While the inability to determine apportionment of responsibility may have been a concern in determining whether the \$5,000 requirement for a conviction under section 380(1) of the Criminal Code had been satisfied, it is of less import in the civil action where the defendants would have joint and several liability.

[26] Regardless, the uncontradicted evidence of Ms. Chenail-Trépanier on this motion is that the original amount of all of the shareholders loans advanced was \$4,263,000. By adjusting the accounts of other Caisse members and falsifying records of repayments, Ms. Clouthier asserted that the true loan balance was \$2,951,300. In doing so, Ms. Chenail-Trépanier reconciled information provided by Ms. Clouthier with the results of her own investigation and, in her affidavit, accepted \$2,951,300 as the estimated loan balance, despite there being good reason to believe that most of not all of the difference between that figure and the original loan amount was, in fact, based on fiction.

[27] Although questionable because the true loan balance is likely much higher, Mr. Van Niejenhuis for the plaintiff submits that \$2,951,300 is a "safe" number. I agree. And to further give the defendants the benefit of any doubt, the plaintiff then deducts the sum of \$540,000, representing the initial twelve shareholder loans, which did not form part of Nadeau J.'s conclusion of guilt of fraud beyond a reasonable doubt.

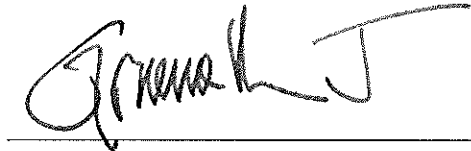
[28] The deduction of \$540,000 from Ms. Chenail-Trépanier's estimated loan balance of \$2,951,300 results in a total of \$2,411,300.

[29] Although the notion of when Mr. Malette "fell into fraud" was a factor taken into account by Nadeau J. when sentencing Mr. Malette, the fact nevertheless remains that each loan made by the Caisse was based on Mr. Malette's fraudulent mis-statement (i.e. his non-disclosure). For the purposes of the four point civil fraud test articulated by Swinton J., that is sufficient to support a finding of civil fraud in respect of all of the loans. There is therefore no merit to the defendant's argument that a trial is required to find out which of the loans were a product of fraud and then assess damages accordingly.

[30] Finally, it was submitted that, because of the previous settlement of \$7,000,000 with the auditors, there could be a risk of double recovery if judgment is granted. Given Ms. Chenail-Trépanier's estimate that the total loss of the Caisse amounted to \$15,045,976, even allowing for some margin of error (of which there is no evidence), there is little prospect of double recovery.

[31] The plaintiff shall have summary judgment against the defendant Nicol Malette for \$2,411,300 plus applicable pre-judgment interest. If the parties cannot agree on the calculation of pre-judgment interest I can be spoken to.

[32] Counsel agreed that an appropriate amount of costs of the motion on a partial indemnity scale would be \$10,000 payable to the prevailing party. In light of the outcome, the plaintiff is awarded costs of this motion in the amount of \$10,000 against the defendant Nicol Malette.

A handwritten signature in black ink, appearing to read "Mew J.", is written above a horizontal line.

Mew J.

Date: 6 May 2014