COURT OF APPEAL FOR ONTARIO

CITATION: Liquid Capital Exchange Corp. v. Daoust, 2024 ONCA 489
DATE: 20240619
DOCKET: COA-23-CV-0827

Miller, Zarnett and Thorburn JJ.A.

BETWEEN

Liquid Capital Exchange Corp.

Plaintiff
(Appellant)

and

Marc Daoust a.k.a. Jean-Marc Daoust, Peter Cook, Frank Zito*, Enbridge Gas Distribution Inc*., Jobec Investments RT Ltd., Enbridge Sales Inc. and 2299430 Ontario Inc.

Defendants
(Respondents*)

Jeffrey Radnoff, for the appellant

Chris Argiropoulos, for the respondent Frank Zito

John Longo and Pamela Miehls, for the respondent Enbridge Gas Distribution Inc.

Heard: June 4, 2024

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated July 5, 2023, with reasons at 2023 ONSC 3956, and the costs award dated August 2, 2023.

Zarnett J.A.:

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OVERVIEW

[1] During 2013 the appellant, Liquid Capital Exchange Corp. (“Liquid Capital”) was the victim of a fraud relating to its “factoring” business.[1] It was led to believe that WF Canada Ltd. (“WF”) was providing services to the respondent Enbridge Gas Distribution Inc. (“Enbridge”), that WF had issued invoices for those services, that Enbridge had approved those invoices, and that Enbridge had agreed it would pay the amount of the invoices to Liquid Capital. Between June 10, 2013 and July 12, 2013, Liquid Capital advanced $757,525.50 to WF – a portion of the total amount of what it thought were valid WF invoices – with the expectation that Enbridge would forward payment of the full amount of the invoices to Liquid Capital.

[2] In fact, WF was providing no services to Enbridge. Enbridge owed WF nothing. The invoices were fictitious and the statements that Enbridge had approved the invoices and would make payments to Liquid Capital were not made by anyone authorized to do so by Enbridge. The result was that Liquid Capital received no payment from Enbridge to offset what it had advanced to WF.

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[1] A “factoring” business involves lending money on the strength of invoices the borrower has issued to a customer, with the right to payment of the invoices being assigned to the lender.

[3] There was no dispute at trial that the fraud had been perpetrated by WF's principals, Marc Daoust ("Daoust") and Peter Cook ("Cook").[2] Each was experienced in finance, and Cook had previously worked for Liquid Capital in its factoring business. They were each convicted criminally. They testified at trial and admitted their fraudulent conduct.

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[4] What was in dispute at trial was whether the respondent Frank Zito ("Zito"), who at the time of the fraud was a collections manager at Enbridge, was also a participant in the fraud, and whether Enbridge was vicariously liable for Zito's alleged participation.

[5] Cook and Daoust both testified at trial that Zito did not participate in the fraud. Zito also testified that he did not participate.

[6] The trial judge found that Liquid Capital had not satisfied its burden to prove that Zito participated in the fraud. She also concluded that even if she had found that Zito was a participant in the fraud, she would not have found Enbridge to be vicariously liable. She dismissed the action, and awarded costs payable by Liquid Capital in an amount that exceeded the amount of the loss Liquid Capital had claimed (which, by the time of trial had been reduced by recoveries it was able to make from those involved in the fraud).

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[2] Daoust and Cook were defendants to the action but did not defend it at trial – Daoust was noted in default and Cook's defence was struck for failure to comply with disclosure obligations.

[7] On appeal, Liquid Capital challenges the liability determinations. It also seeks leave to appeal the trial judge's costs award.

[8] For the following reasons I conclude that the trial judge did not make a reversible error in refusing to find Zito liable. Therefore, it is unnecessary to address the arguments about Enbridge's vicarious liability. Nor am I satisfied that the trial judge made any error in the award of costs that would justify appellate interference. I would therefore dismiss the appeal and deny leave to appeal costs.

THE LIABILITY APPEAL

(1) The Fraud

[9] That Cook and Daoust were the architects and implementers of the fraud was clearly established at trial.

[10] Cook and Daoust requested that Liquid Capital provide financing to WF, an inactive company they had created. They told Liquid Capital that WF was providing services to Enbridge (which was false) and showed Liquid Capital a fraudulent "Service Agreement" ostensibly between WF and Enbridge to verify this assertion. However, no one from Enbridge had signed that agreement – Cook testified that he forged Zito's name on the agreement as the Enbridge representative. The Service Agreement provided Zito's name and his email address at Enbridge as the Enbridge contact, but Daoust created a second email account (a Telus Blackberry account) in the name of Zito, without permission from or notification to Zito. Cook

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or Daoust, having learned from Liquid Capital that it was reaching out to Zito for certain confirmations and approvals, used the second account to acknowledge, purportedly as Zito on behalf of Enbridge, that services were being provided by WF and that WF invoices would be paid by Enbridge directly to Liquid Capital.[3] The second account was also used, by Cook or Daoust, to approve, purportedly as Zito on behalf of Enbridge, most of WF's fraudulent invoices[4] – invoices Cook and Daoust created for non-existent services. And it was Cook and Daoust who took the money that was paid by Liquid Capital to WF on the strength of the fraudulent invoices.

(2) The Theory of Zito's Liability

[11] Although Liquid Capital's pleaded case against Zito was that he actually sent the emails from the second account and falsely gave the confirmations and approvals that came from it, the evidence did not support that theory. The trial judge noted that there was no direct evidence of Zito's involvement in the fraud. Moreover, Zito denied it, and Cook and Daoust both said that Zito was not involved.

[12] In the face of this evidence, Liquid Capital's case that Zito was involved came to rely on the theory that the fraud could not have been perpetrated without him, and that he benefitted from it.

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[3] The trial judge noted that Cook and Daoust each said the other used the second account.
[4] For one of them, Liquid Capital accepted approval directly from Cook acting in his own name.

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[13] On the first point, Liquid Capital relied on the fact that Zito received two emails from Liquid Capital at his Enbridge email address. One was the original request from Liquid Capital that Enbridge confirm that it was in business with WF, that invoices from WF would be paid to Liquid Capital, and requesting approval of three invoices. The second, sent the same day, enclosed attachments that had been omitted from the first. Had Zito responded negatively, it is unlikely that Cook and Daoust's scheme would have worked. But he did not respond. Although Zito acknowledged having received the emails in his Enbridge account (as well as a copy of an email that was sent to Liquid Capital from the second account), he testified that he had deleted them without opening any attachments, believing they were spam, and he never advised his superiors at Enbridge about them.

[14] On the second point, Cook and Daoust paid about $400,000 of the funds they obtained from Liquid Capital to Rocky Racca ("Racca"), to whom they were indebted. Racca paid nearly $16,000 in the same time period to Zito. Zito had made investments with Racca, and Racca was behind on payments to him.

[15] The trial judge rejected the theory that either of these matters were sufficient to establish, on a balance of probabilities, that Zito participated in the fraud.

(3) The Grounds of Appeal

[16] Liquid Capital argues that the trial judge erred in rejecting its liability theory because she (i) applied the wrong legal test for fraud, (ii) misapprehended the

evidence of Zito's involvement, (iii) provided insufficient reasons, and (iv) failed to draw an adverse inference from the respondents' failure to produce certain documents. It also argues that the trial judge should have recused herself.

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(4) The Trial Judge Did Not Use the Wrong Legal Test

[17] In its factum, Liquid Capital submits that the trial judge misunderstood Liquid Capital's case as one that relied on an inference that Zito had made positive acts of fraudulent misrepresentation to Liquid Capital, by sending the emails from the second account confirming that WF had provided services to Enbridge and would pay the sums owing directly to Liquid Capital, and by approving invoices. But, Liquid Capital argues, its case was that Zito's act of deleting the emails he received in his Enbridge account "without alerting his supervisor at Enbridge was in itself the fraudulent misrepresentation giving rise to fraud." It therefore submits that the trial judge did not apply the correct legal standard to that theory.

[18] I do not accept that argument.

[19] The trial judge's reasons show that she was alive to Liquid Capital's theory that even if Zito was not the actual sender of the emails, he participated in the fraud they effected. She did not misunderstand Liquid Capital's case, or apply the wrong legal theory to it. She found that the theory failed on the facts. She rejected the allegation that Zito was a willing accomplice in the fraud. She accepted Zito's evidence that he deleted the emails without opening the attachments because he

believed they were spam. She found that doing so did not prove his participation in the fraud Liquid Capital alleged on a balance of probabilities.

[20] Liquid Capital also submits that the trial judge erred by considering whether it had failed to exercise due diligence that would have uncovered the fraud. When a person has been deceived by fraud it is not a defence that they could have learned the truth by proper inquiry: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 69.

[21] The short answer to this argument is that, on a fair reading of the trial judge's reasons, she did not introduce a lack of due diligence defence into her consideration of the fraud claim against Zito. She concluded, in respect of that claim, that Liquid Capital had not proven that Zito was a party to the fraud. Her two references to a due diligence concept were not related to that finding. Although she may have considered a lack of due diligence on the point of whether it would be appropriate to hold Enbridge vicariously liable if Zito had committed a fraud, she nowhere indicates that lack of due diligence was a defence for Zito.

[22] Paragraph 22 of the trial judge's reasons describes a proposition that "Liquid Capital was not properly diligent" as a "theory of Enbridge's defence", not Zito's. She later, in analysing the claim against Enbridge, noted that Liquid Capital did not fully follow its own procedures and that, had it done so, it would have discovered

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the fraud. But she does not state that any failure of due diligence on Liquid Capital's part negated Zito's alleged liability for fraud.

[23] The trial judge's later reference, in para. 83 of her reasons, to Liquid Capital not completing its usual due diligence is not expressed as any sort of defence. Rather, she cites Liquid Capital's lack of full diligence as having stemmed from its trust in Cook, leading it to become a victim of Cook and Daoust's fraud.

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(5) The Trial Judge Did Not Misapprehend the Evidence or Give Insufficient Reasons

[24] Although described in its factum as two separate grounds of appeal, Liquid Capital's misapprehension and insufficient reasons arguments were overlapping and in oral argument were made solely as an insufficient reasons submission. I therefore address them from that standpoint.

[25] In essence Liquid Capital takes aim at the trial judge's conclusion in paras. 65 and 66 of her reasons:

> On the basis of the evidence at trial, I do not find that the plaintiff has met its burden of proving Mr. Zito was a party to this fraud.
>
> The burden of proof to establish Mr. Zito's participation in the fraud is on the balance of probabilities. The burden is on the plaintiffs and not the defendants. The plaintiff relies on inferences which it wishes the court to draw, not evidence of Mr. Zito's participation. The evidence of the admitted fraudsters, which was not contradicted on their cross-examinations, was that Mr. Zito did not participate in the fraud. I do not find that the evidence regarding

> payments by Mr. Racca to Mr. Zito, and Mr. Zito's failure to alert his superiors at Enbridge to the two emails and copies of emails, are sufficient to prove his participation in the fraud on the balance of probabilities.

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[26] In coming to this determination, Liquid Capital argues that the trial judge failed to:

i. set out the legal test for fraud;

ii. show how she was applying the facts to that test;

iii. provide any meaningful analysis of the credibility of Cook and Daoust given their denial of Zito's participation; and

iv. show how she grappled with Zito's receipt of payments from Racca and with Zito's failure to alert his superiors to the emails he had received.

[27] I do not accept these arguments.

[28] The primary question concerning sufficiency of reasons is whether the reasons permit meaningful appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 28. The adequacy of reasons are to be determined functionally and contextually in light of the issues raised at trial, the arguments made before the trial judge and the record: *Farej v. Fellows*, 2022 ONCA 254, at para. 45. Appellate courts must not be overly critical in their assessment of reasons, especially in cases turning on credibility assessments: *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 74-82.

[29] The legal test for fraudulent misrepresentation – the case plead against Zito – was not expressly articulated by the trial judge, but it was also not controversial. The trial judge's assessment of the evidence shows she was applying the accepted test[5] – whether there were false representations made by Zito, whether Zito knew the representations were false, whether the representations induced Liquid Capital to act, and whether that action caused a loss. Clearly, the core issue here was whether Zito was liable as having participated in or been a party to the making of the false statements. The trial judge's reasons concentrated on that issue. Liquid Capital has not shown that any legal error in the trial judge's understanding of the test for fraudulent misrepresentation or its application to the facts of this case cannot be reviewed because the reasons are insufficient.

[30] As to the trial judge's acceptance of the evidence of Daoust and Cook about Zito's non-involvement, her reasons show that she was clearly aware that they were fraudsters. The reasons also highlight places where Cook and Daoust's evidence was inconsistent with each other's – such as which of them sent the emails from the second account. But the reasons also identify the key factor that led the trial judge to accept Cook and Daoust's evidence that Zito was not involved in the fraud – namely, that their evidence on this point withstood cross-examination. As she put it: "The evidence of the admitted fraudsters, which was

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[5] Liquid Capital and Enbridge both cite *Bruno Appliance and Furniture, Inc. v. Hyrniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21, for the articulation of the test.

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not contradicted on their cross-examinations, was that Mr. Zito did not participate in the fraud."

[31] The assessment of credibility is quintessentially a matter for the trial judge as the finder of fact. The reasons demonstrate that the trial judge was alive to the fact that she was dealing with witnesses who had committed a fraud by repeatedly lying, and the reasons identify the key reason that overcame that concern. Although Liquid Capital may disagree with the credibility assessment that was made, it knows, from the reasons, why that assessment was made. The reasons show what was decided and why in a way that permits meaningful appellate review: *G.F.*, at paras. 71, 81.

[32] Nor were the reasons insufficient with respect to the trial judge's finding that Zito's failure to advise his superiors about the emails he received concerning the WF arrangement and his receipt of payments from Racca did not establish his participation in the fraud. The sufficiency of reasons must be assessed against the evidence and the arguments at trial.

[33] With respect to the payments, the evidence was that Racca was owed money by Cook and Daoust from a pre-fraud dealing, and they used some of the proceeds from their fraud on Liquid Capital ($400,000) to pay him. In the same time frame, Racca made payments (about $16,000) to Zito. But Liquid Capital did not contend before us that Racca was a party to or knowledgeable about the fraud.

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And the trial judge found that what Racca paid to Zito was money Racca owed Zito from a pre-fraud dealing.

[34] What tied the payments together in a manner suggestive of Zito's participation in the fraud was, according to Liquid Capital, that Daoust had testified that he told Racca to pay Zito from the money WF had obtained from Liquid Capital.

[35] The evidence did not, however, go that far. In the passage relied on by Liquid Capital, Daoust originally answered "I don't recall that, no" to the question "you also told Mr. Racca, to then give money to Mr. Zito, to pay back Mr. Zito for amounts he had invested [with Racca], correct?" Daoust was then confronted with a prior transcript in which he had been asked similar questions and responded positively, but he was not asked to adopt those answers as his evidence in this case. Daoust was then asked, "so that money that you instructed Rocky Racca to pay Mr. Zito, that was from money you got – that WF got from Liquid Capital, correct?" Daoust answered "I don't know" and the matter was left there. It was not suggested to Daoust that he was telling Racca to pay Zito as compensation to Zito for participating in the fraud.

[36] The trial judge's assessment of this issue could have been more detailed, but that is not the question. In light of what the evidence was on this issue, and the trial judge's other findings, her reasons were not inadequate.

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[37] Similarly, the trial judge's conclusion about Zito's failure to tell his superiors about emails he received must be read in light of her acceptance, earlier in her reasons, of Zito's evidence that he deleted the emails without opening the attachments, because he thought they were spam. The reasons must be read as a whole, and when they are, they adequately address this contention.

(6) The Trial Judge Did Not Err by Failing to Draw an Adverse Inference

[38] Liquid Capital argued in its factum that the trial judge should have drawn an adverse inference from the failure of Zito or Enbridge to produce, at the examination for discovery phase of the proceeding (i) an investigation report which Liquid Capital says was the precursor to Enbridge's termination of Zito's employment, and (ii) the termination letter.

[39] Whether to draw an adverse inference from a failure to produce evidence is discretionary: *Gourgy v. Gourgy*, 2018 ONCA 166, at paras. 8-9; *FCP (BOPC) Ltd. v. Suzy Shier (Canada) Ltd.*, 2024 ONCA 227, at para. 7. The trial judge was not obliged to exercise her discretion to draw such an inference here. As she noted: it was open to Liquid Capital to pursue production of these items before trial and it did not do so. Zito's evidence at trial was that he no longer had a copy of the termination letter and did not know why he was fired. There was no evidence he ever had a copy of any investigation report to produce. Nor was Enbridge's witness at trial asked for either the termination letter or any investigation report.

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(7) The Trial Judge Did Not Err by Failing to Recuse Herself

[40] In its factum Liquid Capital argued that the trial judge should have recused herself because, prior to her appointment as a judge, she had, as a lawyer, done work for Enbridge. I see no merit in this submission, which was not advanced in oral argument. There is no suggestion that, while the trial judge was a lawyer, either she or her former firm were involved in this case or anything related to it. Indeed, the trial judge was appointed to the bench in 2008, long before the events giving rise to this action.

(8) Conclusion on the Appeal about Zito's Liability

[41] I would therefore reject the grounds of appeal concerning the trial judge's finding that Zito's liability had not been established. This is dispositive of the appeal against Zito and Enbridge.

THE COSTS APPEAL

[42] The trial judge awarded partial indemnity costs of $394,578.11 against Liquid Capital for its unsuccessful pursuit of this action. This was comprised of $110,654.84 in favour of Zito, and $283,923.27 in favour of Enbridge.

[43] Liquid Capital submits that the quantum of costs reflects an error in principle, because it does not sufficiently take into account the amount in issue in the action. At the time of trial, Liquid Capital was claiming damages of $248,433.50.

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[44] In my view, no error in principle is evident that would displace the very high degree of deference owed to the trial judge's exercise of her broad discretion over costs: *Denman v. Radovanovic*, 2024 ONCA 276, at para. 140.

[45] The amount that was ultimately sought at trial was a function of recoveries Liquid Capital made during the course of the action. The amount originally claimed, and which would have dictated the scope of at least a portion of the efforts of the defence, was in excess of $1 million. As well, there is no hard and fast rule that costs must always be less than the amount in issue. It is one factor among many to be considered: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 57.01(1). The trial judge was in the best position to consider the reasonableness of the costs based on the constellation of factors germane to such a determination.

DISPOSITION

[46] I would refuse leave to appeal costs at trial and would dismiss the appeal.[6]

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[6] In its factum, Liquid Capital asserts that the trial judge erred in not giving it judgment against Daoust and Cook. This matter was not addressed by the trial judge, nor was it raised in the Notice of Appeal, the Amended Notice of Appeal or in oral submissions. I therefore decline to address it. I do so without prejudice to any right of Liquid Capital to move, in the Superior Court, for relief with respect to a matter that was not adjudicated upon under r. 59.06 of the *Rules*.

[47] Having considered the costs submissions of the parties concerning the appeal, I would award costs in favour of the respondent Zito in the agreed upon sum of $27,500, and in favour of the respondent Enbridge in the sum of $27,500. Both amounts are inclusive of disbursements and applicable taxes.

Released: June 19, 2024 “B.W.M.”

“B. Zarnett J.A.”
“I agree. B.W. Miller J.A.”
“I agree. Thorburn J.A.”

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