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COURT OF APPEAL FOR ONTARIO  
LABROSSE, GOUDGE and BLAIR JJ.A.

B E T W E E N:	)	
	)	
561895 ONTARIO INC., JEAN PIERRE	)	Eugene Meehan, Q.C. and
CHARBONNEAU and JOANNE	)	Marie-France Major
CHARBONNEAU	)	for the appellants/
	)	respondents in cross-appeal
Plaintiffs	)	
(Appellants/	)	
Respondents in Cross-Appeal)	)	
	)	
- and -	)	
	)	
METROPOLITAN TRUST COMPANY	)	David R. Elliott
OF CANADA, HSBC TRUST	)	for the respondents/
COMPANY, METROPOLITAN	)	cross-appellants
TRUSTCO LIMITED, AURELE	)	Metropolitan Trust Company of Canada,
SIMOURD, WAYNE LECUYER, KPMG	)	HSBC Trust Company, Metropolitan
INC., BEACON HILL LODGES OF	)	Trustco Limited, Wayne Lecuyer,
CANADA LTD. and BETH-MAR	)	KPMG Inc. and Beth-Mar Realty
REALTY INVESTMENTS LTD.	)	Investments Ltd.
	)	
Respondents	)	Sean E. Cumming
(Respondents/	)	for the respondent/
Cross-Appellants)	)	cross-appellant
	)	Aurele Simourd
	)	
	)	Heard: September 13, 2004

**On appeal from the judgment of Justice Antoine deLotbinière Panet of the Superior Court of Justice dated May 31, 2001.**

**BY THE COURT:**

**Introduction**

[1] The appellants Jean-Pierre and Joanne Charbonneau operated a senior citizens residence through the appellant 561895 Ontario Inc. (the “Company”). The Company was the borrower in respect of four successive mortgages registered against the property in favour of Morguard Trust Company of Canada or its successors, the respondents Metropolitan Trust Company of Canada, HSBC Trust Company and Metropolitan Trustco Limited (all referred to as “Morguard”). The respondent Simourd was Vice-President of Morguard and became personally involved in the third and fourth loans. The action against the other named respondents was dismissed.

[2] The action involved a claim by the appellants with respect to three of the four mortgages made in 1985, 1986 and 1988. Morguard was in the business of structuring loans for potential borrowers. On occasion, Morguard also invested its own funds. As a matter of policy, although the loans were made in the name of Morguard, the identity of the third party investors was never disclosed to the borrower.

[3] In 1988, the Company defaulted on the loan, a receiver was appointed and the property was ultimately sold.

[4] Following 41 days of trial, the appellants were awarded the following damages on the bases of fraud, deceit and breach of trust:

- a) against Morguard, the sum of \$23,815 with respect to the 1985 transaction (overstated amount to discharge the 1983 mortgage), \$216,600 with respect to the 1986 transaction (excessive fees) and \$50,00 for breach of trust; and
- b) against Simourd, as jointly liable for the sum of \$216,600 (as above) with respect to the 1986 transaction and \$50,000 for breach of trust.

[5] The appellants’ claim for punitive damages was dismissed.

[6] In essence, the trial judge found that Morguard intentionally overstated the amount required to discharge the 1983 loan and appropriated for itself the \$23,815. In respect of the 1986 loan, the trial judge found that the \$216,000 was taken by Morguard through fraud and deceit. Furthermore, Morguard and Simourd breached their fiduciary obligations to the appellants in failing to advise them of the personal involvement of Simourd in the transaction and Simourd breached his fiduciary obligation in charging

fees in which he had a personal, indirect beneficial interest, without the knowledge or consent of the appellants. The trial judge awarded damages of \$50,000.

[7] The appellants appeal the dismissal of their claim for punitive damages and seek an increase in the quantum of damage for breach of fiduciary duty. The respondents cross-appeal the findings of liability and the amount of the damages awarded to the appellants.

**The damages for fraud and deceit, and fiduciary duty**

[8] The trial judge gave detailed reasons for the existence of an agency relationship and the existence of a fiduciary relationship and a breach of these relationships, and for the acts of fraud and deceit on the part of the respondents. In particular, the trial judge found:

- the appellants were in a vulnerable position;
- Morguard bargained the terms of the loans;
- the appellants were not privy to the negotiations;
- the appellants had to rely on the representations of Morguard;
- the appellants were dependent on Morguard to secure reasonable terms;
- the appellants were not free to accept or reject investment proposals put to them;
- breaches of fiduciary obligation in three separate loan transactions;
- acts of fraud and deceit perpetrated by officials of Morguard, based on undisputed facts;
- the failure to accurately reveal the fees charged;
- the fraudulent appropriation of monies;
- the failure to reveal and the repeated denial of the inappropriate personal involvement of one of the respondents; and
- the failure by Morguard to disclose material terms.

[9] These findings were the result of the trial judge's assessment of the credibility of numerous witnesses and careful review of the written documents presented at trial. They are amply supported by the evidence. In light of these findings, we are not prepared to interfere with the trial judge's award for fraud, deceit and breach of trust. His findings do not reveal any error that would justify the intervention of this court.

### **Punitive damages**

[10] The appellants submit that in light of the findings of fraud, deceit and breaches of fiduciary obligations on the part of the respondents, the trial judge erred in refusing to award punitive damages against the respondents.

[11] The trial judge saw and heard the witnesses who testified on this issue. He concluded that the actions of the officers of Morguard, Simourd and Lecuyer, were not sufficiently offensive or highhanded as to warrant punitive damages. Damages were awarded for fraud, deceit and breach of fiduciary duty. It is implicit in his reasons that the trial judge considered that the compensatory damages adequately punished the respondents, were sufficient to prevent the wrongdoer from recovering any benefit from the wrong, and that the judgment itself constituted sufficient deterrence.

[12] Keeping in mind that punitive damages should be resorted to only in exceptional cases and imposed with restraint, the trial judge did not, in our view, commit a palpable or overriding error in exercising his discretion not to award punitive damages.

### **Compensation for breach of fiduciary duty**

[13] The appellants appeal the quantum of \$50,000 awarded for breach of fiduciary duty.

[14] The trial judge found that any additional funds that would have been available by the end of 1986 (had it not been for the negligence of the respondents) would likely have been applied, by the appellants, to purchase the shares of other investors. He also found that the appellants would likely not have been in a position to effect repairs to the septic system's malfunction which contributed to the appellants' financial difficulties. The trial judge calculated the value of the business in 1988 and then reduced this amount by applying contingency factors to effect his conclusion as to the likely application of any available funds and arrived at the amount of \$50,000.

[15] In our opinion, the trial judge was entitled to apply contingencies to adjust the damage amount and he properly used his discretion in arriving at that amount .

### **The release**

[16] Because of allegations of misconduct and threatened litigation during the negotiations at the time of the 1988 loan, all parties, including the officers of Morguard and the various law firms and solicitors involved, released each other from any further

claim or demand in respect of the financing of the rest home. The respondents relied on the release to operate as a defence to the claims in this action.

[17] The trial judge concluded that there was a failure by Morguard to disclose material facts to the appellants at the time of the execution of the release and accordingly, the release could not operate as a defence to the action. We agree that the release cannot stand, but not for this reason.

[18] In *Van Patter v. Tillsonburg District Memorial Hospital* (1999), 45 O.R. (3d) 223 at 230 (C.A.), this court referred to the “well established policy in favour of upholding and enforcing settlements agreed upon by litigants, or potential litigants, absent evidence of fraud, mistake of fact or unconscionability”.

[19] In *Mariani v. Lemstra*, [2004] O.J. No. 4283 at para. 12 (C.A.), Sharpe J.A. stated:

It is common ground before this court that the elements of fraudulent misrepresentation are: (1) that the defendant made a false representation of fact; (2) that the defendant knew that the statement was false or was reckless as to its truth; (3) that the defendant made the representation with the intention that it would be acted upon by the plaintiff; (4) that the plaintiff relied upon the statement; and that the plaintiff suffered damage as a result.

[20] The first element in this test is met where there is a positive misrepresentation of fact or where there is a failure to disclose a material fact that the non-disclosing party has a legal obligation to disclose: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at para. 60. A fiduciary relationship may give rise to such an obligation, as it did in this case.

[21] The trial judge found that Morguard and Simourd breached their fiduciary duty to the appellants in failing to reveal the personal involvement of Simourd in the 1986 transaction. The non-disclosure related to a material fact in the release. The trial judge also found that there was reliance by the plaintiffs on their mistaken understanding of the facts. He accepted the evidence of Charbonneau and of his counsel that, had they known of the personal involvement of Simourd, they would not have embarked on the course of negotiation that led to the 1988 loan transaction.

[22] Furthermore, there was a failure to correct a previous representation by not disclosing the true nature of affairs once known. On several occasions, representations were made to the plaintiffs that previous fees charged were legitimate. This was never

corrected despite the defendants' knowledge that these representations were false. The non-disclosure was compounded by the deliberate withholding of the material information despite repeated requests by the plaintiffs.

[23] On these facts, the release was properly set aside on the basis of the fraudulent misrepresentation of the respondents, given the breach of the fiduciary obligation to make disclosure and failure to correct a previous representation that is no longer true.

### **Disposition**

[24] The trial judge awarded the appellants pre-judgment interest on the damages in the amount of \$416,842.74, post-judgment interest, and solicitor-and-client costs fixed at \$740,858.57. Together with the award of damages, the reasons for judgment did justice as between the parties. There is no basis for this court to interfere.

[25] Accordingly, the appeal and the cross-appeals are dismissed. As success is divided, we would make no order as to costs.

Released: DEC 10 2004  
JML

Signed: "J.-M. Labrosse J.A."  
"S.T. Goudge J.A."  
"R.A. Blair J.A."