



Bond Inc. and Thomas J. Lipton Inc. under the name of Thomas J. Lipton Inc.

The defendant's employment with the plaintiff or its divisions will for the purposes of this judgment be simply referred to as employment with Shopsy's. The defendant was employed as National Sales Manager of Shopsy's Food Services from August 11, 1980 to December 31, 1985. The defendant became the Director of Food Services for Shopsy's on January 1, 1986 until his termination on May 16, 1986. At all material times the defendant was responsible for the marketing of Shopsy's food products throughout Canada. His responsibilities included the supervision of district sales managers and salesmen. These duties would include the approval of expense claims related to sales promotion, travel and entertainment.

The plaintiff introduced into evidence the expense claims of a number of Shopsy's employees who were subordinate to or working under the direction of the defendant between the years 1980 and 1986. As well the plaintiff submitted evidence of a comprehensive audit report of the defendant and his alleged tortfeasors, prepared in 1986. The individuals whose expense accounts were filed were also called as witnesses on behalf of the plaintiff. Each of these witnesses gave very similar evidence in describing the scheme employed to obtain monies fraudulently from the plaintiff. There

was a standard expense claim form which was submitted on behalf of the employee. It was also possible for employees to obtain cash advances from Shopsy's prior to putting in their expense claims.

The evidence established that a significant portion of the cash advances obtained by certain employees were actually given directly to the defendant. In the circumstances of this case it would be appropriate to summarize the evidence of each of the witnesses, whose false expense claims were used to cover advances.

Carman Bomasuit

This witness, age 51, joined Shopsy's Food Service in 1978. He became the Sales Manager for the Central Division in 1980 and began reporting to the defendant. Cash advances and expense claims of Bomasuit would have to be approved by the defendant. Bomasuit testified that as a result of encouragement by the defendant he became involved in the falsification of expense claims which began with claims for lunches with the defendant and other employees of Shopsy's which were not considered a legitimate expense by the plaintiff. The invoices would be falsely attributed to a customer or customers.

In Mr. Bomasuit's words the scheme "advanced" to the obtaining of blank chits or invoices from restaurants. He would also claim

the same expenditure twice by claiming the amount of a credit card invoice and as well, the bottom or receipt portion of the restaurant invoice. Blank chits or receipts were also obtained from "friendly" waitresses. The witness Bomasuit testified that the defendant "showed him how to do it".

Bomasuit further testified that the defendant also showed him how to use empty ticket envelopes related to Maple Leaf Gardens, O'Keefe Centre, and the Toronto Blue Jays as examples to falsify claims. The employee making the expense claims would simply write figures on the blank envelope representing a number of tickets and the purported cost thereof and submit the envelopes as part of an expense account, when in fact no tickets were purchased.

The defendant would also ask him to purchase a variety of items for him. Bomasuit specifically recalled buying a bicycle for the defendant's son, a VCR for the defendant, a clock, suits and shoes. He also recalled being asked by the defendant in Chicago to put a number of leather jackets and cowboy boots purchased for the defendant, himself, and their colleague companions, Messrs. Sherman and Kanchwala on his credit card. He was told by the defendant to recover the money by putting in false expense claims.

Bomasuit also recalled obtaining an invoice for repairs to the defendant's automobile which he submitted as an expense having altered the invoice to identify it as his company car.

Bomasuit further testified that as time went on he obtained larger cash advances for the defendant and continued to cover the advances through submitting false expense accounts. Occasionally he would retain some of this cash for his own use.

Bomasuit also recalled paying off a credit card charge for the defendant at a local bank for an amount which was subsequently recovered through false expense claims.

For a period of time the witness Bomasuit stated that he was "fascinated by the defendant" and "excited by the defendant's business acumen". However as time passed and the amount of cash increased he became "terrified".

The witness Bomasuit was asked to estimate the percentage of his expense claims, related to 'food', 'tickets', and 'gifts/goods' which were legitimate. His estimates were as follows for the years 1980 - 1986, taken from his collected expense claims which he had reviewed before the trial.

Food

Approximately 15% of the total of \$16,825.42 was legitimate, therefore \$14,301.61 was fraudulent.

Tickets

Approximately 5% of the total claim of \$13,279.00 was legitimate, therefore \$12,615.05 was fraudulent.

Gifts/Goods

Bomasuit estimated that about \$600.00 represented false claims.

The amount of \$27,516.66 would therefore represent the approximate amount of false expense claims estimated by the witness Bomasuit.

Cyril Sherman

The witness Sherman, age 66 commenced work with Shopsy's in 1959 as a delivery man. Over the years he received a number of promotions until he became the National Account Manager - Food Services.

This witness also described the system of submitting false claims generally in the same terms as did the witness Bomasuit. Prior to reporting to the defendant, Sherman stated that he was

well aware that he could not claim for personal expenses or for taking out fellow sales people. He began reporting to the defendant in 1980. Shortly thereafter the defendant began to request him to obtain cash for him and he put in false expense claims to cover the amounts. The defendant would also encourage Sherman to attend clothing stores with him and they would both buy some clothing. They "would treat it as a perk" and Sherman would cover the cost with false expense claims in the same manner as described by Bomasuit.

The defendant would frequently ask him for cash advances but never told him what he was going to do with the money. Sherman said he was anxious but the defendant "was my boss" and I "didn't have the right to question him". The defendant would also encourage him to buy gifts for his wife which was "a reward for work done". He also took a trip to England on the defendant's encouragement which was largely financed through false claims.

The witness Sherman also testified that he and his colleagues were all "very apprehensive of what we were doing" and that he told them "that it was wrong". However he felt that he had to go along with the scheme as he was afraid that his job could be in jeopardy. He felt that he "wasn't a young man and if I had to leave Shopsy's it would be difficult to get another job".

The witness Sherman stated that he also had reviewed the volumes of his expense claims and the plaintiff's 1986 audit and estimated his fraudulent expense claims between 1980 and 1986 to be as follows:

<u>Tickets</u>	\$	42,188.49
<u>Gifts and Goods</u>	\$	4,403.97
<u>Food</u>	\$	<u>30,103.67</u>
TOTAL OF FALSE CLAIMS		<u>\$ 76,696.13</u>

The witness Sherman estimated the legitimate claims for tickets as being 5 to 8%. For the purposes of the above calculation I have used the figure of 10%. I have also employed the higher figure of 20% in relation to his estimate of 15 to 20% of the gifts and goods claims as legitimate. The figure for food is calculated according to his evidence as being 40% valid in 1980 but only 5% valid thereafter.

Donald Smith

This witness, age 42, who is now a Branch Manager with Lester Foods, joined Shopsy's in 1981. He also testified that he had reviewed the records of his expense accounts and a copy of the 1986 audit investigation in relation to these account. He was introduced to the fraudulent expense scheme by Cyril Sherman. He



testified that he didn't want to participate initially and that he had told the defendant that "it wasn't right". However he "went along with it".

The defendant persuaded him to buy in 1985 the defendant's twenty-eight foot Chris Craft for \$12,000.00 although he was in debt. The defendant assisted him in the obtaining of a loan from their Credit Union. The defendant would also request Smith to obtain cash advances for him and submit false expense accounts. The witness Smith stated that he was encouraged by the defendant to retain some of the cash advances to assist him in paying for the boat, which amounts he estimated as between five and six thousand dollars. The witness estimated that the following figures represented the amounts of his fraudulent expense claims after having reviewed his expense claims before trial.

<u>Tickets</u>	\$	23,785.50
<u>Food</u>	\$	<u>8,100.00</u>
TOTAL OF FALSE CLAIMS		<u>\$ 31,885.50</u>

James Dewar

The witness Dewar, age 32, joined Shopsy's in 1984. He testified that he was introduced to the fraudulent expense account scheme by Carman Bomasuit and Don Smith. It was suggested that "he get what he could".

This witness also reviewed the volumes of his expense claims as well as the 1986 audit investigation as it affected him. He estimated that the following amounts represented his personal fraudulent expense claims:

<u>Tickets</u>	\$	6,788.25
<u>Food</u>	\$	<u>2,838.38</u>
TOTAL OF FALSE CLAIMS		<u>\$ 9,626.63</u>

This witness stated that he did not give any money to the defendant with the exception of a cheque for \$350.00 about which he was rather vague. There was no evidence of any communication between Dewar and the defendant with respect to the fraudulent expense claim scheme.

Brad Bell

This witness, age 42, is now a labour foreman in the construction industry. He became an employee of Shopsy's early in 1981. Bell had known the defendant since 1970.

The witness Bell testified that he was introduced to the fraudulent expense claim scheme by the defendant. He also recalled a flight with the defendant to Vancouver when the defendant stated in reference to the fraudulent scheme that "if we get caught we are going to jail".

The witness Bell also recalled buying some jewellery for the defendant's wife in Vancouver and being told by the defendant to put it on his expense account. He further recalled buying a three wheel 'all terrain' vehicle for the defendant's son in Toronto. At first Bell resisted, stating to the defendant "no way" but he acceded to the request when it was implied to him by the defendant that "someone else could do his job". Bell estimated the value of the jewellery as \$300.00 and the 'all terrain' vehicle at \$1,100.00.

Ali Kanchwala

This witness joined Shopsy's in 1973 in the Accounting Department. In 1981 he became a sales representative. In 1984 he became the Western Region Sales Manager under the direction of the defendant.

Kanchwala testified that he also participated in the 'scheme' to falsify expense claims. He described the various methods of 'cheating' on the expense claims, which he stated that he learned from the defendant.

The witness Kanchwala recalled being in Chicago with the defendant and the witnesses Bomasuit and Sherman where they bought leather jackets and cowboy boots which were paid for initially by Bomasuit on his credit card. The cost of the clothes was then put through the expense accounts of the individuals involved by way of false expense claims.

Kanchwala was encouraged by the defendant to purchase suits, shirts, leather jackets, VCRs, shoes for himself as well as family entertainment and then cover the amounts with false expense claims. He estimated that he spent 'on himself' between \$10,000.00 and \$15,000.00 in total. The balance of his fraudulent expense claims went to the defendant.

The witness Kanchwala estimated that of the expenses claimed between the year 1980 and 1986, the amounts noted below represented false claims.

<u>Tickets</u>	\$	14,043.24
<u>Gifts &amp; Goods</u>	\$	10,509.37
<u>Food</u>	\$	<u>15,000.00</u>
TOTAL OF FALSE CLAIMS		<u>\$ 39,552.61</u>

Kanchwala estimated that in relation to the food expenses that \$15,000.00 to \$20,000.00 would be fictitious. I have employed the lower figure of \$15,000.00.

Peter Spada

The defendant testified at the trial. At the time of the trial he was 46 years old and had been in various food related sales jobs since 1972. In particular he was employed as a District Sales Manager for Kitchens of Sara Lee in 1978 and was National Sales Manager for Robin Hood Multi-foods in 1979. In August of 1980 he joined Shopsy's Foods as National Sales Manager.

The defendant testified that his regional superior Harold Granitz gave him "a carte blanche ticket" and the defendant does

appear to have taken this alleged invitation in the most extreme literal fashion.

The defendant's philosophy with respect to the matter of expense accounts can be summed up in his own words that expense accounts are "to re-imburse a salesman for his efforts". The defendant also testified that he "didn't care about budgets" and that he "never questioned a salesman in his life". He admitted that he falsified expense accounts both at Sara Lee and at Robin Hood Multi-foods. The defendant simply regarded false expense claims as a common practice in the sales industry.

The defendant's attitude generally was that he had built the sales in the food division of Shopsy's in a dramatic fashion and that the increased volume entitled the defendant and his senior sales staff to very significant perks which they would cover off by submitting false expense accounts. His cavalier attitude towards expense claims was illustrated by his statement that "whatever was on my desk I used to put in my expense claims, or whatever was needed".

The defendant readily admitted that he did in fact provide the leadership in the falsifying of expense accounts. Furthermore, in referring to his colleagues who reported to him he stated that he "was dealing with a bunch of scared people".

The defendant did not dispute the evidence of Messrs. Bomasuit, Sherman, Smith, Dewar and Kanchwala except in generally the most minor details. However he denied stating to the witness Bell that "if we get caught we are going to jail" as testified by Bell. The defendant also signed all of their expense claims. He testified that the amounts of cash given to him by the witnesses above mentioned went to pay for the promotion of Shopsy's products. He could give no real particulars of these expenditures except for his statement that large amounts were spent for entertainment in Las Vegas, Chicago, Detroit and Houston. The defendant also estimated that he spent approximately \$6,800.00 per year on prostitutes for important clients of Shopsy's.

The defendant freely admitted that these expenditures would not have been approved of by his superiors except for the 'carte blanche' given to him by his superior Harold Granitz when he was hired. Granitz left the employment of Shopsy's in 1982. The defendant also testified that he encouraged his colleagues to obtain 'perks' for themselves as this was the way he kept them "pumped up".

The defendant stressed throughout his evidence that Granitz had given him a "blank cheque" and as far as he was concerned that meant unlimited expense accounts. He stated that the "policy never

changed" and as no one complained before his dismissal, he assumed that the fraudulent scheme could be perpetuated indefinitely.

There was no evidence adduced at trial that the plaintiff or its predecessors were aware of the fraudulent scheme before 1986. There was no evidence that management acquiesced in any manner with respect to the practice of falsifying expense claims. The defendant did not call any evidence nor did he produce any documentation whatsoever to support his expenditures on behalf of the plaintiff from the cash advances obtained by himself or by the other employees who obtained the cash advances for him.

There was no material conflict between the evidence of the plaintiff's witnesses and the defendant himself. In fact the plaintiff's witnesses Bomasuit, Sherman and Kanchwala appeared to harbour a degree of affection for the defendant and a respect for the defendant's talents as a motivator and as a sales person.

#### The Law

The plaintiff's claim is that the defendant initiated or implemented a scheme through which he and others acting fraudulently and deceitfully obtained monies from the plaintiff. It is further submitted on behalf of the plaintiff that the



defendant is liable in law for any and all damage suffered by the defendant by reason of the fraudulent scheme.

The plaintiff has established fraud. The activities of the defendant and his colleagues fall within the classic definition of an action properly founded on deceit in the oft quoted decision of the House of Lords in Derry v. Peek (1899), 14 App. Cas. 337:

In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

The law of deceit is also outlined by the Ontario Court of Appeal decision of Graham v. Saville (1945), O.R. 301 where Laidlaw J.A. states at p.309:

The wrong called deceit is not easily or satisfactorily defined. It consists in recklessly or wilfully causing another person to believe and act on a falsehood. If a representation be made by a person which he does not in fact honestly believe to be true, it becomes a fraudulent misrepresentation. To create a right of action, the following conditions must concur: (a) that a statement made by the defendant was untrue in fact; (b) that he either knew it to be untrue or was recklessly and consciously ignorant whether it was true or not: per Lord Herschell in Derry et al. v. Peek (1889), 14 App. Cas 337 at 371; (c) that the defendant intended the plaintiff to act upon it; (d) that the plaintiff acted thereon in the manner contemplated or manifestly probable; (e) that the plaintiff suffered damages as a result thereof.

In the case before me the defendant appears to be arguing that he should not be held liable as he had no intention of injuring the

plaintiff. In effect he is stating that while he encouraged the use of false expense claims that it was done firstly to motivate his senior sales colleagues by allowing them perks such as food and clothing, and secondly that the monies were also spent in other ways to benefit the plaintiff through an increased volume of sales. In other words the defendant is stating that while the expense claims were false his motives were not bad or evil.

Lord Herschell in Derry v. Peek deals with the issue of motive at p.365 of the judgment:

I may pass now to Foster v. Charles (1). It was there contended that the defendant was not liable, even though the representation he had made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the Court, Tindal C.J. saying: "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the Chief Justice intended to indicate any doubt that the act which he characterised as a fraud in law was in truth fraudulent as a matter of fact also. Wilfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

and at p.374:

Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there

was no intention to cheat or injure the person to whom the statement was made.

The issue of motive was also dealt with by the House of Lords in Smith v. Chadwick (1884), 9 App.Cas. 187 where Lord Blackburn states at p.201:

I may say, though it is not necessary for the decision of the case, that I think, as a matter of law, the motive of the person saying that which he knows not to be true to another with the intention to lead him to act on the faith of the statement is immaterial. The defendants might honestly believe that the shares were a capital investment, and that they were doing the plaintiff a kindness by tricking him into buying them. I do not say this is proved, but if it were, if they did trick him into doing so, they are civilly responsible as for a deceit.

The next issue to be determined is whether the defendant is a joint tortfeasor with the other individuals, whom he encouraged to submit false claims. There is no question but that the defendant initiated the fraudulent scheme and that his actions provided the common thread throughout the period 1981 to 1986. He was the "boss" and in fact signed all of the false expense claims submitted by his colleagues during that period.

The liability of a joint tortfeasor in an action based on deceit is contained in Halsbury's Laws of England (4th Edition) Vol.31, Paragraph 1035 at p.631:

**1035. Liability of joint representors in action of deceit.** Where a misrepresentation is made by more than one person, and is made fraudulently, then, in an action

for damages, all those who concurred in the fraud are, as in the case of any other tort, both jointly and severally answerable to the representee for the whole amount of the damages.

Damages

The total of the fraudulent claims may be summarized as follows:

Carman Bomasuit	\$	27,516.66
Cyril Sherman		76,696.13
Donald Smith		31,885.50
James Dewar		9,626.63
Brad Bell		1,400.00
Ali Kanchwala		<u>39,552.61</u>
TOTAL		<u>\$ 186,677.53</u>

The evidence indicates that approximately \$70,000.00 of this amount would have represented monies used for the benefit of the defendant's colleagues as listed above and therefore did not accrue directly to the benefit of the defendant. However, that amount was obtained fraudulently from the plaintiff at the instigation and encouragement of the defendant who, as stated above signed all of the expense claims. I find that the defendant is a joint tortfeasor with respect to all of the false claims submitted with the exception of those claims submitted by James Dewar. There was

no evidence of any communications between the defendant and Dewar which would indicate any direct knowledge on the part of the defendant with respect to Dewar's false claims. I therefore find that the Dewar claims should be deducted from the total amount for which the defendant is being held liable.

The estimates of the amounts of the false claims submitted by the defendant's colleagues were also made some years after the submitting of the claims. While the defendant did not seriously challenge these estimates I have some difficulty in simply accepting these estimates as probably accurate. In my view it would be more just in all the circumstances to reduce the estimates given in evidence by 20% after eliminating the amount of the claims submitted by Dewar. The net amount of the plaintiff's damages for which the defendant is being held responsible would therefore be the sum of \$186,677.53 from which the claims of Dewar, totalling \$9,626.63 should be subtracted, less 20% which leaves a net total of \$141,640.72.

In deducting the 20% I am also taking into consideration that the defendant probably did spend some of the advances, which were subsequently covered by false claims, for purposes directly related to the marketing of Shopsy's products. However it is impossible to estimate an amount and I simply mention these unrecorded

expenditures as another reason to reduce the amount of damages claimed by the plaintiff.

The plaintiff is also claiming exemplary damages. There is no doubt but that the defendant's conduct was highly reprehensible. In Denison v. Fawcett (1958), 12 D.L.R. (2d) at p. 537 (Ont. C.A.) Shroeder J.A. outlined at p. 542 the principles that he considered relevant in the award of exemplary damages in a case of fraud and deceit:

If, in addition to committing the wrongful act, the defendant's conduct is "high-handed, malicious, conduct showing a contempt of the plaintiff's rights, or disregarding every principle which actuates the conduct of a gentleman", (to quote a few examples taken from the authorities) his conduct is an element to be considered as a circumstance of aggravation which may, depending upon its extent or degree, justify an award to the injured plaintiff in addition to the actual pecuniary loss which he has sustained. I do not think that it can be stated with any precision what may be classed as aggravating circumstances but malice, wantonness, insult and persistent repetition have always been regarded as elements which might be taken into account.

I am of the opinion that while the defendant's conduct could be characterized by much of the above language employed by Shroeder J.A., I am nevertheless of the view that this is not an appropriate case for exemplary damages. The evidence indicates that the defendant harboured the perhaps perverse belief that on balance his conduct benefited the plaintiff. His evidence that the sales volume of his division increased substantially during his tenure is uncontradicted. The plaintiff's own witnesses gave positive

evidence about the defendant's ability to motivate them to work more effectively in the plaintiff's interest. In all of the circumstances it cannot be said the defendant was motivated by malice towards the plaintiff. Rather the defendant intended to benefit both the plaintiff and himself. The benefits to himself and his colleagues he simply chose to regard as "traditional salesmen perks".

Counterclaim

The defendant counterclaimed against the plaintiff for wrongful dismissal. The plaintiff dismissed the defendant originally on the grounds that the defendant had employed an agency controlled by his wife without advising the plaintiff as required by company policy. The plaintiff did have substantial grounds for dismissing the defendant at that time as revealed in the evidence at trial although those grounds did not become apparent to the plaintiff until a few months later.

The defendant's counterclaim is therefore dismissed. The dismissal will be without costs as there was no significant time whatsoever engaged in relation to the counterclaim at the trial of this action.

**Judgment**

The plaintiff is therefore entitled to recover a judgment against the defendant in the sum of \$141,640.72 together with prejudgment interest in the amount of 10% from the date of the service of the statement of claim on May 9, 1987.

The plaintiff is also entitled to recover its costs of this action on a party and party basis.



McMurtry A.C.J.O.C.

**RELEASED:** March 24, 1992