Court of Queen's Bench of Alberta

Citation: Franiel v Toronto-Dominion Bank, 2020 ABQB 66

Date: 20200128
Docket: 1901 02052
Registry: Calgary

Between:

Helen Franiel

Plaintiff

- and -

The Toronto-Dominion Bank

Defendant

Memorandum of Decision
of
A.R. Robertson, Q.C., Master in Chambers

The Background to This Application

[1] The plaintiff Mrs. Franiel is an 81-year-old Lethbridge customer of the defendant Bank. Over a ten-month period, she was the victim of fraudulent scams 26 times. Believing that she had won a lottery, on some occasions, or that she owed tax money to Canada Revenue Agency, on other occasions, she was persuaded to go to the Bank 26 times for bank drafts to give to the fraud artists. Most bank drafts were for just under $10,000. After a recovery of $8,000.00, she lost $241,730.00.

[2] She sues the Bank on the basis that the Bank owes a duty of care to its customers to help prevent frauds like this. She argues that an elderly customer, attending regularly for Bank drafts for significant amounts of money mostly just under $10,000.00, dealing face-to-face with tellers, should have raised "red flags" to the Bank, and the Bank should have stepped in to stop her.

[3] The Bank assisted in trying to get some of the money back and the $8,000 was recovered.

[4] The Bank defends on the basis that there is no such duty of care as the plaintiff asserts, and if there is, the Bank exercised reasonable oversight in the circumstances.

[5] She sues for $241,730 that she lost, plus bank fees, and also for exemplary damages of $150,000.00

[6] This summary of the facts is largely taken from the pleadings, supplemented by the evidence filed in support of this application, including the transcript of questioning so far. But the basic facts I have described do not appear to be in dispute.

This Application

[7] This application is for an order compelling the defendant Bank to answer questions and provide replies to undertakings requested at the pre-trial questioning of the Bank's corporate representative.

[8] The plaintiff claims that the questioning was substantially frustrated by the number of improper objections and refusals to provide undertakings. At the noon break, plaintiff's counsel simply adjourned, but the Bank's counsel asserted that he was concluding his examination because the Bank's representative was available to continue to be examined "until this examination is concluded".

[9] Accordingly, there is an issue about whether the plaintiff can, essentially, start over, or is limited to asking about undertaking responses and any questions that I direct be answered.

[10] My conclusion is that most of the Bank's objections to questions were not valid and most of the undertaking requests that remained in dispute before me were proper requests. Since I have reached these conclusions, and since there were many objections, particularly to undertaking requests (most were "taken under advisement", as I will discuss) the plaintiff is entitled to re-commence questioning of the Bank's corporate representative. The questioning cannot be said to have been "concluded" in this circumstance.

The Facts

[11] The activity started in March of 2018. Each time Mrs. Franiel was victimized, she was deceived into believing that she needed to obtain a bank draft from the Bank, and most of the bank drafts were for either $9,985 (18 of them), one was for $9,975, three were for $9,950, one was for $9,900, one was for $9,000, one was for $8,000, and one was for $3,275. This occurred over a period of approximately 10 months, ending in January, 2019.

[12] All of the bank drafts were prepared by tellers at one of two branches of the Bank in Lethbridge. Midway through the fraudulent activity, the plaintiff's son visited a branch in Calgary and drew to the teller's attention that he believed his mother might be the victim of fraud. Some kind of note was digitally placed on the plaintiff's account, but the frauds continued; 12 of the bank drafts that she requested were drawn after the Bank was alerted and the note posted digitally on her "file".

[13] I have been provided with the entire transcript of the questioning of the Bank's corporate representative to review, because of (a) the significant number of objections, (b) the complaint that the questioning was substantially frustrated by them, and (c) a complaint made by the Bank's corporate representative about two-thirds of the way through the morning that she was being "bullied". Plaintiff's counsel responded that she was not being bullied.

[14] It is apparent from the transcript that frustrations were running a little high on both sides, because in the course of a questioning that lasted a little under 2 ½ hours, there were a significant number of objections to questions (22), and where 35 undertakings were requested the Bank's counsel said that she would only take the undertakings "under advisement" 25 times. She refused four requests for undertakings. Four undertakings requested were actually given.

[15] There were a couple of duplications in the questions and undertaking requests, but in that morning of questioning there were 51 different points of contention.

[16] As to the assertion by the witness that she was feeling "bullied" the transcript does not, of course, disclose the tones of voice being used, but the questions asked and the answers given, or objections made, do not demonstrate any "bullying". Much later in the questioning defence counsel asserted that plaintiff's counsel was raising his voice, but that was a very brief exchange.

[17] Before the matter came before me for hearing, counsel for the Bank advised that many of the undertaking requests that had been taken "under advisement" would be answered. One of the objections was withdrawn. There was a prior order that directed that replies to undertakings be provided on or before January 22, 2020 (*i.e.* after the date of the hearing before me), so plaintiff's counsel did not argue those points; the plaintiff was going to wait to see what the replies actually are.

[18] The nature of the claim requires establishing that there actually is a duty of care owed by the Bank in these circumstances. That requires the plaintiff to demonstrate, or at least explore, such things as the Bank's knowledge of the sorts of fraudulent activities of which its customers generally are being victimized; when the Bank became aware (or should have become aware) of those sorts of fraudulent activities being perpetrated on Mrs. Franiel; whether the fraudulent activity here appeared to the Bank's tellers to be frequent; whether the Bank adopted any practices, policies, practices, or procedures in order to protect its customers against those fraudulent activities; what those policies, practices, or procedures were; whether they were being followed; and whether those policies, practices or procedures were actually communicated to the tellers on the "front line" of the Bank's interaction with its customers by formal training or otherwise.

[19] The position of the plaintiff is that all of the facts in her case should have raised a number of "red flags" to alert the Bank, either its tellers or branch management, that this elderly lady was being victimized and her Bank account was being drained. She attended at the Bank to obtain significant Bank drafts virtually weekly for these Bank drafts. The fact that most of the drafts were for amounts a little under $10,000, and many of them were in the same amount, should have alerted the tellers that something was wrong.

[20] Particularly in light of the fact that her son had specifically alerted the Bank, the plaintiff's position is that the defendant Bank was not entitled to ignore what must have become an obvious pattern of victimization. The Bank was effectively being used as an accomplice in the frauds.

Preliminary Comments

Relevance and Materiality

[21] Before addressing the specific questions and request for undertakings, I make the observation that it seems to be the Bank's unstated position that since it is confident that it owes no duty of care at all to see why a customer is withdrawing or investing her money and no duty

to decline to act on the customer's instructions, it is not obliged to provide candid answers to questions as to the Bank's level of knowledge of these sorts of frauds generally, or its specific level of knowledge of the plaintiff's behaviour.

[22] If this has guided the objections, it is an error. There has been no application to strike under rule 3.68 or an application to dismiss summarily under rule 7.3. The scope of questions which a party is entitled to ask in questioning is determined by the pleadings, subject to the additional consideration of materiality. It is not determined by one party's confidence in the strength of its central argument.

"Taken Under Advisement"

[23] It is extremely difficult for litigation counsel to deal with requests for undertakings being "taken under advisement" repeatedly. When an objection is made, there is usually a discussion between counsel as to the basis of the objection, and sometimes the debate is resolved. When a request for an undertaking is "taken under advisement", the undertaking is actually being refused, but usually no reason is given, because the objecting lawyer is not clear on whether an objection is proper. That phrase, which has no particular legal meaning, is simply a way of alerting the questioning lawyer that the lawyer representing the witness is not certain of the validity of the objection, and is willing to give it further thought.

[24] However, until the lawyer representing the witness actually advises that the undertaking will be answered, the questioning lawyer is entitled to proceed on the basis that the undertaking has not be given, because it has not.

[25] Furthermore, it is not appropriate to "take under advisement" a host of requests for undertakings where the result is that the questioning has substantially been frustrated. That sets up the dynamic for what is, in essence, written interrogatories. Questions are asked. Answers are deferred until the witness has at least given it more thought and possibly has had a discussion with legal counsel about what the answer is and whether it should be given. They are then provided as answers to the undertakings.

Adjourned vs Concluded

[26] Without getting an answer as to whether several undertakings will or will not be given, a complaint that the questioning lawyer cannot adjourn his or her questioning and must conclude it rings hollow. The statement that a request for an undertaking is "taken under advisement" is *intended* to be a non-answer *and* non-commitment to whether the topic can even be explored. Having frustrated the questioning, the claim by that party that the questioning is over carries little strength.

[27] Similarly, where a multitude of objections are made to questions that are later found to be proper, the assertion that the questioning lawyer has "concluded" also rings hollow. By making an improper objection, the lawyer representing the witness has frustrated the examination. Had the question been answered, the questioning lawyer may have gone in a variety of directions exploring the subject. Questions are often determined based on the answer just received. But once the question is objected to, and perhaps a month later ruled upon, the witness has then had plenty of opportunity to consider the question and the answer, and likely had the opportunity to formulate an answer based upon the arguments made in the course of the application. This also frustrates the questioning process. I do not accept the proposition that the questioning lawyer should have listed all the questions he or she wanted answered and waited for a ruling on

whether they were proper. Very often, the questioning lawyer does not know what the questions will be until there has been an answer to the previous question.

[28] A lawyer conducting questioning is entitled to a reasonably efficient process of asking proper questions and obtaining proper answers. Rule 1.2 specifically directs the parties, their lawyers, and the Court to use the rules "to provide an effective, efficient, and credible system of remedies and sanctions to enforce these rules and orders and judgments."

[29] I agree with Farrington, J. in ***NEP Canada ULC v MEC Op LLC***, 2016 ABQB 186. At paragraph 33, he said this:

> It is fundamental to our system that questioning by a party adverse in interest be permitted to continue without interruption within reason for the purpose of discerning the facts in the litigation. That is the nature of the adversary system.

[30] At paragraph 51, he made the point that the questioning party is entitled to have a useful transcript. Frequent and intrusive and mostly unfounded objections interfere with that right.

Was the Witness Properly Informed?

[31] Another point of contention that has arisen in this application is the plaintiff's assertion that the witness (the corporate representative) was not properly informed before attending for questioning. Her evidence discloses that she did take significant steps to inform herself, but her main weakness, in terms of knowledge of the Bank's information, was in connection with the Bank's work in connection with prevention of fraudulent activities.

[32] She is a bank manager of one of the branches that the plaintiff attended to obtain bank drafts, but she had no direct interaction with the plaintiff. All that was done through tellers. The Bank originally selected as corporate representative the bank manager at the other branch, where most of the Bank drafts were obtained, but then changed its selection of the witness only shortly before the questioning.

[33] Given the nature of the claim, and the detailed knowledge required of a representative of the Bank as to the Bank's general corporate level of knowledge of fraudulent activities being perpetrated on its customers, and the Bank's steps, if any, to combat that, the Bank might have produced a representative who worked in the fraud prevention area, but it is not obvious to me that it was inappropriate to produce a bank manager who supervised the activities in one of the Banks were the plaintiff dealt.

[34] The plaintiff asked for a host of undertakings about the Bank's approach to fraud prevention and many of them can likely only properly be answered by someone specifically knowledgeable in the area. Given this circumstance, it is appropriate for the plaintiff's counsel to examine someone who works in the fraud area with the Bank, and it is my understanding that arrangements have been made for that purpose, subject to a dispute over conduct money.

Conduct Money

[35] In addition to making rulings on the propriety of the questions and request for undertakings, I have been asked to give some directions as to the payment of conduct money.

[36] The statement of claim was filed in the Judicial Centre of Calgary, where the plaintiff's son lives (and where both plaintiff and defence counsel are based), but all of the activity in question, (except for the plaintiff's son's attendance at a Calgary branch, mentioned above) took

place in Lethbridge. All of the tellers and the bank managers involved in the dispute work, and presumably live, in Lethbridge.

[37] The Bank has produced its corporate officer for questioning in Calgary, without the payment of conduct money, but wants conduct money paid if other employees, or former employees, of the Bank are required to attend in Calgary for questioning. It has offered questioning of those witnesses to take place without conduct money in Lethbridge. In the case of the Bank's representative who can speak to fraud prevention issues, it has proposed that questioning take place, without conduct money, by way of video conference. That person is in Toronto.

[38] In light of the fact that the proceedings should very likely have been brought in Lethbridge in the first place, the plaintiff cannot complain if her lawyer is required to attend in Lethbridge to question employees or former employees of the Bank. I would expect counsel to cooperate with each other to try to ensure that those questionings take place back-to-back or on consecutive days, since both plaintiff and defence counsel are based in Calgary.

[39] The other alternative would be to require that each of the employees or former employees make their way to Calgary for what might be an examination lasting well under one hour. That would likely involve paying hotel fees, mileage, meal costs, and witness attendance fees.

[40] The Foundational Rules direct that the Court and the parties are to find the most efficient way to find a resolution to the case. In my view, that involves counsel going to Lethbridge, approximately a 2 ½ hour drive up from Calgary, to conduct questioning using a schedule they have designed to be efficient.

[41] For the examination of the former bank manager who is no longer employed by the Bank, of course the Bank does not direct how she spends her days, so the plaintiff will have to pay her conduct money for her attendance.

[42] In respect of the witness who is knowledgeable about fraud matters, it is my understanding that this witness is based in Toronto, where the Bank has its head office. Had the Bank chosen a witness from Toronto to be its corporate representative in Alberta, I would not have directed conduct money from Toronto to be paid, since the Bank has a very active presence in Alberta, but if the plaintiff wishes to examine this witness, then her choices are either to pay for airfare, hotel (likely two nights), meals, and conduct money for that witness' attendance in Calgary, or to conduct the questioning via videoconference using facilities that are available at the defence counsel's office since they maintain an office in Toronto.

[43] My recommendation is that videoconference be used. It would be less expensive and likely could be arranged more quickly and easily than an attendance requiring the witness to spend, in practical terms, three days in total to travel to Calgary, testify, and then travel back to Toronto. Given the nature of the examination that I expect will take place, I believe that the witness could be fully prepared at a distance, and have available the various documents produced by the Bank to date in connection with this claim. If further documents are identified and necessary for examination during the course of the questioning, the witness may be able to locate them more easily in Toronto, have them sent to plaintiff's counsel in Calgary electronically, and possibly be able to continue the examination without a lengthy break.

[44] But if no agreement can be reached, the plaintiff will have to follow the *Alberta Rules of Court* and pay the appropriate conduct money.

Questions to Which Objections Were Made

[45] I now turn to the questions to which objections were made. The questions were listed in Appendix "A" to the Bank's brief. I will use that list for the numbering and the wording of the questions, provided that where the objection was withdrawn, I will simply skip over that number.

1. *Do you know who made the decision to refuse Mrs. Franiel's demand for compensation?*

[46] The plaintiff argues that this information is necessary because counsel wants to know who was the focal point of the dispute. Counsel wants to know if all of the information that was available to the person who actually made the decision at that time has been produced.

[47] Certainly, the name of the witness, by itself, is not subject to "privilege". The previous *Alberta Rules of Court* provided in rule 213(2) that, "No objection to any question is valid if made solely upon the ground that the answer thereto will disclose the name of a witness."

[48] This provision has not expressly been carried forward in the current *Alberta Rules of Court*, but neither has it been changed. Rather, the proper grounds of objection are listed in rule 5.25 (2), although item (d) sets out the general wording, "any other ground recognized at law". The general law, however, is that information to identify a witness is not privileged: ***Goodswimmer v Canada***, 2005 ABQB 479 at para. 28. I do not believe that that approach changed with the introduction of the current *Rules* in 2010.

[49] The objection was made on the basis that the identification of who decided not to compensate the plaintiff is subject to "litigation privilege". In response to this application, the reason for the objection was expanded, to assert that the information is not relevant or material to the action.

[50] I asked in oral argument how the refusal was communicated, and is my understanding, from the discussion, that it was communicated by in-house legal counsel for the Bank.

[51] I do not understand the assertion that the information is subject to "litigation privilege". I presume the refusal to compensate the plaintiff was given before the lawsuit was commenced. It is therefore not part of the defence solicitor's brief, as "a report made in contemplation of litigation for the instruction of counsel". It is the alleged conscious failure to provide compensation for a tort.

[52] The correct starting approach is this:

> At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry.

Weatherill (Estate of) v Weatherill, 2003 ABQB 69 at para. 16.

[53] In my view, plaintiff's counsel has identified a "rational strategy" for wanting to know the answer to the question if we take into account the fact that exemplary damages have been sought. That is, if the refusal to provide compensation was made at the first instance by someone without access to the Bank's policy or procedural guidelines, or alternatively by someone who

had access to those guidelines but made the decision contrary to the things said in them, the inquiry might be proper. It might have a bearing on the claim for exemplary damages.

[54] On the other hand, if the decision to deny compensation was made only in association with the Bank's legal counsel, then the proper objection is that the question is attempting to probe matters which are the subject of solicitor and client privilege.

[55] If the denial was made after obtaining legal advice, then the answer as to who formally made the decision is not relevant. The Court is entitled to assume that the reasons for denial are those now being litigated in this lawsuit.

[56] No discussion was had in argument, either in the briefs or in oral argument, about plaintiff's claim for exemplary damages, and therefore for the time being I decline to make a ruling on this question.

[57] However, the absolute refusal to answer is troubling; the Bank may want to identify the circumstances under which the decision was made, *i.e.* whether the refusal was a decision made locally, without the involvement of legal counsel, or only in association with or following the involvement of the Bank's legal counsel, in order to oppose the claim for exemplary damages. If the Bank continues to assert that this information is not relevant, then the Bank will have some strong opposition to a later decision that *it* wants to adduce that evidence at trial.

2. *Did you have any involvement in the decision to deny Mrs. Franiel's demand for compensation?*

[58] This involves the same topic as the first question, and the arguments are essentially the same. My approach is the same. I decline to make an order at this time.

3. *Did you have any involvement in this litigation prior to the departure of Candice Mazzuca from the Bank?*

[59] Ms. Mazzuca was the previous Bank manager of the branch at which most of the Bank drafts were drawn. Her involvement, and the significance of the last-minute substitution of the corporate representative because Ms. Mazzuca is no longer employed by the Bank, is the subject of certain questions discussed below. She is said to have made statements against the Bank's interest, including the fact that she expected to be fired as a result of this sequence of events.

[60] The question was asked in connection with plaintiff's counsel's attempt to determine the extent to which the corporate representative had taken steps to inform herself. The objection made at the time was that the question dealt with the witness' involvement in the litigation, an objection which I do not understand. The expanded explanation in the Bank's brief is that it was not relevant or material to the pleadings. Furthermore, the Bank objects on the basis of "litigation privilege".

[61] In oral argument, Bank's counsel pointed out that the witness was prepared, and subsequent evidence demonstrated this.

[62] In my view, the witness' knowledge of the facts in issue and her preparation for the questioning were proper subjects of inquiry, and although information was subsequently provided, this question must be answered.

4. *Do you have knowledge as to why you hadn't seen [a document produced by the Bank entitled "Protecting the Elderly from Fraud and Financial Abuse" published March 13, 2017, online]?*

[63] Plaintiff's counsel asserts that knowledge by the Bank has multiple levels. The document in question is apparently a Toronto-Dominion Bank blog, and it specifically describes "red flags" when dealing with elderly customers and specifically discusses "frequent large withdrawals of money in a short period of time, or unexplained liquidation of investments" and "conversations reveal unexpected lottery win, a new fiancé, or other life changes."

[64] However, this manager of a branch in Lethbridge was unaware of it prior to this litigation. Counsel was attempting to explore the extent to which the Bank attempts to educate its employees on fraud prevention.

[65] Defence counsel argued that the witness cannot speak to why she did not see something. However, she is produced as the Bank's representative and her answer is not limited to her own personal knowledge. An undertaking may have been appropriate, as opposed to an objection.

[66] Counsel also asserts that the question is "illogical", although I do not understand that assertion. She further argues that the information is not relevant or material and that "questions seeking information directly relating [to the witness'] own conduct have no bearing on any issue raised in the pleadings nor can that information reasonably be expected to significantly help determine any issue raised in the pleadings." I also do not grasp this argument.

[67] In my view the inquiry was appropriate. A document produced by the Bank seems to have a significance to the claim and the Bank's defence, and plaintiff's counsel was entitled to explore why it was that she, as a bank manager of a branch where some of the frauds were partly carried out, was not aware of it, and why she, as corporate representative of the Bank, was apparently unable to answer questions about it.

[68] The question must be answered.

5. *Would you agree with me that [the document discussed in question number 4] isn't talking about impersonation fraud; it's talking about frauds such as the tax frauds, the lottery frauds, those sorts of frauds where it's the customer was being fooled?*

[69] Plaintiff's counsel was attempting to clarify the distinction between two different aspects of fraud concerns: one where the Bank is being defrauded by someone impersonating himself or herself as the customer (where the Bank is the direct intended victim), and the fraud perpetrated on the customer, such that that the customer becomes the criminal's agent in obtaining the Bank draft.

[70] The Bank's counsel objected that the document speaks for itself and that the witness would not interpret it.

[71] The distinction between the two kinds of fraud is important in order to properly understand the questions so the witness can properly answer them. This is the distinction that plaintiff's counsel was entitled to address and ensure that the witness understood.

[72] It was not asked for the purposes of interpreting the document, but rather to focus the witness' mind on what was being asked. This is appropriate to make sure that the questions are understood properly, and therefore that the answers may be relied upon.

[73] The question was appropriate and must be answered.

6. *Will the Bank acknowledge that there is something akin to an arms race going on between the Bank and the criminals where every time the Bank takes a step to try to thwart or prevent their activities they modify their behaviour in a way to try to circumvent the Bank's efforts?*

[74] The question was, despite the clourful language about the "arms race", attempting to explore the Bank's corporate (not the witness' personal) knowledge that fighting criminals who perpetrate frauds involves an ever-changing strategy to keep one step ahead of the criminals. Plaintiff's counsel acknowledges that the question was worded awkwardly.

[75] The Bank's counsel objected on the basis of relevance. The expanded explanation was that the Bank cannot speak to what criminals know or do and cannot reasonably provide a response to the question. The Bank further argues that whether or not it acknowledges that that an "arms race" exists is not relevant or material.

[76] The question was not focused on what criminals know or do. The question was focused on the *Bank's* knowledge that there is an ever-changing strategy of fraud by criminals to which the Bank must respond.

[77] Although the Bank's central defence is that it simply does not owe a duty of care to the plaintiff, at paragraph 63 of its statement of claim the Bank set out, in the alternative, that if it owed a duty of care it met the standard including, "providing reasonable oversight and verification to ensure all transactions were legitimate".

[78] What that "reasonable oversight and verification" was, if there is a duty of care, is one of the factors in dispute in this lawsuit. The question was proper, notwithstanding its colourful wording, and must be answered.

7. *Well, is the Bank evolving its responses to what Mr. Haywood describes as "constantly evolving techniques of the criminals"?*

[79] The Bank's counsel objected on the basis that the question is not relevant. The expanded explanation in the brief is that a response would have no bearing on any issue raised in the pleadings, nor would it provide evidence that can reasonably expected to significantly help determine one or more of the issues raised in the pleadings. That is, it is neither relevant nor material.

[80] This question tends to underscore the irony of the prior objection, because the document being examined on at this point (the Bank's document 113), includes an article apparently written by John Haywood, VP, Canadian Fraud Operations for the Toronto Dominion Bank. In this article, he states,

> While TD is constantly looking to improve its detection and analytical capabilities, fraudsters are also constantly evolving their techniques – and at an incredibly fast pace. As such, FC & FMG is constantly reengineering its business model to respond to fraudsters' ever-changing techniques and investing in new and modern capabilities to detect and analyse fraud.

[81] Although this document is produced by the defendant Bank, the mere fact of production is not an acknowledgement of the truth of its contents. This question was therefore intended to explore what the Bank's own VP of Canadian Fraud Operations said on this topic, and whether what he said is true. The document is dated March 29, 2018, which is squarely within the

relevant period of time, because the fraud activity on the plaintiff started March 12, 2018 and continued until January 11, 2019.

[82] The question tends to focus directly on one of the defences raised by the Bank. It was a proper question and must be answered.

8. *Well, in your leading up to Mrs. Franiel being defrauded, did the Bank make any changes to its techniques in order to respond to the constantly evolving techniques being used by the criminals?*

[83] This question is related to the previous one, and the objection was made on the same basis.

[84] My view is the same. The question was proper and must be answered.

9. *As a branch manager, would your branch encounter from time to time people who were trying to send money off on something that was discovered to be an attempted fraud to send money supposedly to the Canada Revenue Agency?*

[85] The objection was made that "TD won't speak to its other customers." The expanded explanation is that the question was asked to admit similar fact evidence, and, "the plaintiff's advance no argument that TD ought to have been able to prevent the alleged fraud based on past experiences". The question is said to have been irrelevant.

[86] The question did not require the Bank to disclose any particular confidential information of other customers, or require speaking to them. The question was clearly asked to determine the level of knowledge that the Bank, at this branch level, had at the relevant time of the existence of the fraudulent activity of which Mrs. Franiel was a victim.

[87] The plaintiff is entitled to explore the Bank's knowledge of the criminal activity apparently being perpetrated on its customers, in order to assert that the Bank did not provide "reasonable oversight" over the transactions being conducted, being a defence specifically raised by the Bank.

[88] The question was proper and must be answered.

10. *You're concerned at that point – the teller asking that question is concerned that perhaps the customer may be being defrauded by someone, and they want to be sure that they're not sending money off on the CRA scam or a lottery scam or something similar, isn't that so?*

[89] The question was asked in the context of trying to determine what questions tellers routinely ask customers when bank drafts are requested, and why they ask those questions. The evidence presented by the Bank is that some tellers, at least, ask *why* the bank draft is being requested. Plaintiff's counsel was trying to explore why that question is asked.

[90] The objection was made that the question was hypothetical as to what a teller might have been thinking and why she was asking a question.

[91] The question was not hypothetical. The question was asked to determine the Bank's procedures and practices in the course of preparing a bank draft. There was evidence that some tellers, at least ask some important questions. The line of inquiry was an attempt to determine what training or instruction tellers are given, and the reasons for asking the question, "Why".

[92] The question was proper and must be answered.

11. *Is the Bank aware that the criminals know what sort of probing questions the customers are liable to be asked when they attend to get a Bank draft to pay the criminals with?*

[93] The Bank's counsel objected on the basis that the witness cannot speak to what criminals are doing. The expanded explanation is that the information is not relevant or material and, furthermore, TD's conduct must be assessed on an objective standard.

[94] The question was not what the criminals know, but what the *Bank* knows about the *modus operandi* of fraudsters manipulating the Bank's customers in order to obtain Bank drafts. That has a bearing on the appropriate level of oversight that the Bank says it conducted.

[95] The question was proper and must be answered.

12. *Are you telling me the Bank has no idea that the criminals prime, so to speak using a pump analogy, prime the victims that they're going to be asked certain questions by the Bank and what the answers to these questions should be?*

[96] The objection was made on the same basis as that made to the previous question. My view is the same. The question was asked to try to determine the Bank's knowledge of the criminals' *modus operandi*.

14. *So what use, then, is the action of that Rubina took?*

[97] This relates to the digital notation on the plaintiff's Bank account, made by a teller in Calgary, reflecting the advice from the plaintiff's son that he thought his mother might be being defrauded.

[98] The Bank's counsel objected without explanation, but in reply to this application, she asserted that the question was "posed in a rhetorical manner that was inappropriate". In further explanation, she asserted that TD personnel have advised the plaintiff's son the purpose of the TD warning message, and that they also advised him of the Bank's extremely limited ability to take any action with respect to the plaintiff's accounts on his instructions.

[99] The inquiry is unrelated to the issue of the plaintiff's son not having authority to instruct the Bank. The question relates to the Bank having specifically been given knowledge that the plaintiff might be the victim of fraud, and having placed some sort of notation on her account which, as the Bank has now explained, appears to have been completely ineffective, and as explained by the witness in questioning, was almost doomed to be ineffective.

[100] The question was asked, perhaps a little awkwardly, as questions often are in the moment during questioning. The question was clearly intended to ask, "How *could* the notation have had any effect?" The question is relevant to the Bank's defence that it exercised "appropriate oversight", specifically in circumstances where it had been put on notice of the possibility of fraud being committed on one of its customers, regardless of whether the person providing the Bank with that information had a power of attorney or otherwise. The answer might avoid the obvious next question, which would be, "Is there something else she might have done?"

[101] I would expect that this is a topic that *the Bank* will want to address in evidence at trial. It is clearly relevant and material.

[102] The question was proper and must be answered.

15. *Did she tell [the plaintiff's son] that the Bank didn't, "Have a leg to stand on," and that she would not, "Try to defend", the TD's actions in this matter?*

[103] This question was asked about statements alleged to have been said by the Bank manager at the branch where most of the bank drafts were drawn, who later left the Bank's employ, when the frauds were discovered.

[104] The objection made at the time of the questioning was that question was not relevant to the material facts "as it relates to a conversation after the relevant events occurred." The expanded explanation for the objection is that the corporate representative cannot be asked to confirm whether a former TD employee made a statement to the plaintiff's son after the alleged loss occurred, and that any response would constitute hearsay evidence. Furthermore, the information is not relevant or material. Statements made by any TD employee regarding their own personal views would have no bearing on any issue raised in the pleadings, as it is not relevant or material.

[105] I do not understand the reference to "hearsay evidence." The questioning lawyer was putting to the Bank's representative information that he plans to tender at trial and giving the Bank's representative an opportunity to confirm or deny the evidence. If the question is said not to have to be answered, I doubt that the assertion of "hearsay" will survive an objection at trial, and then plaintiff's counsel might well have a proper basis to argue before the trial judge that the Bank should not be permitted to deny the evidence because it refused to even allow the opportunity in questioning. My job is to try to make sure that the trial judge is allowed access to the proper evidence that is presented under Part 5 of the *Alberta Rules of Court*. The trial judge can then rule on whether the evidence is "hearsay".

[106] My view is that these statements were alleged to have been said by a TD employee who was in a position of authority in respect of actions that had occurred "on her watch". They would be statements against interest made on behalf of the Bank. They reflect a level of understanding as to the oversight that the Bank normally exercises, and the possible failure of it here. At trial, the Bank may be able to demonstrate that they represented nothing more than her personal opinion, but for the purposes of questioning, the question was clearly appropriate and must be answered.

16. *Did she tell [the plaintiff's son] at the same meeting that her manager of customer service had told her, "Hey, there is this $10,000 limit," and, "It's common knowledge that people, you know, the criminals, the guys trying to hide it, come in and do it just under".*

[107] The objection here was made in the same basis as the objection of the previous question, although counsel also argues that the question puts argument to the witness in the guise of a question. I do not follow this expanded argument.

[108] The question was clearly intended to explore, based on a statement against interest, the Bank's corporate knowledge of the sorts of red flags that the plaintiff asserts were apparent here. The statement was made by a person in authority with the Bank at the time, apparently based on some level of knowledge about the criminals' *modus operandi*.

[109] The question was proper and must be answered.

17. *And so Candice Mazzuca didn't tell [the plaintiff's son], then, that there was such a button, did she?*

[110] Ms. Mazzuca is the former Bank manager, no longer employed. The question related to a button that is said to be available to a teller when the teller is of the view that a fraud may be in progress. I presume it is to alert some security response.

[111] The Bank's counsel objected on the basis of materiality and that the question relates to events that occurred after the fact. In the expanded explanation in the brief, counsel asserted that the witness could not be asked confirm whether a former TD employee made a statement to the plaintiff's son after the alleged loss occurred, the question was inappropriate, and any response would constitute hearsay. She also asserts that the question put argument to the witness in the guise of a question.

[112] The question related to a series of statements against interest which the plaintiff asserts were made by Ms. Mazzuca. None of these grounds of objection have any merit for pre-trial questioning purposes.

[113] The question was proper and must be answered.

18. *Did Candice Mazzuca say to [the plaintiff's son] with respect to the frauds ..., "Like I said, this isn't something new for us at TD and any major Bank. I'll tell you this scam has been going on for years, so it's not like we've never heard of this scan before"?*

[114] The same arguments are put forth, and my view is the same: this question related to a statement against interest made by a Bank employee in a senior position, and the fact that Ms. Mazzuca is no longer employed by the Bank is not a proper ground of objection. The appropriate inquiry should be made, because the question is proper and must be answered.

19. *Did Candice Mazzuca say to [the plaintiff's son], "I'm going to get fired one way or the other; right"?*

[115] The arguments advanced are the same as for the last several questions, and my view is the same: the question was proper and must be answered.

21 and 22. *Was Candice Mazzuca fired? Do you know why Candace Mazzuca left the Bank?*

[116] These questions arise out of question number 19. Whether Ms. Mazzuca was disciplined, to the point of dismissal, for allegedly acting improperly in this matter, whether she was dismissed for reasons completely un-related to this action, or whether she resigned "for personal reasons" as the Bank has advised the plaintiff, is neither relevant nor material to this claim - at this point.

[117] It is my understanding that plaintiff's counsel is going to examine Ms. Mazzuca as a former employee of the Bank. It is possible that evidence elicited from Ms. Mazzuca may change my perspective on the relevance and materiality of the topic, because issues of credibility may arise, and the analysis of credibility may be affected by the circumstances of her departure from the Bank.

[118] But the question need not be answered at this stage. It may properly be re-visited at a later stage.

The Undertaking Requests

[119] I now turn to the undertaking requests.

3. *To provide an unredacted copy of document 111.*

[120] Document 111 is a blog entitled, "Red Flags for the Front Line: How to Identify Elder Abuse". The second page, as produced, has been redacted as being "not relevant". This issue

was directed to be resolved by providing to the Court an unredacted copy of the document or examination. That has been done.

[121] The redacted portion consists of online comments from six people, none of whom appear to be witnesses or possible witnesses in these proceedings, and simply contain favourable comments about receiving the information. This portion is both not relevant and it possibly contains confidential information as to the identity of the people who commented on the blog, assuming that their comments were not available to the public when they were made.

[122] The unredacted copy need not be produced.

9. *To inquire and advise as to what strategies and innovations the strategy solutions and innovations team has come up with to prevent the type of fraud that was perpetrated on Mrs. Franiel.*

[123] The Bank has advised that it will respond to this request for undertaking, provided that a "sealing order" is granted, and that Bank's counsel's understanding is that such an application must be brought before the associate Chief Justice.

[124] I pointed out that that there does not appear to be a need for a "sealing order" as there is no need for this information to be provided to the court, but rather to Mrs. Franiel's legal counsel. Affidavits of records and questioning transcripts are not to be filed with the court unless they are necessary for an interlocutory application or the trial.

[125] There may be a desire to have a confidentiality order that directs that the response shall not be provided to the Court except as the trial judge may direct.

[126] I directed counsel to give consideration to reaching consent on a form of order providing this level of confidentiality. If they are unable to agree, I reserve jurisdiction to consider and possibly make the appropriate confidentiality order.

10. *To make an inquiry of the fraud detection department and advise as to when the Bank first became aware of the lottery scam.*

[127] The objection advanced is that when the Bank first became aware of the "lottery scam" is not relevant or material.

[128] I disagree. The request related to the Bank's level of knowledge of the criminals' *modus operandi*, and the extent to which the Bank's oversight may have been appropriate. The request must be complied with.

11. *To make an inquiry of the fraud prevention department at TD as to their knowledge of how the income tax or CRA scam works and when the Bank first became aware that it was being perpetrated on customers of the Bank.*

[129] My view is the same: the request for undertaking was appropriate and it must be complied with.

13. *To make an inquiry of the fraud prevention department as to whether they are aware that the criminals know what sort of probing question the customers are liable to be asked when they attend to get a Bank draft to pay the criminals with, and whether the Bank is any idea that the criminals prime the victims that they're going to be asked certain questions by the Bank and what the answers to those questions should be.*

[130] The objection was made that any response would require speculation on the part of the corporate representative. I do not follow this line of objection.

[131] A further objection is made that the Bank is not a position to advise what criminals do or do not know nor how they operate. Aside from the fact that the question focusses on what the Bank knows, the article published by the VP, discussed above, discloses that the Bank *is* alert to this level of knowledge, so this objection fails.

[132] A further objection is raised that the corporate representative is not required to attest to information outside of her knowledge or TD's knowledge, or inform herself in matters outside of her control. But she is produced as the corporate representative. She will likely not know the fraud prevention department's level of knowledge unless she asks.

[133] The corporate representative was asked to make an inquiry of the Bank's fraud prevention department. This was clearly an appropriate request and must be complied with.

16. *To make an inquiry of the fraud detection department as to whether the Bank has received any information from either law enforcement, its own experts, or people familiar in the area that the criminals believe that if they ask for more than $10,000 will cause a problem so, as a result, they ask for less than $10,000.*

[134] Similar objections to those raised above were made. The question relates to the Bank's knowledge of the *modus operandi* of criminals, and the request to make an inquiry of the fraud detection department was appropriate and must be complied with.

17. *To make an inquiry of Mr. Hodge and advise what, if any, competitive advantage the Bank is obtained from his department's fraud prevention and detection through analytical innovation, as it respects the types of frauds in this matter.*

[135] This question focuses on what competitive advantage the TD Bank might have as compared to other banks in the Canadian market, and the question asks for irrelevant information as it was posed.

18. *To make an inquiry as to whether finding new ways to protect the Bank's customers and reputation as the Bank's top priority.*

[136] This request arises out of a document that makes a statement in the nature of "puffery" for purposes of marketing the Bank's services. It is unlikely that a proper answer could be made available as to whether security is actually the Bank's "top priority" and in any event it is irrelevant.

35. *To provide what reason code was put by the Bank on Ms. Mazzuca's record of employment when it was filed with the government.*

[137] This was an undertaking request to find out the reason why Ms. Mazzuca left her employment with the Bank, which I have discussed above. It need not be responded to at this time.

Conclusion

[138] An order will issue detailing the specific directions about objections to question and undertaking requests.

[139] The plaintiff is directed to pay appropriate conduct money if she wishes to examine any Bank employee other than the corporate representative in Calgary. If the plaintiff elects to examine employees in Lethbridge who are employed there by the Bank, no conduct money is payable. If the plaintiff wishes to examine the representative of the Bank's fraud detection department, assuming that person is not employed in Calgary, the plaintiff may do so in Calgary after paying appropriate conduct money. Otherwise, the examination may take place by videoconference without the payment of conduct money.

[140] As Ms. Mazzuca is not a party and not a Bank employee, the normal rules dealing with payment of conduct money must be followed.

[141] The corporate representative is directed to return to questioning for the plaintiff's examination to be completed.

[142] The plaintiff was very substantially successful in all aspects of the application, with the main exception being as to conduct money of up-coming examinations. That point was a very small part of the application. Accordingly, in my view it is correct to say that the plaintiff was substantially successful overall.

[143] If counsel are unable to agree upon costs, they may make arrangements to address the Court.

Heard on the 15th day of January, 2020.
Dated at the City of Calgary, Alberta this 27th day of January, 2020.

A.R. Robertson, Q.C.
M.C.C.Q.B.A.

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