CITATION: Iroquois Falls Community Credit Union Limited v. Co-operators General Insurance Company, 2009 ONCA 364
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COURT OF APPEAL FOR ONTARIO

Doherty, Cronk and Juriansz JJ.A.

BETWEEN

Iroquois Falls Community Credit Union Limited (by its liquidator, The Deposit Insurance Corporation of Ontario)

Plaintiff (Respondent)

and

Co-operators General Insurance Company and Cumis General Insurance Company

Defendants (Appellants)

and

Ruth E. Parisi and Ross, Pope & Company

Third Parties

and

Donna Simmons, Aline LePage, Lana Tremblay, Beverly Devine, Jackie Delaurier, John Moon, Ralph Wilkins, Larry Porter, Frank Lachance, Ron Trottier, Raymond Martineau, Sergio Festarini, Gerald Poirier, and Credit Union Central of Ontario

Fourth Parties

and

Cumis General Insurance Company

Fifth Party

Jamieson Halfnight and Christopher McKibbin, for the appellants

Guy J. Pratte, Jane M. Bachynski, and Derek Leschinsky, for the respondent

Sean Lawler, for the third parties

Sara J. Erskine, for the fourth parties

Heard: November 4, 2008

On appeal and cross-appeal from the judgment of Justice C.D.A. McKinnon of the Superior Court of Justice dated December 20, 2007 and reported at 2007 CanLII 56483 (ON S.C.).

Juriansz J.A.:

A. OVERVIEW

[1] The dispute in this appeal is whether and, if so, to what extent, losses due to an employee's misconduct are covered by a fidelity insurance bond. The question arises in the context of an appeal and cross-appeal from a decision on a motion for summary judgment involving a number of parties. Summary judgment was granted in the main action against the appellants, Co-operators General Insurance Company and Cumis General Insurance Company (the "Insurers"), in favour of the respondent, Iroquois Falls Community Credit Union Limited (the "Credit Union") under the fidelity insurance bond in the amount of approximately $1.8 million plus prejudgment interest.

[2] The Insurers had issued the fidelity insurance bond to the Credit Union. The Deposit Insurance Corporation of Ontario ("DICO"), as liquidator of the Credit Union,

made a claim under the bond for losses due to the alleged dishonest misconduct of Donna Simmons ("Simmons"), the general manager of the Credit Union, and others. The Insurers commenced a subrogated third party action against the Credit Union's auditors during the relevant period, Ross, Pope and Company, alleging that they failed to identify, at an early stage, the losses due to the alleged misconduct. The third parties brought a fourth party claim against both the Credit Union's directors and the Credit Union itself alleging contributory negligence. As well, Simmons brought a fifth party claim against Cumis General Insurance Company claiming indemnity in respect of director and officer ("D&O") insurance coverage for her.

[3] Only the Insurers and the third parties defended the Credit Union's motion for summary judgment. The fourth parties chose not to participate in the motion. In granting summary judgment in favour of the Credit Union and against the Insurers, the motion judge stipulated that the judgment was binding only as between the Credit Union and the Insurers. The motion judge reserved for trial the third, fourth, and fifth party claims.

[4] The Insurers' appeal is a broad attack on the motion judge's decision granting summary judgment. They submit that the motion judge: should not have interpreted the bond; interpreted several provisions of the bond incorrectly; was not entitled to make the inferences of fact that he did; incorrectly determined factual issues; used the wrong approach in calculating the quantum of the loss; and, erred in holding that his findings applied only to the main action.

[5] The Credit Union argues strenuously that the Insurers failed to put their best foot forward in response to its summary judgment motion. The Credit Union points out that it filed the detailed results of its massive forensic investigation in support of its motion. The Insurers did not cross examine its expert forensic accountant and failed to file any substantive response to her conclusions. The evidence of the directors and employees of the Credit Union was also available. The Credit Union submits that there would be no new evidence at trial and asserts that the motion judge was as well positioned as a trial judge to interpret the bond and apply it to the complete evidentiary record, which remains uncontested. The Credit Union argues that instead of responding to its material, the Insurers have raised some 19 grounds of appeal relating primarily to the interpretation of the bond. In addition, the Credit Union cross-appeals the motion judge's denial of part of its claim on the basis that the bond's exclusion for "Indirect Loss" applied.

[6] Despite the Credit Union's able argument, I would allow the appeal. A summary judgment motion judge should refrain from deciding issues of fact where significant evidence, albeit uncontested, is reasonably capable of supporting more than one inference. Here, the findings of fact that would determine whether two key conditions in the bond – the condition for "Termination as to an Individual" ("Termination") and the condition for "Notice of Loss", which are discussed later in these reasons – apply should be made at trial. As well, whether the Credit Union's claim under the bond should be assessed as a single loss resulting from a single "scheme" of employee misconduct, as inferred by the motion judge, or, as an assortment of individual losses resulting from

different employee acts during the relevant period, should be decided at trial. If it is determined that the Credit Union's claim is properly treated as an assortment of losses that must be analyzed individually, or if the Condition for Termination is found to apply, the quantification of damages will also be a genuine issue for trial. These conclusions dictate that the entire summary judgment be set aside.

[7] As I explain later, given my disposition of the appeal, I would regard the cross-appeal as moot. As well, it is not necessary to deal with the position of the fourth parties that all the motion judge's findings of fact and credibility concerning them do not bind them in the remaining third, fourth, and fifth party actions.

[8] I do not accept the Insurers' submission that the motion judge should have left the interpretation of the bond to trial. In determining whether there was a genuine issue for trial, the motion judge had to apply the bond to the uncontested facts before him. Nor am I persuaded that this court, after deciding that the action should proceed to trial, should leave the bond to the trial judge to interpret on a full record. The bond's interpretation was hotly contested and the trial judge's conclusions would likely be appealed to this court. Deciding the contentious issues of the bond's interpretation that are completely argued before us and will inevitably arise again at trial will contribute to the efficiency of the trial that must take place.

[9] As my interpretation of the bond will make apparent, on the record before him the motion judge had ample evidence to decide some of the issues in favour of the Credit

Union. I discuss the interpretative issues in the context of the evidence in the motion record. I should not be taken, however, as deciding factual issues. As all the factual and interpretative issues are somewhat intertwined, it would be difficult to isolate the matters that can be finally decided on the evidence in the motion record. Moreover, at trial, trying to settle what isolated matters this court has already decided could prove a difficult exercise. It is better that all issues be allowed to go to trial. My intent is to assist the trial judge with the task of applying the bond, without foreclosing any party from adducing evidence at trial made relevant to the application of the bond given the interpretation of the bond in these reasons. It will be for the trial judge to decide the bond's application to the evidence at trial in light of these reasons.

B. BACKGROUND AND RELEVANT FACTS

[10] The Credit Union was established in the mid-1970s in the town of Iroquois Falls in northern Ontario. At the time of the events in question on this appeal, the vast majority (80% – 90%) of the Credit Union's members were current or former employees of Abitibi Consolidated ("Abitibi"), a pulp and paper company that was the main employer in the town.

[11] In the early 1980s, Abitibi started to scale back its operations significantly, which had a detrimental effect on the town's local economy.

[12] At around this time, Simmons started working at the Credit Union as a teller. She later became the office administrator. In 1987, she was promoted to general manager. In

this capacity, she was responsible for the overall operations of the Credit Union, including its lending activities.

[13] The marked decline in the town's local economy was reflected in the Credit Union's weakening financial position. By the early 1990s, many personal loans and mortgages extended by the Credit Union to its members had become under-secured as a result of worsening local economic conditions and the associated drop in local real estate values. The incidence of bad loans and bankruptcy filings by Credit Union members increased into and continued throughout the 1990s. It was in this deteriorating economic environment that the events relevant to this appeal arose.

[14] In a report dated September 4, 1991, the Ministry of Financial Institutions found a number of deficiencies attaching to certain loans made by the Credit Union, including a number of loans in excess of the $25,000 limit authorized by the Credit Union's by-laws, as well as unauthorized overdrafts and lines of credit. The report also identified that the Credit Union was not in compliance with statutory financial reporting requirements.

[15] In a report dated July 16, 1993, the Ministry of Finance, Credit Unions and Cooperative Services Branch found several contraventions of the Credit Union's by-laws, including unauthorized overdrafts and other irregularities in its lending activities and financial reporting.

[16] In late October 1996, a comprehensive examination of the Credit Union was conducted by the Credit Union Central of Ontario ("CUCO"). In a report dated January

24, 1997, the CUCO inspectors noted that the Credit Union's allowance for impaired loans had not been established in accordance with the applicable provincial by-law. The report also identified: incomplete application forms; inadequate credit investigations; lack of applications, effective credit investigations, and annual reviews of authorized overdrafts; and, other irregularities and deficiencies in control processes. This report was forwarded to the Credit Union's auditors.

[17] Another report conducted by the Ministry of Finance, Credit Unions and Cooperative Services Branch dated March 18, 1999, found irregularities and deficiencies in the Credit Union's internal controls, in particular, with respect to its lending activities, compliance obligations, and business practices. The report specifically noted that the Credit Union's allowance for impaired loans was still inadequate and failed to comply with the provincial by-law.

[18] In September 2001, DICO discovered a significant asset shortage at the Credit Union. Specifically, DICO became aware of a recent filing for bankruptcy by a member of the Credit Union that included the guarantee of unsecured indebtedness in the amount of approximately $750,000. The outstanding indebtedness was owed by the member's husband. This led to a voluntary request by the Credit Union's board of directors to be placed under the supervision of DICO.

[19] When DICO took over supervision of the Credit Union, it identified, in addition to the $750,000 unsecured amount previously discovered: numerous unauthorized advances

on lines of credit exceeding the board-approved limit of $5,000 for loans secured by wage assignments; numerous other unauthorized overdrafts; a number of loans in arrears; and, an unreconciled item on the Credit Union's bank reconciliation of approximately $600,000.

[20] DICO, as liquidator of the Credit Union, submitted an indemnity claim for losses caused by the dishonesty of an employee under the fidelity bond issued by the Insurers. The formal Proof of Loss made by DICO on April 25, 2002 alleged that during the period from 1991 – 2001, Simmons, either alone or in collusion with other employees, dishonestly and fraudulently removed approximately $432,000 from the Credit Union's vault and granted herself, her family members, and other members of the Credit Union illegal, improper, and/or unauthorized lines of credit and overdrafts totaling $1,445,512, as well as related further extensions of credit totaling $223,969. A claim was also made for an unreconciled bank balance of $7,852.61, as well as $50,000 for audit and record reconstruction expenses.

[21] The Insurers denied the entire claim. They asserted that:

> a) there was no coverage under the bond because the requirements for coverage under the employee "Dishonesty" provision of the bond were not met and, moreover, the loss was excluded by the "Unfaithful Performance" exclusion in the bond;
>
> b) if there was coverage under the bond, it terminated in either 1991 or 1998 based on the "Termination" provision of the bond and DICO's failure to submit the Proof of Loss within the time limits prescribed by the bond;

c) the losses claimed included amounts that the Credit Union would have incurred in any event in the ordinary course of business and, accordingly, were not covered by the bond;

d) the losses claimed included amounts excluded from coverage by the "Indirect Loss" and "Loans and Overdrafts" exclusions in the bond; and

e) the losses claimed for the $7,852.61 unreconciled bank balance and the $432,000 cash removed from treasury fell outside the scope of coverage under the bond.

[22] The Credit Union, by its liquidator, DICO, commenced proceedings against the Insurers on January 29, 2004. The third, fourth, and fifth party claims followed.

[23] After the completion of extensive pleadings, 24 days or part days of discovery, and the voluminous production of documents (the motion record consisted of 17 volumes), the Credit Union brought a motion for summary judgment for the determination before trial of a question of law, namely, its right to recover under the bond for the claimed losses stemming from Simmons' alleged misconduct.

[24] For the purposes of the motion, the parties submitted an Uncontested Statement of Facts by which they agreed that:

1. Simmons admitted to committing or engaging in the following acts from time-to-time during the period from 1991 to 2001:

   a) to removing cash from the Credit Union's treasury in the approximate amount of $253,000;

   b) to concealing the above through the creation, execution, and authorization of false or fictitious documents, entries, and postings into the books,

records, and computer system of the Credit Union, including the Treasury Register, Journal Vouchers, Teller Transaction Sheets, the General ledger, and the bank or current account reconciliations ("Cash in CUCO" or "cash reconciliations"). These transactions consisted of debits to the "Cash in CUCO" account and credits to the "Treasury Cash" account which gave the appearance of increasing the amount which the Credit Union had on deposit in its own bank account located at CUCO and decreasing the amount of cash which the Credit Union had in its treasury or vault in Iroquois Falls;

c) to improperly writing-off various loans and overdrafts and concealing these write-offs through the creation and use of various false or fictitious documents, entries, and postings into the books, records, and computer system of the Credit Union, including Journal Vouchers, Teller Transaction Sheets, the General Ledger, and the cash reconciliations. These transactions consisted of debits to the "Cash in CUCO" account and credits to the individual loan or overdraft member accounts;

d) to the use of false or fictitious entries on the cash reconciliations prepared by her to conceal an un-reconciled balance which grew over time to approximately $610,000 as a result of the above removal of cash from treasury and improper write-offs;

e) to failing to report delinquent overdrafts and/or lines of credit on the Credit Union's allowance for doubtful accounts and to failing to include these delinquencies in the provision for doubtful accounts in the Credit Union's general ledger or books;

f) to extending overdrafts and/or lines of credit to herself and staff, their family members, and to other Credit Union members in excess of the overdraft limit set by the Credit Union's Board of Directors of $5,000 secured by wage assignments;

g) to contravening the relevant provisions of the *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c. 11, and the Credit Union Lending Licence and By-Laws by extending or allowing the above overdrafts and/or lines of credit;

h) to concealing the above overdrafts and/or lines of credit through various methods, such as omitting or failing to disclose those on related loan applications, and by accessing the Credit Union's computer system in order to set up or increase preauthorized limits in the members' checking accounts which would allow those members to overdraw their checking accounts without the requirement for further human intervention and keep the account from being reported on any of the regular computer exception reports; and,

2. each overdraft and/or line of credit in the Credit Union's claim includes some amount of interest and/or service charges.
3. Simmons admitted to setting up and increasing the pre-authorized limits on several of the member accounts identified at her examination for discovery.

[25] The Insurers' position on the motion rested on the proper interpretation of the coverage provisions and exclusions of the bond. Their submissions mirrored the reasons they gave the Credit Union for denying coverage when the Proof of Loss was submitted.

[26] After a three-day hearing, the motion judge granted summary judgment in favour of the Credit Union in the amount of approximately $1.8 million plus prejudgment interest, broken down as follows:

a) $439,852.61 for cash taken from treasury, including the unreconciled bank balance, as at September 30, 2007;

b) $1,423,322 for impugned overdrafts, as at September 30, 2007, and as reduced for interest or service charges and any further recovered monies to the date of judgment;

c) $76,738 for related extensions of credit, as reduced for interest or service charges and any further recovered monies to the date of judgment;

d) $25,000 for audit expenses; and

e) $25,000 for records reconstruction expenses.

[27] The Insurers appeal to this court from the motion judge's decision. The Credit Union cross-appeals the motion judge's reduction of its claim by $200,000 on the basis that this amount came within the bond's exclusion for "Indirect Loss".

[28] I will refer to the motion judge's reasons pertinent to my discussion of each of the issues raised on appeal, as necessary.

C. ISSUES

[29] All the issues raised relate to the interpretation of the bond. In regard to the "Dishonesty" provision of the Insuring Agreement under the bond, I discuss the interpretation of:

a) Direct loss;
b) Dishonest act resulting in direct loss;
c) Manifest attempt to cause loss; and
d) Manifest attempt to obtain a benefit.

[30] I then discuss the following exclusions and conditions:

a) Condition for "Termination";

b) Condition for “Notice of Loss”;

c) Exclusion for “Loans and Overdrafts”;

d) Exclusion for “Unfaithful Performance”; and

e) Exclusion for “Indirect Loss”.

D. ANALYSIS

1. Interpretation of the bond – the “Dishonesty” coverage clause

[31] The “Dishonesty” provision of the bond’s Insuring Agreement under which the Credit Union’s claim was made provides that the bond covers:

> Direct loss of property resulting from dishonest or fraudulent acts of any employee, director or committee member, committed alone or in collusion with others with the manifest intent to:
>
> 1. Cause the insured to sustain such loss; and
>
> 2. Obtain financial benefit for any person or entity or for oneself, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other benefits earned in the normal course of employment.

[32] This clause sets out the following four requirements for coverage:

i. the insured must sustain a direct loss of property;

ii. the direct loss of property must result from the dishonest or fraudulent acts of an employee;

iii. the employee must have committed those dishonest acts with the “manifest intent” to cause the insured to sustain the loss; and

iv. the employee must have committed those dishonest acts with the “manifest intent” to obtain a financial benefit for any person or entity or for oneself.

[33] Each of these requirements is analytically distinct from the other requirements. All four requirements must be satisfied in order to trigger coverage under the bond.

i. Direct loss of property

[34] The "Dishonesty" provision of the Insuring Agreement provides that the bond insures only for "direct loss of property". Moreover, the bond contains an express exclusion for "Indirect Loss", which states that the bond does not apply to "[i]ndirect or consequential loss or damage, loss of use or loss of earnings or interest on property." As I have already explained, the requirement that there be a "direct loss of property" is analytically distinct from the requirement that the dishonest employee have the manifest intent to cause such a loss. I deal in this section only with the Insurers' argument that the record before the motion judge did not establish that the Credit Union had suffered direct losses. I discuss in the next section the issue of whether Simmons had the manifest intent to cause the losses.

a) Money taken from treasury

[35] The first argument advanced by the Insurers in this regard is that the Credit Union sustained no loss because "no money went out the door". Simmons explained that she applied the money she took from the Credit Union's treasury to service impaired loans and overdrafts so that the Credit Union would not attract regulatory scrutiny and to prevent the members' accounts from going into default. According to the Insurers, the money that Simmons took from the treasury, in effect, was simply transferred internally within the Credit Union from one accounting heading in its books to another.

[36] It is important to remember that this category involves the unauthorized physical removal of cash from the Credit Union's vault. Simmons admitted to physically removing cash from the Credit Union's vault in large amounts, keeping it in her bottom drawer, and using it to make deposits in smaller amounts to members' checking accounts from time-to-time to service their impaired loans and overdrafts. She said that her practice was to make up a deposit slip and give both the slip and the cash to a teller to deposit into the members' accounts. She said that she made a fictitious journal voucher each time she took money from the vault.

[37] I cannot accept the Insurers' characterization of Simmons' acts as merely transferring funds internally between the Credit Union's accounts. There was both a physical removal of cash from the vault and a deposit of actual cash in the members' accounts. The Insurers' submission attempts to meld these two separate and independent transactions into one. It fails to recognize that the first transaction was complete at the moment that Simmons walked out of the vault with the unauthorized cash. The Credit Union suffered a direct loss to its cash position from that transaction in much the same way that the King sustains a direct loss when robbed by Robin Hood, even though Robin Hood later gives the money to peasants to pay their taxes to the King.

[38] This reasoning is consistent with that of Arbour J. in *Tricontinental Investments Co. v. Guarantee Co. of North America* (1988), 30 C.C.L.I. 33 (Ont. H.C.), one of the two Ontario cases cited to the court regarding the bond's interpretation. In *Tricontinental*, the malefactor diverted money held on behalf of Tricontinental

Investment Company (“TIC”) in the account of Tricontinental Investments Limited (“TIL”) to the account of Tricontinental Chemical Company (“TCC”), a company which he controlled, to use in trading with the hope of generating a profit and repaying the “borrowed” money. However, trading losses prevented him from doing so. Arbour J. stated at p. 41 that: “[i]t is important to recognize that TIC suffered the above mentioned loss as soon as the funds left the TIL Chase account and were received by an unentitled recipient.” She reasoned that the trading losses of TCC did not constitute the loss of TIC but continued it.

[39] In the same vein, the Credit Union would suffer a direct loss of money immediately upon the unauthorized removal of cash from its vault. Simmons’ subsequent act of depositing the money into members’ accounts may be relevant to establishing that she had the manifest intent to obtain a financial benefit for another person but is not relevant here.

[40] While it is not necessary to continue the analysis, I add that counsel for the Insurers recognized that the use of the Credit Union’s own money to pay down a member’s indebtedness would reduce the value of its account receivable without a corresponding receipt. He argued, however, that this reduction was both artificial and temporary. It was artificial because it was only an accounting entry and no true payment had been made on account. It was temporary because once Simmons’ misconduct was discovered the Credit Union could simply reverse the deposit, restore the receivable to its true value, and collect the money from the member whose account had been credited.

[41] I do not accept this argument. As I have already discussed, the Credit Union sustains a loss when cash is improperly removed from its vault. The subsequent reversal of an improper reduction in the value of the Credit Union's account receivable would simply be an attempt to recover a direct loss that had already been sustained. It seems to me that the Insurers fail to distinguish between whether there is a "direct loss", which is but one requirement to trigger coverage, with whether the loss, once established, can be recovered, which is a question of damages.

[42] The Insurers persisted with their "no money out the door" theory, arguing that it applies at least where Simmons deposited money she took from treasury into the accounts of members who were never going to be able to repay any of their indebtedness in any event. However, the evidence in the motion record indicated that at the time Simmons claims to have made payments towards the members' indebtedness, their indebtedness had not been written off and would have been on the Credit Union's books as an asset, the reduction of which constituted a direct loss to the Credit Union.

[43] The evidence before the motion judge would provide the basis for concluding that the Credit Union suffered a direct loss the moment there was an unauthorized removal of cash from its vault.

b) Unauthorized overdrafts and loans

[44] The Insurers argue that the Credit Union did not suffer a direct loss as a result of the extension of unauthorized loans to actual people who had real obligations to repay the

money they received. The Insurers distinguish this situation from one where a financial institution manager makes a fictitious loan to a nonexistent person as a means of defrauding the institution. In that situation, they recognize that the financial institution would suffer a direct loss of the money paid out on the fictitious loan. Here, however, they argue that there is no immediate direct loss because the money is recoverable from the real person who received the unauthorized loan.

[45] The example does not support the Insurers' position because the two situations are not as different as they might first seem. Both situations involve loans made on the basis of fictitious information and the effect of both transactions on the assets of the financial institution is exactly the same. In both situations, the institution has the right to recover the money from the person who received it.

[46] In the same vein, I do not see a meaningful distinction between the situation where a bank employee colludes with an unqualified debtor and, in return for a kickback, loans the bank's money for worthless collateral, and the situation where a bank employee who, out of sympathy, makes the same loan on the same worthless collateral to help the debtor out. Although the employee's motivation is arguably relevant to the issue of "manifest intent", the impact on the bank's assets is exactly the same in the two situations. If one is satisfied that the bank suffers a direct loss from the extending of the bad loan in the first situation, one must also conclude that there is a direct loss from extending the bad loan in the second situation.

[47] Examples aside, the Insurers' reasoning is flawed because it fails to focus on what results directly from the employee's dishonest or fraudulent act. Instead, the Insurers seek to place the focus on what happens or, what the employee hopes will happen, later on.

[48] The direct result of Simmons dishonestly presenting loan applications containing false information to the loan committee for approval is that the Credit Union parted with money it otherwise would have kept, thereby sustaining a reduction of its cash on hand. Evidence of such action would support the finding that the Credit Union sustained a direct loss – it paid out money that it would not otherwise have paid and so ended up with less money.

[49] In erroneously focusing on the Credit Union's ability to attempt to collect the money later, the Insurers confuse the issue of whether there is a direct loss with the issue of whether the direct loss can be recovered. At this stage of the analysis, we are concerned only with the requirements to trigger the coverage clause. Ultimately, whether a particular exclusion applies and the quantification of the damages suffered are questions for later determination, should they arise.

[50] There are additional flaws in the Insurers' argument. First, the Insurers' argument is logical only in the abstract. Abstractly, the Credit Union can always seek repayment of an unauthorized loan until it cannot be repaid. However, the Insurers offered no criterion for concluding when an unauthorized loan will not be repaid. Whether the loans might be

repaid must be considered not as an abstraction, but on the facts contained in the record before the motion judge. The only evidence on the record in this case is that the loans satisfied the objective criteria as to be considered impaired and that their collection was doubtful.

[51] DICO, established under the *Credit Unions and Caisses Populaires Act, 1994*, is part of a comprehensive regulatory depositor protection program for all Ontario credit unions. In its By-law No. 6, DICO has established rules, which reflect generally accepted accounting principles, by which credit unions must establish allowances for impaired loans in their financial statements.

[52] The evidence of the Credit Union's forensic accounting investigator, Ms. McKenzie, was uncontradicted. According to her report dated November 7, 2001, the Credit Union's allowance for impaired loans did not meet the requirements of DICO's By-law No. 6 as at August 31, 2001, at which time its allowance for impaired loans required a minimum adjustment of approximately $1.8 million to comply with the By-law. As at August 31, 2001, the amount of unsecured and unauthorized overdrafts and lines of credit stood at $1,691,874. Under By-law No. 6, this amount should have been added to the Credit Union's allowance for impaired loans on its balance sheet and, more importantly, recorded as a charge against income on its income statement.

[53] When the matter is considered, not abstractly but on the record, there can be no doubt that the value of the Credit Union's accounts receivable was diminished significantly.

[54] Finally, the observation that the Credit Union may be able to recover the unauthorized loans is simply not helpful to the analysis. The consequence of unfortunately having suffered an illegitimate loss is having the right to recover it. The question is not whether the loss can be recovered but, rather, whether it is insured under the bond. The bond confirms this distinction by providing that upon payment of a loss, the insurer shall be subrogated to the rights of the insured to recover the loss.

[55] On the record before the motion judge, there was ample evidence to support the conclusion that the advance of money by allowing unauthorized overdrafts or extending unauthorized loans resulted in a direct loss to the Credit Union. The market value of its loan portfolio was reduced and, according to regulatory criteria, there was a negative impact on its balance sheet and income statement.

ii. Loss resulting from dishonest act

[56] The "Dishonesty" provision of the Insuring Agreement requires that the direct loss that is sustained be the result of "dishonest or fraudulent acts of any employee". First, it must be found that an employee committed dishonest or fraudulent acts. Second, it must be found that the direct loss was a result of those acts. In this section, I conclude that the uncontested admissions support the motion judge's finding that there were dishonest acts

that resulted in loss within the meaning of the bond. The quantification of that loss, however, is a different question. As I explain below, whether the dishonest acts of Simmons and the other employees were part of a single scheme is a genuine issue for trial. If it is decided at trial that each loss on each account must be assessed separately or in smaller groupings, it would be open to the Insurers to dispute the characterization of a particular act as dishonest causing loss.

a) Dishonest acts

[57] In their factum, the Insurers contest the motion judge's finding that "Simmons and the colluding employees admitted their dishonest acts". While they concede that Simmons and other employees admitted misconduct, they argue that whether such misconduct should be characterized as dishonest within the meaning of the bond is a matter for trial. While counsel for the Insurers may not have conceded the point, in oral argument he did not vigorously challenge that the admitted acts were dishonest.

[58] The bond does not define "dishonesty". However, in the ordinary sense of the word, a great many of Simmons' acts cannot be characterized as anything other than dishonest. Simmons, for example, admitted creating, executing, and authorizing false or fictitious documents, entries and postings into the Credit Union's books, records, and computer system. Making fictitious entries is dishonest. The act of accessing the Credit Union's computer system to enter a number to indicate a false inflated pre-authorized overdraft limit is capable of being characterized as forgery. Secretly taking money out of the vault without authorization is dishonest.

b) Loss resulting from dishonest acts

[59] The dishonest removal of cash from the Credit Union's vault resulted in the Credit Union sustaining a direct loss immediately, as explained above. It is not necessary to discuss further the cash taken from the vault. I discuss only the extension of unauthorized credit.

[60] Simmons made dishonest fictitious entries both to facilitate and to conceal the extension of unauthorized credit. The Insurers argue that dishonest acts to conceal the default of legitimately extended credit must be distinguished from dishonest acts that prompted the Credit Union to extend credit that it would not have authorized otherwise. According to the Insurers, a dishonest act of concealment cannot operate retroactively to make a loss that arose from a properly authorized extension of credit a loss resulting from dishonesty. For example, the Insurers say that in many instances members failed to make payments on properly authorized overdrafts and the outstanding balance increased because of the accumulation of interest and service charges. Simmons then increased the "authorized limit" on the Credit Union's computer system to accommodate the accruing interest and service charges and to keep the loans from defaulting. In these situations, there was no fresh advance of funds. The Insurers submit that Simmons' acts of merely concealing indebtedness, even if dishonest, cannot be said to have caused the loss of the total amount of the indebtedness at the end of the day.

[61] The Insurers point out that the motion judge avoided confronting this argument by taking the all-embracing view that all the dishonest acts of Simmons and the other

employees were all part of a single collusive scheme. This enabled the motion judge to conclude that the Credit Union's claim, in the aggregate, resulted from dishonesty. The Insurers argue that Simmons and the other employees did not admit that they acted in a collusive scheme; they admitted to individual acts and decisions made over the years in relation to different members and their accounts. The motion judge, they submit, should not have made on a motion for summary judgment the finding of fact that there was a single collusive scheme.

[62] I agree. Given its potential bearing on the analysis of both liability and damages, the finding of fact that all the dishonest acts were part of one scheme should not have been made on a summary judgment motion. On a summary judgment motion, where significant evidence, albeit uncontested, is reasonably capable of supporting more than one inference, the motion judge should refrain from deciding the issue of fact. The competing inferences should be resolved at trial: see *Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank* (1999), 44 O.R. (3d) 97 (C.A.), at p. 110.

[63] In finding merit in this argument, I should not be taken to express a view as to whether there was or was not a single scheme. Whether there was a scheme, or an assortment of individual acts, or a number of smaller schemes, should be decided at trial. The trial judge can consider, among other things, whether the act of concealing the default of properly extended credit, while not causing a loss on that particular indebtedness, may have allowed the employee's loss-causing activities in general to remain undetected and so to continue.

[64] Whether Simmons' acts are analyzed as a single scheme or as separate acts is a genuine issue for trial that could make a difference to the total amount of the claimed loss awarded.

[65] I should note that the original principal amount of properly authorized overdrafts was not included in the Credit Union's claim and the motion judge deducted $200,000 from the total amount claimed because he concluded that the accumulated interest and service charges were excluded under the bond as a loss of earnings or interest. However, as the Credit Union's entire claim is being sent on for trial, the questions of whether these amounts result from dishonest acts, and whether they should be characterized as accumulated interest or a fresh advance of funds, remain live issues for trial.

[66] In summary on this issue, the uncontested record supports the motion judge's conclusion that there were employee acts of dishonesty that resulted in direct loss. The removal of cash from the vault and the making of fictitious entries to facilitate extending unauthorized credit resulted in direct loss within the meaning of the bond. There is a genuine issue as to whether the acts that gave rise to the claim should be assessed individually or as part of one scheme or a series of schemes. The resolution of this genuine issue may affect the extent to which the amounts claimed by the Credit Union can all be said to be the result of dishonest acts.

[67] The next interpretative issue is whether Simmons had a "manifest intent" to cause the loss, the third requirement under the "Dishonesty" coverage provision of the bond. The Insurers saw this as the "real battleground" of the interpretation of the bond.

iii. Manifest intent to cause loss

[68] As the Insurers point out, the words "with the manifest intent to cause…loss" in the coverage clause indicate that not all losses resulting from dishonesty are insured. The bond insures only against losses that result from dishonest acts done with the manifest intent to cause loss. The bond does not insure losses due to dishonesty where the employee did not have the manifest intent to cause the loss.

[69] The Insurers rely on Simmons' evidence that she did not intend to cause loss to the Credit Union. The Insurers urge that Simmons' intent must be assessed in the context that Iroquois Falls was a "one industry" town and that one industry was declining. Local residents were getting into serious financial trouble due to repeated strikes and layoffs. The Credit Union was not an ordinary commercial bank; it was a creature of the community run by community members. Its staff, including Simmons, were not particularly well trained in finance and accounting. According to the Insurers, when viewed in this context, Simmons' intent was to help members in difficult times and to keep DICO, the regulator, from taking over the Credit Union and perhaps closing it down.

[70] The Insurers argue that Simmons did not have the manifest intent to cause loss or, at least, that whether she had such an intent is a genuine issue for trial.

[71] The starting point in interpreting the bond is a consideration of the text of the bond. The first step in interpreting insurance contracts, like all contracts, is to attempt to give effect to the intention of the parties gathered from the words they have used: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 899, citing *Pense v. Northern Life Insurance Co.* (1907), 15 O.L.R. 131 (C.A.), at p. 137, aff'd (1908), 42 S.C.R. 246.

[72] It is necessary to consider the words "manifest intent" within their setting in the bond. What meaning is attached to the words in other contexts is of limited assistance.

[73] I first observe that the phrase "manifest intent" is part of a coverage clause. It is established that coverage provisions in insurance policies should be construed broadly and exclusion clauses narrowly, as noted by Estey J. in *Consolidated Bathurst Export Ltd.* at p. 899:

> Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract.

[74] If there is any ambiguity about the meaning of "manifest intent", it must be resolved in favour of the insured.

[75] Second, the "manifest intent" the parties had in mind in crafting the bond is the intent to cause a direct loss of property that results from dishonest or fraudulent acts of the employee. This is crucially important because a person may harbour more than one intent at the same time. A person may intend to achieve a final goal by intending to accomplish some interim steps along the way. The words of the bond do not indicate that an intent to cause loss in accomplishing an interim step in a greater plan will not suffice. The words of the bond do not indicate that only the intended outcome of the greater plan must be considered.

[76] In my view, the language of the bond set out above indicates that the focus must be on the employee's intent in doing the act that caused the loss. If the act that caused the loss was an interim step in a greater plan, it is the intended result of the interim step that must be considered. Where the act that caused the loss was an interim step in a greater plan, subsequent acts taken or planned by the employee are quite irrelevant. If there is any ambiguity in this, and I see none, it must be resolved in favour of the insured.

[77] Third, it is of central importance that the word "intent" does not stand alone but, rather, is modified by the word "manifest". The *Canadian Oxford Dictionary*, 2d ed., *s.v.* "manifest", provides the following meaning for the adjective "manifest": clear or obvious to the eye or mind.

[78] Many American courts have found the meaning of the modifier "manifest" significant in understanding the bond's requirement of "intent". In *Auto Lenders*

Acceptance Corp. (2004), 854 A.2d 378, the Supreme Court of New Jersey, after setting out dictionary definitions of the word, stated at p. 393 that "manifest" means that the employee's intent must be "apparent or obvious". The court then posed the rhetorical question – "[t]he use of this word thus begs the question: to whom must the employee's intent be apparent or obvious?" The court adopted the observation in *Hanson PLC v. Nat'l Fire Ins. Co. of Pittsburgh* (1990), 794 P.2d 66 (Wash. App.), at p. 72, that "[a] secret intent is of no consequence" because manifest intent must be apparent or obvious. The court also cited *Black's Law Dictionary*, 7th ed., *s.v.* "intent", which defines manifest intent as "[i]ntent that is apparent or obvious based on the available circumstantial evidence, even if direct evidence of intent is not available."

[79] It is clear that the text of the bond, by including the modifier "manifest", requires that the employee's intent to cause loss be clear or obvious or show itself plainly.

[80] The two Ontario decisions cited by the motion judge are consistent with this approach: *MacNab Auto Sales Ltd. v. Sun Alliance Insurance Co.* (1998), 1 C.C.L.I. (3d) 301 (Ont. C.A.), aff'g [1995] O.J. No. 600 (Ont. Gen. Div.), and *Tricontinental*. In *MacNab* at. p. 303, this court drew a distinction between the employee's "intent" and his "desire". What the court called "desire" may be characterized as the employee's intent to achieve an ultimate outcome. The employee's "intent" pertained to the immediate loss he caused.

[81] In *Tricontinental*, the malefactor diverted money that belonged to one company, TIC, to the account of a company he controlled himself, so that he could use the funds in his trading activity. In disposing of the notion that the malefactor did not have the requisite manifest intent to cause a loss, Arbour J. dismissed as irrelevant his "hope" that the account would eventually show a profit and enable him to repay the money.

[82] It is interesting that neither of the trial judges in these two cases cited dictionary definitions of the word "manifest". Still, they approached the phrase "manifest intent" in the manner I suggest. In *MacNab*, Misener J. said that the employee's intent was "plain and obvious". In *Tricontinental*, Arbour J. said the malefactor's intent was "apparent".

[83] The Insurers submit that the motion judge misunderstood *MacNab*. They rely on the court's use of the words "consciously aware" to submit that *MacNab* sets a "stringent subjective intent standard" for the meaning of "manifest intent". The words are part of the statement of Misener J. at para. 43, of which this court approved:

> Assuming that [the employee], through some process of reasoning, fervently wished that [his employer] would not suffer a loss, the evidence here demonstrates nevertheless that [the employee] was *consciously aware of the fact that he was delivering over used cars that West End never intended to pay for*, and that the total number delivered over on that basis was a steadily increasing one. [The employee] acknowledged all of that in his own testimony. *Intention is not to be confused with desire, and indeed it may be inimical to it. Consequences are intended when there is a conscious awareness that they are the certain result of one's actions*. [The employee] knew that a loss to [the employer] was the certain result of his actions and yet he continued their pursuit. It follows, therefore, that [the employee's] plain and obvious intention

> was to cause [the employer] to sustain the loss for which it now claims. [Emphasis added.]

[84] I draw two things from these remarks. First, the passage makes clear that an employee's "fervent wish" or "desire" for a particular ultimate outcome was irrelevant. Second, the employee's "manifest intent" could be inferred from his "conscious awareness" of what he was doing and his knowledge of the certain consequences of his acts.

[85] I do not read the reasoning of Misener J., or the reasons of this court upholding it, as requiring knowledge that the consequences of an act are certain in order to infer "manifest intent". *McNab* simply decided that knowledge of certain results was sufficient to infer manifest intent.

[86] While care must be taken in resorting to other areas of the law, I note that in criminal law a person's knowledge of the substantially certain consequences of an act is sufficient to establish a person's intent: see *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 774 – 775, and *R. v. Buzzanga* (1979), 25 O.R. (2d) 705 (C.A.), at pp. 720 – 721. In *Buzzanga*, Martin J.A. stated at p. 720 that: "as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence."

[87] I see no reason why a more demanding approach should be taken under the bond, which does not require proof beyond a reasonable doubt. In my view, the employee's "manifest intent" under the bond may be established by the employee's admission as to

his or her intent, or by evidence which establishes that he or she knew or was substantially certain that loss would be the consequence of the dishonest act. Knowledge may be proved by admissions, circumstantial evidence, or a combination of the two.

[88] No matter what evidence is used, the focus of the analysis should be placed on the employee's intent in performing the very act that caused the loss, and not on some act the employee performs or plans to perform later. Doing so makes the analysis both clearer and simpler. This case is a good example.

a) Manifest intent re money taken from treasury

[89] Despite Simmons' stated long-term intent to help members in difficult times and to keep the regulator from taking over the Credit Union, she acknowledged acting with deliberation in taking money from the vault that she knew she was not authorized to take. She also admitted to "purposely" falsifying documentation in order to conceal the cash taken.

[90] The first direct loss I have discussed is the unauthorized removal of cash from the Credit Union's vault. It is Simmons' intent in removing the cash from the vault without authorization that must be considered in applying the bond. Her statements in the record about what she intended to accomplish in the longer term and her subsequent acts can coexist with, but do not negate, her immediate intent in removing the cash.

b) Manifest intent re unauthorized extensions of credit

[91] Simmons did say that she honestly believed that the overdrafts and unauthorized loans would be repaid by the members. She swore that she had no intent to cause the Credit Union to sustain a loss. She said that in some instances, when a loan began to sour, she exercised her judgment to work with the member with a view to payment in the future rather than initiating collection procedures or writing off the loan as bad debt. The Insurers submit that this testimony leads to the conclusion that there is, at the very least, a genuine issue for trial as to whether Simmons had the manifest intent to cause direct loss to the Credit Union.

[92] To complete the picture of Simmons' testimony painted by the Insurers, I add that she also admitted that she knew what level of risk tolerance the Credit Union was prepared to take and that she "unilaterally went beyond that risk tolerance" in granting unauthorized overdrafts and related extensions of credit. In other words, she knew that she was giving out the Credit Union's money on terms it did not wish to lend. Further, she admitted that she had no basis for her hope that members would repay the money.

[93] In this context, I have discussed that the direct loss sustained by the Credit Union is the extending of money that it otherwise would have kept on hand. In applying the bond, it is Simmons' intent at the moment she extended the unauthorized credit that must be considered. Her hopes or her intended ultimate outcome do not negate what she intended to achieve immediately in extending the credit.

[94] As explained in the section on “Loss resulting from dishonest acts”, if the acts of Simmons and the other employees are not regarded as one collusive scheme, it may be open to the Insurers to argue that in doing a particular dishonest act (e.g. concealing rather than facilitating the extending of impaired credit), the employee acted without the manifest intent to cause loss.

iv. Manifest intent to obtain financial benefit for oneself or others

[95] On the evidence in the record, the motion judge had an ample basis for finding that Simmons had the manifest intent to obtain a financial benefit for herself or for others. Not only did Simmons derive a personal benefit from some of her misconduct, but a major plank of the Insurers’ position is that her acts were intended to benefit some individual members of the Credit Union.

[96] This completes my discussion of the coverage provision for “Dishonesty” in the Insuring Agreement. I turn now to the exclusions and conditions of the bond.

2. Interpretation of the bond – exclusions and conditions

[97] The bond has provisions titled “Exclusions” and others titled “Conditions”. Two conditions dictate that the appeal must be allowed. These are the condition for “Termination” and the condition for “Notice of Loss”. I begin by considering these conditions because whether they apply is a genuine issue for trial.

i. Condition for "Termination"

[98] The condition for "Termination", which has a much broader application than the condition for "Notice of Loss", provides:

> This Bond shall not apply to any subsequent loss caused by an EMPLOYEE…:
>
> 1. As soon as the INSURED, any DIRECTOR or the most senior management position, not in collusion with such person learns:
>
>   a) Of any fraudulent or dishonest act committed by such person at any time, whether in the employment of the INSURED or otherwise, whether or not of the type covered under Insuring Agreement "Dishonesty".

[99] The language used in the condition for "Termination" is very broad. It would appear to apply to knowledge of dishonest acts that may have been committed before the employee entered the insured's employ, in relationships other than employment, and that may not have resulted in the type of loss insured under the bond. However, it is not necessary to ponder the extent of its ambit in this case as the Insurers seek to apply it to Simmons' acts while in the employ of the Credit Union. Certainly, the condition makes apparent the Insurers' unwillingness to underwrite the risk posed by the insured keeping on its staff employees that it knows have acted dishonestly.

[100] As stated, a dishonest act that satisfies the condition for "Termination" need not meet the Insuring Agreement's requirements – i.e. the dishonest act need not result in direct loss or be committed with the manifest intent to cause a direct loss. Turning things around, I see no reason why what is relied upon under the Insuring Agreement as a

"fraudulent or dishonest act" should not also be recognized as a "fraudulent or dishonest act" under the condition for "Termination". For example, if making a false entry in the Credit Union's computer system to permit an unauthorized overdraft limit is characterized as dishonest forgery for the purpose of the Insuring Agreement, then the Insurers may rely on the prior knowledge of such an act to trigger the application of the condition for "Termination".

[101] The outside inspection reports to the Credit Union between 1991 and 1999 identified unauthorized overdrafts as well as other lending activity irregularities and financial reporting compliance issues. Specifically, irregularities were identified in these reports in relation to some member accounts that form part of the claim for loss under the bond. There is evidence to suggest that, at least at one point, Simmons could offer no explanation for some of the unauthorized overdrafts.

[102] In my view, the outside inspection reports raise the question of whether the Credit Union learned that Simmons had committed dishonest acts prior to some of the losses and, if so, when. If the Credit Union learned of her dishonesty before some or all the losses claimed were sustained, the condition for "Termination" would apply.

[103] The motion judge did not set out the condition for "Termination" in his reasons. He did deal with the inspection reports in the context of the condition for "Notice of Loss", and he may have intended that analysis to apply to this condition as well. In that analysis, the motion judge did not consider whether the Credit Union learned through the

inspection reports whether Simmons had committed dishonest acts prior to some of the losses and, if so, when.

[104] The question of whether the condition for "Termination" applies on the facts of this case raises a genuine issue for trial. The result is that the entire summary judgment must be set aside, as there is no breakdown of the losses claimed into the time periods before and after the receipt of the various outside inspection reports.

ii. Condition for "Notice of Loss"

[105] The condition for "Notice of Loss" provides:

> The INSURED shall file with the Insurer:
>
> 1. A written notice of loss within 20 days after DISCOVERY OF LOSS
>
> 2. An itemized Proof of Loss, duly sworn, within 120 days after giving such notice.

[106] The motion judge analyzed the content of the outside inspection reports in finding that the Credit Union had met its obligation to file a written notice of loss within 20 days of "discovery of [the] loss", which is defined in the bond using a reasonableness standard as:

> When the insured becomes aware of facts which would cause a reasonable person to conclude that a loss covered by this Bond has been or will be incurred, even though the exact amount or details of loss may not then be known.
>
> This includes notice from a third party to the INSURED of an actual or potential claim alleging circumstances which, if established, would constitute a loss under this Bond.

[107] As a defined term in the bond, this definition is incorporated into the condition for "Notice of Loss".

[108] The motion judge, relying on the decision of the British Columbia Court of Appeal in *Grindrod & District Credit Union v. Cumis Insurance Society Inc.* (1985), 10 C.C.L.I. 39, observed that "mere knowledge by the board from time to time of the existence of overdrafts is insufficient to put a credit union on notice of criminal conduct." Criminal conduct is too high a standard. The motion judge erred by applying this high standard. The issue is simply whether the outside inspection reports would have alerted a reasonable person that a loss covered by the bond had been or would be incurred. It was not necessary for the Credit Union to be put on notice of criminal conduct.

[109] The motion judge assessed the inspection reports. He considered them serially, and did not consider their cumulative effect. He did not ask what a reasonable person would gather from the repeated findings of irregularities in the outside inspection reports. I do not identify this as an error because deciding what the reports might have prompted in the mind of a reasonable person involves the weighing of evidence and the making of inferences where more than one inference is available on the evidence. The question should not be decided on a summary judgment motion. It is a genuine issue for trial.

iii. Exclusion for "Loans and Overdrafts"

[110] The bond excludes coverage for losses due to non-payment of or defaults on loans and extensions of credit or on overdrafts, "whether procured in good faith or through

trick, artifice, fraud or false pretences, except when covered under the Insuring Agreements "Dishonesty" or "Forgery"."

[111] This exclusion does not apply to losses covered under the "Dishonesty" coverage clause of the Insuring Agreement. Therefore, it would not apply to either the unauthorized removal of cash from the Credit Union's vault or to the losses due to unauthorized lending activity, to the extent they result from Simmons' dishonest and manifestly intended actions. As discussed above, such losses are covered under the "Dishonesty" coverage clause of the Insuring Agreement.

iv. Exclusion for "Unfaithful Performance"

[112] The exclusion for "Unfaithful Performance" provides that the bond does not apply to losses due to an employee's "[f]ailure to faithfully perform duties, including but not limited to any deliberate or intentional act or omission in disregard of statutes, bylaws, regulations, lawful rules or instructions governing or directing the performance of duties."

[113] Unlike several other exclusions in the bond, this exclusion does not contain the exception for what is covered under the "Dishonesty" clause of the Insuring Agreement.

[114] The Insurers submit in their factum that this exclusion "is geared towards deliberate or intentional violations of statutes, regulations and employers' instructions, albeit those committed *without* the manifest intent to cause the insured a loss" and "is aimed at acts, *including* dishonest acts, which are committed *without* manifest intent to

cause the insured a loss" (emphasis in original). Put simply, the exclusion provides that the bond does not cover the unfaithful performance of duties that may involve dishonest acts that cause loss but which are done without the manifest intent to cause loss.

[115] On this interpretation, this exclusion has only limited application to this case. Simmons acted with manifest intent to cause loss in removing money from the vault and in advancing money on unauthorized overdrafts and loans.

[116] The exclusion may potentially apply, however, where no new money was actually paid out to the debtor and the claim is that accumulated interest and service charges were "capitalized" by an increase of the credit limit. There is a genuine issue for trial as to whether the exclusion applies in respect of such claims.

v. Exclusion for "Indirect Loss"

[117] The bond contains an exclusion for "Indirect Loss", which provides that the bond does not apply to loss due to:

> Indirect or consequential loss or damage, loss of use or loss of earnings or interest on PROPERTY.

[118] The motion judge found that this provision was unambiguous. He noted that the bond was intended to insure the Credit Union's "property", defined under the bond as "money, securities, non-negotiables, gems, jewelry, precious metal, and other similar tangible items." He said that in this case, the property insured under the bond was "money or credit accounts that allow access to money." He concluded that interest or service charges simply represented profit to the Credit Union and were therefore not

recoverable under the bond. He accepted the Insurers' submission that those interest and service charges amounted to approximately $200,000 and reduced the Credit Union's claim by that amount.

[119] The Credit Union cross-appeals the motion judge's reduction by $200,000 of the amount granted on summary judgment. However, the reduction ceases to exist once the summary judgment is set aside. The cross-appeal becomes moot. Accordingly, the application of the exclusion for "Indirect Loss" to the claim in this case will be a live issue at trial.

E. CONCLUSION

[120] The motion judge erred by granting summary judgment in this case. Whether the acts of Simmons and the other employees were part of one collusive scheme or an assortment of individual acts is a genuine issue of trial. If and to the extent that the employees' acts are found to be independent and separate, whether particular dishonest acts caused loss or were done with the manifest intent to cause loss may become issues at trial. To the extent that the requirements of the coverage clause are met, I have concluded that the questions of whether the condition for "Termination" and the condition for "Notice of Loss" apply are genuine issues for trial. At the trial, either party may rely on any provision of the bond I have not interpreted, or on any provision of the bond in a manner not inconsistent with the interpretation I have provided. The parties are not foreclosed from adducing evidence at trial relevant to the interpretation of the bond in

these reasons. Depending on how these issues are determined, the quantum of the Credit Union's loss will be an issue at trial.

[121] The cross-appeal is moot and whether the Credit Union may claim the amounts disallowed by the motion judge is a genuine issue for trial.

F. DISPOSITION

[122] For the foregoing reasons, I would allow the appeal, set aside the summary judgment granted by the motion judge, and dismiss the summary judgment motion brought by the Credit Union.

[123] The parties may make written submissions as to costs through the court's Senior Legal Officer, Mr. John Kromkamp.

R.G. Juriansz J.A."
"I agree D. Doherty J.A."
"I agree E.A. Cronk J.A."

RELEASED: May 4, 2009