COURT OF APPEAL FOR ONTARIO

CITATION: Plate v. Atlas Copco Canada Inc., 2019 ONCA 196
DATE: 20190313
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Hoy A.C.J.O., Feldman and Huscroft JJ.A.

BETWEEN

Dirk Johannes Plate

Defendant (Appellant)

and

Atlas Copco Canada Inc.

Plaintiff (Respondent)

Douglas M. Cunningham, for the appellant

James D. Patterson and Amanda C. McLachlan, for the respondent

Heard: November 13, 2018

On appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated March 7, 2018, with reasons reported at 2018 ONSC 1588.

Hoy A.C.J.O.:

A. OVERVIEW

[1] The appellant, Dirk Plate, appeals from the motion judge's order granting the respondent, Atlas Copco Canada Inc., summary judgment in the amount of $20 million on its civil claim against the appellant for breach of fiduciary duty.

[2] The appellant was employed as the General Manager of the respondent's Construction and Mining Technique ("CMT") division and then promoted to the position of Vice President Global Strategic Customers. The respondent terminated his employment in 2007, and sued him in 2008, claiming he was involved in a scheme that defrauded the company.

[3] The appellant was subsequently charged criminally. Following a trial by jury, he was convicted of defrauding the respondent of more than $5,000, contrary to s. 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. In the course of imposing sentence, the sentencing judge found that the appellant's participation in the fraudulent scheme amounted to a "gross breach of his fiduciary duty" to the respondent.

[4] Relying solely on the criminal verdict and the findings of the sentencing judge in his Decision on Sentencing, the respondent moved for summary judgment in its civil action. The motion judge determined that the sentencing judge's findings – including the finding that the appellant had breached a fiduciary duty owed to the respondent – were entitled to "very considerable weight" in the civil proceeding. He concluded that the appellant was a fiduciary of

the respondent during the currency of the scheme because the sentencing judge had found the appellant to be a fiduciary, and because that finding was supported by the appellant's title, his duties and the respondent's vulnerability to the appellant, as described in the Decision on Sentencing. The motion judge held that the appellant had breached his fiduciary duty through his participation in the fraudulent scheme. Accordingly, he granted the respondent judgment for $20 million. The appellant appeals that order to this court.

[5] The key issue on appeal is whether the motion judge erred in granting summary judgment in sole reliance on the findings of the sentencing judge relative to breach of fiduciary duty. This raises three questions: (1) were the sentencing judge's findings relative to breach of fiduciary duty admissible? (2) if so, did the motion judge err in giving "very considerable weight" to those findings (in particular the finding that the appellant was a fiduciary)? and (3) did he err in granting summary judgment based on the sentencing judge's findings?

[6] I would allow the appeal and remit the matter back to the Superior Court of Justice for trial. As I will explain, the motion judge properly admitted the sentencing findings into evidence. However, he erred in principle by failing to consider relevant factors in determining what weight he could give to the sentencing judge's finding that the appellant was a fiduciary. That error infected his analysis as to whether there was a genuine issue requiring a trial on the breach of fiduciary duty claim.

B. BACKGROUND

(1) Legal Proceedings

[7] In 2008, the respondent commenced a civil action against the appellant and other individuals alleged to have been involved in defrauding the respondent through a scheme involving the submission of "fake" or inflated invoices for employee benefit payments. The respondent asserted claims for fraud, conspiracy, unjust enrichment and, against the appellant and other former employees, breach of fiduciary duty.

[8] In 2012, the appellant was arrested and charged with theft, fraud and two counts of conspiracy. The indictment covered the period of 2001- 2007. The Crown ultimately proceeded against the appellant only on the fraud charge; all other charges were withdrawn.

[9] One participant in the scheme, Leo Caron (the Human Resources Manager for all of the respondent's divisions), pled guilty. Another participant in the scheme, David Hillier (the financial comptroller for the CMT division), was granted immunity from criminal prosecution in return for his testimony in both the criminal and civil proceedings.

[10] The appellant was tried, alongside his co-accused, Paul Caron[1] (the respondent's third-party broker for its insurance needs), in April 2016. At trial, the Crown's position was that a criminal enterprise to defraud the respondent

[1] Although they share the same last name, Leo Caron and Paul Caron are not related.

through the submission of entirely fake or deliberately inflated invoices for employee benefit payments had been in place for a number of years, with the total amount "overbilled" exceeding $20 million. The Crown alleged that the appellant had participated in the scheme while he was the General Manager of the CMT division in Sudbury, and that he had received at least $1,440,000 in annuities through his participation.

[11] The appellant's position at trial was that he was unaware of the fraud. Although he admitted receiving $1,440,000 in annuities between 2003 and 2006, he argued that the annuities had been authorized by the respondent and that the Crown had not proven beyond a reasonable doubt that the annuities were purchased with the proceeds of the fraud.

[12] The trial lasted approximately 10 weeks. The jury found both the appellant and Paul Caron guilty. Neither appealed from his conviction.

(2) The Decision on Sentencing

[13] In this case, the motion judge granted summary judgment on the breach of fiduciary duty claim in sole reliance on the factual findings made by the sentencing judge. Before turning to the Decision on Sentencing, it is helpful to briefly set out the legal context in which the sentencing findings were made.

[14] Section 724 of the *Criminal Code* governs fact-finding for the purpose of sentencing. It distinguishes between facts essential to the jury's verdict and other relevant facts:

> 724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
>
> (2) Where the court is composed of a judge and jury, the court
>
> (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
>
> (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.
>
> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
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> (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
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> (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
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> (c) either party may cross-examine any witness called by the other party;
>
> (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
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> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence

> of any aggravating fact or any previous conviction by the offender.

[15] In *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 17-18, the Supreme Court summarized the applicable principles where a sentencing judge must make factual findings to facilitate sentencing following a jury trial:

> Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict". The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (*Criminal Code*, s. 724(2)(*a*)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury.
>
> Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts. In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(*b*)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(*d*) and 724(3)(*e*). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues. [Citations omitted.]

[16] As noted below, the motion judge referred to *Ferguson* in assessing the findings made by the sentencing judge.

[17] Turning to the Decision on Sentencing, the sentencing judge was satisfied that the jury relied on a number of facts in finding the appellant and Paul Caron guilty of fraud. Those facts, outlined at para. 2 of the Decision on Sentencing, included the following:

- The respondent is a large multinational corporation.[2]
- From 1997-2005,[3] the appellant was the General Manager of CMT, the respondent's largest division in Canada.
- Beginning in the 1990s, Leo Caron and Paul Caron started a scheme whereby Paul Caron would overbill the respondent by deliberately inflating bills to the respondent or by submitting entirely fake invoices.
- The employee benefit invoices were administered through CMT.
- The overbilling was facilitated by at least two company insiders, in addition to Leo Caron: David Hillier and the appellant. Hillier reported to the appellant.
- The scheme was in place throughout the period of the indictment (2001-2007). A forensic investigation found that there was a net overbilling of $22,336,335.38 in the years 2004-2007.

[2] In fact, the respondent is the Canadian subsidiary of a large multinational corporation: Respondent's Factum, at para. 8. However, nothing turns on this.
[3] The motion judge found that the respondent was in fact the General Manager of CMT from 2002-2005. Again, nothing turns on this discrepancy because of the approach the motion judge adopted on the summary judgment motion below.

- The appellant was motivated by greed, but also by a sense of entitlement and grievance because his pension was less generous than what he expected would be provided to a Canadian executive.
- Paul Caron's companies[4] bought 15 annuities for the appellant in the years 2003-2006, in the total amount of $1,440,000. Paul Caron's company's bookkeeping ledgers reveal five other payments to the appellant in the years 2001 and 2003 in the total amount of $175,930.10.
- The jury rejected the appellant's defence that these payments were legitimate and authorized by his superiors in the international company hierarchy.

[18] The sentencing judge noted that the appellant had admitted receiving cheques from Paul Caron totaling $77,930 (but not the full amount of $175,930.10). He found that it was open to the jury to conclude this amount more likely than not came from Paul Caron's fraudulently obtained funds: at para. 36.

[19] The sentencing judge made a number of additional factual findings, pursuant to s. 724(2)(b) of the *Criminal Code*, in the course of imposing sentence. The sentencing judge found that the appellant was "highly trusted" by the respondent and had "grossly betrayed" that trust through his participation in the scheme. He made those findings in the context of para. 32:

[4] The respondent's employee benefits program was administered by a company incorporated and controlled by Paul Caron. Another company, incorporated and controlled by Paul Caron, handled the respondent's other insurance needs.

> [The appellant] was highly trusted by [the respondent]. He was in charge of its Canadian CMT operations, and, during the currency of the scheme, was promoted to a global vice-presidency. He grossly betrayed that trust by his involvement in the scheme. He was Leo Caron's direct supervisor, and in the best position to stop the scheme had wished to do so. He took advantage of the fact that Leo Caron and the employee benefits program spanned six divisions, which made it easier to conceal the overbilling. He and Leo Caron enticed David Hillier, who reported to [the appellant] as his comptroller, to join the scheme, and he was aware from the beginning of David Hillier's method of concealing the fake invoices. As with Paul Caron, his role was motivated by greed but as well [the appellant] felt a sense of entitlement. [Emphasis added.]

Elsewhere in the Decision on Sentencing, the sentencing judge described the appellant's conduct as a "gross breach of trust": at para. 46.

[20] Key to this appeal is the sentencing judge's comment that the appellant's participation and "passive acquiescence" in the scheme was a "gross breach of his fiduciary duty" to the respondent. He made that comment in the context of paras. 50-51:

> I am satisfied on the evidence at trial that [the appellant] became involved in the scheme to defraud [the respondent] early on in the time period covered by the indictment and remained involved until he left Sudbury in late 2005. Even if he did not receive funds for the whole period of time, his passive acquiescence allowed the fraud to continue.
>
> I am also satisfied that [the appellant] was not a central or integral member of the scheme. However, given the position he held with the company, his involvement was a gross breach of his fiduciary duty to [the respondent].

> It does not get much worse in the Canadian corporate field. [Emphasis added.]

[21] Ultimately, the sentencing judge sentenced the appellant to five years in jail. He rejected the Crown's request for a $22 million restitution order against the appellant on a joint and several basis with Paul Caron and Leo Caron. Instead, the sentencing judge made a restitution and forfeiture order against the appellant for the current value of the annuities, and for the sum of $77,930 (reflecting the amount the sentencing judge was satisfied the appellant had received from the fraudulent scheme in addition to the annuities).

[22] The appellant did not seek leave to appeal sentence.

(3) The Summary Judgment Decision

[23] The respondent subsequently moved for summary judgment against the appellant in its civil action. Among other things, the respondent sought a declaration that the appellant was liable to the company in fraud, conspiracy and breach of fiduciary duty, and an order that the appellant and Leo Caron were jointly and severally liable to it for $22,336,335.38.

[24] Applying *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657, discussed later in these reasons, the motion judge held that, given the similarity of the issues, the identity of the parties, and the criminal nature of the prior proceedings, the findings of the sentencing judge were admissible. He also made the blanket finding that all the findings were entitled to

"very considerable weight" on the motion for summary judgment. He concluded that a trial was not required for him to undertake that weighing analysis: at paras. 29-33.

[25] The motion judge cautioned himself that this conclusion did not relieve him of the responsibility of determining which findings of fact made by the sentencing judge were necessarily implied by the jury's verdict or otherwise required for the purpose of sentencing, and therefore properly made by the sentencing judge in accordance with *Ferguson*. He described this as applying the "*Ferguson* filter": at para. 34.

[26] The motion judge directed himself that his determination that the findings of the sentencing judge were entitled to very considerable weight did not amount to a determination that they were beyond question. He noted that abuse of process is a flexible doctrine, and re-litigation of prior findings may be allowed in a subsequent proceeding where to preclude re-litigation would result in unfairness. However, he concluded the appellant had failed to place before him evidence from which he might conclude that there would be any unfairness worked by the application of the doctrine of abuse of process on the summary judgment motion: at paras. 35-38.

[27] Consequently, the motion judge held that the appellant was generally precluded by the doctrine of abuse of process from re-litigating the sentencing judge's findings, and as a result the respondent was entitled to judgment on its

claim to the extent it could be supported by findings properly made by the sentencing judge in the criminal proceeding: at para. 2.[5]

[28] Following the discussion of abuse of process, the motion judge then considered which of the claims advanced against the appellant were supported by the Decision on Sentencing, applying the "*Ferguson* filter".

[29] The motion judge concluded that neither the civil fraud claim (to the extent that it sought damages in excess of the value of the annuities and the $77,930 the sentencing judge found was implicit in the jury's verdict in relation to the appellant), nor the claim in civil conspiracy was made out. He dismissed those claims: at paras. 47-58. The respondent does not cross-appeal the dismissal of those claims.

[30] However, the motion judge found that *Ferguson* permitted the sentencing judge to make the findings that he did "relative to fiduciary duty", as s. 718.1 of the *Criminal Code* required the sentencing judge to consider the gravity of the offence and the degree of responsibility of the offender, and s. 718.2(a)(iii) of the *Criminal Code* entitled him to consider whether the appellant abused a position of trust: at para. 61. Abuse of trust is an aggravating fact.

[31] Relying on the sentencing judge's findings, the motion judge concluded that the appellant was a fiduciary of the respondent from 2002 until 2007 (when

[5] Below I address the question of whether the motion judge applied the abuse of process doctrine so as to preclude the appellant from contesting the finding that he was a fiduciary.

his employment was terminated). He explained why the appellant was a fiduciary, at para. 62:

> The Decision on Sentencing made specific findings that Mr. Plate was a fiduciary. The finding is one amply supported by Mr. Plate's title during the relevant time frame (General Manager of CMT and then vice-president) and by such description as the Decision on Sentencing contains regarding his duties and the vulnerability of Atlas Copco to him. Mr. Plate has provided me with no evidence to negative that finding.

[32] The motion judge went on, at paras. 64-65, to find that the appellant had breached his fiduciary duty through his participation in, and "passive acquiescence" to, the fraudulent scheme:

> The Decision on Sentencing found that Mr. Plate had specific knowledge of the existence of the fraud scheme and of how it worked. It found that he was in the best position to put a stop to it. It found that his passive acquiescence allowed the fraud to continue. However attenuated Mr. Plate's degree of involvement in the fraud scheme may have been, the Decision on Sentencing found that Mr. Plate *was* involved to some degree. I attach no weight to Mr. Plate's denial of such knowledge and conclude that the interest of justice do not require him to be given an opportunity at trial to persuade a different judge to reach a conclusion inconsistent with the one already reached by the Sentencing Judge after an adversarial criminal hearing.
>
> I therefore find that Mr. Plate breached his fiduciary duty to his employer Atlas Copco. A fiduciary does not have the option of remaining mute in the presence of an identified, known scheme that is actively harming his employer. Still less is he entitled to accept benefits and payments that I have inferred were in whole or in part made in return for his silence. [Emphasis in original.]

[33] In determining what damages flowed from the appellant's breach of fiduciary duty, the motion judge found, based on the Decision on Sentencing, that the appellant knew of the scheme and had received some payments arising from it by 2003 at the latest. The motion judge therefore inferred that the appellant's breach of fiduciary duty occurred no later than December 31, 2003 and continued until the appellant's employment was terminated in November 2007: at paras. 67-69.

[34] The motion judge held that the damages attributable to the appellant's breach of fiduciary duty were the entirety of the respondent's losses arising from the fraudulent scheme, which the respondent had failed in his duty to stop. In the Decision on Sentencing, the sentencing judge found the net overbilling for the period of 2004-2007 was $22,336,335.38. The motion judge was satisfied that this amount reflected the *minimum* of the respondent's damages arising from the appellant's breach of fiduciary duty. Against this amount, he gave the appellant credit for the amount of all of the annuities seized from the appellant, Hillier and Leo Caron (which was just under $2 million), and the $77,930 ordered repaid by the appellant by the criminal court: at paras. 70-73.

[35] The motion judge thus granted judgment in the amount of $20 million, while ordering the respondent to account for any future net recoveries from the other co-defendants named in the civil action.

C. ANALYSIS

[36] The appellant makes a number of arguments on appeal:

1. The appellant was not given notice that the respondent was seeking summary judgment based on the alleged existence and breach of his fiduciary duty and, accordingly, the judgment against him cannot stand.

2. The motion judge erred in relying on the findings in the Decision on Sentencing relative to fiduciary duty to grant judgment against him for breach of fiduciary duty because those findings were not express or implied in the jury's verdict.

3. Even if the motion judge were entitled to rely on the findings in the Decision on Sentencing relative to fiduciary duty, the motion judge had insufficient evidence regarding his duties while he was the General Manager of CMT to make the factually-based determination that he owed the respondent a fiduciary duty.

4. The motion judge erred in applying the doctrine of abuse of process to bar him from relying on discovery evidence to defend the summary judgment motion.

5. The motion judge erred in law by finding that "passive acquiescence" to a fraudulent scheme constituted breach of fiduciary duty.

6. It was not open to the motion judge to award damages greater than the amount of the restitution ordered by the sentencing judge.

7. The motion judge improperly relied on broad "policy reasons" to justify granting judgment against him.

[37] In essence, the appellant's core submission – while not expressly stated in these terms – is that the motion judge could not grant summary judgment for breach of fiduciary duty on the strength of the findings made by the sentencing judge.

[38] As I will explain, I agree and would allow the appeal on this basis. Although not necessary to resolve this appeal, I will then address the appellant's argument that the motion judge: (a) erred in applying the doctrine of abuse of process to bar him from relying on discovery evidence to defend the summary judgment motion; (b) erred by finding that "passive acquiescence" to a fraudulent scheme constituted breach of fiduciary duty; and (c) erred by awarding damages for breach of fiduciary duty in excess of the amount of restitution ordered by the sentencing judge. My hope in addressing these issues is to contribute to the more efficient resolution of the action.

(1) Summary Judgment and the Decision on Sentencing

[39] In analyzing this core issue, I address three main points: (a) whether the sentencing judge's findings relative to breach of fiduciary duty were admissible; (b) if so, whether the motion judge erred in according "very considerable weight" to the sentencing judge's findings (in particular the finding that the appellant was a fiduciary); and (c) whether the motion judge erred in granting summary judgment.

(a) Admissibility of Sentencing Findings

[40] One of the appellant's main arguments on appeal is that the motion judge was not entitled to rely on the sentencing judge's findings concerning the appellant's breach of fiduciary duty on the subsequent summary judgment motion. In the appellant's submission, the motion judge could rely only on those findings accepted by the sentencing judge as express or implied in the jury's verdict pursuant to s. 724(2)(a) of the *Criminal Code*.

[41] Relying on *R. v. Punko*, 2012 SCC 39, [2012] 2 S.C.R. 396, the appellant argues that any further finding made by the sentencing judge under s. 724(2)(b) is not a judicial determination on the *merits* of the case, but only a judicial determination *for the purpose of sentencing*: *Punko,* at para. 11. As a result, the motion judge could not rely on the sentencing judge's findings concerning fiduciary duty because such findings were (correctly) not accepted by the sentencing judge as express or implied in the jury's verdict.

[42] Relying on *Malik*, which was referenced by the motion judge, the respondent argues that the findings in the Decision on Sentencing were admissible on the summary judgment motion, whether or not express or implied in the jury's verdict, and that the motion judge was entitled to grant summary judgment in sole reliance on those findings.

[43] As I will explain, I do not agree with the appellant's broad reading of *Punko*. On my reading of the case, *Punko* does not preclude findings made

under s. 724(2)(b) from being admitted in evidence in the context of this civil action. I agree with the respondent that *Malik* supports the motion judge's decision to admit the sentencing findings, although I do not agree that the motion judge was entitled to grant summary judgment. I turn now to *Punko* and *Malik*.

(i) *Punko*

[44] As I have noted, the focus of the appellant's argument is para. 11 of *Punko*:

> Where a fact is necessary for the purpose of determining the appropriate sentence but is not express or implied in the jury's verdict, the sentencing judge must make his or her own finding (s. 724(2)(*b*) *Cr. C.*). However, such a finding does not constitute a judicial determination on the merits of the case; rather, it constitutes a judicial determination only for the purpose of sentencing. [Emphasis added.]

[45] In order to understand what the court was saying in para. 11, it is important to understand the context of the case.

[46] In *Punko,* the Supreme Court considered the application of the doctrine of issue estoppel in the context of a multi-issue criminal jury trial. A prolonged investigation of the Hells Angels by the RCMP identified a number of possible criminal offences. Some of those offences were within the jurisdiction of the provincial Crown; others were within the jurisdiction of the federal Crown.

[47] The provincial offences proceeded to trial first. Four accused were tried on a number of offences, including offences allegedly committed for the benefit of, at

the direction of, or in association with a criminal organization (i.e. the Hells Angels). The four accused were found guilty of a number of offences, but acquitted on all the criminal organization counts.

[48] Meanwhile, federal prosecutors charged two of the four accused with various drug-related offences and, on some of the counts, it was again alleged that they had done so for the benefit of, at the direction of, or in association with a criminal organization (i.e. the Hells Angels). The two accused argued that the Crown was estopped from leading evidence that the Hells Angels was a criminal organization, because the issue had been decided by the jury in the provincial prosecution. In making this argument, the accused referred to certain findings made by the sentencing judge in the provincial proceedings.

[49] Criminal issue estoppel is a narrow doctrine. It precludes the Crown from re-litigating those facts that were decided in favor of the accused at the earlier trial: *Punko*, at para. 7; citing *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at paras. 22, 31, 33. The resolution of an issue in favor of the accused must be a "necessary inference from the trial judge's findings or from the fact of the acquittal": *Punko*, at para. 7; *Mahalingan*, at para. 52. Where the prior proceeding was before a jury, the finding in favor of the accused must be logically necessary to the jury's verdict of acquittal: *Punko*, at para. 8; *Mahalingan*, at para. 53.

[50] Against this backdrop, Deschamps J. held that although s. 724(2)(b) of the *Criminal Code* permits a judge imposing sentence after a jury trial to "find any

other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to the fact", such findings cannot be relied on in support of issue estoppel: *Punko*, at para. 19. Since the merits of the case in a jury trial "pertain to the issues the jurors can take into consideration in reaching a verdict" and issue estoppel applies "only where the unanimity of the jury on an issue can be discerned through reasoning based on logical necessity", a finding under s. 724(2)(b) cannot ground issue estoppel: *Punko*, at para. 11. Deschamps J.'s statement, at para. 11, that a finding made under s. 724(2)(b) "does not constitute a judicial determination *on the merits*" (emphasis in original) but rather a "judicial determination only for the purpose of sentencing" must be understood in this context.

[51] Understanding para. 11 in context, *Punko* does not preclude the respondent from seeking to rely on findings made under s. 724(2)(b) in the context of this civil action: a finding under s. 724(2)(b) – while not a finding "on the merits" or relating to the accused's criminal liability – is still a judicial finding.

[52] *Punko* also underlines the point that findings made in sentencing proceedings must be understood in context – and, in particular, in light of the statutory scheme that governs such findings. That point is consistent with *Malik,* to which I now turn.

(ii) *Malik*

[53] In *Malik*, the Supreme Court followed the lead of this court[6] and put to rest the so-called rule in *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587 (C.A.), which held that prior judicial findings or judgments were hearsay or opinion evidence and thus inadmissible in a subsequent judicial proceeding. Writing for the court, Binnie J. described, at para. 7, the general circumstances in which a prior judicial finding will be admissible in subsequent civil proceedings:

> [A] judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process).

[54] Although *Malik* considered the admissibility of a prior judgment in a subsequent interlocutory proceeding, its reasoning is not restricted to interlocutory proceedings: *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716, at paras. 43-44. *Malik* has been applied in the context of final determinations on the merits in subsequent civil proceedings: see e.g. *MacRury v. Keybase*, 2017 NSCA 8, 411 D.L.R. (4th) 255; *National Bank Financial Ltd v. Barthe Estate*, 2015 NSCA 47, 359 N.S.R. (2d) 258; *I.K.K. v. M.P.*, 2018 ONSC 2743, 8 R.F.L.

[6] See *Demeter v. British Columbia* (1983), 43 O.R. (2d) 33 (H.C.J.), aff'd (1984), 48 O.R. (2d) 283 (C.A.); and *Del Core v. College Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (C.A.).

(8th) 367; *Deposit Insurance Corp. of Ontario v. Malette*, 2014 ONSC 2845; and *Kay v. Caverson*, 2011 ONSC 4528, 5 C.L.R. (4th) 17, aff'd 2013 ONCA 220, 19 C.L.R. (4th) 213.

[55] In Binnie J.'s view, a "prior judicial decision between the same or related parties or participants on the same or related issues" is not "merely another controversy over hearsay or opinion evidence": *Malik*, at para. 52. Rather, the "court's earlier decision [is] a judicial pronouncement after the contending parties [have] been heard" having a "substantial effect on their legal rights": *Malik*, at para. 52. In this vein, "the admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the context of the need to promote efficiency in litigation and reduce its overall costs to the parties": *Malik,* at para. 37. The rule in *Hollington* gave rise to unnecessary inefficiencies, and any resulting unfairness in admitting prior judicial findings into evidence could be addressed on a case-by-case basis: *Malik*, at para. 52.

[56] In this case, the motion judge identified the issues in the prior criminal proceedings as including "whether [the appellant] was guilty of the fraud charged and, once he was found guilty … what relevant aggravating and mitigating circumstances were present": at para. 24. In the motion judge's view, the findings of the sentencing judge were admissible in the summary judgment proceedings. He explained his reasoning, at paras. 30-31:

> The fraudulent scheme pleaded in the statement of claim is the same fraudulent scheme described by [the sentencing judge] in the Decision on Sentencing. The fiduciary duty of [the appellant] toward the [respondent] pleaded in the statement of claim arises out of the same relationship as the fiduciary duty about which [the sentencing judge] made findings of fact. There is very clearly a large overlap of issues between the civil and criminal proceedings even if all the issues in the one were not present in the other and vice versa.
>
> [The appellant] was of course a party to both proceedings and was, as I have indicated, vitally concerned in the criminal proceedings. While [the respondent] was not a party to the criminal proceedings *per se*, [the respondent] was the victim of the crime being tried.

[57] I agree that the sentencing judge's findings, including those made under s. 724(2)(b) of the *Criminal Code*, were admissible on the summary judgment motion.

[58] The sentencing judge's findings were relevant to the issues raised on the summary judgment motion. The appellant (as the criminal accused) and the respondent (as the complainant) were "parties" or "participants" in the prior criminal proceedings, which raised similar or related issues. *Malik* directs that lack of identity of issue goes to weight, not admissibility: at para. 43. At the sentencing proceedings, the extent of the appellant's breach of trust was a relevant consideration, pursuant to s. 718.2(a)(iii) of the *Criminal Code*. It is in relation to this factor that the sentencing judge found the appellant to have breached a fiduciary duty to the respondent. Thus, the fact that the issues in the

criminal proceedings were not identical to those in the civil proceeding did not operate as a bar to admissibility of the sentencing judge's findings relative to the respondent's breach of fiduciary duty.

[59] I turn now to the issue of weight, and, in particular, the sentencing judge's finding that the appellant was a fiduciary.

(b) Weight of the Finding that the Appellant was a Fiduciary

[60] Having concluded that the sentencing findings were admissible, the motion judge then turned to the weight and significance to be given to those findings. He concluded, upon weighing the evidence before him pursuant to r. 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, that all the findings of the sentencing judge were entitled to "very considerable weight" because of the similarity of the issues, the identity of the parties, and the criminal nature of the prior proceeding, and that a trial was not required in order for him to undertake that weighing exercise: at para. 33. He did not revisit that blanket finding when he turned to deal with the breach of fiduciary duty claim some pages later in his reasons.

[61] A motion judge's weighing of evidence to determine whether there is a genuine issue requiring a trial is ordinarily accorded deference on appeal. However, deference is not accorded where there is an error in principle. Here, the motion judge erred in principle by failing to consider factors that were relevant to the weight to be accorded to the sentencing judge's findings relative to

fiduciary duty: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 81, 84; *Chernet v. RBC General Insurance Co.*, 2017 ONCA 337, at para. 4.

[62] I have discussed *Malik*. It not only speaks to the issue of admissibility of prior judicial findings, but also to the question of the weight to be given to such findings. Where prior judicial findings are found to be admissible, *Malik* directs that the weight to be afforded to those findings will depend on all the circumstances of each case, including factors such as the similarity of the issues to be decided, the identity of the parties, the nature of the earlier proceedings, the opportunity given to the prejudiced party to contest the previous finding, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil: *Malik*, at paras. 42, 47-48.

[63] In this case, the first reason the motion judge gave for concluding that the appellant was a fiduciary of the respondent from 2002-2007 was the sentencing judge's finding that the appellant was a fiduciary. I repeat the motion judge's fiduciary duty analysis, which is found at para. 62 of his reasons, for ease of reference:

> The Decision on Sentencing made specific findings that Mr. Plate was a fiduciary. The finding is one amply supported by Mr. Plate's title during the relevant time frame (General Manager of CMT and then vice-president) and by such description as the Decision on Sentencing contains regarding his duties and the vulnerability of Atlas Copco to him. Mr. Plate has provided me with no evidence to negative that finding. [Emphasis added.]

[64] It is unlikely that the respondent would have sought summary judgment on its claim for breach of fiduciary duty in sole reliance on the Decision on Sentencing in the absence of the finding that the appellant's participation in the scheme was a "gross breach of his fiduciary duty". In my view, the outcome of the summary judgment motion turned on that finding.

[65] At the outset, it is important to emphasize that the characterization of an individual as a "fiduciary" carries a particular meaning at common law, and reflects a conclusion of mixed fact and law: *Waxman v. Waxman* (2004), 186 O.A.C. 201, at para. 716 (C.A.), leave to appeal dismissed [2005] 1 S.C.R. xvii (note). A fiduciary relationship arises where: (1) there is an undertaking by the fiduciary to act in the best interests of the beneficiary; (2) the beneficiary is vulnerable to the fiduciary's exercise of discretion or control; and (3) an identifiable legal or practical interest of the beneficiary stands to be adversely affected by the fiduciary's exercise of discretion or control: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36. With respect to certain traditional, or *per se*, fiduciary relationships, these elements are presumed to exist. In other circumstances, they will arise on case-by-case, or *ad hoc*, basis: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 408-410; *Elder Advocates,* at paras. 29-36.

[66] The motion judge did not consider whether the issue of the appellant's fiduciary status had been argued before the sentencing judge.

[67] Indeed, in its written sentencing submissions, the Crown did not argue that the appellant was a fiduciary.[7] Rather, the Crown focused on the extent of the appellant's breach of trust, arguing that the appellant was highly trusted by the respondent and grossly betrayed that trust. As noted above, pursuant to s. 718.2(a)(iii) of the *Criminal Code* "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim" is an aggravating factor on sentencing. Although a fiduciary relationship involves an element of trust, it has a distinct meaning at law from the term "position of trust" in s. 718.2(a)(iii): see *R. v. G.(A)* (2004), 190 C.C.C. (3d) 508 (Ont. C.A.), at paras. 16-18.

[68] In his sentencing submissions, the appellant did not take issue with the assertion that he was highly trusted by the respondent and had breached that trust. Instead, he argued that his position with the respondent had not facilitated the fraud because he was not responsible for, or involved with, the employee benefits plan. He argued that a breach of trust is not as egregious where the trusted employee's position is not essential to the accomplishment of the defalcation.

[69] It is in this context that the sentencing judge made the finding – contained in a single sentence in his Decision on Sentencing – that the appellant breached a fiduciary duty to the respondent. While the characterization of an individual as a

[7] The parties' written submissions on sentencing, but not the transcript of the sentencing proceedings, were before the motion judge.

fiduciary is a question of mixed fact and law, the sentencing judge did not have the benefit of legal submissions from the parties on that issue, and did not advert to any legal authority in his Decision on Sentencing on the test for imposing a fiduciary obligation, in finding the appellant to be fiduciary.

[70] Moreover, because the finding that the appellant was a fiduciary was not express or implied in the jury's verdict, but was made by the sentencing judge in the exercise of his fact-finding power under s. 724(2)(b) of the *Criminal Code*, the appellant's ability to appeal that finding was constrained significantly. The appellant could not contest the finding that he was a fiduciary by appealing his conviction; rather, he would be required to seek leave to appeal sentence. Given that it was uncontroverted that the appellant occupied a position of trust (which is an aggravating factor on sentencing), and in light of the deferential standard of review applicable to sentencing decisions on appeal, it is unlikely that contesting the sentencing judge's finding that the appellant was a fiduciary would have had any practical effect on the sentence imposed. As a result, the appellant did not realistically have the opportunity to contest the sentencing judge's finding that he was a fiduciary by way of appeal. In this way, this finding under s. 724(2)(b) of the *Criminal Code* is different from a finding express or implied in a jury's verdict of guilt, which could be contested by appealing conviction as of right.

[71] As I have noted, the opportunity to contest the prior judicial finding is identified in *Malik* as an important factor in determining the weight to be given to

that prior finding: *Malik*, at para. 48. Here, the fiduciary question was not in play before the sentencing judge and the appellant did not have a realistic opportunity to challenge the fiduciary finding. The motion judge failed to consider these factors – factors that diminished the weight to be accorded to the finding that the appellant was a fiduciary – and, in doing so, he erred in principle.

[72] I have focused my attention in this section on the sentencing judge's finding that the appellant was a fiduciary. The motion judge also relied on other findings made by the sentencing judge relative to breach of fiduciary duty. I will now discuss those other findings in assessing whether the motion judge erred in granting summary judgment.

(c) Summary Judgment – Genuine Issue for Trial

[73] As *Hryniak* directs, there will be no genuine issue requiring a trial when the motion judge is able to reach a fair and just determination on the merits of the motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact; (2) allows the judge to apply the law to the facts; and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak*, at para. 49. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportionate procedure: *Hryniak*, at para. 59.

[74] In this case, in addition to relying on the sentencing judge's finding that the appellant was a fiduciary, the motion judge accepted that the appellant was a

fiduciary for the period of 2002-2007 because: (1) the fiduciary finding was supported by the appellant's title during the relevant time frame (General Manager of CMT and then Vice-President Global Strategic Customers); (2) the description of the appellant's duties and the respondent's vulnerability to the appellant in the Decision on Sentencing suggested he was a fiduciary; and (3) the appellant had provided the motion judge no evidence to negative that finding: at para. 62.

[75] As I have explained, the motion judge erred in according the sentencing judge's finding that the appellant was a fiduciary "very considerable weight". The issue is whether, given the diminished weight to be afforded to that finding, there is a genuine issue requiring a trial when that finding is considered along with the other findings relied on by the motion judge.

[76] Before addressing that issue, I pause here to note that, while the motion judge's reasons are somewhat unclear in this regard, I do not understand him to have applied the doctrine of abuse of process to preclude the appellant from leading evidence to contest the sentencing judge's finding that he was a fiduciary of the respondent. Despite some comments earlier in his reasons that seem to suggest he applied abuse of process to all of the findings contained in the Decision on Sentencing (see, for e.g., paras. 2 and 38), para. 62 suggests he did not do so with respect to the sentencing judge's finding that the appellant was a fiduciary. At para. 62, the motion judge adverted to the fact that the appellant had

provided him no evidence to negative the finding that he was a fiduciary. Thus, the motion judge does not appear to have treated the sentencing judge's finding that the appellant breached a fiduciary duty as having acquired conclusive effect.

[77] In my view, it would have been an error to preclude the appellant from re-litigating that finding in these circumstances, for largely the same reasons that inform my conclusion that the motion judge could not give "very considerable weight" to the sentencing judge's finding that the appellant was a fiduciary. The abuse of process doctrine is sensitive to the circumstances in which prior judicial determinations are made and the opportunity afforded to the prejudiced party to contest the relevant finding in the earlier proceedings: see e.g. *Intact Insurance Co. v. Federated Insurance Co. of Canada*, 2017 ONCA 73, 134 O.R. (3d) 241 (C.A.).

[78] Returning to the issue of whether there is a genuine issue requiring a trial, I am not satisfied that the subsidiary findings relied on by the motion judge were sufficient to eliminate the need for a trial on the fiduciary question.

[79] The motion judge pointed to the appellant's title in concluding he was a fiduciary. The respondent's claim for breach of fiduciary duty – at least as it relates to the period from 2002-2005 when the appellant was the General Manager of CMT – depended on the appellant being characterized as a fiduciary-

employee.[8] Although senior level employees that form part of "top management" and exercise discretion to affect their employer's legal and economic interests may owe a fiduciary duty to their employer, this is inherently a contextual and fact-specific determination: *Can Aero v. O'Malley*, [1974] S.C.R. 592, at pp. 605-606; *Edgar T. Alberts Ltd. v. Mountjoy* (1977), 16 O.R. (2d) 682 (H.C.J), at p. 692; *Felker v. Cunningham* (2000), 191 D.L.R. (4th) 734 (Ont. C.A.), at paras. 14-16, leave to appeal dismissed [2000] S.C.C.A. No. 538; *Dunsmuir v. Royal Group*, 2017 ONSC 4391, 41 C.C.E.L. (4th) 93 (S.C.), at para. 131, aff'd 2018 ONCA 773, 50 C.C.E.L. (4th) 310 (C.A.). In this vein, it is unhelpful to focus on job titles; the role of a "General Manager" can embrace dramatically different responsibilities and duties across different organizations.

[80] The motion judge said he also relied on the description in the Decision on Sentencing of the appellant's "duties" but did not point to specific findings. I would note that the sentencing judge's findings say very little about the nature of the appellant's duties and responsibilities as the General Manager of CMT. The sentencing judge noted that the appellant was the General Manager of the CMT division, that he was in charge of its Canadian CMT operations and that he was promoted to a global vice-presidency. He also noted that the appellant was Leo Caron's direct supervisor and that Hillier reported to him. There is no mention of

[8] Neither the sentencing judge, nor the motion judge, found that the appellant was an officer or director of the respondent, such that he would be a status-based, or *per se*, fiduciary and subject to a statutory duty of loyalty under s. 122(1)(a) of the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44.

the appellant's reporting obligations or any details as to the nature and scope of his responsibilities in either of his roles.

[81] The motion judge also said he relied on the sentencing judge's description of the vulnerability of the respondent to the appellant. Again, he did not point to particular findings.

[82] One relevant finding is the sentencing judge's finding that the appellant was "highly trusted" by the respondent. But while this finding may be relevant to whether the appellant is a fiduciary, not all relationships involving trust are fiduciary in nature.

[83] The sentencing judge also found that the appellant was best positioned to stop the fraud; in this sense, the respondent was "vulnerable" to the appellant's decision not to stop the fraud. However, vulnerability alone is insufficient to ground a fiduciary duty: *Elder Advocates*, at paras. 28, 36. The focus of the fiduciary relationship is an undertaking by the fiduciary to exercise a discretionary power to affect the legal or practical interests of the purported beneficiary; it is from this exercise of discretion or control that the "vulnerability" must arise: *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 67-71; *Elder Advocates*, at para. 36.

[84] The motion judge relied on the sentencing judge's finding as to the total overbilling for the period of 2004-2007 in calculating the damages for breach of fiduciary duty. This assumed that the appellant was a fiduciary from 2002-2005,

when he was the General Manager of CMT. Neither the sentencing judge's findings, nor the motion judge's reasons, provide any basis for calculating the damages if the appellant was not a fiduciary while he was the General Manager of CMT.

[85] As I have said, the deference ordinarily accorded to a motion judge's determination that there is no genuine issue requiring trial is displaced in this case. In the end, I am not persuaded that a fair and just determination on the merits could be made on this summary judgment motion. In this unusual case, the respondent's summary judgment motion cannot be saved by the inadequacy of the appellant's responding evidence. Given my concerns about the weight that could be afforded to the sentencing judge's finding that the appellant breached a fiduciary duty, the limited nature of the other evidence relied upon by the motion judge and the overall approach that he adopted on the summary judgment motion, I am not satisfied that the record before the motion judge positioned him to make the necessary factual and legal findings to either grant judgment to the respondent for breach of fiduciary duty in the amount of $20 million or to dismiss its claim for breach of fiduciary duty.

[86] Further, the respondent seeks damages in the amount of $20 million against the appellant. While the amount at issue is not of itself a basis for declining to grant summary judgment, in this case a trial is also a proportional procedure.

[87] I should not be taken as suggesting that findings made under s. 724(2)(b) of the *Criminal Code* in sentencing proceedings cannot, in a proper case, ground summary judgment in subsequent civil proceedings. Both the *Malik* framework and the doctrine of abuse of process are flexible concepts, attentive to the circumstances in which prior judicial determinations are made and the proposed use of such findings in subsequent proceedings.

[88] Indeed, it may be that the appellant will ultimately be found to be a fiduciary of the respondent. This is an issue for the ultimate trier of fact.

[89] While I would allow the appeal on this basis and remit the matter back to the Superior Court of Justice for trial, I go on to address the appellant's arguments that the motion judge (1) erred in applying the doctrine of abuse of process to bar him from relying on discovery evidence to defend the summary judgment motion; (2) erred by finding that "passive acquiescence" to a fraudulent scheme constituted breach of fiduciary duty; and (3) erred by awarding damages for breach of fiduciary duty in excess of the amount of restitution ordered by the sentencing judge.

(2) The Appellant's Other Arguments

(a) Abuse of Process and Discovery Evidence

[90] The appellant argues that the motion judge erred in applying the doctrine of abuse of process to bar the appellant from relying on evidence obtained during

examinations for discovery in the civil proceeding to defend the summary judgment motion. As I will explain, I do not agree.

[91] Relying on the discovery evidence, the appellant's key position on the summary judgment motion was that he had not been involved in the fraudulent scheme. In essence, he sought to re-litigate his criminal conviction.

[92] The doctrine of abuse of process provides the court the discretion to prevent re-litigation where necessary to preserve the integrity of the adjudicative process: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 42-43, 51; *Intact Insurance,* at para. 28. Re-litigation inevitably has a detrimental effect on the due administration of justice, as it can lead to inconsistent results, devalue finality, and contribute to the unnecessary expenditure of public and private resources, with no guarantee that the second result will be more accurate than the first: *C.U.P.E.*, at paras. 51-52; *Intact Insurance*, at para. 28.

[93] Thus, re-litigation is to be avoided unless the circumstances dictate that re-litigation is necessary to enhance the credibility and effectiveness of the adjudicative process as a whole: *C.U.P.E.*, at para. 52; *Intact Insurance*, at para. 28. While there is no closed list of circumstances in which re-litigation is necessary, courts will permit re-litigation if in the specific circumstances "fairness dictates that the original result should not be binding in the new context": *C.U.P.E.*, at para. 52-53; *Intact Insurance*, at para. 28.

[94] The motion judge adverted to *C.U.P.E.* He concluded that the appellant was precluded from re-litigating the factual findings disclosed by the Decision on Sentencing on the subsequent summary judgment motion: see paras. 2, 35-40. He found that the appellant had failed to place any evidence before him from which he might conclude that there would be an unfairness worked by the application of the doctrine of abuse of process: paras. 35-38.

[95] As I have already explained, I understand the motion judge to have applied the abuse to process doctrine to all of the relevant sentencing findings, *other* than the finding that the appellant was a fiduciary: at para. 62.

[96] I do not see any basis to interfere with the motion judge's application of the abuse of process doctrine on the motion for summary judgment. I agree with the motion judge that allowing the appellant to impugn the findings contained in the Decision on Sentencing (with the exception of the sentencing judge's finding that the appellant was a fiduciary) would undermine the integrity of the adjudicative process.

[97] The issues in the criminal proceeding were substantially similar to those in the underlying civil proceeding, as both proceedings arose out of the same fraudulent scheme. The appellant was represented by counsel throughout his criminal trial, and was found guilty beyond a reasonable doubt of fraud over $5,000. The appellant had the right to appeal his conviction, but did not do so.

[98] There is no indication that the appellant's criminal trial was tainted by fraud or dishonesty: *C.U.P.E.*, at para. 52. There is also no indication, at least on this record, that evidence not available in the criminal proceeding is now available that conclusively impeaches the original result: *C.U.P.E.*, at para. 52. Indeed, the discovery evidence the appellant now seeks to rely on existed before his criminal trial.

[99] With the exception of the sentencing judge's finding that the appellant was a fiduciary of the respondent, the appellant had the full opportunity to litigate the factual findings contained in the Decision on Sentencing: *Intact Insurance,* at para. 34. The potential consequences of the criminal proceeding were sufficiently serious to incentivize a full defence: *Intact Insurance*, para. 41. The appellant has not pointed to any other reason that would justify re-litigation.

[100] As a result, I reject the appellant's argument that the motion judge erred in precluding the appellant from relying on discovery evidence to, in effect, contest the factual foundation of his criminal conviction in the context of this summary judgment motion.

(b) "Passive Acquiescence" and Breach of Fiduciary Duty

[101] The appellant argues that the concept of passive acquiescence as it relates to the conduct of fiduciaries is not known to law and liability cannot be imposed on this basis.

[102] I disagree. A fiduciary who knows about wrongdoing committed against the beneficiary has a duty to tell the beneficiary: *Dunsmuir v. Royal Group*, 2017 ONSC 4391, 41 C.C.E.L. (4th) 93, at para. 134, aff'd 2018 ONCA 773, 50 C.C.E.L. (4th) 310, at para. 14. As a matter of law, a fiduciary who knows of a fraudulent scheme perpetrated against the beneficiary and passively acquiesces to its continuation has breached his duty to the beneficiary.

(c) Damages for Breach of Fiduciary Duty and the Restitution Order

[103] The appellant also argues that by ordering damages in excess of the restitution ordered by the sentencing judge, the motion judge improperly acted as a *de facto* appeal judge to alter the outcome of a court of co-ordinate jurisdiction.

[104] I disagree. The quantum of restitution ordered under s. 738(1)(a) of the *Criminal Code* and the assessment of damages for breach of fiduciary duty are guided by different principles. Since the sentencing judge and the motion judge were engaged in different exercises that were guided by different principles, the quantum of restitution ordered by the sentencing judge does not represent the "upper limit" of the damages that the motion judge could order for breach of fiduciary duty.

[105] The sentencing judge rejected the Crown's request for a $22 million restitution order made jointly and severally against the appellant and Paul Caron, and instead made a restitution and forfeiture order against the appellant in favour of the respondent in respect of the annuities and the sum of $77,930. In doing so,

the sentencing judge was guided by s. 738(1)(a) of the *Criminal Code*, which permits a sentencing judge to order restitution to a victim of a crime in an amount not exceeding the value of the loss less the value of any amount already returned, where the amount is readily ascertainable.

[106] Restitution orders are discretionary in nature, and are intended to give effect to several sentencing principles, including the principle of rehabilitation. As a result, the impact of the proposed restitution order on the offender's prospects for rehabilitation is a relevant factor: *R. v. Castro*, 2010 ONCA 718, 102 O.R. (3d) 609, at para. 26; *R. v. Yates*, 2002 BCCA 583, 169 C.C.C (3d) 506, at paras. 7, 11. The offender's ability to pay is also a relevant factor, though not the predominant factor in cases involving breach of trust: *Castro*, at para. 28; *Yates*, at paras. 12, 17. Where a restitution order is imposed in conjunction with a sentence of imprisonment, the entirety of the sentence must be consistent with the totality principle: *Castro*, at para. 23. The order need not be made for the full amount of a victim's loss.

[107] In crafting a restitution order, it is also relevant to consider whether civil proceedings have been initiated: *Castro*, at para. 24. As the appellant himself stated in his written submissions on sentencing, "a restitution order should be made with restraint and caution. The existing civil proceeding involving [the respondent and the appellant] is best capable of determining the amount of loss suffered attributable to the actions of [the appellant]".

[108] These sentencing principles do not guide the court in providing a civil remedy for breach of fiduciary duty. Equitable compensation – as a form of fiduciary relief – is discretionary in nature: *Mady Development Corp v. Rossetto*, 2012 ONCA 31, 287 O.A.C. 277, at para. 18. The fundamental measure of equitable compensation for breach of fiduciary duty is restitutionary; the injured beneficiary is entitled to be reimbursed for the losses flowing from the fiduciary's breach, and to be put in the position it would have been in but for the breach: *Hodgkinson*, at p. 440. The court can consider the principles of remoteness, causation and intervening acts when necessary to achieve a fair and just result, but those principles should only be applied if doing so does not raise any policy concerns: *Waxman,* at para. 662; *Hodgkinson*, at p. 443.

[109] Further, s. 741.2 of the *Criminal Code* provides that a civil remedy for an act or omission is not affected by the fact that a restitution order has been made in respect of that act or omission.

[110] As a result, while the damages that flow from the appellant's alleged breach of fiduciary duty will fall to be determined at the eventual trial, the quantum of such damages for breach of fiduciary duty may exceed the amount of restitution ordered under s. 738(1)(a) of the *Criminal Code*.

DISPOSITION

[111] For these reasons, I would allow the appeal, dismiss the respondent's motion for summary judgment, and remit the matter back to the Superior Court of

Justice for trial. I would order that the appellant is entitled to his costs of the appeal, fixed in the amount of $22,000, inclusive of HST and disbursements. Costs of the summary judgment motion should be determined by the motion judge in light of this disposition.

Released: “AH” “MAR 13 2019”

“Alexandra Hoy A.C.J.O.”
“I agree K. Feldman J.A.”
“I agree Grant Huscroft J.A.”