SUPREME COURT OF NOVA SCOTIA
Citation: *Quadrangle Holdings Ltd. v. Coady Estate,* 2016 NSSC 106

Date: 2016-04-18
Docket: Hfx No. 291455
Registry: Halifax

Between:

Quadrangle Holdings Ltd. v.

Plaintiff

v.

The Estate of Blair Coady, James Matheson, and Industrielle Alliance Valeurs Mobilières Inc.

Defendants

Judge: The Honourable Justice James L. Chipman

Heard: March 31 and April 1, 2016, in Halifax, Nova Scotia

Counsel: Michael E. Dunphy, Q.C. and Richard W. Norman, for the Plaintiff/Applicant
Andrew K. Maciag, Q.C., for the Defendant/Respondent The Estate of Blair Coady
Duane A. Rhyno (watching brief), for James Matheson
Jeremy P. Smith (watching brief), for Industrielle Alliance Valeurs Mobilières Inc.

By the Court:

Introduction

[1] The Plaintiff seeks summary judgment against one of the Defendants. Quadrangle Holdings Ltd. ("Quadrangle" or the "Applicant") says that the evidence and law establishes that the defences of The Estate of Blair Coady ("the Estate" or the "Respondent") have no reasonable chance of success at trial.

History of the Proceeding

[2] This lawsuit was commenced approximately nine years ago. Just over a year ago, the matter made its way to our Court of Appeal (*Quadrangle Holdings Ltd. v. Coady*, 2015 NSCA 13) and Justice Bryson succinctly traced the history of the litigation in paras. 1-7:

> [1] Quadrangle Holdings Limited says that Blair Coady caused Shannon International Resources Inc. to misappropriate some of Quadrangle's shares in Rally Energy Limited. Mr. Coady was an officer and director of both Shannon and Rally. Quadrangle pledged the Rally shares to Shannon as security for a promissory note from Quadrangle to pay for shares in Shannon.
>
> [2] Rather than holding the Rally shares as security, Mr. Coady had them delivered to Lynch Investments Limited in Halifax which disposed of most of the Rally shares and credited the proceeds to a Shannon account. Quadrangle learned this in October of 2005.
>
> [3] Initially a settlement agreement was reached with Shannon, and as a result Quadrangle did nothing. But Shannon became judgment-proof so in 2008 Quadrangle sued Mr. Coady in Nova Scotia. Mr. Coady brought a motion in the Nova Scotia Supreme Court for a stay arguing that Nova Scotia had no jurisdiction, and, in any event, that Alberta was the preferable forum. In an unreported decision, the Honourable Justice Kevin Coady declined to decide the jurisdiction issue, but granted a stay and found that Alberta was the preferable forum.
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> [4] Then Quadrangle sued Mr. Coady in Alberta. Justice McCarthy of the Court of Queen's Bench decided that the claim could not be entertained there because it was statute barred under the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, in 2011 (2012 ABQB 22).

> [5] On October 4, 2012, Justice McCarthy's order dismissing Quadrangle's action against Mr. Coady was registered as an Order of the Supreme Court of Nova Scotia pursuant to the *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30 (ECJDA).
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> [6] Quadrangle brought a motion before the Nova Scotia Supreme Court to revive the proceedings stayed by Justice Coady. Quadrangle also brought a second Nova Scotia action in which it seeks remedies against Industrielle Alliance Valeurs Mobilières Inc., successor to Lynch Investments, and James Matheson who is alleged to have given Lynch instructions to sell the Rally shares at Mr. Coady's request. Quadrangle sought a lifting of the stay of the 2008 action and consolidation of that action with its 2011 action.
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> [7] The Honourable Justice Gerald P. Moir decided that the 2008 and 2011 Nova Scotia proceedings should be consolidated and that the stay of the 2008 proceedings should be lifted. He also decided that the law applicable to the alleged misappropriation of the Rally shares was Nova Scotia, (2013 NSSC 416).

[3] The Nova Scotia Court of Appeal upheld Justice Moir's decision and Blair Coady sought leave to appeal to the Supreme Court of Canada. Leave was denied on October 15, 2015 (*Blair Coady v. Quadrangle Holdings Ltd.*, 2015 CanLII 66262 (SCC)).

[4] In February 2015, Quadrangle filed a Notice of New Counsel and Michael E. Dunphy, Q.C. became counsel of record. By Order dated March 25, 2015, the matter was placed under case management. I was designated the case management judge and it was agreed any applications would be brought before me.

[5] On November 17, 2015, Quadrangle filed the within Application. The motion was scheduled for January 29, 2016, and then re-scheduled to February 12, 2016. On December 9, 2015, a Notice of Intention to Act on One's Own was filed by Mr. Coady.

[6] Mr. Coady died on December 31, 2015. By Order dated January 29, 2016, Mr. Coady's widow, Gloria Coady, (in her capacity as Executrix of his Estate, and not in her own capacity) was appointed to represent The Estate. By further Order of the Court (and with the consent of Quadrangle), the application for summary judgment against The Estate was postponed to March 31 and April 1, 2016.

[7] On January 19, 2016, Quadrangle filed their brief, book of authorities and affidavit of Dr. George Findlay. Dr. Findlay is the director and beneficial owner of Quadrangle and he deposed his affidavit on January 18, 2016.

[8] On March 15, The Estate filed its brief and book of authorities. On March 22, Quadrangle filed a rebuttal submission.

The Applicable *Civil Procedure Rule*

[9] *Civil Procedure Rule* 13, which provides the test for summary judgment, was amended after Quadrangle filed their motion. Accordingly, the question arises as to whether the new summary judgment Rule (amended February 26, 2016, and published in the Royal Gazette on March 2, 2016) applies to the motion.

[10] In considering this question, it is important to bear in mind that summary judgment is procedural in nature. In *Onex Corporation v. American Home Assurance (2009)*, 100 OR (3d) 313 (ONSC), the plaintiffs filed a motion for summary judgment under Ontario's Rules of Civil Procedure. The motion was heard in 2010, after the summary judgment rule was amended. Justice Belobaba found the 2010 summary judgment rule as amended should apply absent a "transitional provision" signaling otherwise. He wrote at para. 5:

> The Rules of Civil Procedure set out the procedure for the conduct of civil litigation. The case law is clear that no one has a vested right in any particular form of procedure. The only "right" one has is to have the matter disposed of according to the procedure in force at the time of disposition. <u>As a general rule, procedural enactments apply retrospectively -- that is, they take immediate effect and apply even to matters that were commenced before the new procedure came into force, unless the contrary is expressed in the legislation.</u>
> [emphasis added]

[11] In *Alymer v. HMQ and AGC*, 2010 ONSC 649, Justice Conway similarly found that Ontario's new summary judgment rule applied. Again, the Court found that the summary judgment rule was a procedural enactment and was presumed to apply immediately unless a contrary intention is indicated (see paras. 19-24). In finding that the new civil procedure rule applied regardless of when the notice of motion was filed, Justice Conway stated:

> [27] Since this is a procedural enactment, it is presumed to apply immediately, unless a contrary intention is evinced from the legislation. I agree with the AGC that there is no such contrary intention expressed in the legislation, nor any transitional rules which apply to Rule 20 so as to rebut the presumption of immediate effect.
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> [28] The new Rule 20 therefore applies as of January 1, 2010, regardless of when the notice of motion was filed …

[12] Once again, summary judgment is procedural in nature. The authorities confirm that procedural enactments are exempt from the common law presumption against retroactivity, and absent an expressed contrary intention, are presumed to apply immediately.

[13] Nova Scotia's new Rule 13 does not contain any indication that it was only intended to apply prospectively. In keeping with the authorities from the Ontario Superior Court, I am of the view that the summary judgment provisions are procedural in nature. Accordingly, the exemption from the presumption against retroactivity ought to apply. In the result, I find the new Rule 13 applies to the within proceeding.

Summary Judgment on Evidence in an Action

Rule 13.04

[14] Quadrangle brings their application for summary judgment on evidence in the action. In particular, they cite Rule 13.04 and highlight these provisions:

> **Summary judgment on evidence in an action**
>
> **13.04 (1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> …
>
> **(5)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting

> party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

[15] Quadrangle emphasizes that the only evidence before the Court is Dr. Findlay's affidavit. The Applicant reminds the Court that the Respondent filed no affidavits and chose not to cross-examine Dr. Findlay. They assert that on the evidence, there is no genuine issue of material fact for trial, or question of law requiring determination. In the result, Quadrangle submits that the Court must grant summary judgment on liability with damages to be assessed at a later date.

[16] By way of response, The Estate says there are material facts in dispute requiring a trial. The Estate points out that since Mr. Coady is deceased, they cannot provide current evidence from him. Nevertheless, they assert that the evidence previously given by Mr. Coady (June 28, 2011 discovery transcript along with a May 15, 2008 affidavit filed in support of Mr. Coady's own summary judgement motion in the Alberta action, attached as Exhibit K to Dr. Findlay's affidavit) is sufficient to support their position that there are material facts requiring a trial.

Governing Authorities

[17] Two years ago, the Supreme Court of Canada released a landmark decision respecting summary judgment, *Hryniak v. Mauldin*, 2014 SCC 7. Although the case deals with the much more broadly-worded Ontario summary judgment rule, the Court set out some principles of general application. The applicability of *Hryniak* in this Province has been considered on a number of occasions. In *Armoyan v. Armoyan*, 2014 NSSC 174, Justice Forgeron stated:

> **19** The Nova Scotia Court of Appeal has not yet commented on the impact, if any, of the summary judgment decisions of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, and its companion case, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8. That these pronouncements possess both a specific and general value, is noted by Karakatsanis, J.A., in para. 35 of *Hryniak v. Mauldin, supra*., which states as follows:
>
> > 35 Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

> **20** *Rule* 13 does not contain the expansive powers that are found in Ontario's summary judgment *Rule*. The Ontario rule grants evidentiary powers that have little or no parallel to *Rule* 13. Weighing evidence, drawing inferences, and making credibility findings, all of which are presumptively available on summary judgment in Ontario, are foreclosed or limited under *Rule* 13. The summary judgment test in Nova Scotia, therefore, continues to be based upon the two part test and analytical framework outlined in *Coady v. Burton Canada Co.*, 2013 NSCA 95, but subject to the proportionality principles reviewed in *Hryniak*. Summary judgment rules are to be "interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims": para. 5 of *Hryniak v. Mauldin, supra*.
> [emphasis added]

[18] With the advent of the new *Rule*, there is no longer a two-part test; however, the analytical framework outlined in *Burton* is essentially the same. Further, in the time since Justice Forgeron's decision, our Court of Appeal has provided guidance concerning the impact of *Hryniak*. In *Blunden Construction v. Fougere*, 2014 NSCA 52, Justice Saunders stated as follows at paras. 6-9:

> [6] In our respectful view, the recent decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, has little bearing upon the circumstances, analysis, reasoning or result in this case. There, Justice Karakatsanis, writing for a unanimous Court, considered the application of a new Rule in Ontario (their Rule 20) which now empowers judges in that province to weigh the evidence, draw reasonable inferences from the evidence, and settle matters of credibility when deciding whether to grant summary judgment. Those powers are foreign to the well-established procedures and settled law which operate in Nova Scotia.
>
> [7] We recognize of course the guidance provided by Justice Karakatsanis in her reasons concerning the importance of interpreting summary judgment rules "broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims." She spoke of the values and principles that underlie our civil justice system and raised a clarion call for a shift in culture to provide alternative adjudicative measures to the conventional trial model; and invoke procedures which will provide access to justice that is simplified, proportionate, less expensive, just and fair. A process for summary judgment is one such measure designed to streamline technical and often cumbersome rules, and enable judges to dispose of appropriate cases, summarily. In signalling the urgent need for such a transformation Karakatsanis, J. wrote at paras. 27-28:
>
> > [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern

> reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[8] Karakatsanis, J. emphasized that judges have a critical role to play in ensuring that the case is well suited to summary judgment and presents as one which will allow the judge to decide the facts with confidence and choose a fair and proportionate way to resolve the dispute. She wrote:

> [50] ... When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[9] Justice Karakatsanis cautioned that while such motions can save time and expense, their application can also produce the opposite effect by slowing the pace and adding to the cost of litigation and in that way denying or delaying a responding party's access to justice. Thus, judges must be vigilant that such processes are used appropriately and are not abused:

> 32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[emphasis added]

[19] Accordingly, *Hryniak* is of limited application in assessing summary judgment in Nova Scotia. The task of the Court is to ensure that the case is well suited to summary judgment. It is for the Applicant to demonstrate this suitability.

[20] The wording of *Rule* 13.04 indicates that the decision to grant summary judgment is not a discretionary one; a judge *must* grant summary judgment in the absence of a genuine issue of material fact for trial and when there is an absence of a question of law requiring determination (13.04(2)).

[21] In *Ross Estate v. Police Assn. of Nova Scotia*, 2014 NSSC 42, at para. 16 and in *Krewenki v. Long Beach Boat Building Ltd.*, 2015 NSSC 80, at para. 14, Justice Moir and Justice Murray, respectively, confirmed that Rule 13.04(1) is mandatory and the Court does not retain a residual inherent discretion to grant or refuse summary judgment.

[22] In *Coady v. Burton Canada Co.*, 2013 NSCA 95, Justice Saunders (for the majority) added an important caveat to this general rule. While a judge should not dismiss a motion for summary judgment on the basis of prematurity, he or she can adjourn the hearing until sufficient disclosure has been made to allow the parties to put their best foot forward (paras. 80, 86 and 87). The new *Rule* (13.04(6)(b)) embodies this as it reads:

> **13.04 (6)** A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> **…**
>
> b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[23] I see nothing in the new *Rule* to change what Justice Saunders noted in paras. 142 and 143 of *Burton*:

> Discretion should remain with the motions judge to defer, dismiss or otherwise determine a motion for summary judgment on the evidence … when the following circumstances arise:
>
> (1) the responding party has been unable to obtain the material evidence, and

> (2) the relevant material evidence is likely available from sources that are identified and/or identifiable, and
>
> (3) the responding party has been diligent in pursuing that evidence.
>
> This test allows a proper balancing of the competing interests and principles. Failure to retain that discretion may encourage machinations that have no place in civil litigation.
> [emphasis added]

[24] It is not necessary for the full disclosure process to be complete, or for affidavits of documents to have been exchanged; however, there must be sufficient material before the motions judge in order to make a determination about whether summary judgment should be granted: see *MacNeil v. Nova Scotia (Attorney General)*, 2010 NSSC 138 at para. 7, cited with approval in *Burton* at para. 140.

[25] In *Chan v. White*, 2014 NSSC 383, the plaintiff sought an adjournment of the defendants' motion for summary judgment on evidence on the basis the motion was premature because discovery examinations of the defendants had not been completed. The defendants' motion for summary judgement was premised on the fact that nine years after commencing the proceeding, the plaintiff had still not produced an expert opinion on standard of care. The plaintiff argued that it would be "prudent" to wait for discoveries before retaining an expert. Justice Coady denied the adjournment, concluding the plaintiffs were "just procrastinating to forestall summary judgment". Justice Coady noted that the plaintiffs did not suggest they were taken by surprise by the motion (para. 9).

[26] Before concluding this section, I wish to comment concerning what constitutes a “material fact”, as contemplated by Rule 13. A material fact is a fact that is essential to the claim or defence; it is a fact that can or will affect the outcome of the matter, or "anchors" the cause of action or defence: see *Burton* at para. 87, and *Sinclair v. Fierro*, 2014 NSCA 5 at para. 28.

Background Giving Rise to this Application

[27] When I review the pleadings and Dr. Findlay's affidavit, I find portions of Justice Moir's decision (2013 NSSC 416) are of assistance in summarizing the background to the within application. For example, at paras. 2 and 3, he states:

> [2] The claim is about misappropriation of shares. Quadrangle claims that Mr. Coady used his position in Shannon International Resources Inc. to misappropriate some of Quadrangle's shares in Rally Energy Ltd., of which Mr. Coady was also an officer and director. The Rally shares had been pledged by Quadrangle to Shannon as security for Quadrangle's promise to pay for some shares in Shannon.
>
> [3] Instead of holding the shares as security, Mr. Coady caused Shannon to deliver them to Lynch Investments Limited in Halifax. Under instructions from a Mr. James Matheson, with whom Mr. Coady had a business relationship, Lynch Investments disposed of most of the Rally shares and credited the proceeds to a Shannon account. Quadrangle found this out in October of 2005.

[28] Further, Justice Moir's summary of the claims at paras. 18-22 is of application:

> [18] In 2003, Rally was about to drill for natural gas on Prince Edward Island, and Shannon was a minor participant. Dr. Findlay attended a presentation in Halifax put on by Mr. Coady and others. He also met Mr. Matheson at that time. Findlay and Coady discussed Quadrangle investing in Shannon.
>
> [19] In July 2003, Shannon and Quadrangle signed a securities subscription agreement under which Quadrangle acquired, by private placement, common shares in Shannon and fixed price warrants for additional shares. In May 2004, Quadrangle exercised the warrants. Quadrangle owed $US 160,000, but it did not pay cash. Instead, Quadrangle promised to pay for the shares in the next October with interest.
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> [20] As security for the promise to pay $160,000, Quadrangle pledged 500,000 shares in Rally. It executed a "promissory note" that is really a security agreement at the same time as it exercised the warrants, and it delivered the Rally shares to a Shannon account with BMO Nesbitt Burns.
>
> [21] Shortly after the pledge, Mr. Coady transferred the Rally shares to a Shannon brokerage account at Lynch Investments in Halifax. Mr. Coady told Lynch it could take instructions for sale of these from Mr. Matheson, a former investment adviser. Some 373,000 Rally shares were sold by Lynch Investments under Mr. Matheson's instructions well before the $160,000 payment was

> due. Quadrangle was not in default of its agreement with Shannon. The statement of claim says that proceeds went to another of Mr. Coady's companies, Shear Wind Inc.
>
> [22] Quadrangle claims that Mr. Coady caused the Rally shares to be sold without the knowledge or authority of Quadrangle and misappropriated the proceeds.

[29] It is the disposition of the Rally shares and the use of the sale proceeds which is the subject of the main dispute between Quadrangle and the Estate. Quadrangle alleges that Shannon was not entitled to sell the Rally shares. The Applicant alleges that Shannon held them in trust for Quadrangle. The Estate's position is that the Rally shares could be traded in the ordinary course of business and that, if they were, Shannon would have been required to replace them with like shares.

Analysis and Disposition

[30] In order to determine whether the Applicant has met its burden, I have set forth the main issues and analyzed them within the context of *Rule* 13 and the jurisprudence.

Pursuant to the Promissory Note, Were the Rally Shares to be Held in Trust by Shannon?

[31] Quadrangle submits that pursuant to an express trust created by the terms of the promissory note dated March 10, 2004 (the "Note"), the Rally shares were trust property. On the other hand, the Estate says that the Rally shares could be traded in the ordinary course of business.

[32] When I review the evidence, I cannot find anything to support The Estate's position. In particular, I have focussed on the Note (Exhibit A of Dr. Findlay's affidavit) and the discovery transcript of Mr. Coady (Exhibit K of Dr. Findlay's affidavit). The Quadrangle Rally shares were provided to Shannon pursuant to the terms of the Note. The Note includes the following terms:

> … the Holder [i.e. Shannon] may not register the Collateral in his name or in the name of his nominee or nominees, as pledgee, unless the Collateral is foreclosed upon as set forth herein.

[33] In addition the Note provided the following regarding remedies on default:

> Remedies on Default. In the event that Promissor fails to pay the Note upon the Maturity Date, Holder shall have the right to foreclose upon the Collateral and dispose of same in a commercially reasonable manner. Note Holder shall provide Promissor 5 days notice of its election to foreclose and Promissor shall have the opportunity to cure such default during such period. The obligations of Promissor under the Note shall be reduced by the accountable sales proceeds from the sale of the Collateral and the Holder shall [sic] full recourse against the Promissor for any deficiency thereof.

[34] Having regard to the above passages (and when the entire wording of the Note is considered in context), I find that Shannon was only entitled to deal with the Rally Shares in accordance with its rights on default. The facts disclose that there never was a default. Accordingly, I am of the view that the Note provides for the Rally shares to be held in trust.

[35] Interestingly, although they argue the point on this motion, the Estate did not defend on the basis that Quadrangle Rally shares could be traded in the ordinary course of business by Shannon. Indeed, in his Defence at para. 6, Mr. Coady admits the Rally shares were to be held "in trust":

> … Mr. Coady states that any shares of Rally placed by Quadrangle were placed in trust with Shannon International Resources Inc. ("Shannon") …

[36] As for the argument made by the Estate that Mr. Coady's discovery transcript at p. 26 supports the notion that the Rally shares were not held in trust, the passage requires scrutiny in context. First, the question and answer reads as follows:

> Q. Did you ever choose not to follow any of Mr. Matheson's recommendations with respect to the trading in the securities owned by Shannon?
>
> A. Yes, at one point he suggested that I still – or I give orders to share all of the Rally shares that Shannon had under its control, not in trust but under its control.

[37] Importantly, Shannon had Rally shares under its control other than the Quadrangle Rally shares. Indeed, the Quadrangle Rally shares were only a portion of Shannon's holdings of Rally shares. In my view, Mr. Coady's evidence could very well relate to clarifying that the suggestion was that all shares be sold under

its control (not only the ones in trust). I would add that in his oral submission, Mr. Maciag candidly acknowledged this might well be the situation.

[38] Returning to Mr. Coady's Defence, it is important to note that it was filed by his then lawyer, William L. Ryan, Q.C., on April 7, 2015. In my view, the para. 6 admission is critical and obviously post-dates Mr. Coady's ambiguous discovery evidence on the point.

[39] It is well established law that "three certainties" must be established to create an express trust. These were discussed by Justice Murphy in *Moore v. Catholic Episcopal Corp.*, 2015 NSSC 308:

> [28] In Waters' Law of Trusts in Canada, fourth ed. at page 140 the author identifies the requirements to create a trust:
>
> > **For a trust to come into existence, it must have three essential characteristics.** As Lord Langdale M.R. remarked in *Knight v. Knight*, in words adopted by Barker J. in *Renehan v. Malone* and considered fundamental in common law Canada, **(1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain.** This means that the alleged settlor, whether he is giving the property on terms of a trust or is transferring property on trust in exchange for consideration, **must employ language which clearly shows his intention that the recipient should hold on trust**. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Third, **the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.** [Justice Murphy's emphasis added, citations omitted]

[40] In my view, the language of the Note speaks for itself. The three essential characteristics are met. The Note clearly contemplates that Quadrangle is pledging the shares as collateral to secure an obligation and that the Rally shares can only be dealt with if Quadrangle defaults (which it did not) on the terms of the Note.

[41] A key factor in determining whether a trust exists is whether there is a duty on the part of the holder of the property to keep it distinct from his or her own personal property: see *Ontario Hydro-Electric Power Commission v. Brown*

(1959), 21 DLR (2d) 551, 1959 CarswellOnt 165 (Ont. CA). At the end of the day, it is my determination that there is no evidence supporting any other conclusion than that the Rally shares constitute clear and certain property. There is no uncertainty as to who is the beneficiary of the trust. Pursuant to the Note, the Rally Shares were supposed to be held in trust by Shannon.

Does the Evidence Establish that, Contrary to the Terms of the Note, the Rally Shares Were Sold Out of the Shannon Account?

[42] In reviewing Mr. Coady's discovery transcript and affidavit, it is clear that he admitted selling the Rally shares between July and November of 2004. For example, there are emails from Lynch Investments Limited to Mr. Coady confirming trading instructions from Mr. Coady to sell the Rally shares. Further, between July and November, 2004, Shannon's Lynch Investment Limited account statements show the sale of the Rally shares by Shannon.

[43] Once again, it is my view that the evidence establishes Shannon was only entitled to deal with the Rally shares in accordance with the provisions of the Note regarding remedies on default. It is my further determination that the evidence establishes that, contrary to the terms of the Note, the Rally shares were sold out of the Shannon account.

Was Mr. Coady a Constructive Trustee of the Rally Shares When He Wrongfully Sold Them, and Therefore Personally Liable?

[44] Shannon was the trustee of the Rally shares. As such, Shannon was tasked with holding the Rally shares in trust for Quadrangle. Mr. Coady was president of Shannon. His discovery transcript and the emails confirm that he controlled the Lynch Investment Limited brokerage account to which the Rally shares were transferred.

[45] A trustee owes the beneficiary of a trust a fiduciary duty: see *Frame v. Smith*, [1987] 2 S.C.R. 99. Upon reviewing the evidence, it is clear that Mr. Coady wrongfully sold the trust property, concealed the fact of the sale and transferred the proceeds of the sale to another company in which the trustee had an interest. In my view, the evidence establishes that Mr. Coady's handling of the Rally shares was done in such a way to make Mr. Coady a constructive trustee of the Rally shares. In the result, I find he is personally liable for their conversion as a constructive trustee. Alternatively, Mr. Coady's fraud is more than sufficient to cause the

corporate veil to be pierced and for liability to be assigned to Mr. Coady in his personal capacity.

[46] The Estate argues that as soon as Mr. Coady became aware of the actions of Mr. Matheson, he halted further sales of Rally shares and insisted that Quadrangle be advised of the situation. Throughout their brief and in oral submissions, the Estate aggressively "points the finger" at James Matheson, saying Shannon was prevented from providing equivalent shares because of the actions of Mr. Matheson.

[47] When I review the evidentiary record, I cannot find support for these assertions. Indeed, it is my finding, particularly when I scrutinize the emails of the share transactions (appended to Mr. Coady's May 15, 2008 affidavit, which he was discovered or cross-examined on June 28, 2011) that it was Mr. Coady who either instructed, or was fully aware of the instructions to sell Quadrangle's Rally shares.

[48] I would add that Quadrangle was not advised of the wrongful sales until October, 2005. This was almost eleven months after the last sale of the Quadrangle Rally shares. If Mr. Coady wanted to advise Quadrangle of the inappropriate sale of the shares, he was obviously far too late.

Is Full Trial Disclosure Required in Order to Have a Proper Hearing?

[49] Through written and oral submissions, the Estate argues that further disclosure is required in order to have the matter properly adjudicated. The Estate weaves the disclosure theme into their allegations pointing the finger at Mr. Matheson for the position they say Mr. Coady found himself in. Whereas the Estate's brief makes the case that Mr. Coady was essentially unknowingly a front for a scheme of deception perpetrated by Mr. Matheson, this theme does not appear anywhere else. In particular, there is nothing in Dr. Findlay's affidavit (inclusive of Mr. Coady's discovery transcript and his affidavit) which in any way forms the basis for such allegations. It is perhaps therefore not surprising that there is no cross-claim against Mr. Matheson (or anyone else) in the Defence filed approximately a year ago.

[50] With respect to the argument that further disclosure might shed more light on the allegations against Mr. Matheson (or anything else argued by the Estate), until the filing of their brief, there was no mention of disclosure deficiencies. In this regard, the matter has been under case management for a year. During this time, the Estate (and previously Mr. Coady, represented by counsel up until late

2015) did not raise any disclosure problems with the Court. Similarly, there has been nothing raised with respect to the new allegations contained in the Estate's brief that they "may wish to introduce expert handwriting witnesses and other expert evidence as to the validity of the documentation purported to be signed by Blair Coady". On balance, I find this a dubious attempt to "muddy the waters" in an effort to have the motion dismissed. Indeed, I am compelled to the Applicant's argument as set out in para. 22 of their rebuttal brief:

> The Estate cannot properly resist a summary judgment motion by raising a multitude of issues that have not been pleaded and for which there is no evidentiary basis. With respect, the vast majority of the Estate's submissions relate to non-pleaded allegations with no supporting evidentiary base whatsoever. Quadrangle submits this is a weak attempt to "muddy the waters" in an attempt to convince the court that a trial is necessary. The Estate outlines 16 different points in paragraph 73 of its Brief. Many of these clearly raise a "theory" that Mr. Matheson was the mastermind behind all of these wrongful activities and Mr. Coady was a "victim". With respect, there is no evidence to this effect. More importantly, whether Mr. Matheson was the mastermind is irrelevant to Mr. Coady's liability to Quadrangle.

[51] Returning to Justice Coady's words in *Chan*, I am of the view that the Estate's late production arguments amount to "procrastinating to forestall summary judgment". Accordingly, I have chosen to exercise my discretion to determine summary judgment to avoid "machinations that have no place in civil litigation" (see *Burton* at para 143).

[52] I would add that to the extent the Estate has raised issues surrounding an alleged failure to mitigate, these allegations can obviously be dealt with at a subsequent damages assessment.

Summary

[53] Although the Estate's brief denies virtually all of the allegations against Mr. Coady, these denials are not borne out on the evidence. Indeed, when I scrutinize the record I am left with these material facts having been established:

1. that Quadrangle provided the Rally shares to Shannon to be held in trust in accordance with the terms of the Note;
2. that the Rally shares could not be sold or otherwise dealt with unless there was a default and notice was provided under the Note;

3. that Quadrangle did not default under the Note and Shannon did not purport to exercise its remedies on default;
4. that Shannon wrongfully sold the Rally shares with the knowledge of and/or on the instructions of Mr. Coady; and
5. that Mr. Coady/the Estate had actual knowledge of the breach of trust or was reckless or willfully blind to whether there was breach of trust.

[54] In light of Mr. Coady's admissions and the law, I find on a balance of probabilities that the Estate's defences have no reasonable chance of success at trial. Returning to the direction of the Supreme Court of Canada in *Hryniak*, I find this case is well suited to summary judgment because it presents as one which allows me to decide the facts with confidence and choose a fair and proportionate way to resolve the dispute. In particular, the liability dispute deserves resolution now. A trial would not be proportionate, timely or cost effective. The moving party has satisfied me on a balance of probabilities that the Estate has no defence to this action.

[55] I am satisfied that there is no genuine issue of material fact (on its own or mixed with a question of law) for trial. Further, the matter does not require determination of a question of law. Accordingly, I grant summary judgment against the Estate with damages to be assessed at a date to be determined.

Costs

[56] I order costs on this application of $2,000 to be paid by the Estate on a forthwith basis to Quadrangle. Further, the Estate shall pay the costs of the action to Quadrangle with costs to be set following the assessment of damages or as otherwise ordered by the Court.

Chipman, J.