NOVA SCOTIA COURT OF APPEAL
Citation: *Risley v. MacDonald*, 2022 NSCA 76

Date: 20221209
Docket: CA 509221
Registry: Halifax

Between:

John Carter Risley and Lobster Point Holdings Limited

Appellants

v.

Judith Iris MacDonald (formerly Risley)

Respondent

Judge: The Honourable Justice David P. S. Farrar

Appeal Heard: October 14, 2022, in Halifax, Nova Scotia

Subject: fresh evidence – summary judgment – *Rule* 13.04 – genuine issue of material fact requiring trial – *Limitation of Actions Act*, S.N.S. 2014, c. 35 – acknowledgment in writing

Summary: The respondent, Judith MacDonald, brought a motion in the Supreme Court for partial summary judgment against her former spouse and his company Lobster Point Holdings Limited for payment of a $10 million debt which she said was due to her under the terms of the Consent Corollary Relief Order. The debt was secured by a Promissory Note guaranteed by Lobster Point.

She also sought summary judgment on a limitation defence raised by the appellants on the motion. Mr. Risley asserted that the debt had been paid in full by a series of direct payments to Ms. MacDonald and by payments to their two adult children. In the alternative, he argued the action was statute-barred.

Justice Gregory Warner granted Ms. MacDonald's motions and ordered Mr. Risley to pay $10 million to Ms. MacDonald forthwith if he failed to do so Lobster Point Holdings was liable to pay the amount pursuant to its guarantee on the Promissory Note.

The appellants appeal his decision and Order.

Issues:

(1) Should leave to appeal be granted?
(2) Should the appellants' motion to adduce fresh evidence be granted?
(3) Did the motions judge err in finding no genuine issue of material fact for trial concerning the $10 million debt?
(4) Did the motions judge err in disallowing the limitations defence?

Result: Leave to appeal was granted.

The motion to adduce fresh evidence was dismissed. The evidence did not pass the first stage of the *Palmer* test. It was available at the time of the original motions and could have been introduced at that time.

The motions judge did not err in finding that there was no genuine issue of material fact for trial concerning the $10 million debt. Mr. Risley's assertion the debt had been paid was just that, a "bold assertion", and not supported by his evidence or the evidence of anyone else.

Finally, the motions judge did not err by disallowing the limitations defence. Emails of Mr. Risley—one dated February 19, the other dated March 12, 2019—satisfied the writing and acknowledgment provisions of the *LLA*.

The motion to adduce fresh evidence is dismissed, and the appeal is dismissed with costs to the respondents in the amount of $7,500, inclusive of disbursements.

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Appellants

v.

Judith Iris MacDonald (formerly Risley)

Respondent

Judges:	Beveridge, Farrar and Beaton JJ.A.
Appeal Heard:	October 14, 2022, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Farrar J.A.; Beveridge and Beaton JJ.A. concurring
Counsel:	Michelle Awad, K.C., for the appellants William Ryan, K.C., for the respondent

Reasons for judgment:

Introduction

[1] The respondent, Judith MacDonald, brought a motion in the Supreme Court of Nova Scotia for partial summary judgment against her former spouse, John Risley and his company Lobster Point Holdings Limited ("the appellants"). Ms. MacDonald sought payment of a $10 million debt which she said was due to her under the terms of a Consent Corollary Relief Order, which had incorporated a Settlement Agreement reached between the parties to resolve the division of property in their divorce proceedings. The debt was secured by a Promissory Note that was guaranteed by Lobster Point.[1] She also sought summary judgment on a limitation defence raised by the appellants on the motion.[2]

[2] The central issue on the summary judgment applications was whether the debt had been paid. Mr. Risley asserted that the debt had been paid in full by a series of direct payments to Ms. MacDonald and by payments to their two adult children. He said Ms. MacDonald had agreed to be responsible for 50% of whatever he decided to pay to their children. As an alternative argument, Mr. Risley argued Ms. MacDonald's action was statute-barred.

[3] The motions were heard by Justice Gregory M. Warner over two days in June 2021. By decision dated August 18, 2021 (2021 NSSC 250), Justice Warner allowed both motions and entered judgment against Mr. Risley in the amount of $10 million.

[4] The appellants appeal both rulings and seek to introduce fresh evidence.

[5] For the reasons that follow I would dismiss the motion to adduce fresh evidence and the appeal with costs to Ms. MacDonald in the amount of $7,500, inclusive of disbursements.

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[1] In the *facta* and arguments of the parties, the issue is often described as payment of the Promissory Note. The issue is actually payment of the $10 million debt due under the Settlement Agreement and secured by the Promissory Note and Lobster Point's guarantee. It is properly described in ¶7 of the motions judge's decision.

[2] Although the appellants intended to file an amended defence adding the limitation issue, it was never filed. The motions judge agreed to address the limitation defence as it was argued by both parties.

Background

[6] Ms. MacDonald and Mr. Risley were married in 1970, separated in 2014, and divorced in March 2018. They have two adult children, Michael and Sarah.

[7] On March 17, 2018, Justice Mona Lynch issued a Divorce Order and a Consent Corollary Relief Order. Clause 2 of the Consent Corollary Relief Order stated, "The division of property has been agreed upon to the mutual satisfaction of the parties, as set out in a Settlement Agreement dated March 2, 2018".

[8] The March 2, 2018 Settlement Agreement was part of a global resolution of Ms. MacDonald's entitlement to spousal support and division of matrimonial property. The resolution provided for a total transfer of $150 million from Mr. Risley and Lobster Point to Ms. MacDonald and her holding company Judi's Holdings Limited.

[9] The $150 million settlement included $25 million (paid before the March 2, 2018 Settlement Agreement), $10 million (payable on May 31, 2018 secured by a Promissory Note and Lobster Point's guarantee), and a February 15, 2018 reorganization of their respective shareholdings in Clearwater Seafoods, GFL Environmental Holdings Inc. and Kingsett Canadian Real Estate Holdings. In the reorganization, Ms. MacDonald's holding company received an interest in Clearwater of $100 million, in GFL of $7.5 million, and in Kingsett of $7.5 million, together with entitlement to continued receipt of dividends when payable.

[10] On January 29, 2021, Ms. MacDonald and Judi's Holdings issued a Notice of Action and Statement of Claim against Mr. Risley and Lobster Point claiming shareholder oppression, a number of remedies, and payment of the $10 million debt. It is only the debt claim that was before the motions judge.

[11] On February 24, 2021, Mr. Risley filed his Statement of Defence. In it he pled "he has made various payments in satisfaction of the obligation represented by the Note. Therefore, neither John personally nor LPHL, as Guarantor of John's obligation under the Promissory Note, is liable for any of the amounts claimed in the Statement of Claim in relation thereto".

Summary Judgment Motion

[12] Before the motions judge, Mr. Risley claimed that he has actually overpaid the debt by more than $3 million. He came up with this amount by adding

payments made directly to Ms. MacDonald of $2,862,500, plus attributing to her 50% of amounts he paid for the benefit of their two children and their families. Ms. MacDonald's 50% share of those amounts would be $10,843,743.

[13] Ms. MacDonald said the $2,862,500 she received were dividend payments or advances on dividends. She denied ever agreeing to be responsible for 50% of the funds Mr. Risley paid to their children.

[14] The positions of the parties were described by the motions judge in his decision:

> [21] She claims that all of the $1,083,333.42 John advanced to her in monthly installments of $41,666.67, between June 1, 2018 and January 29, 2021, and John's calculation of Judi's tax liability of 50% in respect of those payments ($541,666.71), together with the three lump-sum payments received in December 2018, April 2019 and September 2019, totaling $825,000.00, and John's calculation of Judi's tax liability of 50% on these payments ($412,500.00), were advances on dividends related to her holdings in Clearwater, GFL, and Kingsett. They were never described to her, nor agreed to by her, as payments on the $10-million lump-sum Promissory Note due May 31, 2018. Judi relies on several email exchanges between her brother and agent, Mickey MacDonald ("Mickey") and John as undisputed facts in support of this position. John does not dispute the authenticity and contents of the emails.
>
> [22] John takes the position at this hearing that his holding company cannot and has not declared any dividends, and therefore the actual advances ($1,908,333.42), and John's calculation of Judi's tax liability of 50% ($954,166.71) on them were payments on the $10-million Promissory Note, not advances on dividends.
>
> [23] Whether this disagreement constitutes a genuine issue of material fact for trial is a question to be answered in this decision.
>
> [24] The second disagreement relates to John's claim for credit against the $10-million Promissory Note for one-half of the funds that, between March 2018 and April 2021, he advanced to, and paid on behalf of, or for the benefit of their two children and their families, together with John's calculation of Judi's tax liability of 50%, on each of the payments. He relies on Paragraphs 14, 16 and 17 of his Affidavit, as raising an issue of credibility, and therefore a genuine issue of material fact for trial.
>
> [25] Judi claims not to have been aware of, nor to have agreed to, any amendment or waiver of her entitlement to receive the $10-million pursuant to the Promissory Note by reason of John's payments to their children. She claims to have been unaware of this claim until his affidavit was filed in this motion on May 25th, 2021. Judi relies on:

(a) John's failure to state in any email exchanges or documents of any kind before this Action was commenced what he alleges in his May 25, 2021 affidavit,

(b) his words to the contrary in his pre-Action email exchanges,

(c) the particulars of (and when) he claims their agreement was made,

(d) John's acknowledgment that he did not provide any accounting to Judi of the credits he claims until his May 25, 2021 affidavit in this motion, and

(e) the emails exchanged between John and Mickey, and on March 12, 2019, by John to Judi, their children, and Mickey, as John's acknowledgment that he owed the $10 million, and that he did not pay it because he was unable to pay it.

[26] Whether this disagreement constitutes a genuine issue of material fact for trial is the second question to be answered in this decision.

[27] The third question is John's alternate claim that more than two years had passed without written acknowledgement or payment on the Promissory Note.

[15] The motions judge correctly identified the three issues he had to consider in determining whether there was genuine issue of material fact requiring a trial:

- Were the payments Mr. Risley made to Ms. MacDonald payments on the debt;
- Whether Mr. Risley was entitled to set-off 50% of the amounts he paid to their children from the amount owing on the debt;
- Was the action statute-barred?

[16] He concluded that Mr. Risley had not raised a genuine issue for trial nor was the action statute-barred, and granted summary judgment requiring Mr. Risley to pay the $10 million debt to Ms. MacDonald. If he failed to do so forthwith, Lobster Point would be liable to pay the amount. It is from that decision the appellants now appeal.

Issues

[17] The appellants describe the issues in their factum:

Preliminary Issue A:	Should Leave to Appeal Be Granted?
Preliminary Issue B:	Should the Appellants' Motion to Adduce Fresh Evidence be Granted?

Issues Concerning the Merits of the Appeal:

Issue 1(a): Did the Learned Chambers Judge err by finding that there were no genuine issues of material of fact requiring trial regarding whether the Judi Payments were dividend payments or credits against the Debt?

Issue 1(b): Did the Learned Chambers Judge err by finding that there were no genuine issues of material of fact requiring trial regarding whether the Family Payments were credits against the Debt?

Issue 1(c): Did the Learned Chambers Judge err by finding there was an acknowledgement of the Debt that restarted the limitation period under the LAA?[3]

Issue 2: Did the Learned Chambers Judge err by making findings of credibility in relation to the conflicting evidence provided by the Appellant and the Respondent in relation to Issues 1 (a) and (b)? We incorporate the Appellants' submissions on this issue in the submissions for Issues 1(a) and 1(b).

[18] I would restate the issues as follows:

1. Should leave to appeal be granted?
2. Should the appellants' motion to adduce fresh evidence be granted?
3. Did the motions judge err in finding no genuine issue of material fact for trial concerning the $10 million debt?
4. Did the motions judge err in disallowing the limitations defence?

Standards of Review

[19] The issue of whether leave to appeal should be granted is one of first instance so there is no standard of review (*Burton Canada Company v. Coady*, 2013 NSCA 95, at ¶18).

[20] For the same reason there is no standard of review as to whether fresh evidence should be admitted (*Ward v. Murphy*, 2022 NSCA 20, at ¶25).

[21] The standard of review applicable to appeals from summary judgments is well-established, as set out in *Burton Canada Company v. Coady*:

> [19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the

[3] *Limitation of Actions Act*, S.N.S. 2014, c. 35, s. 1.

> impugned order under appeal did or did not have a terminating affect, is now extinct. There is only one standard of review. We will not intervene unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. See for example, *AMCI Export Corporation v. Nova Scotia Power Inc.*, 2010 NSCA 41; *Innocente v. Canada (Attorney General)*, 2012 NSCA 36 at ¶21-29; *WBLI Chartered Accountants*, *supra*; and *Nova Scotia v. Roué*, 2013 NSCA 94.

[22] This standard of review also applies to the fourth ground of appeal I have identified above—whether the motions judge erred in granting summary judgment on the limitation issue.

Analysis

1. Leave to Appeal

[23] Ms. MacDonald acknowledges the appellants have raised an arguable issue which could result in the appeal being allowed and leave to appeal should be granted. I agree and would grant leave to appeal.

2. Should the appellant's motion to adduce fresh evidence be admitted?

[24] The appellants are seeking to admit the affidavit of Michelle C. Awad, K.C., dated April 8, 2022 as fresh evidence in support of the appeal. The affidavit attaches copies of Ms. MacDonald's tax returns from 2018-2020; certain working papers from Judi's Holdings; email correspondence between counsel from March 2021 to April 2022; and briefs and materials filed with the Nova Scotia Supreme Court in February 2022 on a production motion brought by the appellants.

[25] The appellants argue that this evidence is necessary to prove that:

a) Judi's Holdings did not receive any dividends;

b) Judi's Holdings did not declare any dividends; and

c) Ms. MacDonald's tax returns do not show receipt of any dividends from Judi's Holdings or Lobster Point Holdings.

[26] The appellants say this new evidence refutes Ms. MacDonald's earlier evidence that the contested payments made by Mr. Risley were not related to the debt but instead constituted dividend payments or advances on dividend payments.

[27] Ms. MacDonald objects to the introduction of the fresh evidence claiming portions of it contain double-hearsay and are inadmissible. She also says the evidence fails to meet the four-part test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

[28] It is not necessary for me to address the hearsay issue—the evidence is not admissible under *Palmer*.

[29] The oft-cited *Palmer* test is as follows:

> […] From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> (p. 775)

[30] The fresh evidence fails on the first stage of the *Palmer* test for the following reasons.

[31] First, the alleged evidence with respect to the non-payment of dividends could have been adduced through the tax returns of either Lobster Point Holdings or Ms. MacDonald and Judi's Holdings.

[32] There was no evidence before the chambers judge, and there is no evidence before this Court, to suggest that the corporate tax returns for Lobster Point from 2018 to 2020 were not available at the time of the summary judgment hearing in June 2021. Lobster Point's tax returns could have provided the same evidence that the appellants ask this Court to admit as to whether Lobster Point declared any dividends during these three years. Had the appellants exercised due diligence, they could have produced Lobster Point's tax returns.

[33] Second, the Affidavit is silent as to why the appellants could not, by due diligence, have adduced Ms. MacDonald's or Judi's Holdings tax returns on the motion.

[34] The first time Mr. Risley sought disclosure of Judi's tax returns was in an email dated August 24, 2021, six days after the release of the motions judge's decision. In that letter, Ms. Awad notes that the relevance of the documents arises from the position Ms. MacDonald took before Justice Warner:

> In addition to the documents requested, ***given the position which the Plaintiffs took before Justice Warner, please also produce all the Plaintiffs' tax returns for the years 2018 to present***, as well as the records (financial and otherwise) for the corporate Plaintiff which evidence the declaration and payment of the dividends which the individual Plaintiff testified she received.
>
> [Emphasis added.]

[35] There is no evidence the tax returns are relevant to any other issue in the underlying proceeding. If they only became relevant because of the motions judge's decision, there would not have been an obligation to disclose them prior to the decision.

[36] The appellants argue that "the Fresh Evidence was solely in the Respondent's and JHL's control and they had a positive, ongoing obligation to disclose it in a timely manner under the *Civil Procedure Rules*" (Appellants' Factum, at ¶19).

[37] The tax returns were a live issue on the summary judgment motion on two fronts—whether dividends had been declared and whether Mr. Risley had access to Ms. MacDonald's tax returns.

[38] Mr. Risley was cross-examined on whether dividends were declared and who prepared Ms. MacDonald's tax returns:

> **[Mr. Risley:]** There were no dividends declared by – on behalf of the shares that were represented in the hundred and fifteen million dollars ($115,000,000). ***And she never acknowledged those payments as dividends, nor reported them to Revenue Canada as dividends.***
>
> **Q.** You were doing the tax filing for her in that regard, weren't you?
>
> **A.** I wasn't personally, no.
>
> **Q.** Your company was doing it?

> **A.** Yes.
>
> **Q.** Okay. She wasn't doing it?
>
> **A.** No.
>
> **Q.** ***So, you were setting up what the tax position under those payments were?***
>
> **A.** I wasn't but ---
>
> **Q.** ***Your company was.***
>
> **A.** ***Yes, that's correct.***
>
> [Emphasis added.]

[39] This exchange confirms that not only did Mr. Risley have access to Ms. MacDonald's tax returns, he had reviewed them for the purposes of determining whether she had acknowledged the payments as dividend payments.

[40] The appellants are not adducing "fresh" evidence, but rather evidence designed to corroborate the assertion in Mr. Risley's affidavit on the summary judgment motion that "[t]hese are cash payments to Judi. The suggestion that they are dividends from LPHL to JHL is incorrect as LPHL has not declared any dividends on the Class E, F, and G Preferred shares held by JHL" (Affidavit of John Risley, at ¶21).

[41] In his decision, the chambers judge expressly noted this evidence in Mr. Risley's affidavit and the absence of any corroborating evidence on point:

> [58] In his affidavit at Paragraph 25, John acknowledged the issuance of Class E, F and G shares from LPHL to Judi's holding company, but he adds that no dividends had been declared on the Class E, F and G shares, and at Paragraph 26, he states that Mickey is in error when he says dividends were paid. John's affidavit does not address the email exchanges and Exhibit 8, to the effect that the payments to Judi were advances on dividends which he acknowledges she was entitled to. ***If John wanted to challenge Judi's entitlement to dividends that John refers to in the emails, he had a duty to put his best foot forward, and to advance some evidence that contradicted his statements in the only emails in evidence. A bald assertion in an affidavit that LPHL has not declared or paid dividends on the Class E, F and G shares does not raise a genuine issue of material fact as to whether the sums he paid Judi were as stated in his emails***.
>
> [Emphasis added.]

[42] In the recent Supreme Court of Canada decision *Barendregt v. Grebliunas*, 2022 SCC 22, the Court affirmed the four-part test in *Palmer*. In doing so, it reviewed the importance of the due diligence test. The decision is instructive as it

makes clear it is impermissible to do what the appellants are attempting on this appeal. They are seeking to overturn an unfavourable outcome by introducing evidence that was available at the first instance.

[43] In *Barendregt*, the mother made an application to relocate the children from Kelowna, British Columbia to Telkwa, British Columbia.

[44] The trial judge ordered primary residence of the children to the mother and allowed them to relocate to Telkwa. One of the issues before the trial judge was the father's ability to make the Kelowna home habitable.

[45] The father appealed the decision and sought to introduce additional evidence about his finances and the renovations he had made to the house since trial. The court of appeal admitted the evidence on the basis that it undermined a primary underpinning of the trial decision and the assumption the father might not be able to remain in the Kelowna had been displaced.

[46] The mother appealed and the Supreme Court of Canada overturned the appeal decision. It reaffirmed the *Palmer* test and found that the father's evidence did not satisfy the test because it could have been available for trial with the exercise of due diligence. The Court found that the purpose of fresh evidence was not to shore up trial evidence to overturn an unfavourable outcome at first instance:

> [6] In my view, the evidence did not satisfy the *Palmer* criteria. ***The respondent sought to overturn an unfavourable trial outcome by adducing evidence on appeal that could have been available at first instance, had he acted with due diligence. Effectively, he was allowed to remedy the deficiencies in his trial evidence on appeal — with the benefit, and guidance, of the trial reasons.*** […]
>
> [Emphasis added.]

[47] It then went on to explain the purpose of the first *Palmer* criterion:

> [36] Functionally, the first *Palmer* criterion — that the evidence could not, by the exercise of due diligence, have been obtained for the trial — focuses on the conduct of the party seeking to adduce the evidence. It requires litigants to take all reasonable steps to present their best case at trial. This ensures finality and order in the judicial process […]
>
> […]
>
> [38] The *Palmer* test's due diligence criterion plays a similar role: it ensures that litigants put their best foot forward when first called upon to do so.

> [39] […] Otherwise, the opposing party must endure additional delay and expense to answer a new case on appeal. Permitting a party in an appeal to fill the gaps in their trial evidence based on the failings identified by the trial judge is fundamentally unfair to the other litigant in an adversarial proceeding.

[48] That is precisely what the appellants are attempting to do—to fill the gaps in the motion evidence based on the failings identified in the decision. The issue of whether the payments made directly to Ms. MacDonald by Mr. Risley were payments on the debt, dividends or advances on dividends was squarely before the motions judge. He found that the evidence on this issue did not rise to the level of raising a genuine issue of fact for trial.

[49] The appellants now seek to introduce evidence to buttress Mr. Risley's position before the motions judge. They cannot do so. The application fails to satisfy *Palmer*'s first requirement.

[50] Having found the first part of the *Palmer* test has not been satisfied it is not necessary to address the other three parts of the test. The motion to adduce fresh evidence is dismissed.

3. Did the motions judge err in finding no genuine issue of material fact for trial on the $10 million debt?

[51] The appellants make two submissions on this ground of appeal:

(a) That the motions judge erred in his interpretation of the meaning of "genuine issue of material fact" under the first step of the *Shannex* test;

(b) That the motions judge inappropriately weighed the evidence and made findings of credibility in determining that there was no genuine issue of material fact as to whether the payments to Ms. MacDonald or the parties' children were credits against the debt.

[52] *Rule* 13.04 provides:

> **13.04 Summary judgment on evidence in an action**
>
> (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.

[53] In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, Justice Fichaud set out the well-known test for summary judgment under *Rule* 13.04 in five sequential questions.

[54] The first question in *Shannex* tracks the wording of *Rule* 13.04—"Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?" Fichaud J.A. explained the approach under the first *Shannex* question:

> [34] […] A "material fact" is one that would affect the result. A dispute about an incidental fact – i.e. one that would not affect the outcome – will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes.

[55] Although the appellants take no issue with the motions judge's identification of the appropriate law on a summary judgment motion, they take issue with its application. They say that Justice Warner erred in isolating the word "genuine", which led him down a path to consider the kind of evidence which was not genuine, as opposed to considering whether there was a genuine issue of material fact for trial. They state it this way in their factum:

> 66. […] The isolation of the word "genuine" led Justice Warner to dictionaries (Decision, para. 37) and then to case law which dealt with "the kind of evidence that was not genuine" (Decision, para. 40). This was an error. ***The proper assessment was whether the "genuine" issue which was the "genuine issue of material fact" was an issue tied to the pleadings.*** Assessing the evidence is a different matter.
>
> [Emphasis added.]

[56] With respect, contrary to the appellants' position, determining whether a genuine issue of material fact exists is based on both the pleadings ***and the evidence***, not simply "an issue tied to the pleadings". *Rule* 13.04(4) provides:

> On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

[57] The motions judge did not isolate the word "genuine". He recognized that the issue before him was to determine a genuine issue of material fact. To do so, he had to consider both the pleadings and evidence:

> [34] Of particular relevance to this case is the meaning, and the methodology for determining, a genuine issue of material fact. This court relies particularly on the above cited statements from *Coady* and *Shannex*.

[58] The motions judge referred to dictionary definitions of genuine. After having done so, he brought himself back to the issue of whether the evidence which he had to consider gave rise to a genuine issue of material fact. On that issue, he cited the Supreme Court of Canada in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423:

> [40] In *Guarantee*, the Supreme Court of Canada did provide an example of the kind of evidence that was not genuine and therefore did not raise to the level of creating a genuine issue of material fact. Paragraph 31 reads:
>
> > 31 Gordon objected that the various affidavits of Bailey raised a credibility issue sufficient to require a trial. O'Brien J. disagreed. Reading the various affidavits, he was of the view that Bailey's reversal of position after a limitation period defence had been asserted did not create a genuine issue for trial. We agree with that finding. The reversal was based on Bailey's opinion that actual knowledge that Rachar had benefited from his transactions was determinative. The affidavit of November 22, 1995 states that the June 26, 1991 date was used only because this was the date at which Gordon knew it had to meet a capital requirement, not because it believed that a loss of the type covered by the Bond had

> occurred. O'Brien J. looked at this in the context of the proceedings, taking into account the sophistication of the parties and the fact that they had been discussing their problem with forensic accountants and outside legal counsel. We do not find his conclusion to be unreasonable, especially in view of the fact that the true test of discoverability is an objective one under the terms of section 3 of the Bond. We would add that the trial judge's ruling on this point is entirely consistent with previous decisions holding that a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence.

[59] In instructing himself on what constitutes a genuine issue of material fact, the motions judge also referred to this Court's decision in *Smith v. Nova Scotia (Attorney General)*, 2010 NSCA 14, which referred to *Guarantee Co. of North America*:

> [46] In *Smith v Nova Scotia (Attorney General)*, 2010 NSCA 14, leave to appeal denied, Hamilton JA wrote for the Court:
>
> > [17] I am also satisfied that the judge did not err by inappropriately making findings of fact, findings of credibility or drawing inferences. An issue of credibility or a dispute of fact exists where there is a conflict in the evidence and the trier of fact is required to accept the testimony of one witness over another to make a final determination on the issues raised. Here the only relevant evidence before the judge was the evidence of the appellants themselves. On that evidence alone he concluded that there was no genuine issue for trial.
> >
> > [18] The judge was entitled to accept the discovery evidence of the appellants and reject their affidavit evidence to the extent it was contradicted by their discovery evidence. In **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at pp. 436-7, the Court noted that "a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence." There were no such detailed facts or supporting evidence in the affidavits of Messrs. Borden and Smith.
> >
> > [19] Also in **Rogers Cable TV Ltd. v. 373014 Ontario Ltd.**, [1994] O.J. No. 2196 (Gen Div) the court states:
> >
> > > 6 I am completely satisfied that the plaintiff has established that there is no genuine issue for trial. What the defendant's position amounts to is this -- a genuine issue for trial is raised in every case in which a defendant swears that it does not owe a debt, notwithstanding overwhelming evidence to the contrary presented by the plaintiff, and in the absence of any additional evidence by the defendant to support its denial. Although in one sense an issue

> of credibility is raised on the assumption that a trial judge may believe the defendant, in my view in the context of the record in this case this does not constitute a genuine issue for trial with respect to the defence put forward within the meaning of rule 20.04(2)....

[47] Said differently, the court is not deciding between the evidence of one witness over another. It is deciding whether to accept the statements made by a party prior to litigation over his evidence given in an affidavit on a summary judgment motion.

[48] Hamilton JA cited Paragraph 6 in *Rogers Cable TV Ltd v 373014 Ontario Ltd*, [1994] OJ No. 2196. Paragraphs 5 and 7 are relevant to this case. At Paragraph 7, Borins J (as he then was), relying on the principles in *Ungerman*, wrote:

> In my respectful view, this conclusion is in conformity with the principles discussed by Morden A.C.J.O. on behalf of the Court of Appeal in the Ungerman case, supra, at pp. 549-52. At best, the issue raised by the defendant is spurious. The following passage from the reasons for judgment of Morden A.C.J.O. at p. 552 has direct application to the facts of this motion: "As the first passage indicates, the proposition that an issue of credibility precludes the granting of summary judgment applies only when what is said to be an issue of credibility is a genuine issue of credibility (Emphasis added.) Although the defendant may have raised an issue of credibility, it is far removed from constituting a genuine issue of credibility. Therefore, the plaintiff has established that there is no genuine issue for trial in this case.

[60] Having cited the law in some detail, the motions judge then turned to the evidence and considered whether it raised a genuine issue of material fact, based on all the evidence from any source.

Payments to Ms. MacDonald by Mr. Risley

[61] The motions judge first considered whether the periodic payments made by Mr. Risley to Ms. MacDonald were made in satisfaction of the debt. The evidence before the motions judge was that Mickey MacDonald, Ms. MacDonald's brother, dealt with Mr. Risley as Ms. MacDonald's agent when negotiating the divorce settlement agreement, and later regarding the status of that agreement and Mr. Risley's compliance with it.

[62] In his decision, the motions judge summarized in detail the relevant communications between Mr. MacDonald, Mr. Risley and others. The following appears in his decision:[4]

> [57] The relevant communications in evidence (mostly email chains), in chronological order, are:
>
> […]
>
> 5. August 30, 2018. "Re: Loan". seven emails between John and Mickey. John asks for a business loan to close a deal the next day. Mickey and John exchange information re John's leveraged position. Mickey at first ("with deep regret") declines, but in fifth email an hour later at 4:29PM, he writes to John:
>
> > OK, I will loan you the money against all the good advice I've gotten and from my gut instinct on the condition you pay Judi her money ASAP and that you separate her $100M shares from all the crazy investments in the future!"
> >
> > John replies at 4:44PM: "That's the mission I am embarked upon – to monetize some of our CB stake so I can do just that. And Thank you".
>
> Mickey replies at 8:09PM: "No problem, just don't let me down!
>
> 6. September 27, 2018. "Re: Judi's Dividend Account". 3 emails. John to Mickey, Mickey to John, and John's reply.
>
> > (3)Date: Thursday, September 27, 2018 at 5:00 PM
> > To: Mickey Macdonald -
> > Subject: RE: Judi;s dividend account
> >
> > The number of shares was fixed as of the date of the agreement (at least as Stan advises). And yes, the 90k is the monthly advance.
> >
> > (2) From: Mickey MacDonald
> > Senit: Thursday, September 27, 2018 3:57 PM
> > To: John Risley
> > Subject: Re: Judi's dividend account
> >
> > I'm not getting your math but let me check the agreement on how you are coming up with the numbers. My memory is that it is based on $100,000,000M in Clearwater share value so the dividend should be more like $1.2m. I'm assuming the 90K advance is the monthly amount you have been sending her?
> >
> > Mickey MacDonald

[4] I have reproduced only the motions judge's summary of emails exchanged after May 31, 2018, the due date of the debt. His summary also includes emails leading up to the entering into the settlement agreement; those are not reproduced.

(1) From: John Risley
Date: Thursday, September 27, 2018 at 11:46 AM
To: Mickey MacDonald
Cc: John Risley
Subject: Judi's dividend account

Sorry to be late with this. Hope this [*sic*] numbers make sense.....
The agreement took effect as of Feb 15th. Since then two dividend payments have been made, one for the period ended March 31st, and one for the period ended June 30. She was entitled to half the first dividend and 100% of the second for her share of the total dividend we received.

That share is equal to 79.59% (she has 79.59% of CFFI's shares).

So that means 698,060.50 times 79.59% times 50 3⁄4 equals 277,793 Plus 698,060.5 times 79.59% equals 555,586.35.

Total 833,379.35

Less 7 months of advances....90k gros [*sic*] times 9 equals 630k. So we owe her 203,379.35.

Any questions, please let me know.

7. September 28, 2018. "Re: Judi's dividend account". Follow-up exchanges at 7:51 am and 8:14 am to the September 27th emails.

(2) From: John Risley
Date: Friday, September 28, 2018 at 2:14 AM
To: Mickey Macdonald
Subject: RE: Judi's dividend account

Yes...she gets 40+k each month tax free. And her tax return for the last several years reflects that.
So the way we did the 100 mln was to determine a number of shares times the share price, and that equaled 80% of the shares we own. So she gets 80% of the dividend. The way the guarantee works is that all our shares are "pledged "such that if the share price falls (as it has) and she wanted to sell the shares then all my shares would be available to her such that she got her 100 mln.

(1) From: Mickey MacDonald
sent: Friday, September 28, 2018 7:51 AM
To: John Risley
subject: Re: Judi's dividend account

John

]udi gets around $40k a month so you must be paying her after tax dollars? I assume they take that into consideration when they did her tax's? I also thought the $100,000,000 was supposed to be based on the Clearwater dividend not tied to the share price as her money was secured by the value of your hold portfolio of investments not just Clearwater shares.

Mickey MacDonald

8. February 15, 2019. A letter from Judi's lawyer (Mick Ryan) to John's divorce lawyer states that Judi's extreme patience with John's substantial breaches of the Agreement has reached a breaking point. Counsel threatens to commence an Action.

9. February 19, 2019. "Re Judi". Mickey's email to Spavold, copied to John seeking a breakdown of the money owed Judi, and John's reply to Mickey and Spavold an hour later.

(1) From: Mickey MacDonald <____ -.>
Sent: Tuesday, February 19, 2019 12:23 PM
To: Stan Spavold - >
Cc: John Risley <
Subject: Judi

Stan

Could you give me a break down of money owed to Judi, I have it as $25M and John was saying you said it was $22,500,000?

Mickey MacDonald

(2) From John Risley
Date: Tuesday February 19,2019 at 1:21 PM
To: Mickey MacDonald and Stan Spavold.
Subject: RE: Judi

I had a quick look after we met and the deal was 150 mln,
115 was satisfied by the synthetic share deal (100 for CSL; 7.5 for GFL and 7.5 for Kingsett)
25 in cash (paid)
A further 10 in cash (not paid)
What is owing is the 10 plus the 7.5 from GFL . . . 17.5mln.

(I have avoided any calculation on dividends, monthly payments etc.)

10. February 26, 2019. "Re Judi". An email from Spavold to Mickey, referring to the February 19 emails. It reads:

From: Stan Spavold
Date: Tuesday, February 26, 2019 at 2:40 PM
To: Mickey MacDonald
Subject: Re: Judi

> I have looked at this again and agree with John's analysis below.
> I was wrong on the $22.5.
>
> Stan Spavold
> [Court note: attached was the exchange of February 19. 2019]

11. March 8, 2019. Ryan's letter to John's divorce lawyer giving March 15th as a deadline to pay what he owes or make an agreeable schedule for payments. The letter goes on to list John's outstanding obligations. In addition to outstanding obligations respecting two Put Notices re Clearwater shares, and $7.5 million related to LPHL's sale of its interest in GFL, the first and fifth outstanding obligations read:

> 1. $10 million due to our client by Mr. Risley personally arising out of the divorce settlement agreement and evidenced by a Promissory Note in the amount of $10 million due May 31, 2018. A copy of the Note is attached. This amount is also guaranteed by Lobster Point Holdings supported by a written guarantee made on March 2, 2018, a copy of which is also attached;
>
> 5. Our client's holding company is also entitled to additional dividends on the tracking shares of Clearwater held by it in Lobster Point Holdings based on dividends declared in 2018. I understand these have been partially paid but not paid fully;

12. March 12, 2019. "Re: Mick Ryan". John sent a lengthy email to Judi, their two children and Mickey in relation to Ryan's "Santa Claus" letter of March 8th. Mickey emailed a short reply, to which John responded with another lengthy email. The emails are attached to this decision as Schedule "A" (Ex. 6, Tab E). I excerpt from John's first email: "I acknowledge I owe Mum money. No question. I am doing all I can to put myself in a position to respond to these obligations." From the second email, I excerpt: "HPS, our long term lender, an offshoot of JP Morgan, has a security interest on all our assets. . .They also allow us to take enough money out of CFFI to pay our obligations, dividends to me so I can pay Mum, Sarah, and Michael their salaries/allowances etc. Moving 10 mln out from under their security blanket would be a problem and not something they would agree to absent some event which they would like. . .".

13. On cross-examination, John was shown and identified a chain of seven emails, dated after the corporate reorganization and Agreement relating to Judi's entitlement to dividends. They were marked Exhibit 8 (attached as Schedule "B"). The first five, dated September 17 and 18, 2018, and September 3, 2019 are between John and Elizabeth McEwen, CFO at CFFI. The 6th and 7th are between John and Mickey on September 6, 2019.

[63] The motions judge then referred to Mr. Risley's cross-examination where he made the following acknowledgements:

- He sent the email exchanges referring to Ms. MacDonald's entitlement to dividends and repayment of dividends or advances on dividends;
- Judi was entitled to dividend payments;
- The email exchanges did not indicate that the debt was being reduced by the advances.
- Neither the Promissory Note, the guarantee, nor the Settlement Agreement were ever amended. (decision, ¶60-61).

[64] Mr. Risley, when questioned in cross-examination about the clear references to his and his corporate employees' calculations, and acknowledgment of MacDonald's holding company's entitlement to dividends, and the advances purportedly made on this entitlement, replied, "That is not my position today" (decision, ¶60).

[65] Before the motions judge, the following exchange took place between Ms. MacDonald's counsel and Mr. Risley with respect to the email exchange on September 27 and 28 (reproduced above). In those emails, Mr. Risley makes reference to Ms. MacDonald receiving approximately $40,000 every month as a dividend payment:

> **Q.** Yeah. And on the first page under an email from you to Mickey MacDonald, Friday, September 28, 2018 at 8:14 a.m. ---
>
> **A.** Yes. Yes.
>
> **Q.** --- you're confirming that she's -- she, Judi, is getting forty thousand, approximately, tax-free each month, correct?
>
> **A.** Yes.
>
> **Q.** And that that forty thousand was calculated on the basis that it's -- or sorry -- that her dividend, if you look below, is calculated that she gets 80 percent of the declared dividend with respect to the hundred-million-dollar ($100,000,000) share transaction, ***and that that 40K was effectively an advance against the dividend amounts that she gets.***
>
> **A.** So, your question is whether or not the forty thousand dollars ($40,000) was a dividend or was an advance against a dividend?

Q. ***Was that my suggestion to you, sir, is that that forty-one approximately thousand dollars ($41,000) is an advance against the dividend under the shares. Do you agree with me on ---***

A. ***Yeah, that's not our position.***

Q. ***That's what this email says, sir.***

A. ***That's what the email says, yes.***

Q. ***And that's what you wrote at the time?***

A. ***Yes.***

Q. ***And that's what you told Mickey MacDonald at the time ---***

A. ***Yes.***

Q. ***--- that the forty thousand dollars ($40,000) was an advance under the dividends that Judi was owed under the share transaction, correct?***

A. ***Yes.***

Q. ***And the -- the email's pretty clear in that regard. Do you agree with me on that?***

A. ***I do.***

Q. ***But what you're saying today is that's not my position as I sit here today.***

A. ***That's correct.***

[…]

Q. You were making payments in 1 advance under the dividends to Judi all along, correct?

A. I was making payments to her, yes.

Q. Yes. And those payments were advances under the dividends?

A. I'm not -- which payments are you talking about? I was making many, many payments ---

Q. The forty ---

A. --- and those were payments against my obligation to her, not payments against a dividend account.

Q. The forty-one thousand dollar ($41,000) monthly payment that you were making ---

A. Yes.

Q. --- those were with respect to dividends, correct?

A. Um-hmm.

Q. You have to say "yes," sir, if you agree.

A. Sorry. That I what? Agree that ---

Q. The forty-one thousand dollar ($41,000) roughly monthly payments that you were making to Judi ---

A. Yes.

Q. --- those were on account of her entitlement to dividends, correct?

A. No. They were on account of her entitlement to ten million dollars ($10,000,000).

Q. That's your position here today?

A. That's my position here today.

Q. That was not your position when you were writing these emails, though, was it?

A. You could interpret my position as being different from that.

[Emphasis added.]

[66] The motions judge referenced this cross-examination:

> [63] He was directed to his email exchanges of September 27 and 28, 2018, six months after the Settlement Agreement as to when Judi's new dividend entitlement was to take effect. He acknowledged the references in the emails to the two dividend payments and Judi's entitlement to 80% of the first payment and to 40K tax free each month. When directed to Mickey's question in the September 27, 2018 email: "I'm assuming the 90K advance is the monthly amount you have been sending her?", he replied: " And yes, the 90K is the monthly advance." This is a clear and unequivocal admission that the advances to Judi were in respect to her entitlement to dividends.

[67] It was only after considering all of this evidence that the motions judge concluded Mr. Risley's change in position did not raise a genuine issue of material fact or credibility for trial:

> [64] […] Baldly stating that one's ***"position"*** at the hearing of the motion is different from the email communications is not evidence. It does not raise a genuine issue of material fact. It does not create a credibility issue.
>
> [65] I conclude that the Applicant has established that there is no genuine issue of material fact for trial with respect to whether the periodic advances were on the unamended Promissory Note. They were not. There is no requirement for determination of a question of law in respect of this issue, except the limitations issue dealt with below.

> […]
>
> [67] […] A promissory note is a debt. This promissory note was for the payment of principal, without interest. The payment of a debt, in the context of the Settlement Agreement in evidence – that is, payable without interest - does not credit a tax liability to the recipient.

[68] I am satisfied that the motions judge did not make findings of fact, findings of credibility or draw inferences.

[69] The appellants' position is that it is only necessary for them to file an affidavit where they simply deny what the motions judge found to be clear and unequivocal evidence, without any other corroborating evidence, and that will be enough to raise a genuine issue of material fact for trial.

[70] A review of the record makes it clear that Mr. Risley's change in position was solely for the purpose of trying to avoid summary judgment. His position is contrary not only to the evidence put forward by Ms. MacDonald, but by his own words as evidenced by all of the email communications. A self-serving affidavit is not sufficient in and of itself to create a triable issue, in the absence of any supporting evidence (*Guarantee*, ¶31).

[71] The motions judge did not err in finding that Mr. Risley's "bald assertions" did not raise a genuine issue of material fact requiring a trial.

Payments to the Children

[72] The motions judge was similarly unpersuaded with the position Mr. Risley took concerning payments he made to the adult children. He outlined Mr. Risley's evidence as follows:

> [70] John swears in his affidavit as follows:
>
> > 14. Judi and I have always focused on the welfare and happiness of Sarah and Michael and their families and during our divorce negotiations, Judi and I repeatedly discussed the fact that any proceeds from our settlement would ultimately flow to our children and their grandchildren, as beneficiaries of Judi's Estate. Judi also confirmed to me, and I believe, that she intended to use all cash payments from me for the benefit of Sarah and Michael and their families, as she understood she, personally, already had more money than she would ever need.
> >
> > ...

> 16 In the time since I signed the Promissory Note on March 2, 2018, Judi and I have had multiple discussions about my providing cash for her and my providing cash for Sarah and Michael and their families. I have always been fully honest and transparent with Judi, including about my investing and the fact that I frequently do not have the liquidity necessary to fund all of Sarah's and Michael's demands. Judi's consistent response when such matters came up in our discussions was that she did not want to fight about money and that I should take care of the kids. Judi repeatedly indicated that she was in agreement with my giving cash to (or making payments on behalf of) Sarah and Michael and their families using funds which would otherwise have first gone to Judi before she gave them to one or both of Sarah and Michael (or paid amounts on their behalf)
>
> 17. Consistent with my discussions and agreement with Judi described above, in the time since I signed the Promissory Note on March 2, 2018, 1 have made payments to Judi[,] to Sarah, to Michael, on behalf of Sarah, on behalf of Michael and for the benefit of each of Sarah's and Michael's families. Those payments have fully satisfied the amount due under the Promissory Note, and more.
>
> 18. In the time since I signed the Promissory Note, a total of $13,706,243 of payments have been made by me to or on behalf of Judi, Sarah and Michael. Finance staff within the companies I control, led by Kristen MacDiamid, CPA, CA, have kept records of the amounts paid.

[73] The motions judge then details why he did not accept Mr. Risley's evidence as creating an agreement between Ms. MacDonald and Mr. Risley:

> [73] First, the words he used in Paragraphs 14, 16 and 17 of his affidavit do not expressly state that Judi agreed that he could credit against his $10 million overdue debt any monies he might have paid, or may in future pay, for the children's benefit. Nor do the words identify with any particularity when and under what circumstances any communications occurred.
>
> [74] Second, his email exchanges up to and including those of March 12, 2019 acknowledge and confirm, as outstanding, $10 million on the Note. No document or communication before his May 25, 2021, affidavit, filed in this motion, claims an agreement for credit against the $10 million Note for advances he made after March 2018 to or for their children.
>
> [75] Third, in response to a rhetorical question: surely you do not claim that Judi was in agreement to you claiming credit for advances you identify in your affidavit after Mr. Ryan's March 8, 2019 demand letter or at the latest, after Judi's Action was filed on January 29, 2021? – he answered words to the effect that: yes, it was after the March 8, 2019, Ryan letter that the communications occurred and/or the agreement was made. This evidence as to when John states that the agreement was made means that there was no agreement respecting any advances

> made before March 8, 2019. It cannot justify claiming credit for payments made to or for the benefit of the children before the communications or agreement. It is problematic that the largest credit that John claims against the Note is the April 15, 2021 payment to his son, Michael, of $6,266,500, described as "deposit for new house".
>
> [76] Fourth, in the Statement of Defence filed February 24, 2021, John did not identify payments to or for his children and their families as agreed credits against the Note. In Paragraph 4 of the Defence, he admits execution of the Note and "further states that he has made various payments in satisfaction of the obligation represented by the Note". His pleading does not set out the material fact in issue.

[74] He then concluded:

> [84] John acknowledged that his May 21, 2021 affidavit is the first itemization of the particulars of the expenditures made by him since March 2, 2018 to or for the benefit of their children. He relied on the finance staff at his companies, led by Kristen MacDiarmid, for the list of payments set out at Paragraph 21, Exhibit A, and the 28 pages of Exhibit B.
>
> [85] All the evidence is clear and unambiguous. It does not raise a genuine issue of material fact as to whether at any time Judi agreed to credit against the $10 million dollar debt due May 31, 2018, one-half (plus tax at 50%) of any advances John made to or for the benefit of their children between March 2, 2018 and April 15, 2021.
>
> [86] Baldly stating that the only evidence before the court that predates the summary judgment motion is not what his present position is does not create a genuine issue of credibility, or raise a genuine issue of material fact for trial.

[75] The motions judge did not err in his determination that Mr. Risley's evidence did not raise a genuine issue of material fact.

[76] As with the issue regarding the dividend payments, the motions judge was left with only Mr. Risley's evidence that there was an agreement. There was no documentary evidence to support his assertion, nor was there any evidence from the children that they knew anything about this alleged agreement. Ms. MacDonald denied the agreement, Mickey MacDonald was never apprised of the agreement, and Mr. Risley's own evidence in emails and other communications he had with Ms. MacDonald, Mickey MacDonald and his children do not support the existence of this agreement.

[77] It was not a case of a judge weighing evidence or making findings of credibility. There simply was no evidence that such an agreement ever existed. Mr. Risley's position amounts to this: Ms. MacDonald agreed that he would have

sole discretion to decide how to spend money that he owed her without any consultation with her, without justifying why he was making the payments or in any way accounting for the moneys spent.

[78] In essence, he suggests she gave him unfettered control over the money he owed her. The largest credit, over $6 million, was made in April 2021, after Ms. MacDonald commenced action against Mr. Risley. This without any communication from him or his counsel he was doing so and seeking to get credit on the debt he owed her. The evidence goes beyond anything that is believable and has no evidentiary value. The motions judge correctly found it did not raise a genuine issue for trial.

[79] I would dismiss this ground of appeal.

Issue 4: Did the motions judge err in disallowing the limitations defence?

[80] The appellants say that the judge erred in granting summary judgment on the limitations defence. They made this argument as an alternative argument before the motions judge and repeat it before us.

[81] Even though it is an alternative argument, it seems somewhat incongruent with the position Mr. Risley took that he had made payments on the debt and the time for making payments had been extended well beyond May 31, 2018. The appellants acknowledged before us there had been extensions of time to pay. The affidavit of Mickey MacDonald sworn May 31, 2021, provides:

> 9. Throughout that period of time, I discussed the matter with my sister, Judi MacDonald, and upon Mr. Risley's request, I asked for an extension of the time for full payment of the $10,000,000 sum secured by the Promissory Note and Guarantee.
>
> 10. On each occasion, Judi granted an extension on the basis that the money would be forthcoming and eventually paid.

[82] Mr. Risley did not contradict this evidence before the motions judge. Before us, his counsel agreed there had been extensions of time. An email dated May 27, 2019, attached to Mickey MacDonald's affidavit, puts the extension at May 2019:

> When Judi gave you the last extension on your payment to her u said you thought u might have some money coming in May that you would give her $1M, how did you make out?

[83] In granting summary judgment on the limitations defence, the motions judge relied on s. 20 of the *Limitation of Actions Act*, S.N.S. 2014, c. 35, which provides:

> **Acknowledgments**
>
> **20 (1)** Where, before the expiry of the relevant limitation period established by this Act, a person acknowledges liability in respect of a claim for
>
> (a) payment of a liquidated sum;
>
> (b) the recovery of personal property;
>
> (c) the enforcement of a charge on personal property; or
>
> (d) relief from enforcement of a charge on personal property,
>
> the limitation period begins again at the time of the acknowledgment.
>
> […]
>
> **(8)** Subject to subsections (9) and (10), this Section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even if the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum owing.
>
> **(9)** This Section does not apply unless the acknowledgment is made to
>
> (a) the claimant;
>
> (b) the claimant's agent; or
>
> (c) an official receiver of or trustee for the claimant, acting under the *Bankruptcy and Insolvency Act* (Canada),
>
> before the expiry of the limitation period applicable to the claim.
>
> **(10)** Subsections (1), (2), (3), (6) and (7) do not apply unless the acknowledgment is in writing and signed by the person making it or the person's agent.
>
> **(11)** In the case of a claim for payment of a liquidated sum, part payment of the sum by the defendant or the defendant's agent has the same effect as an acknowledgment referred to in subsection (10).

[84] Although the motions judge did not rely on it, s. 21(1) of the *LAA* provides a limitation period may be extended by agreement:

> **Agreements**

> **21 (1)** A limitation period established by this Act may be extended, but not shortened, by agreement.

[85] The motions judge did not find the evidence of Mr. MacDonald, Ms. MacDonald, and Mr. Risley himself sufficient to extend the limitation period. It seems clear from the evidence which I have set out above that the parties had agreed to extensions of the limitation period to, at the very least, May 2019.

[86] The motions judge instead relied on s. 20(1) of the *LAA* in finding the debt had been acknowledged in writing.

[87] The motions judge found that two emails in particular—one dated February 19, the other dated March 12, 2019—satisfied the provisions of the *LAA*:

> [98] There can be no doubt that the emails, individually and collectively, contain John's acknowledgement that he still owed Judi the $10 million payable per the Note. On February 19, 2019, four days after Judi's lawyer's demand letter to John's lawyer, and in reply to Mickey's request for a breakdown of the money John still owed Judi, John recited the Settlement Agreement and confirmed that the $10 million remained unpaid. On March 12, [2019], four days after Judi's lawyer's second detailed demand letter, John wrote two emails to Judi, Mickey and his children, that unequivocally acknowledged the debt of $10 million and that he was not able at that time to pay it.

[88] On appeal, Mr. Risley suggests that the motions judge made three errors.

[89] First, Mr. Risley claims that his February 19 and March 12, 2019 emails did not acknowledge the debt under section 20 of the *LAA* because the common law requires the acknowledgment to be clear and unequivocal, and to confirm the actual amount that remains owing.

[90] In support of the their position, the appellants cite *Deloitte & Touche LLP v. Kuiper*, 2015 ONSC 7770, as follows:

> 126. […]
>
> > [15] In *Montcap Financial Corp. v. Schyven*, 2011 ONSC 4030 (CanLII) at para. 27, and in *Skuy v. Greennough Corporation*, 2012 ONSC 6998 (CanLII) at para. 56, Justice Perell in both instances referred to *Middleton...[v. Aboutown Enterprises Inc., [2008] O.J. No. 3608 (S.C.J.)]*...and stated that an acknowledgment for the purposes of the Act of an indebtedness for a liquidated sum "**must, at a minimum, confirm and concede the amount that remains owing**". In *West York International Inc. v. Importanne Marketing Inc.*, 2012 ONSC 6476

> (CanLII), Justice DiTomaso at paragraph 92 referenced *Middleton* and *Montcap,* and repeated Justice Perell's wording that the acknowledgment **"must, at a minimum, confirm and concede the amount that remains owing."**
>
> [Emphasis in the appellants' factum.]

[91] What the appellants omitted is the case relied on in *Deloitte,* being *Middleton v. Aboutown Enterprises Inc.*, [2008] O.J. No. 3608, was appealed to the Ontario Court of Appeal.

[92] In *Middleton v. Aboutown Enterprises Inc.*, 2009 ONCA 466, the Court expressly rejects the words which the appellants have highlighted:

> [1] We do not accept the motion judge's statement that to stand as an acknowledgment, the letter and Release would, "at a minimum, have to demonstrate and confirm the amount of the debt that remained owing".

[93] They go on to find:

> […] that the letter and unsigned Release […] did not constitute a clear and unequivocal acknowledgement of the debt claimed […] or indeed any amount remained owing in respect of the promissory note.

[94] I take from the Ontario Court of Appeal's disagreement with the statement relied on by the appellants is that clear and unequivocal acknowledgement of a debt, not necessarily the amount of the debt, would satisfy the requirements of Ontario's *Limitations Act*.

[95] However, the motions judge here found that Mr. Risley unequivocally acknowledged the debt of $10 million.

[96] Even if the *LAA* required the amount of the debt be acknowledged, Mr. Risley has done so. The motions judge made no error in this regard.

[97] Second, Mr. Risley says that the motions judge skipped from the first to the third *Shannex* question without considering the second, and further erred by exercising his discretion to answer the third question.

[98] For ease of reference, I will set out the first three *Shannex* questions:

- **First question: does the challenged proceeding disclose a "genuine issue of material fact", either pure or mixed with a question of law?** […]

- **Second question**: If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?** […]
- **Third Question**: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in Burton's second test: **"Does the challenged pleading have a real chance of success?"**

[*Shannex*, ¶34]

[99] The motions judge explained his analysis of the first three *Shannex* questions as follows:

> [99] As for the first *Shannex* question, there remains no genuine issue of material fact, either pure or mixed with a question of law, for trial. John acknowledged owing the $10 million Note in emails to Judi and her agent in February and March 2019. These restarted the two-year limitation period. The limitation period had not expired when the plaintiffs commenced their Action.
>
> [100] As for the second and third *Shannex* questions, I have explained my finding above that, as a matter of mixed fact and law, John's electronic communications meet the legal requirements of paragraph 9 of the *Electronic Commerce Act*. They constitute an acknowledgment of the outstanding $10 million debt in writing in compliance with paragraph 20 of the *Limitation Act*.

[100] The motions judge's approach here is consistent with other Nova Scotia courts which have adjudicated limitation defences. For example, in *Nova Scotia (Attorney General) v. Luke*, 2017 NSSC 120, Justice Wright took much the same approach as the motions judge here:

> [13] In the present case, we are drawn to the third question of that analysis because here there is no genuine issue of material fact to be determined; rather, the challenged pleading requires the determination of a question of law. That evokes the pivotal question of whether the challenged pleading has a real chance of success. It is for the responding party to show a real chance of success and if the party cannot do so, then summary judgment issues to dismiss the ill-fated pleading.

[101] Having found that Mr. Risley had acknowledged the debt, the only issue that remained is whether as a matter of law, the limitation defence had a real chance of success. It did not and the motions judge committed no error in the manner in which he addressed the *Shannex* questions.

[102] Third, the appellants argue that the motions judge erred in disallowing the limitation defence by concluding that the emails satisfied the writing and signature requirements of the *LAA*. The motions judge relied on a number of cases cited by Ms. MacDonald, one of which was *Lev v. Serebrennikov*, 2016 ONSC 2093. In that case, the court found that an email can satisfy the requirements of the Ontario *Limitations Act*:

> [24] In my view, an email can satisfy the requirements of s. 13 of the *Act* concerning acknowledgement. The issue in every case will be one of fact concerning authenticity.

[103] As in this case, there the court found that the email constituted an acknowledgment of the debt. The email in *Lev* was in writing but not signed by the appellant. The appellant there, as here, said it did not amount to acknowledgement pursuant to s. 13(1), Ontario's equivalent to our s. 20(1) of the *LAA*.

[104] The court concluded that the email satisfied the requirements of the Ontario *Act*:

> [24] In my view, an email can satisfy the requirements of s. 13 of the Act concerning acknowledgement. The issue in every case will be one of fact concerning authenticity.
>
> [25] Turning then to the facts in the present case, although the email in question is not signed by the appellant with his signature, his name is on the email and based on the other emails filed as exhibits, it was clearly sent by him from his email address which is noted. Again, the appellant did not deny that it was his email at trial. Finally, the acknowledgement is within the original limitation period. All of that is sufficient, in my view, to bring the matter in this case within s. 13(10) of the *Act* and to extend the limitation period for the debt from November 11, 2012 pursuant to s. 13(1).

[105] The motions judge also relied on *I.D.H. Diamonds NV v. Embee Diamond Technologies Inc.*, 2017 SKQB 7. Similarly, the issue in that case was whether emails acknowledged the existence of the debt under the Saskatchewan *Limitations Act*. The court found that it did. As here, there were significant emails going back and forth between the parties discussing the debt, when it would be paid, and different arrangements for how it might be satisfied (¶57). Although not cited to the motions judge below, the trial decision was upheld by the Saskatchewan Court of Appeal in *Embee Diamond Technologies Inc. v. I.D.H. Diamonds NV*, 2017 SKCA 79, where the Court held:

> [6] The question of whether the limitation period under s. 11 of *The Limitations Act* barred IDH's claim turned on whether Embee had factually and legally acknowledged its indebtedness to IDH through a number of emails. To answer this question, the Chambers judge assessed the whole of the evidence before him and determined Embee had in fact acknowledged the debt through emails it had sent to IDH. The Chambers judge then turned to *The Electronic Information and Documents Act, 2000* and the common law determine whether the electronic nature of the acknowledgement had satisfied the legal *in writing* and *signed* requirements for an acknowledgement under s. 11 of *The Limitations Act*, ultimately deciding that it had.
>
> […]
>
> [8] As to the correctness of the law applied by the Chambers judge, which is the second ground of appeal, we find no error in the Chambers judge's interpretation and application of *The Electronic Information and Documents Act, 2000* or in his identification and application of the common law principles engaged by the facts of this case. For the reasons given by the Chambers judge, we find no merit to the second ground of appeal.

[106] Finally, a passage from *Civil Procedure and Practice in Ontario*[5] describes the current state of the law in Ontario regarding an electronic acknowledgment of a debt:

> One issue that has arisen is whether an electronic acknowledgment (particularly an email) is sufficient. While this issue remains unsettled with some courts finding that emails are not sufficient, a growing number of cases have found that emails can constitute a signed, written acknowledgment for the purpose of section 13. ***The issue is one of authenticity and where the email contains a name, is from the party's email address, and the party does not deny sending it, it seems likely that the court will accept that the email is a signed, written acknowledgment.***
>
> [Emphasis added.]

[107] The issue is whether the emails were authentic. The motions judge considered the law and found that there was no issue of authenticity since Mr. Risley acknowledged sending the emails:

> [96] I adopt the Plaintiff's submission as to the applicable law.

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[5] Debbie Boswell and Yola S. Ventresca, *Limitations Act Chapters, 3. Attempted Resolutions, Successors, Acknowledgments, and Notices of Possible Claim*, Sections 11–14, in Civil Procedure and Practice in Ontario, Noel Semple (ed.), Canadian Legal Information Institute, 2021 CanLIIDocs 2095.

> [97] Applying the law to the evidence in this case, John acknowledged the emails he sent to Judi, and to Mickey, her agent. He acknowledged that Mickey was her agent.

[108] In summary, the motions judge correctly concluded that the appellants' limitation defence had no real chance of success. I do not accept, nor did the motions judge, that it raised a material issue of fact requiring trial.

[109] I would dismiss this ground of appeal.

Conclusion

[110] The appeal is dismissed with costs to the respondent in the amount of $7,500, inclusive of disbursements.

Farrar J.A.

Concurred in:

Beveridge J.A.

Beaton J.A.