NOVA SCOTIA COURT OF APPEAL
Citation: *Wright v. Ratcliffe*, 2024 NSCA 77

Date: 20240814
Docket: CA 527888
Registry: Halifax

Between:

Alex Wright

Appellant

v.

James Ratcliffe and Victory Seafood Limited

Respondents

Judge:	The Honourable Justice Robin C. Gogan
Appeal Heard:	June 6, 2024, in Halifax, Nova Scotia
Subject:	Summary Judgment – Civil Procedure Rule 13.04 – Limitation of Actions – discoverability principle
Summary:	The respondents James Ratcliffe and Victory Seafood Limited obtained summary judgment against Alex Wright on the basis that Wright's action was barred by operation of the *Limitations of Actions Act*. Wright appealed arguing that the motion judge made errors in the application of the discoverability principle and was wrong to grant summary judgment.
Issues:	(1) Should leave be granted? (2) Did the motion judge err in his application of summary judgment principles to the limitation defence?
Result:	Leave to appeal granted. The motion judge identified and applied the correct principles in finding that Wright knew the material facts supporting a plausible inference of liability when he sent a text message to Ratcliffe on June 26, 2019. The judge did not: (1) err in the assessment of the evidence; (2) misapprehend evidence; or (3) ignore evidence on the issue of when Wright discovered his

claim. Wright had no real chance of success in establishing that his action was brought within the two-year limitation period. Summary judgment was required under *Civil Procedure Rule* 13.04.

The appeal is dismissed with costs to the respondents in the amount of $2,500.00.

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Respondents

Judges:	Bryson, Fichaud and Gogan JJ.A.
Appeal Heard:	June 6, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Gogan J.A., Bryson and Fichaud JJ.A., concurring
Counsel:	Christopher I. Robinson, for the appellant James B. Green and Erin Mitchell, for the respondents

Reasons for judgment:

Introduction

[1] Alex Wright and James Ratcliffe were friends and business partners. They started a company called Global Seafoods Limited ("Global"). Global was in the business of marketing and exporting Nova Scotia seafood. Wright and Ratcliffe shared other business interests. After several years, both Global and the friendship ran into trouble. Wright believed Ratcliffe betrayed their personal and business relationships by taking Global's business opportunities for himself.

[2] This decision is about when Wright became aware of his claim against Ratcliffe and whether he brought his action in time. In other words, this is a decision on the issue of discoverability. As explained below, the issues arise in the context of a summary judgment motion.

[3] This is an appeal of an interlocutory decision. It requires leave of the Court.[1] For the reasons to follow, I would grant leave but dismiss the appeal.

Background

History of the Proceedings

[4] There is no dispute about the broader context of this case. The parties were long-time friends who became business partners. One of the companies in which they had a shared interest was Global. It began operations in August of 2015. Wright and Ratcliffe were officers, directors, and shareholders in the company. Wright was a chartered accountant by profession and oversaw company finances. Ratcliffe's focus was on business development.

[5] The parties agree that 2018 was a difficult year for Global, necessitating adjustments to its business plan. Challenges continued into the first few months of 2019. Global reduced its staff and conducted the majority of its business through one supplier, Captain's Choice Lobster Limited ("Captain's Choice"), and one customer, First Catch Fisheries Co. Limited ("First Catch"). It fell behind in its payments to Captain's Choice at a time of increasing competition in the seafood supply business. Captain's Choice sought a new supply agreement with Global. Ratcliffe was the point of contact between Global and Captain's Choice.

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[1] Leave to appeal from an interlocutory decision is required by s.40 of the *Judicature Act*, R.S.N.S. 1989, c. 240.

[6] In February of 2019, Ratcliffe incorporated Victory Seafood Limited ("Victory"). It began operations as a seafood export and marketing company on April 1, 2019.

[7] Global ceased operations in the spring of 2019 and was wound up on December 31, 2019. There is no dispute these steps were taken by agreement between Wright and Ratcliffe. The dispute lies in the discussions behind those decisions.

Legal Proceedings Begin

[8] Wright commenced action against Ratcliffe and Victory on August 12, 2021. He claimed Ratcliffe had a fiduciary duty to both Global and him as a shareholder and director. In his claim, Wright alleged "in or around February of 2019":

> a. Mr. Radcliffe either negligently or intentionally misrepresented that Captain's Choice would no longer trade with Global;
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> b. Mr. Radcliffe either negligently or intentionally misrepresented that he had been offered and accepted an employment position – or any position in-house – with Captain's Choice; and
>
> c. Mr. Radcliffe solicited and converted Global's corporate opportunity, to wit its business with primary trading partners Captain's Choice and First Catch; [2]

[9] Wright also claimed oppression under the Third Schedule of the *Companies Act*[3].

[10] Wright's pleading states he became aware of Victory in June of 2019, and learned it was doing business with First Catch in December of 2019. This information caused Wright to make further inquiries about Victory's operations, and its public accounts. On the basis of the information obtained, Wright formed the belief that Victory was trading in Global's former business.[4] His pleading does not reveal the point in time when he came to this conclusion.

[11] Wright claimed a variety of damages from both Ratcliffe and Victory, including ongoing losses resulting from the misappropriation of business opportunities.

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[2] Amended Statement of Claim at paras. 19, 21, 33.
[3] R.S.N.S., 1989, c. 81, Third Schedule, ss. 5.
[4] Statement of Claim, paras. 24-30. Claims based on a breach of fiduciary duty between Ratcliffe and Global were struck Campbell J. in *Wright v. Ratcliffe*, 2022 NSSC 128.

[12] Ratcliffe and Victory defended Wright's action on the basis that: (1) Ratcliffe did not have a fiduciary obligation to Wright; (2) there had been no negligent or fraudulent misrepresentation; (3) the oppression claims lacked merit; and (4) all claims were barred by operation of the *Limitations of Actions Act*[5] ("*LAA*").[6]

[13] Ratcliffe and Victory brought a motion for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04 arguing that Wright's action against them was out of time.

The Summary Judgment Decision

[14] The summary judgment motion was heard by Justice Scott Norton who granted it and dismissed Wright's action. His decision is reported as *Wright v. Ratcliffe*, 2023 NSSC 287 ("Wright Decision").

[15] Before Justice Norton, neither party disputed the two-year limitation period in s. 8(1)(a) of the *LAA*. Wright's submission was that he commenced his claim within two years of its discovery and was compliant with the limitation period.[7] The motion judge began his detailed decision by identifying the issue before him – whether Wright's action commenced on August 12, 2021 was discovered within the two previous years. If discovered before August 12, 2019, Wright's action would be statute barred.

[16] In his decision, the motion judge referenced the pleadings, the nature of the claims, and the positions of the parties. He was guided by ss. 8 and 9 of the *LAA*, as well as the leading authorities on summary judgment[8] .

[17] As a framework for his analysis, the motion judge relied on this Court's decision in *Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52 quoting the following passage:

> [20] Did the defendants establish that there are no genuine issues of fact on the question of whether the plaintiff's action is statute barred because the limitation period has expired? …
>
> …

[5] SNS 2014, c. 35.
[6] Statement of Defence, paras. 66, 69, 73, and 79.
[7] Respondent's motion submission, at para. 44 referring to s. 8(1)(a) the *LAA*.
[8] *Shannex v. Dora Construction Ltd.*, 2016 NSCA 89, and *Risley v. MacDonald*, 2022 NSCA 76.

> [23] When the defendant pleads a limitation period and proves the facts supporting the expiry of the limitation period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule …
>
> [24] In the context of a summary judgment application where a limitation defence is pleaded, the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test … Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.
>
> (Emphasis Added)

[18] The evidence on the motion came from Wright and Ratcliffe, as well as former business partner Reginald LeBlanc. The evidence was reviewed, and divergent points identified, with the judge noting "the only material facts are those relating to whether the limitation period under the *LAA* had expired by the time that this action was commenced on August 12, 2021".[9] The motion judge went on to make extensive findings of fact[10] and concluded:

> [39] I find that the Defendants have established that there are no genuine issues of fact on the question of whether the Plaintiff's action is statute barred because the limitation period is expired. The alleged misrepresentations that form the basis of the Plaintiff's claim were made between January and June 2019. The disputed payment of the $100,000 was made in April 2019. On their face, these claims arose long before August 21, 2019, and therefore the Notice of Action filed August 21, 2019 [sic], was time barred, subject to the Plaintiff establishing that the time did not expire based on the argument of discoverability.[11]

[19] Following *Milbury*, the motion judge found the undisputed material facts drove the conclusion that Wright's action was out of time unless he could rely on the principle of discoverability. Wright had the burden to establish, on evidence, a realistic prospect that he had discovered his claim after August 12, 2019.

[20] Justice Norton went on to consider the evidence and arguments on the issue of discovery. He cited s. 8(2) of the *LAA* for the statutory parameters, as well as the guidance of the Supreme Court of Canada in *Grant Thornton LLP v. New*

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[9] *Wright* at para. 34.
[10] *Wright* at paras. 37-38.
[11] In this passage, the motion judge made an error in the date the action was filed. The correct date is August 12, 2021. This error is obvious from the record and does not materially impact the reasons or result.

Brunswick, 2021 SCC 31 ("*Grant Thornton*"). On the motion, Wright argued he had suspicions about Ratcliffe, but nothing more, until the late fall of 2020 when he was able to view the public accounts posted by Victory[12]. Ratcliffe disagreed, relying on a text message sent to him by Wright on June 26, 2019. The content of the text message is significant and reproduced here:

> I was devastated to discover in recent days, the betrayal, lies and deceit by your actions both personally and professionally as a director of all the companies in the global group. I have just uncovered plans dating back to January. I now know about Victory Seafoods being registered mid February. This also [led] to me finding out you are not working for Dennis as an employee or on behalf of the global group but have indeed replicated the company we have built together since August 2015 and prior planning back to 2014. Not only that, but you have moved over customer, supplier and freight forwarding accounts to your new company and even Aimee our logistics manager (whom you told me was retiring) and Leanne to replicate the finance system I initially built in Quickbooks. This is a clear breach of your fiduciary duty as a current director of these companies and an action that has been taken to avoid buying me out of the businesses … I have been under advisement to pursue legal damages in relation to the above in both the UK and Canada. My preference would be to break ties and for me [to] take over full ownership of The Snapper Shack, JA Global and Elite Seafoods and I will relinquish my shareholding in Global Seafoods. I am also expecting a substantial financial settlement in addition to this, in relation to these matters. If this will not be achievable between us, please let me know at the earliest opportunity, so future communication and proceedings can be taken by our individual legal council [sic].[13]

[21] Ratcliffe argued the text message demonstrated Wright discovered his claims no later than June 26, 2019. The motion judge agreed, finding the message revealed "sufficient knowledge, actual or constructive, of the material facts upon which a plausible inference of liability can be drawn"[14]. Applying *Grant Thornton*, he found Wright's claim was discovered on the date the text message was sent. This led directly to the ultimate conclusion that Wright's discoverability argument had no chance of success. The summary judgment motion was granted and the action dismissed.

[22] Before proceeding, I note a contentious point from the motion that carries forward to this appeal. Although the text message Wright sent to Ratcliffe on June 26, 2019, was admitted, the inferences available from this message were disputed.

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[12] Wright motion Affidavit, at paras. 57-59.
[13] Ratcliffe Affidavit, Appeal Book, Part 2, Exhibit "P".
[14] *Wright* at para. 55.

On this point, it was Wright's evidence that the text message was sent in the context of broader circumstances. Beginning in June 2019, Wright discovered: (1) Ratcliffe was not working in Canada as expected; (2) emails in the company mailbox between Ratcliffe, customers, and freight forwarders referencing Victory; and (3) basic company information on Victory.[15]

[23] On this evidence, Wright argued he had suspicions Ratcliffe deceived him, convinced him to close Global on "false pretences," and was "now conducting what used to be Global's business through Victory."[16] He said it was "frustration and doubt" (as opposed to a plausible inference of liability) that resulted in the text message to Ratcliffe on June 26, 2019.[17]

[24] Beyond this, it was undisputed that Wright and Ratcliffe met the following day (June 27, 2019). It was Wright's evidence that this lengthy meeting with his long-time friend allayed any suspicions until he reviewed Victory's public accounts in the fall of 2020.[18] Following the argument along, Wright did not discover his claim until the fall of 2020, and filed his action on August 12, 2021, meaning he was compliant with the *LAA*.

[25] The motion judge did not accept Wright's *ex post facto* characterization of the text message or the argument flowing from it. On this critical point, he relied on the text from Wright to Ratcliffe and found it: (1) did not reveal any genuine dispute of fact, but (2) did reveal knowledge of facts sufficient to support a plausible inference of liability. Beyond that, the judge did not accept an estoppel argument advanced for the first time without notice or authority or find any evidence of acknowledgment or waiver during the June 27, 2020, meeting. [19]

[26] The place of the text message in the discoverability analysis is revived on this appeal. The estoppel and waiver arguments are not.

[27] With this background, I turn to consider the issues.

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[15] Wright motion Affidavit at paras. 42, 43, 44.
[16] Wright motion Affidavit at para. 44.
[17] Wright motion Affidavit at para. 45.
[18] Wright motion Affidavit at paras. 45-56.
[19] *Wright* at paras. 57-59. For clarity, it is worth noting that Wright raised an estoppel argument for the first-time during oral argument on the motion. His submission was the assurances received from Ratcliffe during the conversation on June 27, 2019, was the basis for estoppel. No notice of this issue was given to the Court below or to Ratcliffe. The argument was not supported by any authority and was dismissed by the motion judge.

Issues

[28] In his Notice of Appeal, Wright alleges various errors by the motion judge in his application of the discovery principle. Having heard the parties and considered the record, I would frame the issues as follows:

(a) Should leave be granted?

(b) Did the motion judge err in his application of the summary judgment principles to the limitation defence?

Standard of Review

[29] On the question of leave, there is no standard of review.[20]

[30] On summary judgment appeals, the standard of review is not in dispute. First set out in *Burton*[21], and applied many times since[22]:

> The standard of review applicable to decisions on summary judgment motions is well known. 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."

[31] The determination of when a claim has been discovered under the *LAA* is a question of mixed fact and law. The question involves a highly factual assessment, calling for deference, and reviewable for palpable and overriding error.[23]

[32] Conceptually however, this is not an appeal about discoverability *per se*, but about whether the judge analyzed the issue properly in the context of a summary judgment motion.[24]

[33] It is on this basis that I proceed.

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[20] *Burton Canada Company v. Coady*, 2013 NSCA 95 at para. 18.
[21] *Burton* at para. 19.
[22] See for example *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29; *Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4; *Risley v. MacDonald*, 2022 NSCA 76; and *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72.
[23] *Pellerin Savitz LLP v. Guindon*, 2017 SCC 29 at para. 11.
[24] *Risley*, 2022 NSCA 76 at para. 22.

Analysis

1. Should leave to appeal be granted?

[34] The threshold for leave is long settled. In *Shannex,* Justice Fichaud explained:

> [27] This is an appeal from an interlocutory motion, for which leave is required. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Justice Saunders, for the majority, set out the test for leave to appeal:
>
> > 18 … The question of whether leave to appeal ought to be granted is one of first instance. The well-known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed.

[35] The question of leave is not contested. There is an arguable issue. I would grant leave and proceed to assess the merits of this appeal.

2. Did the motion judge err in his application of the summary judgment principles to the limitation defence?

[36] This appeal deals with a discreet aspect of summary judgment. The broader principles are not in dispute, and merit only brief review as context for the analysis that follows.

The Basic Principles of Summary Judgment

[37] In Nova Scotia, summary judgment is brought under *Civil Procedure Rule* 13.04. It provides a mechanism to deal with pleadings having little to no merit. The purpose and objective of the summary judgment rule was articulated by Justice Saunders in *Burton*:

> [22] … Summary judgment should be just that. Summary. "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on the merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.[25]

[25] *Burton* at para. 22.

[38] The principles guiding the application of the *Rule* have been reviewed many times and are well known[26]. Summary judgment has two stages. The first requires an applicant establish no genuine dispute of material fact requiring trial. If no such dispute, stage two requires a respondent show a real chance of success. [27]

[39] In *Burton*, it was recognized that the *Rules* governing summary judgment codify well established principles into an "effective matrix of procedural directives.[28] In *Shannex* (at paras. 34-52), Justice Fichaud distilled the substance and process of summary judgment into five sequential questions that have since become the analytical framework. The first three of those questions are relevant to this appeal:

> 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
>
> 2. If the answer to above is No, then: does the challenged pleading require a determination of a question of law, either pure or mixed with a question of fact?
>
> 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?

[40] As observed recently in *Arguson Projects Inc.*, a motion judge who fails to ask these questions as posed risks falling into error.[29] A similar point was made by this Court in the context of a limitation issue in *Risley*.[30]

Summary Judgment, Limitation Periods and Discoverability

[41] The motion judge in this case was required to apply the principles of summary judgment to a claim defended on the basis of a limitation period. He was referred to and applied this Court's decision in *Milbury* which remains the leading authority on motions for summary judgment involving a limitation period defence.[31] For an applicant to obtain summary judgment on the basis of an expired limitation period, the *Milbury* analysis requires: (1) the defendant prove there is no

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[26] The most recent distillation of the principles is found in *Arguson*.
[27] *Burton* at para. 26-27 adopting the test in the seminal case *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11.
[28] *Burton* at para. 29.
[29] 2023 NSCA 72 at para. 34.
[30] 2022 NSCA 76 at paras. 97 – 101.
[31] *Jesty v. Vincent A. Gillis Inc.*, 2019 NSSC 320 at paras. 23-24; *Cochrane v. HFX Broadcasting et al*, 2021 NSSC 341 at paras. 33-34; *Hardit Corporation v. Holloway Investments Inc.*, 2022 NSSC 328 at para. 38; *Halef v. 3104457 US Investments Inc.*, 2023 NSSC 65 at para. 35; *Thompson v. Scotia Capital Inc.*, 2023 NSSC 409 at para. 31; *Conrad Merzetti v. Arichat Metals et al*, 2024 NSSC 120 at paras. 58-59.

genuine issue of fact requiring trial on the challenged pleading; and (2) the plaintiff fail to demonstrate a real chance of success in his claim the limitation period has not expired.

[42] In *Milbury*, the applicants established several of the claims advanced were commenced outside the limitation period – in other words, there was no genuine or material dispute that the period had long passed. The respondent was then required to demonstrate a real chance of success in its claim the limitation period had not expired because of the discoverability principle.[32]

[43] The principles that guide the assessment of discoverability are key to the outcome in this case. The *LAA* tells us the two-year limitation period runs from the point at which a claim is "discovered":

> GENERAL LIMITATION PERIODS
>
> **General rules**
>
> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[44] The standard of knowledge required to discover a claim was clarified in *Grant Thornton*. Justice Moldaver explained:

> [42] … a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to

[32] *Milbury* at para. 24.

> the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.
>
> [43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.
>
> [44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise.
>
> [45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known …
>
> Since the term *prima facie* can carry different meanings, using plausible inference in the present context ensures consistency. A plausible inference is one which gives rise to a "permissible fact inference."
>
> [46] The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability … Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run.
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> (Emphasis added/Citations omitted)

[45] With this context, I move on to consider Wright's allegations of error by the motion judge.

The Allegations of Error

[46] It is clear the motion judge approached his analysis guided by the *Milbury* framework and principles in *Grant Thornton*. There is no basis to conclude otherwise. Wright concedes Ratcliffe proved the basic two-year limitation period

was expired when he brought his action.[33] The issues now raised all relate to the application of the discoverability principles.

(a) Misuse of Evidence on Summary Judgment

[47] Wright argues the motion judge erred in his assessment of events of June 2019, including the text message sent from Wright to Ratcliffe on June 26, 2019. On the motion, it was Wright's evidence he had nothing more than suspicions in June of 2019, and the concerns conveyed in the text were allayed by the end of a meeting the following day. In finding otherwise, Wright says the motion judge erred by weighing evidence, assessing credibility, and drawing inferences from disputed facts. Ratcliffe disagrees, saying the motion judge properly applied the law to the undisputed material facts.

[48] The motion judge identified the text message as central to his analysis of discoverability:

> [53] In my view, the determination of the issue of whether the claims were discoverable rests on the analysis of the text message sent by Mr. Wright to Mr. Ratcliffe on June 26, 2019. There is no genuine issue of fact in relation to the text message. The plain text of the message discloses that Mr. Wright believes that he has information that Mr. Ratcliffe has betrayed him, lied to him, and deceived him "both personally and professionally as a director of all the companies in the Global group." He states that he is aware of the registration of Victory, and, as a result, knows that Mr. Ratcliffe is not an employee of Captain's Choice as he claims to have been told by Mr. Ratcliffe (although Mr. Ratcliffe denies having said so). Mr. Wright says that he is aware that Mr. Ratcliffe has replicated the company they built together (Global) and moved customer, supplier, and freight forwarding accounts to the new company. He calls all of this "a clear breach of your fiduciary duty" and an action taken to avoid having to buy Mr. Wright out of the business. He says that he has been "under advisement to pursue legal damages in both the UK and Canada" and puts forward that he will be seeking a transfer to make him the sole owner of various businesses in addition to a substantial financial settlement.
>
> [54] Mr. Wright, faced with the evidence of this text, now seeks to characterize it as "mere suspicion and speculation" and asserts that he has no idea whether the allegations had any truth to them. However, his affidavit did not say this. Rather, it says that he sent the message because of frustration and doubt regarding the situation.[34]

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[33] Appellant's Factum, at para. 18.
[34] *Wright* at paras. 53-54.

[49] In conducting his assessment of the evidence, the motion judge was aware of the limits imposed by summary judgment. He could not weigh evidence or assess credibility. His task was to identify the material facts "relating to whether the limitation period under the *LAA* had expired by the time that this action was commenced on August 12, 2021".[35]

[50] Wright complains the motion judge came to his conclusions on the basis of disputed facts. He points to his evidence on the motion that his text message was sent out of frustration and doubt, not knowledge. Confronting Ratcliffe via text was part of the due diligence triggered by his suspicions, and not the basis of an inference of liability. These arguments were made to the motion judge and rejected.

[51] The principles restricting the assessment of evidence on summary judgment are not contested. It is an error to weigh evidence, assess credibility, or resolve factual disputes. These tasks belong to a trial judge. That said, a motion judge has tools to assist in assessing the evidence. Several of those are important here.

[52] First, a judge hearing a summary judgment motion is permitted to draw inferences from undisputed facts as long as the inferences are strongly supported.[36] The fact that Wright sent Ratcliffe the text message was not disputed. Neither was the authenticity of the text. The content of the text was before the motion judge for consideration. This evidence powerfully supports the conclusion that Wright had all the material facts available to discover his claim for purposes of s. 8(2) of the *LAA* as of June 26, 2019. It is challenging to conceive of a stronger basis for a plausible inference of liability. Relying on this evidence did not require the motion judge to resolve any contested facts.

[53] Second, a motion judge is required to determine whether the evidence raises a "genuine" dispute of fact. This point was addressed in *Risley* where the respondent's evidence on the motion was inconsistent with statements made in a previous email conversation.[37] Relying on *Guarantee*, and *Smith v. Nova Scotia (Attorney General)*[38], the motion judge in *Risley* determined the inconsistent evidence did not disclose a genuine issue:

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[35] *Wright* at paras. 33-34.
[36] *Guarantee* at para. 30; *Lameman* at para. 11; *Burton* at paras. 28-29.
[37] 2021 NSSC 250.
[38] 2010 NSCA 14 at paras. 17-19.

> [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.[39]

[54] This Court agreed with the motion judge. Justice Farrar concluded:

> [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 of 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*, para. 31).[40]

[55] A similar issue is presented here. There is no dispute of fact between the text message and Ratcliffe's evidence. The evidence that "disputes" the text message comes from Wright himself. On the motion, he characterized the text as the product of suspicions and resulting frustration and doubt. It is well settled that bald denials and self-serving affidavit evidence are "not sufficient in itself to create a triable issue."[41]

[56] It is clear the motion judge did not assess credibility, weigh evidence, or resolve any disputes of fact. He did not misapprehend suspicion for knowledge. That Wright offered evidence characterizing his own earlier words does not make those words the subject of a genuine dispute requiring a trial. The motion judge properly determined the evidence revealed no genuine issue. He was required to do so. There is no error.

(b) Ignoring evidence and the discoverability principle

[57] The final argument advanced by Wright is that the motion judge ignored evidence about: (1) the June 27, 2020, meeting with Ratcliffe; and (2) the long-term friendship between the parties. Wright contends that in failing to consider this

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[39] *Risley*, 2021 NSSC 250 at para. 47.
[40] *Risley*, 2022 NSCA 76 at paras. 69-70.
[41] *Guarantee* at para. 31.

evidence, the judge erred in his assessment of due diligence, which tainted his conclusions on when the claims were discovered.

[58] On this point, Wright relies on the decisions of the Ontario Court of Appeal in *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*[42] and *Vu v. Canada (Attorney General),*[43]as well as *Kolesnik v. City of Toronto*[44] for the proposition that reasonable diligence is a contextual analysis.

[59] As I understand the point, Wright developed suspicions about Ratcliffe which triggered the need for due diligence. The assessment as to whether Wright acted reasonably required consideration of all the circumstances, including his long-term friendship with Ratcliffe and the assurances given during the meeting on June 27, 2020. Wright submits the motion judge ignored this evidence and erred in his conclusion the claim was discovered in June of 2019.

[60] Considered in context, this argument is not sustainable. *Grant Thornton* is the leading authority on the knowledge required to trigger the limitation period. Both *Crombie* and *Kolesnik* were decided before *Grant Thornton,* and *Vu*, decided later, relies on it. As *Grant Thorton* tells us, a claim is discovered when the plaintiff has knowledge of material facts supporting a plausible inference of liability. The material facts are those listed in s. 8(2) of the *LAA*.

[61] There are two pathways to the required knowledge: (1) actual knowledge; or (2) constructive knowledge. In other words, the material facts: (1) are known; or (2) ought to have been known. This principle has its origin in the common law discoverability rule. The common law rule originates in equity and balances the various rationales for imposing limitation periods with the need to avoid the injustice of precluding a claim before the plaintiff has knowledge of it.[45]

[62] Either knowledge base may be proven by direct or circumstantial evidence, but only one is required to establish discovery and trigger the limitation period.

[63] The reasons in *Grant Thornton* cite *Crombie* on the components of constructive knowledge:

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[42] 2017 ONCA 16.
[43] 2021 ONCA 574.
[44] 2020 ONSC 984.
[45] *Grant Thornton* at para. 29.

> 44 In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise (*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc*., 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).[46]

[64] In his argument on this point, Wright leans on the fact he had suspicions and took reasonably diligent steps as a result. There was no dispute about the fact he searched corporate email accounts and sought out information about Victory. He argues the text message of June 26, 2019, was just another step. With the context properly considered, he contends it was reasonable to confront his friend and business partner and believe Ratcliffe's explanations.

[65] Returning to the principles of summary judgment, the evidence did not demonstrate any genuine issue of material fact. Wright had suspicions, took reasonable steps, and then confronted his friend in a text message. The text is direct evidence of Wright's knowledge. The motion judge concluded:

> [55] It is not disputed that Mr. Wright sent the text message to Mr. Ratcliffe on June 26, 2019. That message reveals sufficient knowledge, actual or constructive, of the material facts upon which a plausible inference of liability can be drawn. I conclude the claim was discovered as of that date. Mr. Wright's degree of knowledge went well beyond suspicion or speculation. On his own evidence, it was his suspicion that led him to exercise due diligence and investigate the emails he uncovered and then inquire into the incorporation details of Victory. Having made these inquiries, his suspicion translated into sufficient knowledge from which a plausible inference of liability can be drawn. The tone and the words of the text message clearly suggest that he received "advisement" and he clearly articulated the basis for legal liability and damages. The law does not require certainty of liability in order to "discover" a claim.

[66] In concluding as he did, the motion judge did not ignore relevant evidence or make any other error in law. To the contrary, he considered the evidence and properly determined there was no genuine dispute of material fact on the issue of discoverability. The undisputed facts, either directly or inferentially, supported the finding that Wright had the required knowledge to trigger the limitation period as of June 26, 2019. Once running, there was no basis in fact or law to stop the limitation clock.

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[46] *Grant Thornton* at para. 44.

[67] The assessment of the motion judge on this issue attracts deference. Wright has not demonstrated any error requiring intervention. Wright's action was doomed to fail. Summary judgment was properly granted.

Conclusion

[68] For these reasons, I find no error in the conclusion there was no genuine issue of fact requiring trial. Nor did Wright's action have a real prospect of success on the basis of discoverability. In these circumstances, the motion judge was required to grant summary judgment and dismiss Wright's action against Ratcliffe.

[69] I would grant leave but dismiss the appeal with costs to the respondent in the amount of $2,500.00.

Gogan J.A.

Concurred in:

Bryson J.A.

Fichaud J.A.