NOVA SCOTIA COURT OF APPEAL
Citation: *Scotia Capital Inc. v. Thompson*, 2025 NSCA 17

Date: 20250310
Docket: CA 530760
Registry: Halifax

Between:

Scotia Capital Inc./Scotia Capitaux Inc., carrying on business as SCOTIAMCLEOD

Appellant

v.

Charles Thompson and Charles Thompson as Executor of the Estate of Glenda Thompson

Respondent

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	January 15, 2025, in Halifax, Nova Scotia
Facts:	The case involves Scotia Capital Inc. (ScotiaMcLeod) and Charles Thompson, who, along with his late wife, became clients of ScotiaMcLeod in 2001. Their investment advisor, David Chabassol, allegedly engaged in misconduct, leading to claims of breach of contract, negligence, and breach of fiduciary duty. The Thompsons also sought repayment of a personal loan given to Chabassol. The dispute centers on whether the claims are statute-barred under the *Limitation of Actions Act* (paras 5-13).
Procedural History:	*Thompson v. Scotia Capital Inc.*, 2023 NSSC 409: Justice James L. Chipman dismissed ScotiaMcLeod's motion for summary judgment, finding material questions of fact regarding the discoverability of the right of action (para 1).

Parties Submissions:	Appellant (ScotiaMcLeod): Argued that the motion judge failed to properly apply the principles of discoverability and that the claims were statute-barred as the limitation period expired before the Thompsons commenced proceedings (paras 3, 10). Respondent (Thompson): Contended that they were unaware of the potential claims until 2018, when advised by a financial planner to seek legal counsel, thus invoking the discoverability principle to argue the limitation period had not expired (paras 14, 25-26).
Legal Issues:	Did the motion judge err in determining that there were material facts in dispute relating to discoverability which required a trial?
Disposition:	The appeal was dismissed with costs awarded to the respondents in the amount of $2,500.00 (para 4).
Reasons:	Per Farrar J.A. (Scanlan and Van den Eynden JJ.A. concurring): The motion judge correctly identified the legal principles regarding discoverability and limitation periods. The judge found that there were material facts in dispute, such as the timing of Thompson's awareness of potential claims and his reliance on Chabassol's advice. The evidence presented by Thompson was sufficient to demonstrate a genuine issue for trial. The motion judge did not apply incorrect legal principles, nor would an injustice result from his decision (paras 14, 19-29).

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Judges:	Farrar, Scanlan, Van den Eynden, JJ.A.
Appeal Heard:	January 15, 2025, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Farrar, J.A.; Scanlan and Van den Eynden, JJ.A. concurring
Counsel:	Michelle C. Awad, K.C. and Sarah Douglas, for the appellant Colin D. Bryson, K.C. and Thomas D. Morehouse, for the respondent

Reasons for judgment:

Introduction

[1] Scotia Capital Inc. (ScotiaMcLeod) seeks leave to appeal and, if granted, appeals the decision of Justice James L. Chipman dismissing its motion for summary judgment on the evidence.[1]

[2] The motion judge found that the respondents had presented sufficient evidence to demonstrate there were material questions of fact relating to discoverability of the right of action.

[3] On this appeal ScotiaMcLeod argues, among other things, that the motion judge failed to properly apply the principles concerning discoverability.

[4] For the reasons that follow, I would dismiss the appeal with costs to the respondents in the amount of $2,500.00[2] in any event of the cause.

Background

[5] Charles Thompson and his wife Glenda Thompson[3] (who died on June 27, 2011) became clients of ScotiaMcLeod in September 2001. Their investment advisor was David Chabassol. The Thompsons had been investment clients of Chabassol for many years before Chabassol joined ScotiaMcLeod.

[6] Chabassol joined ScotiaMcLeod in July 2001 and remained there until October 14, 2014, when he took a medical leave. He never returned to work.

[7] After Chabassol went on medical leave, David Bugden took over as the Thompsons' financial advisor. Bugden left ScotiaMcLeod in 2016 and Wayne Fraser became their financial advisor.

[8] The Thompsons initially commenced a lawsuit against ScotiaMcLeod and Chabassol on August 19, 2019 and subsequently amended it on October 3, 2019. They seek damages from ScotiaMcLeod for breach of contract, negligence and breach of fiduciary duty arising out of the alleged wrongdoing by Chabassol in his

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[1] *Thompson v. Scotia Capital Inc.*, 2023 NSSC 409.
[2] The parties agreed on the quantum of costs for the appeal.
[3] I will refer to the respondents collectively as the Thompsons unless the context requires otherwise.

dealings with them. The Thompsons allege no wrongdoing on the part of either Bugden or Fraser.

[9] On January 21, 2020 ScotiaMcLeod filed its defence denying all allegations. In his defence filed February 10, 2020 Chabassol also denied all of the allegations. Chabassol died on May 6, 2021, and on November 1, 2021 Thompson filed a notice of discontinuance with respect to the claims against Chabassol.

[10] On June 6, 2023 ScotiaMcLeod filed a motion for summary judgment on evidence. ScotiaMcLeod sought an order dismissing the Thompsons' claims on the basis, that pursuant to the *Limitation of Actions Act*, S.N.S. 2014, c. 35, the statutory limitation period expired long before the Thompsons commenced the proceeding on August 19, 2019. Its position was the claims related to Chabassol's conduct would be statute-barred after October 14, 2016 (two years after Chabassol left ScotiaMcLeod).

[11] On the motion the following evidence was presented:

- affidavit of ScotiaMcLeod's Atlantic Regional Director Gregory Payne, sworn and filed October 13, 2023;
- affidavit of Charles Thompson, sworn November 10, 2023 and filed November 17, 2023;
- supplementary affidavit of Mr. Payne, sworn and filed November 28, 2023;
- supplementary affidavit (with amendments agreed upon by the parties) of Mr. Thompson sworn December 5, 2023; and
- Exhibit 1, an excerpt from Charles Thompson's January 26, 2023 discovery examination.

[12] The affiants were not cross-examined, and their affidavits (with exhibits) went in by consent.

[13] In addition to their claims for breach of contract, negligence and breach of fiduciary duty, the Thompsons also claimed repayment of a $1,050,000.00 personal loan advanced to Chabassol by the Thompsons in 2008 and 2009. Although that loan was in issue before the motions judge, ScotiaMcLeod is not challenging the motion judge's finding that the action, insofar as it relates to the loan, is not statute-barred.

[14] The motion judge, after reviewing the law on summary judgment motions, made the following finding:

> [48] The evidence causes me to conclude that with respect to discoverability, there are material facts in dispute referrable to Thompson:
>
> - not receiving any expert advice that he had a claim against Scotia until 2018;
> - having no reason to think that his losses were anything more than market losses;
> - placing trust in Chabassol (as evidenced by, among other things, the loan);
> - not appreciating that he may have a claim until it was suggested to him that he get legal advice; and
> - being not as knowledgeable or as sophisticated as the KYC forms prepared by Chabassol make him out to be.
>
> [49] As is made clear in *Grant Thornton LLP*, the limitation clock does not start based upon mere suspicion or speculation of liability; there must be "a plausible inference of liability". The evidence led on this motion convinces me that it will be a "live issue" as to whether there was a plausible inference of liability to trigger Thompson making a claim or even retaining an expert any sooner than he did.
>
> [50] I am alive to the competing arguments which are all rooted in the pleadings and affidavit (with appended discovery excerpts and other exhibits) evidence. Having said this, it is not the role of the Court on a Rule 13 summary judgment motion to weigh the evidence or make credibility findings. This must be left for a future day and I note the trial in this matter is set for June, 2025.

[15] ScotiaMcLeod says that the motion judge erred in his application of the principles relating to discoverability and had he properly applied those principles he would have allowed the claim for summary judgment.

Issues

[16] The issues are as follows:

1. Should leave to appeal be granted?
2. Did the motion judge err in his determination that there were material facts in dispute relating to discoverability which required a trial?

[17] The respondents concede leave to appeal should be granted. I agree and will not discuss it further.

Standard of Review

[18] The standard of review applicable to appeals from summary judgments is well established, as set out in *Burton Canada Company v. Coady*:[4]

> [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 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.

Analysis

[19] As was the situation in the recent case *Peill v. Soil and Sea Co-op Limited*,[5] ScotiaMcLeod focused on the analysis applicable to summary judgments as set out in *Shannex Inc. v. Dora Construction Ltd.*[6]

[20] In *Peill* Justice Bourgeois put to bed the notion that *Shannex* had modified this Court's decision in *Nova Scotia Home for Coloured Children v. Milbury*[7] on limitation issues in summary judgment motions:

> [26] Before addressing the appellants' argument, it is important to provide clarification regarding the test to be applied to a summary judgment motion where a limitations issue is raised. There has been some suggestion that this Court's decision in *Shannex* has supplanted or modified the two-step analysis in *Milbury*. That is not the case.
>
> [27] *Shannex* was not a limitations matter. The principles outlined therein did not modify *Milbury* in anyway. The motion judge was correct to consider *Shannex* when assessing if there was a genuine issue of material fact regarding whether Edward's share had been lawfully revoked. ***However, it was the principles in* Milbury *that governed her consideration of whether there was a genuine issue of material fact regarding the expiry of the limitation period***.
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> [Emphasis added]

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[4] 2013 NSCA 95, at para. 19.
[5] 2025 NSCA 11 [*Peill*].
[6] 2016 NSCA 89 [*Shannex*].
[7] 2007 NSCA 52 [*Milbury*].

[21] In *Milbury*, this Court set out the approach on summary judgment where there is a genuine issue of material fact regarding the expiry of the limitation period:

> [23] When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule: **Soper v. Southcott**, [1998] O.J. No. 2799 (C.A.) at ¶ 14; **Gray Condominium Corp. No. 27 v. Blue Mountain Resorts**, [2005] O.J. No. 793 (S.C.J.) at ¶ 18.
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> [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 on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. 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 in original]

[22] In his decision, the motion judge, after setting out the law in *Milbury*, concluded:

> [23] Based on the foregoing, Scotia must establish that there is no genuine issue of fact for trial on the question of whether the limitation period for Thompson's claims has expired. Once Scotia does that, the burden shifts to Thompson to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired by operation of the discoverability principle.

[23] The Thompsons acknowledged that Scotia MacLeod had met its burden to show that the statutory limitation period had expired. Therefore, the burden shifted to them to present evidence that the limitation period had not expired due to the discoverability principle.

[24] Having identified the correct legal principles, the motion judge turned to the evidence to determine whether the Thompsons had met their burden.

[25] The motion judge referred to a number of paragraphs in Mr. Thompson's affidavit of November 17, 2023. In particular, he referred to paragraph 53 which

addressed when he first became aware he may have had an action against ScotiaMcLeod:

> 53. Until early 2018, I felt that the losses that I sustained in my investment portfolio were simply market losses and were not contributed to by the negligent advice of David Chabassol. I trusted David, and aside from my complaint about his purchase of Pacific and Western stock, felt that he had provided me with investment advice in my best interest. This changed in early 2018, as a result of a conversation I had with my nephew, Kent Thompson. I was complaining to Kent that I did not feel that I was getting the service from ScotiaMcLeod that I felt I should, and he suggested that I see Vince Byrne, a financial planner in Amherst. I met with Mr. Byrne in early 2018 and after he reviewed my records, Mr. Byrne recommended that I retain legal counsel to consider advancing a claim against ScotiaMcLeod.

[26] In their amended statement of claim the Thompsons assert:

> 27. The Plaintiffs state that for the purposes of section 8 of the *Limitation of Actions Act*, SNS 2014, c 35, their claims herein were not "discovered" until the spring of 2018 when they received advice that their investment losses were not just market losses, but were caused by or contributed to by the negligence and/or breach of fiduciary duty of the Defendants.

[27] After reviewing the evidence, the motion judge concludes:

> [38] In my view, Thompson in his amended pleading and affidavits provides a foundation for his dispute with Scotia. For example, his first affidavit (at paras. 19-28) there is evidence referrable to his loan to Chabassol. As for his investments, the first affidavit provides detailed evidence at paras 29-35 and again in his second affidavit (referrable to his savings or in trust accounts) at paras 4-8. As for his investment knowledge and strategy, this is detailed at paras 36-48 of his first affidavit.
>
> [39] Having considered all of the evidence on the motion, I am satisfied that there clearly is a dispute of material fact. Unlike the situation in *Risley* (see para. 31 where I quote from *Arguson* which discusses this), what we have here from Thompson's affidavit evidence amounts to far more than bold assertions in a responding affidavit. Thompson's two affidavits, combined with Mr. Payne's affidavits and the pleadings, provide demonstrable evidence that there are material facts in dispute between the parties that will affect the result at trial. From all of the evidence I can readily conclude that there are live issues concerning the know-your-client (KYC) letters and forms, the loan, Mr. Thompson's level of knowledge and sophistication as an investor, the overall performance of his investments under Scotia and whether Chabassol should have "dialed back" the ongoing high risk/margin investment strategy.

[28] He then summarizes his conclusions in the paragraph which I have cited above and repeat for ease of reference:

> [48] The evidence causes me to conclude that with respect to discoverability, there are material facts in dispute referrable to Thompson:
>
> - not receiving any expert advice that he had a claim against Scotia until 2018;
> - having no reason to think that his losses were anything more than market losses;
> - placing trust in Chabassol (as evidenced by, among other things, the loan);
> - not appreciating that he may have a claim until it was suggested to him that he get legal advice; and
> - being not as knowledgeable or as sophisticated as the KYC forms prepared by Chabassol make him out to be.

[29] The motion judge properly identified the law, reviewed the facts in detail and determined that there were material facts in dispute relating to the discoverability issue. In doing so, he did not apply wrong principles of law, nor would an injustice result from his decision.

Conclusion

[30] The appeal is dismissed, with costs to the respondents in the amount of $2,500.00 inclusive of disbursements in any event of the cause.

Farrar, J.A.

Concurred in:

Scanlan, J.A.

Van den Eynden, J.A.