NOVA SCOTIA COURT OF APPEAL
Citation: ***Sinclair v. Fierro***, 2014 NSCA 5

Date: 20140117
Docket: CA 413763
Registry: Halifax

Between:

James R. Sinclair

Appellant

v.

Steven James Fierro

Respondent

Judges:	Oland, Fichaud and Farrar, JJ.A.
Appeal Heard:	December 2, 2013, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Fichaud, J.A.; Oland and Farrar, JJ.A. concurring
Counsel:	John Kulik, Q.C. and Ian R. Dunbar, for the appellant Christa M. Brothers and Ian Breneman, for the respondent

Reasons for judgment:

[1] Mr. Fierro sued Mr. Sinclair on a promissory note and obtained summary judgment on the evidence. Mr. Sinclair appeals. He says there are contested issues of material fact properly for trial.

Background

[2] Mr. James Sinclair is the President of Visual Spirit Inc. ("VSI"). VSI was federally incorporated in 2002. Its object was to establish the VSI Media Fund. The Fund was supposed to hold millions of dollars that would finance the development of film, television and theatrical productions.

[3] Mr. Sinclair also was affiliated with several other companies. One was VSI HBI Inc. ("HBI"). Mr. Sinclair is described in the evidence as HBI's Chief Executive Officer. HBI's principals also included Mr. Christian Keller.

[4] In June 2003, Mr. Sinclair met Mr. Steven Fierro. Mr. Fierro is an investment professional with experience in trading currency options. The two agreed to do business together. Mr. Fierro was to advance funds for Mr. Sinclair's media productions.

[5] In March 2004, Mr. Fierro wired his initial advance of $150,000 to VSI. Apparently, this amount was to finance Mr. Keller's projects for HBI. After two further advances totalling $450,000 from Mr. Fierro to VSI in June 2004, Mr. Keller disappeared from the scene. Nonetheless, Messrs. Sinclair and Fierro persisted with their media projects, for which Mr. Fierro advanced $50,000 in October 2006 and $250,000 in June 2007 to companies associated with Mr. Sinclair. Mr. Fierro's affidavit describes these advances as loans to Mr. Sinclair. Mr. Sinclair's affidavit says they were investments in VSI or the other companies.

[6] From March 2004 through June 2007, when their arrangement ended, Mr. Fierro advanced a total of $900,000 to finance Mr. Sinclair's projects.

[7] The affidavits of Messrs. Sinclair and Fierro conflict as to whether, and the extent to which, the parties agreed that Mr. Sinclair would be expected personally to repay Mr. Fierro's advances. I will discuss this evidence later (paras 50-53).

[8] In March 2004 and March 2006, promissory notes were given to Mr. Fierro for the then cumulative amounts of $150,000 and $600,000 respectively.

[9] The third and final promissory note was signed on June 14, 2010 (“2010 Note”). It says it “supersedes all other notes and agreements”. So it is the focus of this proceeding. The 2010 Note and its attached Exhibit say, in full:

PROMISSORY NOTE

PRINCIPAL AMOUNT: USD$900,000.00 DUE: December 4th, 2007

MADE AT the City of Toronto, Canada, this 4th day of June, 2007.

FOR VALUE RECEIVED, and in consideration of a lender’s fee of USD$2.00 (the “FEE”) the undersigned joint and severally promise to pay Steven Fierro (“FIERRO”), the principal amount of nine hundred thousand dollars ($900,000.00) of lawful money of the United States, together with interest on the amount outstanding, accruing from and including the dates hereof, both before and after maturity, default and judgment, at a rate per annum of 8.0% adjusted daily, on the amount outstanding at the end of such day and compounded monthly. The principal sum shall be paid in one (1) installment in the amount of nine hundred thousand dollars ($900,000.00) which is due and payable on December 4th, 2007. The FEE is noted as paid in full prior to June 4th, 2007.

THE UNDERSIGNED hereby, waives demand, presentment, protest, notice of protest, and notice of dishonor.

THE UNDERSIGNED, WHEN NOT IN DEFAULT hereunder, shall have the privilege of prepaying the whole or any part of the principal sum secured at any time or times without notice or bonus.

THE UNDERSIGNED, hereunder, has further acknowledged that he shall be in receipt of funds with respect to various business ventures, receivables and income tax credits which are due during the term of this arrangement. As such the undersigned agrees and understands that it is implicit to this agreement that any available receivables be applied forthwith to reduce the principal on this note.

IF ANY PROVISION of this Promissory Note shall be held invalid or unenforceable, such invalidity or unenforceability shall attach only to such portion and shall not affect or render invalid or unenforceable any other provision of this Promissory Note.

INTEREST shall be accrued from the dates on which the advances were made below, contributing to the principal amount of nine hundred thousand dollars ($900,000.00) of lawful money of the United States.

$150,000	March 29, 2004
$150,000	June 1, 2004
$300,000	June 11, 2004
$50,000	October 25th, 2006
$250,000	June 4th, 2007

THIS PROMISSORY NOTE, inclusive of EXHIBIT "A", supersedes all other notes and agreements between FIERRO and THE UNDERSIGNED.

THIS PROMISSORY NOTE is made pursuant to and shall be governed by and construed in accordance with the laws of the Province of Ontario in Canada.

JAMES R. SINCLAIR

[signature of "James R. Sinclair"] June 14/2010
James R. Sinclair Date
President, Visual Spirit Inc.

EXHIBIT "A"

PREFERENTIAL OPTION

RELATED PROMISSORY NOTE: USD$900,000.00

DUE: December 4th, 2007

MADE AT the City of Toronto, Canada this 4th day of June 2007.

THE HOLDER of the attached Promissory Note (the "NOTE"), Steven Fierro ("FIERRO"), in consideration for the principle amount received of nine hundred thousand dollars ($900,000.00) of lawful money of the United States, may choose, at his option, to participate in the financing of the VSI Media Fund (the "Media Fund").

DURING THE COURSE of the normal business of Visual Spirit Inc., it is expected that the Media Fund will be established, affording the company to pay out the NOTE in full. FIERRO shall have the preferred option to convert all or part of the NOTE into the Media Fund at a 20% discount, or otherwise agreed upon arrangement.

THIS PREFERANTIAL OPTION is executed in conjunction with the attached PROMISSORY NOTE and is made pursuant to and shall be governed by and construed in accordance with the laws of the Province of Ontario in Canada.

JAMES R. SINCLAIR

[signature of "James R. Sinclair"] June 14/2010
James R. Sinclair Date
President, Visual Spirit Inc.

[10] Mr. Sinclair acknowledges that he placed his signature on the 2010 Note and on Exhibit "A". In each location there is only one signature, under the typed "JAMES R. SINCLAIR" and over the typed "James R. Sinclair President, Visual Spirit Inc.".

[11] The $900,000 has not been repaid to Mr. Fierro.

[12] On January 25, 2012, Mr. Fierro filed a Notice of Action against Mr. Sinclair with the Supreme Court of Nova Scotia. The Statement of Claim claimed, as a debt, the principal of $900,000 on the 2010 Note plus interest and costs. That was the only pleaded cause of action.

[13] Mr. Sinclair's Defence of March 7, 2012 denied that he was personally liable.

[14] On March 23, 2012, Mr. Fierro moved for summary judgment on the evidence under *Civil Procedure Rule* 13.04. Messrs. Fierro and Sinclair each filed affidavits. Justice McDougall heard the motion on June 20 and 27, 2012. Mr. Fierro was cross-examined. Mr. Sinclair's position was that, according to the underlying agreement, the 2010 Note was to bind VSI, not Mr. Sinclair personally. Mr. Fierro contended that the 2010 Note, on its face, unambiguously bound Mr. Sinclair, and that recourse to extrinsic evidence of the background agreement was unnecessary.

[15] The judge issued a decision on December 20, 2012 (2012 NSSC 429), followed by an Order of January 25, 2013. He ordered that Mr. Fierro have summary judgment for the $900,000 principal plus interest of 8%, per the 2010 Note, and costs of $1,000.

[16] On Mr. Sinclair's personal liability, Justice McDougall reasoned:

> **i. Is Mr. Sinclair personally liable on the face of the promissory note?**
>
> [17] As mentioned above, the fact that this note was signed by Mr. Sinclair on June 14, 2010 is not contested nor is its validity. Instead, Mr. Sinclair argues that he signed it in his capacity as president of Visual Spirit Inc. and therefore only the corporation is liable and not him personally. This is supported by the fact that his title and the company name is directly below his name. Moreover, he notes that no money was ever transferred to him directly. Indeed, the wire transfer receipts, attached as exhibits to Mr. Fierro's affidavit, show that the first three transfers were sent to VSI (Exhibits "B", "F", & "I"), the fourth transfer was sent to IYOUWE Inc. (Exhibit "T"), and the last transfer was sent to Wake Media (Exhibit "W").
>
> [18] On the other hand, Mr. Fierro points out that the first clause reads that: "the undersigned *joint and severally* promise to pay Steven Fierro," which, in his submission, can only mean that the document was intended to bind both VSI and Mr. Sinclair as his is the only signature on the document. To the extent that it is ambiguous, Mr. Fierro submits that it should be interpreted in his favour since Mr. Sinclair is the one who drafted the note and, as confirmed in cross-examination, Mr. Fierro had no input on the language whatsoever. [McDougall J.'s emphasis]
>
> [19] Mr. Sinclair admits that he drafted the note but he testifies at paragraphs 25(v) and 25(xxviii) of his affidavit that all promissory notes were drafted without the assistance of a lawyer and that he did not know what "joint and several" meant. He testifies that he did not intend to become personally liable. The plaintiff disputes this arguing that Mr. Sinclair cannot disown his own signature without showing that the document is radically different from what he believed he signed and that he did not sign it carelessly which he has not done: **Gardin** v. **J & B Kozma Enterprises Ltd.** (1997), 159 NSR (2d) 144; **Castle Building Centres Group Ltd.** v. **Da Ros** (1990), 95 NSR (2d) 24 (SCTD), aff'd (1990), 97 NSR (2d) 270 (SCAD).
>
> [20] I agree with the plaintiff's position; *the term "joint and severally promise" unambiguously manifests an intention that both Mr. Sinclair and VSI should be liable.* [Emphasis added] Whatever Mr. Sinclair's subjective intention, it cannot displace the objective meaning of the note. For the same reason, it is irrelevant that the money was directed to the corporations and not Mr. Sinclair's personal accounts and, in any event, all funds were solicited by Mr. Sinclair. Although Mr.

Sinclair seems to suggest at paragraph 20 of his brief that a separate personal guarantee would need to be drawn up in order to bind Mr. Sinclair, the legislation plainly does not require that. Section 179(1) of the *Bills of Exchange Act*, *supra*, states that:

> 179 (1) A note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor.

[21] In Maurice Megrah & Frank R. Ryder, Byles on Bills of Exchange, 24th ed (London, UK: Sweet & Maxwell, 1979), the authors commented on an identical provision of the UK Act that a "joint and several note, though on one piece of paper, comprises, in reality and in legal effect, several notes." As such, there is no need for a separate personal guarantee to bind Mr. Sinclair and its absence does not raise any genuine issue for trial.

[22] Further, Mr. Sinclair cannot escape the language he drafted simply by asserting that he did not know what it meant. Documents do not need to be drafted by a lawyer to have legal effect and Mr. Sinclair admits that he signed the promissory note. Moreover, he has not presented any evidence that would allow him to escape the consequences of that signature under the test in **Castle Building Centres**, *supra*. Indeed, he chose to draft and sign a $900,000.00 promissory note without the assistance of a lawyer. While perhaps imprudent it was nonetheless something he could do if he wanted to. Moreover, I doubt that he truly did not intend to bind himself. By his own admission in an e-mail to Mr. Fierro on October 25, 2010, Mr. Sinclair said that: "[t]he promissory note to you is from me and my company, Visual Spirit, so that I owe you the funds" (Mr. Fierro's affidavit, Exhibit "CC"). While Mr. Sinclair testifies in his affidavit that "[m]y reference to 'me' was meant as a reference to VSI -- my company," it makes no sense that he meant to repeat "my company" while adding "so that ***I*** [McDougall J.'s emphasis] owe you the funds."

[23] In any event, Mr. Sinclair's subjective intention is irrelevant and the promissory note unambiguously indicates that Mr. Sinclair is personally liable.

. . .

DISPOSITION

[32] The plaintiff has satisfied me that there is no genuine issue for trial and the defendant has failed to show that he has any defence with a real prospect of success. As a result, I grant the plaintiff's motion for summary judgment and allow his claim.

[17] Essentially, the judge concluded:

> (1) The words "the undersigned joint and severally promise to pay" on the face of the 2010 Note unambiguously meant that Mr. Sinclair was personally liable.
>
> (2) As extrinsic evidence cannot alter a promissory note's clear and unambiguous written terms, any dispute within the evidence of Messrs. Fierro and Sinclair concerning the underlying agreement was not material under the first branch of the summary judgment test.
>
> (3) On the second branch of the summary judgment test, Mr. Sinclair did not satisfy his burden to show a real chance of success.

[18] Mr. Fierro had contended, in the alternative, that Mr. Sinclair was liable for the tort of breach of warranty of authority. The judge said it was unnecessary to address that issue.

[19] On March 28, 2013, Mr. Sinclair filed a Notice of Appeal to the Court of Appeal. Mr. Fierro followed with a Notice of Contention.

Issues

[20] On Mr. Sinclair's appeal, the threshold question is - Is the judge correct that the 2010 Note, on its face, unambiguously fastens Mr. Sinclair personally with liability for $900,000? If the judge is correct, then extrinsic evidence is irrelevant, there is no material dispute of fact, and the appeal would be dismissed. If the judge is incorrect on the threshold question, the next question is - Is there a material dispute of fact in the extrinsic evidence whether the agreement was that Mr. Sinclair be personally liable? If so, then the matter should go to trial under the first branch of the summary judgment test.

[21] Mr. Fierro's Notice of Contention raises a separate issue - Should Mr. Fierro have summary judgment for Mr. Sinclair's breach of warranty of authority?

Standard of Review

[22] The standard of review is this Court's normal standard to a judge - correctness for extractable issues of law and palpable and overriding error for issues of either fact or mixed fact and law with no extractable legal error. Insofar

as a judge has exercised a discretion delegated by law, the Court of Appeal also reviews for patent injustice. But Rule 13.04(1) – upon which this appeal turns - does not delegate a discretion. So patent injustice is not pertinent to this appeal. *Burton Canada Company v. Coady*, 2013 NSCA 95, paras 19, 70, 77-79. See also *Canadian Imperial Bank of Commerce v. CNH Capital Ltd.*, 2013 NSCA 35, paras 32-36.

Analysis - Mr. Sinclair's Appeal

[23] In *Burton*, paras 37-44, this Court summarized the test for summary judgment on the evidence under Rule 13.04. Justice Saunders said:

> [42] At this point a summary of the analytical framework may be helpful. In the first stage the judge's focus is concerned only with the important factual matters that anchor the cause of action or defence. At this stage the relative merits of either party's position are irrelevant. It is only if the judge is satisfied that the moving party has met its evidentiary burden of showing there are no material factual matters in dispute that the judge will then enter into the second stage of the inquiry. The focus of that stage is <u>not</u> – as the judge put it here – to see if the "undisputed facts ... give rise to a genuine issue for trial". That is a misstatement of the test established in **Guarantee**. Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success? [Saunders, J.A.'s underlining]

[24] This appeal turns on the test's first stage. Did the judge err in law by ruling that Mr. Fierro had met his burden of showing there was no dispute of material fact?

[25] What is a dispute of material fact?

[26] In *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, the majority said:

> [27] The disputed fact under Stage 1 must be "material", *ie.* essential to the claim or defence. A dispute over an incidental fact will not derail a summary judgment motion at Stage 1.

[27] In *Hiltz* (see para 30) the parties disputed whether Mr. Alex had even voiced the alleged representation. The existence of that representation was the basis of Mr. Hiltz' claim. If the representation had not been made, his claim would fail. But if the representation had been made, his claim possibly could succeed, depending on the trial judge's determination of other issues. The outcome potentially pivoted on the disputed fact. So the disputed fact was material, not incidental. Accordingly, the majority held that the first branch of the summary judgment test was not satisfied, meaning the second branch was irrelevant, summary judgment was not available, and the matter should go to trial.

[28] Similarly, in *Burton*, para 42, Justice Saunders spoke of material facts as "important factual matters that anchor the cause of action or defence".

[29] Mr. Sinclair submits that there are several disputes of material fact including, according to his factum (para 2), "whether the Appellant personally guaranteed some or all of the funds advanced by the Respondent". Mr. Sinclair's submissions reiterated the point of contention as whether he was a guarantor. Mr. Fierro's factum responds:

> 102. … The Respondent's position on summary judgment was that the Appellant is personally liable on the Promissory Note, itself. No separate guarantee is necessary for the Appellant to be liable …

[30] I agree with Mr. Fierro's characterization of the issue. The only cause of action cited in Mr. Fierro's Statement of Claim is on the 2010 Note. There is no pleading of a guarantee. So the appropriate inquiry is whether there are disputed material facts concerning Mr. Sinclair's personal liability as a "maker" of the 2010 Note, rather than as a "guarantor". This adjustment is to conform with the terminology of ss. 176(1), 179(1) and 185 of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4 (below para 34).

[31] Before coming to that inquiry, as a preliminary matter I agree with Justice McDougall that, generally speaking, extrinsic evidence is unavailable to interpret unambiguous wording in a written contract. The following authorities confirm the point.

[32] In *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, Justice Iacobucci for the Court said:

> 54 … The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document *is clear and unambiguous on its face*. In the words of Lord Atkinson in *Lampson v. City of Quebec* (1920), 54 D.L.R. 344 (P.C.), at p. 350:
>
> > … the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself … [I]f the meaning of the deed, reading its words in their ordinary sense, be *plain and unambiguous* it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say; "Our intention was wholly different from that which the language of our deed expresses …
>
> …
>
> 57 In my view, there was *no ambiguity* to the contract entered into between Apotex and Novopharm. …
>
> 58 More specifically, there is no need to resort to any of the evidence tendered by either Apotex or Novopharm as to the subjective intentions of their principals at the time of drafting. Consequently, I find this evidence to be inadmissible by virtue of the parol evidence rule: see *Indian Molybdenum Ltd. v. The King*, [1951] 3 D.L.R. 497 (S.C.C.), at pp. 502-3.
>
> …
>
> 61 Having established that no extrinsic evidence is admissible, what does the text of the agreement say about the intentions of the parties?
>
> [Italics added]

[33] Similarly, G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011), pp. 440-51, elaborates on the parol evidence rule and its exceptions. Included are the following passages:

> The fundamental rule is that if the language of the written contract is *clear and unambiguous*, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing. … [p. 440]

> … There are some real exceptions, by virtue of which a party introducing such evidence is at one and the same time upholding the validity of the written contract yet attempting to have its meaning understood in a certain way.
>
> First, *where the contract as written is ambiguous, extrinsic evidence can be admitted* to resolve such ambiguity. But the court should not strain to create an ambiguity that does not exist. *It must be an ambiguity that exists in the language as it stands, not one that is itself created by the evidence that is sought to be adduced*. For example, a contract was signed by the general manager of a company in circumstances which left it uncertain whether he was signing on behalf of the company, as an agent, or in his own name, but with his representative character appended, intending to be personally liable. Evidence of other surrounding circumstances was therefore admitted in this case, *Automobiles Renault Canada Ltd. v. Maritime Import Autos Ltd.* [(1961), 31 D.L.R. (2d) 592 (N.S.S.C.)], to establish that the company, not the manager, was the bailee of the vehicles. … [pp. 442-44]
>
> Second, while it is not possible to admit parol or other extrinsic evidence to alter the contract by adding to or subtracting from its terms as written, such evidence may nonetheless be introduced to explain, without contradicting, the language of the contract, for example, by showing the true nature of the transaction or legal relationship of the parties or by adding a term where to do so is necessary to give effect to the obvious intention of the parties. … [p. 445]
>
> [Italics added]

Fridman discusses other exceptions, not applicable to this case, about which I make no comment.

[34] For a promissory note, these propositions are channelled by the *Bills of Exchange Act*. The *Act* prescribes what must appear on the face of the promissory note, in order that the obligee may sue directly on the note without evidence of the underlying contract. The *Act* includes:

> PART I
>
> GENERAL
>
> …
>
> Signature
>
> **4.** Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is

sufficient if his signature is written thereon by some other person by or under his authority.

What required of corporation

5. In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is duly sealed with the corporate seal, but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

…

PART II

BILLS OF EXCHANGE

…

Liability by signature

130. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such, but when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of this Act respecting endorsers.

…

PART IV

PROMISSORY NOTES

Definition

176. (1) A promissory note is an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.

…

Joint and several liability

179. (1) A note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor.

Individual promise

> (2) Where a note bears the words "I promise to pay" and is signed by two or more persons, it is deemed to be their joint and several note.
>
> …
>
> Effect of being maker
>
> **185.** The maker of a note, by making it,
>
> (*a*) engages that he will pay it according to its tenor;
>
> …
>
> Application of Act to notes
>
> **186.** (1) Subject to this Part, and except as provided by this section, the provisions of this Act relating to bills apply, with such modifications as the circumstances require, to notes.
>
> (2) In the application of the provisions of this Act relating to bills, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first endorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

[35] Turning to the threshold question in this case - Is there ambiguity in the wording of the 2010 Note, as to whether Mr. Sinclair was to be personally liable, so that extrinsic evidence of the underlying agreement may be admitted to resolve the ambiguity?

[36] Justice McDougall focussed on the words "the undersigned joint and severally promise to pay" in the first paragraph of the 2010 Note. That phrase signalled to the judge that "the undersigned" would include plural makers of the 2010 Note, one of which had to be Mr. Sinclair. I agree that this is an available interpretation.

[37] But is it the only available interpretation?

[38] The second and fourth paragraphs of the 2010 Note attach singular predicates to the "undersigned":

> THE UNDERSIGNED hereby waives, …
>
> THE UNDERSIGNED, hereunder, has further acknowledged …

[39] Section 176(1) of the *Bills of Exchange Act* says that the promissory note must be "signed by the maker". The 2010 Note's "undersigned" includes only one signature. The only signature was beneath the typed words "JAMES R. SINCLAIR" and over the typed words "James R. Sinclair President, Visual Sprint Inc." Does one signature unambiguously engage two makers?

[40] Bradley Crawford, *Crawford and Falconbridge Banking and Bills of Exchange*, 8th ed, vol. 2 (Toronto: Canada Law Book Inc., 1986). ["*Falconbridge"*], para 6207 discusses the potential ambiguity that may arise from a single signature for two makers of a promissory note:

> The Act does not define "maker" but there is no ambiguity in the term. He is the party who, by his signature on a promissory note, promises to pay it. *There may, however, be ambiguity in the instrument as to* which of two or more signatories is the maker or *whether there are more makers than one*. … In the great majority of cases, of course, the maker will sign in the customary place. In exceptional cases it may be necessary for the court to consider parol evidence to determine the true agreement between the parties concerning the liability assumed (see § 5509.3). *Where a note is signed by an agent or other representative, other questions may arise as to the identity of the person technically bound by the form of the execution.* These are discussed in §§ 5003.7 and 5003.8. [Italics added]

Falconbridge, para 5003.8 elaborates:

> **(b) Joint liability of representative and principal**
>
> At the heart of the problem is the question of whose instrument an item is when signed by one who has in fact a representative character, but does not clearly expressly indicate that character on the instrument itself. It is sometimes suggested that the rule is more strict with respect to bills, cheques and notes than for common contracts, out of concern for the negotiability of the former. But that argument has no force where the action raising the point is between immediate parties as the great majority of the cases in the last twenty-five years have been. Section 131 [now s. 130] of the Act does present a technical reason why the rule may operate slightly differently with respect to bills: one signature may not be effective to bind both principal and agent since by that section "no person is liable [on] a bill who has not signed it". But "signed" must be understood in the sense required by s. 4 throughout the Act. It is sufficient if one's name is written by another with authority. Thus, in a typical example, an individual's handwritten signature appearing below the typed or printed name of a corporation (leaving aside the effect of the presence or absence of any word such as "by" or "per" to indicate a representative character) may constitute two "signatures" for the purposes of the Act, at least where there is evidence that the individual had signing authority or power to bind that corporation by himself. And there have

> been cases in which default judgment on the item had been obtained against the corporation and also judgment subsequently after trial, against the signing individual. *But the circumstances in which such a form of execution could plausibly be consciously chosen by the parties to implement an agreement to create joint liability on the part of the signer and the corporation must be very rare indeed. It is submitted that it was in this sense that Arnup J.A. for the Ontario Court of Appeal [Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd. (1972), 31 D.L.R. (3d) 690 (O.C.A.), varied 49 D.L.R. (3d) 422 (S.C.C.)] expressed "grave doubts" how a single signature could bind both a corporation and a signing individual. Both he and Spence J., on appeal [S.C.C., p. 428], appear to contemplate that where the intention is to create joint liability, the individual should sign twice, once as authenticating signing officer for the corporation, and once in his personal capacity. The same view has been taken a second time by the Ontario Court of Appeal in Allprint Co. Ltd. v. Erwin [(1982), 136 D.L.R. (3d) 587] on similar facts.* [Italics added]

[41] In *Albert Pearl (Management) Ltd.*, cited by *Falconbridge*, Justice Spence for the Supreme Court of Canada, said (pp. 426-28):

> Arnup, J.A. in the judgment of the Court of Appeal, said [citation omitted]:
>
> > Having regard to the authorities, to the relevant sections of the *Bills of Exchange Act*, R.S.C. 1970, c. B-5, and to the surrounding circumstances I have set out, we are unanimously of the opinion that this promissory note is to be regarded as the note of the corporation.
> >
> > We have all expressed, in the course of the argument, *our grave doubts as to how a single signature could be both the signature on behalf of the corporation and the signature of the individual himself, as a maker of the note, thereby involving him in personal liability*. We have reached the conclusion that Mr. Fienberg personally is not a maker of the note and that, accordingly, the judgment against him cannot stand.
>
> …
>
> With respect, *I have come to the conclusion that the Court of Appeal was quite correct* in its view that that promissory note did not evidence the personal debt of the defendant John D. Fienberg. I make that statement *not only by reference to the method of execution of the document, i.e., that the said Fienberg's signature appeared once only* and that directly beneath the stamped signature of the appellant J.D.F. Builders Limited but, *having reviewed the evidence* of Albert Pearl …. [Italics added]

[42] Given the approach suggested by these authorities, it must be acknowledged that a possible interpretation of the 2010 Note is that a single signature does not

engage two "makers". On the other hand, as I have noted, Justice McDougall's contrary interpretation also is possible.

[43] This ambiguity means that extrinsic evidence of the parties' agreement should be considered to assist with the interpretation of the 2010 Note. I express no view how that ambiguity would be resolved. Each case is factually unique, and the circumstances of *Fierro v. Sinclair* differ from those in *Albert Pearl* and the other cases cited by *Falconbridge*. For instance, in *Albert Pearl* the Note's engagement used the plural "We promise to pay" but, unlike the 2010 Note here, the individual's typed name did not appear over the signature. To assess whether such differences are significant, one has to review the extrinsic evidence of the underlying agreement, as Justices Arnup and Spence did in *Albert Pearl*.

[44] The next question is - Even if Mr. Sinclair's signature engages only one "maker", does the 2010 Note unambiguously convey that this maker would be Mr. Sinclair personally?

[45] Mr. Sinclair's signature appears below his typed name "James R. Sinclair". The fourth paragraph of the 2010 Note uses a personal pronoun:

> THE UNDERSIGNED, hereunder, has further acknowledged that he shall be in receipt …

Clearly Mr. Sinclair's personal liability is an available interpretation.

[46] But, again, that is not the only available interpretation. Exactly the same form of signature appears on Exhibit "A" to the 2010 Note. This is the "Preferential Option" to participate in the financing of VSI Media Fund. The Preferential Option explicitly is part of the 2010 Note, meaning its composition is available to determine whether the 2010 Note is ambiguous. The VSI Media Fund was to be VSI's property, and only VSI could sign an effective option for that Fund. The Preferential Option's second paragraph speaks of the Media Fund being established, allowing "the company to pay out the NOTE in full". So the format - *i.e.* Mr. Sinclair's signature under the words "JAMES R. SINCLAIR" and over the words "James R. Sinclair President, Visual Spirit Inc." - disclosed an intent that VSI be an engaged party.

[47] Consequently, if the 2010 Note has only one maker, there is ambiguity on its face whether the maker is Mr. Sinclair or VSI.

[48] In my view, this is a case where extrinsic evidence of the underlying agreement should be admissible to resolve the interpretive ambiguity as to whether the maker of the awkwardly drafted 2010 Note was Mr. Sinclair, VSI or both.

[49] Returning to stage one of the summary judgment test - Is there a material dispute of fact, on this issue, within the extrinsic evidence?

[50] From the evidence filed for the summary judgment motion, it appears that there was no written umbrella contract stating the terms of repayment to Mr. Fierro for his advances. Rather, the terms of agreement must be read or inferred from emails, correspondence, and conversations between Messrs. Fierro and Sinclair starting in June 2003, when they met, and culminating with each of Mr. Fierro's five advances between March 2004 and June 2007.

[51] On that topic, Mr. Fierro's affidavit of April 25, 2012 includes:

> 6. … although I did not wish to invest directly in VSI HBI, VSI, or its film projects without Sinclair's personal guarantee, I was willing to loan Sinclair money, personally, to help him pursue his business ventures.
>
> 7. At that time, I understood from Sinclair that any monies I advanced to him were personally guaranteed, and could be repaid forthwith upon demand.
>
> …
>
> 9. On or about March 29, 2004, I lent Sinclair USD$150,000 …
>
> 12. … Again, I was assured that the loans were short-term in nature, personally guaranteed by Sinclair, and repayable on demand.
>
> 13. On or about June 1, 2004, I lent Sinclair USD$150,000 …
>
> 14. Sinclair acknowledged the receipt of my loan to him in an email …
>
> 17. On or about August 2, 2004, Sinclair confirmed that he personally guaranteed my first loan of $150,000 …
>
> 18. Since they were personal and intended to be short-term, my second and third loans to Sinclair were not formally documented, such as by way of promissory note.
>
> …
>
> 31. From my correspondence with Sinclair, he led me to understand that if I advanced additional funds for a short term, he would be in a position to easily repay the funds I had loaned him previously.
>
> 32. … I lent Sinclair USD$50,000 …

34. … Sinclair stated that he would be able to pay his debts soon, and indicated that he would be able to repay me all the funds I loaned him by fall 2007. … [underlining in Affidavit]

35. On or about June 4, 2007, I lent Sinclair USD$250,000 ….

36. In total, as of June 4, 2007, I lent Sinclair USD$900,000.

37. On or about June 4, 2007, Sinclair recognized his personal indebtedness to me, in the amount of USD$900,000, by way of Promissory Note ….

39. From June 2007 through December 2011, I regularly inquired with Sinclair as to when he would repay the loans I made to him. …

43. … I sent Sinclair a spreadsheet detailing that [sic] amounts and purpose of each loan I made to him. …

45. On or about October 25 and 26, 2010, Sinclair sent me emails acknowledging that while he used the funds I loaned him to finance his various film projects through different corporations, Sinclair is personally indebted to me. …

46. On or about November 3, 2010, I made a demand for the repayment of the funds I loaned to Sinclair. …

48. Further to my repeated requests for a statement detailing the total amount of principal and interest Sinclair owed me, Sinclair re-sent me the Promissory Note …

49. … I sent an email to Sinclair detailing the amounts he owed me, …

51. Whereas the promissory notes issued to me by Sinclair provide for a transfer of shares on default of payment or an option to convert all or part of the indebtedness pursuant to the promissory notes into equity in VSI HBI, VSI or one of their media funds, at no point did I receive, or consent to receive, any shares in any company from Sinclair related to the amounts he owes to me, nor did I ever exercise any option to convert Sinclair's indebtedness to me into equity in any company or project.

[52] Mr. Sinclair's affidavit of May 31, 2012 responds:

5. While I was involved in HBI, VSI, and VSI's related companies, I did not personally guarantee repayment of any of the loans except for the first one, which I guaranteed on very specific conditions that I discuss below. I did not personally receive any of the funds invested. …

21. At no time did I personally guarantee repayment of Loans 2, 3, or 4.

22. … At no point did I personally guarantee repayment of Loan 5.

…

25.(iii) As to Paragraph 6 in Mr. Fierro's Affidavit, Mr. Fierro did not loan me money personally. He initially loaned funds to HBI, and then to VSI.

25.(iv) As to Paragraph 7 of Mr. Fierro's Affidavit, Mr. Fierro could not have understood that any monies advanced to HBI or VSI would be personally guaranteed by me. …

25.(vi) As to Paragraph 9 in Mr. Fierro's Affidavit, Mr. Fierro did not loan me money. Further, I have not used any money loaned by Fierro to HBI or VSI for personal purposes.

25.(vii) As to Paragraphs 13 and 14 in Mr. Fierro's Affidavit, I never confirmed that Mr. Fierro loaned me money. …

25.(viii) As to Paragraph 16 in Mr. Fierro's Affidavit, Mr. Fierro did not loan me money. …

25.(x) As to Paragraph 18 in Mr. Fierro's Affidavit, Loans 2 and 3 were not personal loans. …

25.(xxii) As to Paragraph 32 of Mr. Fierro's Affidavit, Mr. Fierro did not loan me money. …

25.(xxv) As to Paragraph 35, Mr. Fierro did not loan me money. …

25.(xxvi) As to Paragraph 36 in Mr. Fierro's affidavit, Mr. Fierro did not loan me money. The loans were made to VSI.

25.(xxvii) As to Paragraph 37 in Mr. Fierro's affidavit, I did not acknowledge my personal indebtedness to Mr. Fierro; ...

25.(xxix) As to Paragraph 39 in Mr. Fierro's affidavit, the loans were not made to me.

…

25.(xxxi) As to Paragraph 43 in Mr. Fierro's Affidavit, the loans were not made to me.

…

25.(xxxiv) As to Paragraph 46 in Mr. Fierro's affidavit, the loans were not made to me.

25.(xxxv) As to Paragraphs 48 and 49 in Mr. Fierro's affidavit, the loans were not made to me.

25.(xxxvi) As to Paragraph 51 in Mr. Fierro's affidavit, the loans were not made to me. Further, Mr. Fierro did allocate USD $300,000.00 for conversion into the VSI Fund in April 2005.

[53] It is obvious, from overlaying these extracts, that there is a factual dispute as to whether Messrs. Fierro and Sinclair discussed, acknowledged or agreed that Mr. Sinclair would be personally responsible for repayment of $900,000. This dispute relates to material facts that would resolve the ambiguity in the 2010 Note whether the Note's "maker" was Mr. Sinclair, VSI or both.

[54] In my respectful view, the judge erred in law by ruling that there was no ambiguity in the 2010 Note and, therefore, no dispute of material fact. Mr. Fierro has not satisfied his burden under the first stage of the test for summary judgment on the evidence under Rule 13.04. This means that the second stage is not engaged, and there is no interlocutory inquiry to be made whether Mr. Sinclair's defence has a real chance of success. The matter should go to trial, and it will be for the trial judge to assess the merits of Mr. Fierro's claim and Mr. Sinclair's defence. I would allow the appeal on this basis.

[55] At the hearing in the Court of Appeal, there was discussion whether the 2010 Note was an unconditional promise to pay a sum certain on demand or at a fixed and determinable future time, within s. 176(1) of the *Bills of Exchange Act*. Those issues haven't been pleaded or developed in argument. So I won't comment.

Analysis – Mr. Fierro's Notice of Contention

[56] Mr. Fierro's Notice of Contention submits that this Court should give summary judgment to Mr. Fierro based on the tort of breach of warranty of authority. This is based on the following theory. On March 12, 2007, Corporations Canada had dissolved VSI, apparently for delinquent filings. So, when the 2010 Note was executed in June 2010, VSI had no corporate capacity. On June 6, 2012, before the summary judgment hearing, Corporations Canada issued VSI a Certificate of Revival. Mr. Fierro contends that, during the events culminating with the 2010 Note, Mr. Sinclair warranted that he had the authority to bind VSI and that, by allowing VSI's corporate registration to lapse, Mr. Sinclair breached this warranty.

[57] Mr. Sinclair points to evidence that Mr. Fierro knew of VSI's lapsed registration and advanced funds anyway. Mr. Sinclair says this shows that Mr. Fierro did not rely on any warranty and, in any case, whether he relied is a disputed material fact for trial. Mr. Fierro responds that this just corroborates his position on the main issue, that he expected Mr. Sinclair to be the one personally responsible.

[58] Mr. Fierro's claim for breach of warranty of authority isn't pleaded. He hasn't moved to amend the Statement of Claim. The cause of action wasn't cited in his Notice of Motion for summary judgment. Rather, it was introduced during argument on the second day of the summary judgment hearing before Justice

McDougall. This was after Mr. Sinclair had filed his affidavit to respond to the motion for summary judgment, and after the close of cross-examination.

[59] Each party to a summary judgment motion is expected to "put his best foot forward" with evidence under both branches of the test under Rule 13.04 [*Burton*, para 87(6)]. This assumes that, when the responding party gathers his evidence for the motion, he has been given notice of the cause of action for which summary judgment is sought. He isn't expected to grope blindfolded.

[60] The Court cannot grant summary judgment in the abstract for an unpleaded cause of action. It is for Mr. Fierro to move to amend his Statement of Claim and plead the newly raised tort. Then Mr. Sinclair would have the opportunity to amend his Defence, joining the issue. If Mr. Fierro then files another summary judgment motion for breach of warranty of authority, Mr. Sinclair will have notice that he should martial his best evidence on that matter for the motions judge.

[61] I would dismiss Mr. Fierro's Notice of Contention.

Conclusion

[62] I would allow the appeal, overturn the Order for summary judgment against Mr. Sinclair, and dismiss Mr. Fierro's Notice of Contention. Any costs paid to Mr. Fierro under Justice McDougall's Order should be repaid. I would order costs of $1,000 for the motion in the Supreme Court and a further $2,000 for the appeal, plus reasonable disbursements for the appeal, payable forthwith by Mr. Fierro to Mr. Sinclair in any event of the cause.

Fichaud, J.A.

Concurred: Oland, J.A.

Farrar, J.A.