NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia Home for Coloured Children v. Milbury, 2007 NSCA 52

Date: 20070504
Docket: CA 275523
Registry: Halifax

Between:

Nova Scotia Home for Coloured Children and
Family and Children's Services of Annapolis County

Appellants

v.

Elizabeth Ann Milbury

Respondent

Judges:	Roscoe, Saunders and Fichaud, JJ.A.
Appeal Heard:	April 2, 2007, in Halifax, Nova Scotia
Held:	Appeal and cross appeal are allowed per reasons for judgment of Roscoe, J.A.; Saunders and Fichaud concurring.
Counsel:	John Kulik, for the appellant, Nova Scotia Home for Coloured Children W. Bruce Gillis, Q.C., for the appellant Family and Children's Services Raymond Wagner and Fiona Imrie, for the respondent

Reasons for judgment:

[1] The respondent, Elizabeth Milbury, is one of 61 former residents of the Nova Scotia Home for Coloured Children who are suing the former orphanage for damages arising from physical and emotional abuse suffered while she resided there for several months 59 years ago. She also claims damages from Family and Children's Services of Annapolis County (the Agency) which was instrumental in apprehending her from the care of her parents and placing her at the Home and from the Province of Nova Scotia which was responsible for overseeing the activities of the Home and the Agency.

[2] The action is framed in negligence, breach of fiduciary duty, breach of contract and vicarious liability for the abuse alleged to have been inflicted by employees of the Home. In their defences, in addition to denying that the plaintiff was abused, the Home and the Agency denied the existence of a fiduciary duty, a contract or a duty of care, and claimed that the action was barred by the **Limitations of Actions Act**, R.S.N.S., 1989, c. 258.

[3] The Home and the Agency brought an application for summary judgment which was heard by Justice M. Heather Robertson in Chambers. The chambers judge allowed the summary judgment application in respect to the claims for breach of fiduciary duty but dismissed the application in respect to the claims for vicarious liability, breach of contract, and negligence. She also rejected the defendants' arguments that the action was statute barred, after determining that there was an arguable issue regarding discoverability. The decision is reported as 2006 NSSC 293; [2006] N.S.J. No. 400.

[4] The Home and the Agency appeal the dismissal of the summary judgment application for the claims in negligence, vicarious liability and breach of contract and on the basis of the discoverability principle. The plaintiff cross-appeals the order granting summary judgment on the fiduciary duty claim. There is no cross-appeal by the plaintiff respecting the dismissal of the fiduciary duty action against the Agency. For the reasons that follow I would allow both the appeal and the cross appeal.

Evidence on the application:

[5] Ms. Milbury filed three affidavits in response to the application for summary judgment, her own and one each from her sisters, Shirley Melanson and Pauline Comeau. In her affidavit, the plaintiff stated that she was born on July 25, 1945. When she was between two and three years old, she and five of her older siblings were taken into care of the Agency and placed at the Home for several months. The plaintiff does not have any "clear memories" of what happened to her while she was at the Home, "other than remembering feelings of sadness and crying". She was advised by her sister Shirley Melanson that one of the staff at the Home put her in extremely hot water causing her to scream and that she came out of the water as red as a lobster; that she appeared to be terrified of the Home's staff and would wet her pants whenever they approached her; and that there was not enough food for the children at the Home and they were frequently hungry.

[6] The evidence of Ms. Milbury relating to the limitation period is that she was told by her sister Shirley in March 2001 that she had read in the newspaper of a claim against the Home by a former resident and that her sister had contacted Wagner and Associates, the lawyers for the other claimants, about the possibility of making a claim in March 2001. The plaintiff contacted the lawyers herself in March 2001. She stated that "until her sister told her about the possibility of making a claim against the Nova Scotia Home for Coloured Children, I was not aware that I might have a claim".

[7] Shirley Melanson asserts in her affidavit that the plaintiff was put in a tub of scalding water by a staff member at the Home. The plaintiff cried and she looked like a cooked lobster when she was removed from the tub. Her sister Pauline Comeau recalled that the plaintiff was afraid of the staff and would not eat.

[8] The statement of claim was filed on January 8, 2003. The application for summary judgment was heard on May 23, 2006. There was no other evidence submitted by the plaintiff explaining when she first knew that she had been abused while she resided at the Home or when she discovered that she suffered damages as a result of the abuse. An amended statement of claim was filed on May 23, 2006 which added particulars of the claim based on a fiduciary duty.

The decision under appeal:

[9] The chambers judge set out the test on a summary judgment application pursuant to Rule 13.01 in ¶ 8 as follows:

> [8] The law is well settled that the applicant bears the initial burden of establishing there is no arguable issue of fact to be determined at trial. If that burden is met the respondent must show that her case has a real chance of success. **United Gulf Developments Ltd. v. Iskandar**, [2004] N.S.J. No. 66 (N.S.C.A.) paras. 9 and 10; **MacNeil v. Bethune**, [2006] N.S.J. No. 62, N.S.C.A., para. 21.

[10] The judge dealt with each of the causes of action separately. With respect to the claim for breach of fiduciary duty, after reviewing the relevant legal principles she concluded:

> [49] It is obvious that the defendants had a fiduciary duty toward the plaintiff. However, whether a breach of that duty has occurred by reason of fiduciaries placing their own interests ahead of those of the plaintiff has not been shown in the plaintiff's response to this application.
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> [50] Had there been any evidence before me to support the "plantation argument" I would have concluded that an arguable case could be made as against the NSHCC and potentially against the Province of Nova Scotia. The underpinning for such a claim is simply absent in the plaintiff's pleadings and response to this application.
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> [51] The pleadings recite extensive historical information about the operation of the NSHCC from the 1920's through to the period of time the plaintiff was resident there in 1947-48. We do not however have class proceedings legislation in this Province. The pleadings appear to be generic in nature intended to apply to the circumstances of the other potential claimants Mr. Wagner represents.
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> [52] As I noted the plaintiff's sisters do not allege that they were required to work in market gardens at the NSHCC. Nor has counsel for the plaintiff offered any sources for the historical information about the NSHCC that he sets forth in the statement of claim. These remain bare allegations.
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> [53] Counsel for the plaintiff are well aware of the obligation to be in a position to respond with at least some evidentiary foundation to support each cause, if they are to resist summary judgment. I note that this application was commenced on

> February 7, 2006 and that there has been sufficient time for the plaintiff to offer additional evidence in resisting the application.

[11] Regarding the claim based on vicarious liability for the actions of the Home's employees, the chambers judge concluded:

> [58] In this case the specific alleged acts of abuse involve the alleged incident of the scalding bath, fear of the staff and a sustained condition of hunger. The affidavits of the plaintiff's sisters are sufficient to support an arguable issue for trial. The NSHCC had undertaken the hands on care of the plaintiff and her siblings. The acts complained of are directly related to the duties for which its employees would have been hired, the care and feeding of its residents.
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> [59] The role of Mr. Eric Woods, a social worker with the CAS Annapolis, in visiting the home to see how the plaintiff and her siblings were faring also raises an arguable issue for trial and meets the established low threshold test.

[12] The claims based on negligence and breach of contract were also found to raise arguable issues for trial:

> [60] The plaintiff has raised arguable issues for trial. The defendant the NSHCC cannot reasonably argue that because the plaintiff was only two years of age and cannot remember the incidents related to her by her sisters, that no damage could therefore have occurred and the case for negligence must fail. If these alleged events in fact occurred, it will be for a trial judge to determine if the defendants breached a required standard of care and the measure of damages that arise in consequence. No doubt such alleged events would have a lasting effect on a child.
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> ...
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> [63] Whether or not there exits a claim in contract as against the defendants is a matter that would also be flushed out during the trial process. As our discussion in court revealed funding arrangements were made between the Province and the NSHCC and settlements were made as between municipal units when children were placed in care. This is not an inappropriate claim, that should be dismissed at this time.

[13] As for the defendants' arguments that the action was out of time, the chambers judge concluded:

[64] Turning to the limitation period, the plaintiff acknowledges that these events are well beyond the limitation period but says she was unaware that she may have had a claim before March 2001.

[65] By operation of the **Limitation of Actions Act** the latest date the plaintiff could have pursued these causes was within one year of her 21st birthday, i.e. July 25, 1967 s. 2(1)(a); or an action in contract within six years, therefore July 25, 1972, s. 2(1)(e).

[66] The plaintiff cannot avail herself of the relief of s. 3 of the **Act,** which could have allowed a four year extension of the limitation period, because of the events are alleged to have occurred before June 26, 1982.

[67] It is correct therefore that the claims were potentially statute barred by some 30 years before the action was commenced in January 2003.

[68] Discoverability is therefore a live issue.

...

[72] The defendants argue that the plaintiff must lead evidence why the claim was not discovered during the limitation period. I am satisfied that the plaintiff has raised an arguable issue for trial and that she should not be barred from proceeding because she was unaware of her potential claim before March 2001. She has led sufficient evidence in this regard.

[73] The discoverability principle is intended to ensure that no injustice will occur by reason a person being unaware they have a potential claim. The plaintiff was an infant when the alleged acts of abuse are said to have occurred. A further explanation of these events will occur through the trial process.

[74] I am satisfied that the defence of limitation periods should not, at this juncture succeed in defeating the plaintiff's actions in contract negligence and vicarious liability as against the defendants.

Issues:

[14] Although both appellants and the respondent raise several grounds of appeal and cross appeal, as will be seen, it is not necessary to deal with all of them. The

grounds can be conveniently consolidated and distilled into the following issues, the first relating to the appeal and the second to the cross appeal:

> 1. Did the chambers judge err in law in not granting summary judgment on the claims in negligence, breach of contract and vicarious liability on the basis of the expiry of the limitation period?
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> 2. Did the chambers judge err in finding that there was no arguable issue for trial on the claim for breach of fiduciary duty?

Standard of Review:

[15] On the appeal, since the actions in negligence, breach of contract and vicarious liability were not dismissed, the standard of review is the usual standard applied to appeals of interlocutory orders. We will not intervene unless wrong principles of law were applied or a patent injustice would result. See: **Maritime Travel Inc. v. Go Travel Direct.Com Inc.**, 2007 NSCA 11; **United Gulf Developments Ltd. v. Iskandar**, 2004 NSCA 35; **Eikelenboom v. Holstein Assn. of Canada**, 2004 NSCA 103.

[16] However on the cross appeal, the chambers judge's order is one which has a final or terminating effect. Therefore the standard of review is not that usually applied to discretionary orders of an interlocutory nature but rather, whether there was an error of law resulting in an injustice. See: **Jeffrey v. Naugler**, 2006 NSCA 117; **Purdy Estate v. Frank**, [1995] N.S.J. No. 243 (C.A.); **Clarke v. Sherman**, [2002] N.S.J. No. 238 (C.A.); **Binder v. Royal Bank of Canada**, 2005 NSCA 94; **MacNeil v. Bethune**, 2006 NSCA 21.

Analysis:

Test for Summary Judgment:

[17] In **Orlandello v. AGNS**, 2005 NSCA 98, Justice Fichaud explained the two stage test on a summary judgment application:

> [12] **Rule** 13.01 permits a defendant to apply for summary judgment on the ground that the claim raises no arguable issue. **Rule** 17.04(2)(a) allows a third party to invoke **Rule** 13.01 to challenge a plaintiffs claim. In **Eikelenboom**, after reviewing the authorities, this court stated the test:

> [25] Applying these authorities to the circumstances of this case, it is apparent that in order to show that summary judgment was available to it, [the defendant] had to demonstrate that there was no arguable issue of material fact requiring trial, whereupon [the plaintiffs] were then required to establish their claim as being one with a real chance of success.

See also: **United Gulf Developments Ltd. v. Iskandar**, 2004 NSCA 35 at 9; **Hercules Managements Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165 at 15; **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at 27.

[18] As stated in **Selig v. Cooks Oil Company Ltd.**, 2005 NSCA 36, there are two distinct parts of the test and they should be dealt with sequentially:

> [10] ... First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[19] If the applicant does not establish that there is no genuine issue of fact, it is not necessary to go to the second step. There is no onus on the responding party if the applicant does not succeed on the first prong of the test. If there are genuine issues of fact, the application should be dismissed.

1. Limitations of Actions - discoverability:

[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? The **Limitations of Actions Act** provides that actions for assault and battery must be commenced within one year after the cause of action arose: s. 2(1)(a). Actions for breach of contract and negligence have a six year limitation: s. 2(1)(e). The plaintiff does not allege that she was sexually abused, so section 2(5) regarding discovery of the causal relationship of the damages is inapplicable. (As will be discussed further in the next section, there is no limitation period for actions for breach of fiduciary duty) Section 4 of the **Act** provides that if a cause of action accrues while a person is under the age of nineteen, the time does not start to run until she reaches the age of majority. However, at the time the plaintiff reached the age of majority, the specified age was 21. The age of majority

changed from 21 to 19 in 1971. See: **The Age of Majority Act**, Stats. N.S. 1970-71, c. 10, s. 7. Therefore, subject to extensions that might arise as a result of the discoverability principle and s. 3 of the **Act**, in this case the plaintiff attained the age of majority in 1966 and all the relevant statutory limitation periods would have expired by 1972, 31 years prior to the commencement of the action.

[21] Section 3 of the **Limitations of Actions Act** permits a court to disallow a defence based on a limitation period and to allow an extension of a further four years. However, s. 3(5) provides that the section does not apply if the time limitation expired before June 26, 1982. Even if it applied to these causes of actions, the maximum extension would be until 1976, unless through the application of the discoverability rule the cause of action arose at some later date.

[22] In **Central Trust Co. v. Rafuse**, [1986] 2 S.C.R. 146, LeDain, J., for the Court, described the discoverability rule as follows (at pp. 151- 152):

> . . . A cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. ...

[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.

[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.

[25] The only evidence submitted by the plaintiff to support the extension of the limitation period based on the application of the discoverability rule is that summarized above at ¶ 6. Essentially, her evidence is that she did not know she could sue the Home until 2001. She has not provided any evidence of when she first became aware that she was injured, or suffered abuse while living at the home. The question not answered in her pleadings or affidavits is: when did her sisters first tell her that she had been placed in a scalding hot bath and was sad and hungry while living at the Home? The plaintiff has not provided any explanation for why she did not know or could not have known about the abuse within the statutory time limit or within a reasonable period of time thereafter. This is an important factor in a summary judgment application where a limitation period is raised by the defence. As stated by Ferrier, J. in **Stell v. Obedkoff** , [1999] O.J. No. 2312 (S.C.J.):

> 13 However, beyond the allegations, the plaintiffs have not adduced any evidence which gives rise to a factual issue regarding the question of discoverability. No evidence has been provided indicating that there were unusual circumstances which prevented the plaintiffs from discovering the alleged negligence of the defendants, nor has there been any suggestion that the defendants withheld a vital part of the evidence. No evidence has been provided to explain why the alleged negligence of the defendants could not reasonably have been discovered within the limitation period.

[26] The comments on discoverability in the context of a summary judgment application in **Jack v. Canada**, [2004] O.J. No. 3294 (S.C.J.) are instructive:

> 81 Counsel have referred to legal authorities regarding the discoverability rule. Discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it or to sue. **Peixeiro v. Haberman**, [1997] 3 S.C.R. 549 (S.C.C.) at paras. 36 and 44.
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> 82 A cause of action arises for the purposes of a limitation period when the material facts on which the action is based have been discovered or ought reasonably to have been discovered, by the exercise of reasonable diligence. Central Trust v. Rafuse, [1986] 2 S.C.R. 147 at p. 224; **Peixeiro v. Haberman** (1995), 25 O.R. (3d) 1 at p. 4 (Ont. C.A.).
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> 83 The rule of reasonable discoverability is to ensure that the plaintiffs have sufficient awareness of the facts to be able to bring an action. The suggestion that a plaintiff requires a "thorough understanding" of such facts even after the action

> is brought, sets the bar too high. Similarly, to say that a plaintiff has to know the precise cause of her injuries before the limitation period started to run would also place the bar too high. **K.L.B. v. British Columbia** [2003] 2 S.C.R. 403 (S.C.C.) at para. 55-57; **McSween v. Louis** (2000), 187 D.L.R. (4th) 446 at p. 459 (Ont. C.A).
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> 84 The exact extent of one's loss need not be known before a cause of action can be said to have accrued. Once a plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent nor the type of damage need be known. **Peixeiro v. Haberman**, supra, at p. 557.
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> ...
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> 87 The facts upon which any plaintiff relies to fall within the discoverability rule must have an objective basis. Objective facts supporting negligence that were discovered at a later point in time beyond a limitation period are an absolute pre-requisite to the extension of the limitation period. The extension of a limitation period is not driven by "wishes", "maybes", or "emotions" generated by a benevolent or well-intentioned source. **Lalani v. Woolford,** [1999] O.J. No. 3440 (Ont. Div. Ct.) at paras. 12, 16, 19; **Morellato v. Wood** (1999), 175 D.L.R. (4th) 753 (Ont. S.C.J.); affirmed at (1999) 187 D.L.R. (4th) 760 (Ont. C.A.).
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> 88 In order to establish that there is a genuine issue for trial with respect to Jack's claim that she did not have the requisite material facts available to her until "in and around 1994", Jack must adduce evidence to support her claim that the necessary information was not discoverable until that time. In my opinion, she failed to do so. Further, Jack must provide evidence demonstrating that there is a factual issue surrounding her failure to discover the alleged negligence before 1994 that requires resolution at trial. Again, in my opinion, she has failed to do so.
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> 89 She has not provided any evidence on either point. **Stell v. Obedkoff** (1999), 45 O.R. (3d) 120 (Ont. S.C.J.) at pp. 123-125.

[27] It is the discovery of the facts giving rise to a cause of action that starts the time running, not the discovery of the applicable law. Ignorance of the law does not postpone the starting of the time period. See: **Coutanche v. Napolean Delicatessen**, [2004] O.J. No. 2746 (C.A.) and **Hill v. South Alberta Land Registration District** (1993), 135 A.R. 266 (C.A.).

[28] The chambers judge found that “discoverability was a live issue” based on the plaintiff’s statement that she was an infant at the time of the abuse and she did not know that she had a potential claim against the home until 2001. This was, with respect, an error in principle. Knowing that a claim is possible does not equate to knowledge of the facts underlying the cause of action. The plaintiff did not present any evidence supporting the discovery of facts underlying her claim sometime after 1972. The limitation defence had been pleaded in November 2005 and the application for summary judgment made on that basis had been filed in February 2006. In May 2006, there still was no evidence presented by the plaintiff to support a discoverability argument. Therefore the summary judgment application should have been granted. The plaintiff did not meet the onus of establishing that there was a real chance of success because there was a valid limitation defence.

[29] The appeal is therefore allowed. It is not necessary to deal with the other issues raised by the appellants.

2. Fiduciary duty:

[30] The cross appeal raises the issue of whether summary judgment should have been granted on the plaintiff’s claim for breach of fiduciary duty. This requires examination of two questions: does the limitation defence apply to this claim and if not, did the Home establish that there was no genuine issue for trial? (The plaintiff did not appeal the dismissal of the claim for breach of fiduciary against the Agency.)

[31] The Home does not dispute that the **Limitations of Actions Act** in Nova Scotia does not prescribe a limitation period for actions for breach of fiduciary duty. The comments of LaForest, J. in **M. (K.) v. M. (H.)**, [1992] 3 S.C.R. 6 at pp. 69-71 are therefore applicable as well to Nova Scotia actions:

> ... In Ontario, by contrast, the Act applies only to a closed list of enumerated causes of action. Counsel for both parties have apparently conceded that this list does not include fiduciary obligations, and it is therefore unnecessary to consider this question in great depth....

See also: **D.K. v. B.D. Estate**, [2000] N.S.J. No. 330 (S.C.), and the discussion of the issue by Professor Rotman in *Fiduciary Law,* Thomson Carswell, 2005, at page 619 *et seq*. My comments should not be taken to exclude the application of laches

to an equitable claim, if laches is pleaded and established. But laches involves factual issues that are for trial, not summary judgment: **Allen v Royal Canadian Legion** 2007 NSCA 44 at ¶ 28-31.

[32] The statement of claim was amended on the day the summary judgment application was heard to include particulars of the exploitation element of the claim for breach of fiduciary duty. The following allegations were added:

> 39. The Plaintiff states that the NSHCC breached its parental-type fiduciary duty to act loyally in the best interests of the Plaintiff and not to put its own or others' interests ahead of the Plaintiff in a manner that abused the Plaintiff's trust. The breaches of its fiduciary duty include that it:
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> (a) structured its operations so that they exploited the resident children as a source of free labour rather than functioning as a facility dedicated to the proper care, protection and education of neglected children;
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> (b) sold substantial portions of the food produced at the home with the aid of free child labour while at the same time depriving the resident children of adequate food and nourishment;
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> (c) allowed it's the staff to consume substantial portions of the food produced at the home with the aid of free child labour while at the same time depriving the resident children of adequate food and nourishment;
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> (d) by operating the home like an exploitive plantation, created or materially contributed to an atmosphere of tolerance and encouragement of excessive mental and physical abuse such that the repugnant practices pervaded the home and the relationships between the residents of the home as well as between the agents, employees, servants and residents of the home.

[33] The argument of the Home before the chambers judge, which was accepted by her, was that the plaintiff did not provide any evidence in her affidavit to support the plantation argument which would be required to prove that the Home put its own interests ahead of the plaintiff’s interests. Nor did the plaintiff allege that the Home benefited from her personal labour on the farm. Therefore the judge concluded that there was no genuine issue for trial on the question of benefit to the fiduciary at the expense of the child.

[34] The argument on behalf of the Home was analogous to that of an application to strike for defective pleadings when it submitted that judgment should be granted because there is no allegation that the plaintiff personally worked on the farm. However, in my view, the pleadings contained in paragraphs 39(a) to (d), given the evolving law in this field, are sufficient to pass the low threshold of absolutely unsustainable.

[35] Since the exploitation element of the fiduciary duty claim had just been included in the statement of claim on the day of the application for summary judgment, the defendants did not present any evidence to establish that there was no genuine issue of fact respecting exploitation for trial. In that respect, this claim differs from the other claims where the defendant's submissions on the limitation defence were based on agreed-upon dates and the statutory prescriptions. Those submissions shifted the onus on the plaintiff to establish that the limitation periods did not apply because of the discoverability rule. As a result, on the fiduciary duty claim there was not yet any factual hurdle for the plaintiff to refute. The defendants did not seek an adjournment of the summary judgment application in order to file affidavits to show there was no genuine issue for trial on the fiduciary duty cause of action.

[36] The comments respecting the onus on a defendant applicant for summary judgment made in **MacNeil v. Bethune**, 2006 NSCA 21 are applicable:

> [31] I would underline, however, that as I have said the summary judgment test has two steps, each of which has a different onus. The first step is that the moving party must show that "there is no genuine issue of material fact for trial and therefore summary judgment is a proper question for consideration...": **Guarantee Co. of North America**, *supra.* This requirement has been described in **Somers Estate v. Maxwell** (1995), 107 Man. R.(2d) 220 ; [1996] M.J. No. 46 (Q.L.)(C.A.), as follows:
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> > 10 In some respects a defendant's motion for summary judgment is like a motion to dismiss a claim as one disclosing no cause of action . The most significant [difference] is that, unlike the motion to dismiss on the pleadings, a motion for summary judgment is not decided on the assumption that the facts alleged are true. The defendant must prove the facts to be such that, *prima facie*, the action fails in law. The burden then shifts to the plaintiff to prove facts which establish, if not the validity of the claim, at least a genuine issue for determination.

> 11 The initial question for the motions judge was not therefore that which she asked herself. There was no onus on the plaintiff to establish either a genuine issue or a *prima facie* case until the defendant had proven, on a *prima facie* basis, the absence of a valid claim in law.

[32] I have also found the comments of Green, J., as he then was, in **Marco**, *supra*, helpful in this regard:

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> 3. To bring himself or herself within the Rule the applying party must:
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> (a) in a case where he or she has the ultimate burden of proof on the merits, put forward an evidentiary basis for the claim which, if considered alone, would prove each element of the cause of action; or
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> (b) in a case where the other party has the burden of proof on the merits, put forward an evidentiary base establishing a defence to the claim as defined in the pleadings or tending to show that the other party's claim has no substance to it.
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> 4. In either of the foregoing cases, the applying party's case must consist of an organized set of facts set out in a coherent way, either from primary sources or the best sources available, including admissions on interrogatories and discoveries, that constitute proof of a proper foundation of the claim or defence, as the case may be.
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> [emphasis added]

[37] In this case the defendant Home did not meet the first part of the summary judgment test, and the application should therefore have been dismissed. It was an error of law to put the burden of the second step on the plaintiff when the defendant had not presented an evidentiary base establishing a defence to the claim for breach of fiduciary duty.

Conclusion:

[38] I would for these reasons allow the appeal and the cross appeal. Summary judgment is granted to the Home and the Agency on the plaintiff's claims in breach of contract, negligence and vicarious liability for assault. The summary judgment order granted by the chambers judge on the claim for breach of fiduciary duty against the Home is set aside. Any costs paid as a result of the order of the chambers judge are to be repaid.

[39] Since success was divided there should be no costs on the appeal or the cross appeal to the Home or the plaintiff. The Agency should have costs of the appeal payable by the plaintiff in the amount of $1500 plus disbursements. The Agency is also entitled to its costs of the action payable by the plaintiff, to be determined on application to Supreme Court chambers.

Roscoe, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.