SUPREME COURT OF NOVA SCOTIA
Citation: *MacDonald v. Risley*, 2021 NSSC 250

Date: 20210818
Docket: Hfx No 503709
Registry: Halifax

Between:
JUDITH IRIS MACDONALD (formerly Risley) and **JUDI'S HOLDINGS LIMITED**

PLAINTIFFS

v.

JOHN CARTER RISLEY and **LOBSTER POINT HOLDINGS LIMITED**

DEFENDANTS

Judge:	The Honourable Justice Gregory M. Warner
Heard:	June 10 and 17, 2021, in Halifax, Nova Scotia
Counsel:	John T. Shanks, for the Plaintiffs Michelle C. Awad Q.C. and Melanie Gillis, for the Defendants

By the Court:

A. Introduction

[1] Judith MacDonald ("Judi") seeks summary judgment on the evidence on a portion of an Action commenced on January 29, 2021 by her and her holding company (the second plaintiff – "JHL") against her former spouse, John Risley ("John") and his holding company (the second Defendant – "LPHL") to enforce the terms of settlement of their 2018 divorce. The $150,000,000 settlement included $25,000,000 (paid before the March 2, 2018 Settlement Agreement ("Agreement")), $10,000,000 (payable on May 31, 2018, secured by a promissory note and LPHL guarantee), and a February 15, 2018 reorganization of their respective shareholdings in Clearwater Seafoods, GFL, and Kingsett, whereby Judi's holding company (JHL) retained an interest in Clearwater of $100 million dollars, in GFL of $7.5 million dollars, and in Kingsett of $7.5 million dollars through John's holding company (LPHL), together with an entitlement to continued receipt of dividends when payable, as before the divorce.

[2] This summary judgment motion by Judi against John is only for payment of the unpaid $10-million Promissory Note executed on March 2, 2018, payable on May 31, 2018.

[3] In essence, John claims that he has overpaid the promissory note by payments since 2018 - to Judi of $2,862,500, and to or for the benefit of their two children and their families of $10,843,743.00. Judi claims that the amount that John claims as payments to her were advances on, or dividends related to, her shareholdings in three companies that were reorganized by transfer to John's holding company as part of a Share Purchase Agreement ("SPA") incorporated into the Agreement. She denies that she agreed to, or was aware of John's intent, to credit against the $10-million Promissory Note the advances to her on dividends or any advances John might make or have made to or for the benefit of their children and their families.

[4] Alternatively, John claims that the limitation period for enforcement of the Promissory Note expired before Judi sued.

[5] John submits that, if summary judgment is not granted, Rule 13.08 does not authorize the Court to consider severing the issue of the $10-million Promissory Note, or converting part of the Action into an Application, and that the status of the

proceeding (at a very early stage with no disclosure and discoveries), and complexity of the issues, mitigate against a speedy trial.

B. The pleadings

[6] The Notice of Action and Statement of Claim of January 29, 2021 alleges that Judi and John were married in 1970, separated in 2013, resolved their corollary relief issues by the Agreement dated March 2, 2018, which Agreement was incorporated in their Divorce Order and Consent Corollary Relief Order, issued on March 22, 2018.

[7] The Agreement acknowledged that John had paid a lump sum payment of $25 million before the date of the Agreement. It required him to pay an additional lump sum payment of $10 million to Judi within 90 days of the Agreement, which payment was secured by a Promissory Note and accompanied by an unconditional guarantee of the second Defendant, LPHL.

[8] Judi claims that, despite demands, John has not paid the $10-million Promissory Note; therefore, Judi claims payment of the Promissory Note together with interest from the due date of May 31, 2018.

[9] Judi pleads that John caused a corporate reorganization of his holding company and family trust. This effectively converted Judi's shareholdings in Clearwater Seafoods, at a fair market value of $100 million, GFL Environmental Holdings, at a fair market value of $7.5 million, and Kingsett Canadian Real Estate Holdings, at a fair market value of $7.5 million, into preferred shares that tracked the value of the underlying securities, and that when dividends were paid on these securities, John's holding company was required to pay them to Judi's holding company. Furthermore, Judi’s holding company had the right to redeem the preferred shares related to all three companies, and the additional rights respecting the Clearwater shares to require John to purchase up to 20% of the shares each year beginning in 2018. These provisions are set out in a Share Purchase Agreement (SPA) dated February 15, 2018, that was incorporated in the March 2, 2018 Settlement Agreement (“Agreement”). Pursuant to the SPA, Put Notices were sent to John in October 2018, January 2019, and January 2021, requiring him to purchase $60 million of the class E preferred shares of LPHL representing part of Judi’s indirect (through her holding company) interest in Clearwater. Judi claims that John has not responded to these notices; she claims $60 million plus interest.

[10] Judi's holding company pleads that John's holding company sold their interests in GFL in 2018, Kingsett since 2018, and Clearwater in January 2021, thereby entitling her holding company to the agreed $115 million value of those shares.

[11] Judi's holding company further alleges shareholder oppression against John's holding company in relation to its failure to advance funds to her holding company in accordance with the SPA of February 15th, 2018.

[12] Judi claims payment from John of the $10-million Promissory Note, and, failing payment by John, from John's holding company as guarantor.

[13] Judi's holding company claims payment of $60 million in accordance with the Put Notices, $7.5 million arising from the sale of GFL, $7.5 million arising from the sale of Kingsett, lost opportunity damages, and the value of the remaining class E preferred shares, or alternatively the entire value of the class E preferred shares, together with dividends paid to John's holding company but not forwarded to Judi's holding company, and finally claims damages for oppression of Judi's holding company.

[14] The Statement of Defence of February 24, 2021, admits the first 10½ Paragraphs of the Statement of Claim but denies the remainder. With respect to the $10-million Promissory Note and guarantee, John admits that he signed the Promissory Note. He pleads that "he has made various payments in satisfaction of the obligation represented by the Note. Therefore, neither John personally nor LPHL, as Guarantor of John's obligation under the Promissory Note, is liable for any of the amounts claimed in the Statement of Claim in relation thereto."

[15] The Defendants admit the special resolution dated February 15, 2018 that increased the capital of John's holding company by creating three new classes of preferred shares - E respecting Clearwater, F respecting GFL, and G respecting Kingsett, as part of the reorganization contemplated by the Settlement Agreement. The terms of the preferred shares were negotiated between the parties. The terms and conditions limit retraction in the first five years after their issuance. The Defendants plead that no retraction rights have yet arisen.

[16] The Defendants deny that they owe $7.5 million respecting the preferred F shares relating to GFL. They state that the three classes of preferred shares include provisions for dividends in certain circumstances. Entitlement to receive, and the Directors' duty to declare and pay dividends, are subject to the applicable law, which

includes a prohibition on paying dividends out of capital. The Board of Directors of John's holding company has not been in a position to legally declare dividends on the class E preferred shares. They further plead that the triggering "GFL dividend payment date" for the class F preferred shares has not occurred.

[17] John admits entering the SPA dated February 15, 2018 but denies breach of any obligation under it. Because Judi's holding company's entitlement to require John to purchase up to 20% of the class E preferred shares in any calendar year, requires a business valuator's determination of their fair market value, and because that valuation has not occurred, his obligations have not crystallized.

[18] The Defendants deny conduct amounting to oppression.

[19] Alternately the Defendants say that if money is owed to the Plaintiffs or either of them, the amounts claimed are exaggerated.

C. The summary judgment motion

[20] Judi seeks summary judgment on evidence against John only in respect of the $10-million payable in a lump sum on May 31, 2018 as set out in the Promissory Note and Agreement.

[21] She claims that all of the $1,083,333.42 John advanced to her in monthly installments of $41,666.67, between June 1, 2018 and January 29, 2021, and John's calculation of Judi's tax liability of 50% in respect of those payments ($541,666.71), together with the three lump-sum payments received in December 2018, April 2019 and September 2019, totaling $825,000.00, and John's calculation of Judi's tax liability of 50% on these payments ($412,500.00), were advances on dividends related to her holdings in Clearwater, GFL, and Kingsett. They were never described to her, nor agreed to by her, as payments on the $10-million lump-sum Promissory Note due May 31, 2018. Judi relies on several email exchanges between her brother and agent, Mickey MacDonald ("Mickey") and John as undisputed facts in support of this position. John does not dispute the authenticity and contents of the emails.

[22] John takes the position at this hearing that his holding company cannot and has not declared any dividends, and therefore the actual advances ($1,908,333.42), and John's calculation of Judi's tax liability of 50% ($954,166.71) on them were payments on the $10-million Promissory Note, not advances on dividends.

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

[24] The second disagreement relates to John's claim for credit against the $10-million Promissory Note for one-half of the funds that, between March 2018 and April 2021, he advanced to, and paid on behalf of, or for the benefit of their two children and their families, together with John's calculation of Judi's tax liability of 50%, on each of the payments. He relies on Paragraphs 14, 16 and 17 of his Affidavit, as raising an issue of credibility, and therefore a genuine issue of material fact for trial.

[25] Judi claims not to have been aware of, nor to have agreed to, any amendment or waiver of her entitlement to receive the $10-million pursuant to the Promissory Note by reason of John's payments to their children. She claims to have been unaware of this claim until his affidavit was filed in this motion on May 25th, 2021. Judi relies on:

> (a) John's failure to state in any email exchanges or documents of any kind before this Action was commenced what he alleges in his May 25, 2021 affidavit,
>
> (b) his words to the contrary in his pre-Action email exchanges,
>
> (c) the particulars of (and when) he claims their agreement was made,
>
> (d) John's acknowledgment that he did not provide any accounting to Judi of the credits he claims until his May 25, 2021 affidavit in this motion, and
>
> (e) the emails exchanged between John and Mickey, and on March 12, 2019, by John to Judi, their children, and Mickey, as John's acknowledgment that he owed the $10 million, and that he did not pay it because he was unable to pay it.

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

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

[28] The evidence on this motion consists of cross-examination of Judi and John, and the following exhibits:

(f) affidavits of Judi and her brother Mickey McDonald ("Mickey"), filed May 20, 2021 and sworn May 31, 2021 (Exhibits #1 and #2, respectively),

(g) affidavits of John and his legal counsel sworn on May 25, 2021 (Exhibits #3 and #4, respectively),

(h) reply affidavits of Judi and Mickey (Exhibits #5 and #6 respectively),

(i) Judi's Affidavit Disclosing Documents, tendered by John's counsel through cross-examination of Judi (Exhibit #7), and

(j) a series of seven email exchanges tendered by Judi's counsel through cross examination of John (Exhibit #8).

D. The legal test for summary judgment on evidence.

[29] In *Coady v Burton Canada*, 2013 NSCA 95, (*Coady*) the Court of Appeal reaffirmed that that the two-part summary judgment test described by the Supreme Court of Canada in *Guarantee Company v Gordon Capital* [1999] 3 SCR 423 *(Guarantee*) remains the applicable law in Nova Scotia. I adopt and incorporate, in their entirety, Paragraphs 22, 26-34, and 87. They remain the applicable law.

[30] In *Fougere v Blunden Construction*, 2014 NSCA 52, the court clarified that the Supreme Court of Canada decision in *Hryniak v Mauldin*, 2014 SCC 7, had little bearing on the Nova Scotia summary judgment test because the Nova Scotia rule differed from Ontario Rule 20, except as a "clarion call for a shift in culture to provide alternative adjudicative measures to the conventional trial model" (Paragraph 7).

[31] Civil Procedure Rule 13.04 and 13.08 were amended on February 26, 2016 to reinstate the two-stage *Guarantee* test. The Rules read in part as follows:

13.04 Summary judgment on evidence in an action

(1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

(a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;

(b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence

requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

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

(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

(a) determine a question of law, if there is no genuine issue of material fact for trial;

(b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

…

13.08 Hearing after dismissal of motion for summary judgment on evidence

(1) A judge who dismisses a motion for summary judgment on evidence must, as soon as is practical after the dismissal, schedule a hearing to do either of the following:

(a) give directions for the conduct of the action, if it is not converted to an application;

(b) on the motion of a party or on the court's own motion, convert the action to an application in court, set a time and date for the hearing of the application, and give further directions as called for in Rule 5 - Application.

(2) A judge who gives directions for the conduct of an action that is not converted may include directions that do any of the following:

(a) restrict discovery in view of disclosure made through an affidavit or cross-examination on an affidavit;

> (b) narrow the issues to be tried by specifying what facts are not in dispute;
>
> (c) regulate disclosure or production of documents, electronic information, or other evidence;
>
> (d) permit evidence on the motion for summary judgment to stand as evidence at trial;
>
> (e) provide for a speedy trial.

[32] Since *Shannex v Dora Construction*, 2016 NSCA 89 ("*Shannex*"), the analysis proceeds by way of five sequential questions. In Paragraph 34, the Court identifies and describes the first question as: does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with the question of law? The Court writes:

> A material fact is one that would affect the result . . . The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites. . .

[33] The *Shannex* Court noted, at Paragraph 36, that the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to put his best foot forward with evidence and legal submissions on all these questions including "the genuine issue of material fact", any issue of law, and whether there was a real chance of success. The *Shannex* Court did not discuss the meaning of *genuine*.

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

[35] In *Coady*, the Court was emphatic that the seminal decision in Canada is *Guarantee*. (See Paragraphs 26, 27 and 31)

[36] While many decisions cite and discuss the words "of material fact", and further comment that a court cannot draw inferences from the available evidence to resolve disputed facts, there is little commentary in Nova Scotia caselaw on the meaning of "genuine" in the term "a genuine issue of material fact" as found in Rule 13.04.

[37] A broad cross section of definitions from reputable dictionaries are remarkably consistent. They include: authentic, real, sincere, possessing the claimed or attributed character, quality or origin. Its meaning is the opposite of counterfeit or disingenuous.

[38] Clearly a broad definition of the word *genuine* is counter-intuitive to the mandated summary judgment process repeatedly prescribed by our appellate court. On the other hand, the word cannot be ignored. It would be a misuse and abuse of the litigation process to simply file a bald or bare denial of a material fact in an affidavit to thwart the intent of the summary judgment process.

[39] Counsel on this motion, which involves partial summary judgment in a proceeding that involves other complex issues, correctly submit that Rule 13.08, as amended in 2016, does not authorize conversion of **part** of the Action into an application, and therefore severance of this issue into a simpler, faster, fairer and proportionate alternative form of dispute resolution otherwise available through an application. Specifically, Counsel submit that, pursuant to 13.08(1)(b), a court may convert an action into an application, but not part of an action into an application. Said differently, the circumstances of this case preclude other summary processes to determine the simple issue respecting the $10-million Promissory Note. What Saunders JA, in *Fougere*, succinctly articulated as the wise and creative application of former Rule 13.07 to obtain a fair, speedy and proportionate alternative for determination of the truth is not available in this case.

[40] In *Guarantee*, the Supreme Court of Canada did provide an example of the kind of evidence that was not genuine and therefore did not raise to the level of creating a genuine issue of material fact. Paragraph 31 reads:

> 31 Gordon objected that the various affidavits of Bailey raised a credibility issue sufficient to require a trial. O'Brien J. disagreed. Reading the various affidavits, he was of the view that Bailey's reversal of position after a limitation period defence had been asserted did not create a genuine issue for trial. We agree with that finding. The reversal was based on Bailey's opinion that actual knowledge that Rachar had benefited from his transactions was determinative. The affidavit of November 22, 1995 states that the June 26, 1991 date was used only because this was the date at which Gordon knew it had to meet a capital requirement, not because it believed that a loss of the type covered by the Bond had occurred. O'Brien J. looked at this in the context of the proceedings, taking into account the sophistication of the parties and the fact that they had been discussing their problem with forensic accountants and outside legal counsel. We do not find his conclusion to be unreasonable, especially in view of the fact that the true test of discoverability is an objective one under the terms of section 3 of the Bond. We

> would add that the trial judge's ruling on this point is entirely consistent with previous decisions holding that a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence.

[41] This application of the test did not come out of the blue. In describing the test for summary judgment at Paragraph 26, the court in *Guarantee* cited a leading ONCA decision, *Irving Ungerman v Galanis* [1991] OJ No. 1478 ("*Ungerman*"). That decision reads in part:

> [22] … The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. …
>
> …
>
> [26] … the proposition that an issue of credibility precludes the granting of summary judgment applies on when what is said to be an issue of credibility is a genuine issue of credibility. …
>
> …
>
> [35] … I think Sutherland J. erred in concluding that there was no genuine issue for trial.

[42] *Ungerman* was decided when Ontario's Rule 20 was similar to the Nova Scotia Rule and not as broad as the rule upon which *Hryniak* was decided. On the evidence in *Ungerman*, the Appeal Court, applying the test - that an issue of credibility had to be a genuine issue of credibility, found that there was a genuine issue requiring a trial.

[43] *Ungerman* was recently cited by Nova Scotia Courts.

[44] In *Kaehler v SystemCare Cleaning*, 2018 NSSC 219 ("*Kaehler*"), Muise J relied on the *Ungerman* definition of a genuine issue at Paragraph 19. He ultimately dismissed the summary judgment motion, when he found that there existed competing inferences which required a weighing of the evidence. Interestingly, on appeal, the Nova Scotia Court of Appeal, 2019 NSCA 29, did not take issue with the use of the term "genuine issue", but did reverse the decision and grant summary judgment on the basis that there was no material fact in dispute.

[45] *Ungerman* was relied upon by Beveridge JA in his dissenting analysis in *2420188 Nova Scotia Limited v Hiltz*, 2011 NSCA 74, at Paragraphs 42 to 46.

[46] In *Smith v Nova Scotia (Attorney General)*, 2010 NSCA 14, leave to appeal denied, Hamilton JA wrote for the Court:

> [17] I am also satisfied that the judge did not err by inappropriately making findings of fact, findings of credibility or drawing inferences. An issue of credibility or a dispute of fact exists where there is a conflict in the evidence and the trier of fact is required to accept the testimony of one witness over another to make a final determination on the issues raised. Here the only relevant evidence before the judge was the evidence of the appellants themselves. On that evidence alone he concluded that there was no genuine issue for trial.
>
> [18] The judge was entitled to accept the discovery evidence of the appellants and reject their affidavit evidence to the extent it was contradicted by their discovery evidence. In **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at pp. 436-7, the Court noted that "a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence." There were no such detailed facts or supporting evidence in the affidavits of Messrs. Borden and Smith.
>
> [19] Also in **Rogers Cable TV Ltd. v. 373014 Ontario Ltd.**, [1994] O.J. No. 2196 (Gen Div) the court states:
>
> > 6 I am completely satisfied that the plaintiff has established that there is no genuine issue for trial. What the defendant's position amounts to is this -- a genuine issue for trial is raised in every case in which a defendant swears that it does not owe a debt, notwithstanding overwhelming evidence to the contrary presented by the plaintiff, and in the absence of any additional evidence by the defendant to support its denial. Although in one sense an issue of credibility is raised on the assumption that a trial judge may believe the defendant, in my view in the context of the record in this case this does not constitute a genuine issue for trial with respect to the defence put forward within the meaning of rule 20.04(2)....

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

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

> In my respectful view, this conclusion is in conformity with the principles discussed by Morden A.C.J.O. on behalf of the Court of Appeal in the Ungerman case, supra, at pp. 549-52. At best, the issue raised by the defendant is spurious. The following passage from the reasons for judgment of Morden A.C.J.O. at p. 552 has direct

> application to the facts of this motion: "As the first passage indicates, the proposition that an issue of credibility precludes the granting of summary judgment applies only when what is said to be an issue of credibility is a genuine issue of credibility (Emphasis added.) Although the defendant may have raised an issue of credibility, it is far removed from constituting a genuine issue of credibility. Therefore, the plaintiff has established that there is no genuine issue for trial in this case.

[49] Recognizing the danger of referring to non-Nova Scotia caselaw, it is relevant that in *Goldman v Devine*, 2007 ONCA 301, (before Rule 20 was amended to the rule upon which *Hryniak* was decided, and when the rule was similar to the Nova Scotia rule) the court upheld summary judgment on the basis that the claim did not raise a genuine issue for trial, using these words:

> [22] Moreover, the appellants' contention that the respondents Chin Sang, Gualbance and Noronha agreed or represented, at various times, to release the remainder of the GIC funds and/or to renew the appellants' mortgage, rest solely on bald assertions by the appellants. No particulars or documentary support for these allegations was proffered by the appellants. We agree with the respondents that in the absence of some arguable legal obligation by the Bank to release the GIC prior to the repayment of its loans notwithstanding the clear contrary language of the Credit Facility documents, these allegations do not give rise to a genuine issue for trial.
>
> [23] Finally, we are not satisfied that a trial is required in this case for the purpose of the determination of contested facts. On this record, there is simply no meaningful support for the representations or the additional financing arrangements alleged by the appellants, other than unsubstantiated and bald assertions. These fall far short of any demonstration of real credibility issues, or other genuine issues necessitating a trial. Self-serving evidence that merely asserts a defence or a claim without providing some detail or supporting evidence is not sufficient to create a genuine issue for trial: see Rozin v. Ilitchev (2003), 2003 CanLII 21313 (ON CA), 66 O.R. (3d) 410 (C.A.) at para. 8.

[50] Similarly, in *Rozin v Ilitchev*, [2003] OJ No. 3158, Sharpe JA, citing *Guarantee* and *Rogers Cable*, wrote:

> [8] In my view, the motions judge did not err in granting summary judgment against Igor Ilitchev and Northwest. On this record, it was open to the motions judge to find that there was no genuine issue for trial. While a judge must avoid making findings on contested factual issues on a summary judgment motion, a judge is also required to assess the record with a view to determining whether there is a genuine issue of disputed facts. Self-serving affidavits that merely assert defences without providing some detail or supporting evidence are not sufficient to create a genuine issue for trial:

> Guarantee Co. of North America v. Gordon Capital Corp., 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, at para. 31. As stated by Borins J. (as he then was) in Rogers Cable TV Ltd. v. 373041 Ontario Ltd. (1994), 1994 CanLII 7367 (ON SC), 22 O.R. (3d) 25 (Gen. Div.), at p. 28, "The requirement that the parties put their 'best foot forward' goes together with the requirement that the motions judge 'take a hard look at the merits of the action at this preliminary stage' to determine whether the moving party has succeeded in establishing that there is no genuine issue for trial." Borins J. added, at pp. 28-29 O.R.:
>
> > What the defendant's position amounts to is this -- a genuine issue for trial is raised in every case in which a defendant swears that it does not owe a debt, notwithstanding overwhelming evidence to the contrary presented by the plaintiff, and in the absence of any additional evidence by the defendant to support its denial. Although in one sense an issue of credibility is raised on the assumption that a trial judge may believe the defendant, in my view in the context of the record in this case this does not constitute a genuine issue for trial . . .
>
> (Emphasis in original)
>
> [9] In the present case, the failure of Ilitchev to satisfy undertakings to provide the documentary evidence that would support his assertion that he was the victim, not the perpetrator, of the fraud, are particularly telling. One is left with Ilitchev's bald assertion of facts that he himself said could be supported when the relevant documents were produced. The documentary evidence that has been filed, including the promissory notes signed by Ilitchev in his personal capacity, supports the respondent's version. This evidence, combined with the startling inconsistencies and implausible elements in Ilitchev's evidence and his failure to provide any support for his defence, brings this case within the same category as Royal Bank of Canada v. Feldman (1995), 1995 CanLII 7060 (ON SC), 23 O.R. (3d) 798 (Gen. Div.), at p. 800, appeal quashed (1995), 1995 CanLII 8962 (ON CA), 27 O.R. (3d) 322n (C.A.) [page415] where it was held that ". . . considered in the context of all the evidence, the defendant's evidence is so disingenuous as not to constitute a genuine issue for trial." See also 1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 1995 CanLII 1686 (ON CA), 21 O.R. (3d) 547, 43 R.P.R. (2d) 161 (C.A.), at p. 557 O.R.; Blackburn v. Lapkin (1996), 1996 CanLII 7973 (ON SC), 28 O.R. (3d) 292, 134 D.L.R. (4th) 747 (Gen. Div.), at p. 313 O.R.; Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 1996 CanLII 7979 (ON SC), 28 O.R. (3d) 423 (Gen. Div.), at pp. 434-35, affd [1997] O.J. No. 3754 (QL) (C.A.).

[51] I have taken into consideration the circumstance described in Paragraph 31 in *Guarantee* as applicable to the analytical framework and questions set out by our appellate court in *Coady* and *Shannex*.

E. Is there a genuine issue of material fact based on all the evidence from any source as to whether the periodic payments to Judi were made in respect of the $10-million Promissory Note due May 31, 2018?

[52] Basic to this question are the email communications, mostly between Mickey and John. Judi's first affidavit states that since their 2013 separation, Mickey assisted her in the negotiation of the financial issues arising from her and John's separation and divorce. For this purpose, Mickey had direct contact with John to structure and implement their financial settlement both before and after it was executed. Effectively Mickey was Judi's agent, supplemented by her lawyer.

[53] In his affidavit, John swears at Paragraph 10: “In the time since March 2, 2018, Mickey McDonald has not been involved in my direct dealings with Judi”.

[54] When confronted with the many email communications between John and Mickey, he withdrew that statement and acknowledged the email communications, some of which referred to other direct oral communications. The only exception, acknowledged by Judi in Paragraph 16 of her reply affidavit, and referenced in Mr. Ryan's March 8, 2019 demand letter to John's lawyer, was a very short period between February 26, 2019 and March 12, 2019. Ryan’s March 8th letter begins with a statement that: “Mickey MacDonald is no longer involved in this situation and therefore there is no compromise or agreement to be reached directly between your client and Mr. MacDonald”. This is confirmed in John’s March 12, 2019, emails to Judi, their two children and Mickey, which emails were answered by Mickey on behalf of Judi.

[55] It is not a disputed material fact that John dealt with Mickey as Judi's agent when negotiating the Agreement and after the Agreement was executed, including communications when Mickey sought from John an understanding of the status of the Agreement and John's compliance with it.

[56] The only documentary evidence as to the nature and status of the periodic payments, and John’s calculation of taxes charged to Judi in respect of these periodic payments, are the email exchanges. The relevant email exchanges contain clear acknowledgements by John that the periodic payments to Judi - the actual cash advances of $1,908,333.42, together with John's calculation of Judi's tax liability in respect of these advances on dividends ($954,166.71), were not payments on the $10-million Promissory Note.

[57] The relevant communications in evidence (mostly email chains), in chronological order, are:

1. February 27, 2017. "Re: Judi Newco". 4 emails amongst Fae Shaw (one of John's lawyers), Stan Spavold (one of John's advisors and business associates), John and Mickey respecting the name of Judi's holding company.

2. April 7, 2017. "Re: Settlement matters". An email from John and Mickey (whom John calls "Barry").

> From: John Risley <
> Date: Friday, April 7, 2017 at 11:09 AM
> To: Judi Risley >, Judi Risley
> Mickey Macdonald
> Subject: Settlement matters
>
>]udi and Barry,
>
> I am glad I waited 24 hours before responding to the letter you delivered to me yesterday. Waiting is always good for the calming impact it has on what would otherwise be a too-emotional reaction.
>
> First, good for you Judi for writing the letter. Great to see your willingness to do so and the independence it demonstrates.
>
> Second, thanks to Barry for your willingness to be involved in helping settle these matters. I am sorry to drag you into this but there is no one who Judi will listen to more than you.
>
> Third, it is clear to me Mr Ryan is not in the slightest bit interested in anything other than getting me into an arena where he can chuck spears at me. . . .
>
> So, I think we are close to something which responds to what you Judi, say you want.
> I have offered you 100 mIn worth of Clearwater Seafood shares. Not only that, I have offered to guarantee that those shares don't have less than 100 mln by providing you with extra shares such that you have no downside, only upside. That was never part of the deal, but something Stan and I thought was in your interests and incorporated in the deal.
> Absolutely you get the dividends on the stock.
> It was/is my hope you never sell these shares and that ultimately they get passed on to Michael, Sarah and their kids. . . . The agreement does allow you to sell up to 20mm a year in shares, subject only to offering me the right

to buy them first. It is important for you to understand that if you sold these shares you would pay about half your sale proceeds in taxes.

In addition to the above you have been given 25 mln in cash and 7.5mm worth of shares in each of Kingsett Capital and Green For Life (total 15mln). You can sell those shares anytime you like.

I owe you another 10mln.

This is the basis of the deal. I suggest we have a meeting amongst the 3 of us next week to talk this through and agree any changes which are reasonable.

I think I have demonstrated my willingness to be fair and live up to my obligations.

3. June 27, 2017. "Re: Judi shares". 4 emails amongst Shaw, Spavold, and John, copied by John and Spavold to Mickey.

(4) From Stan Spavold <
Date: Tuesday, June 27, 2017 at 12:59 PM
To: John Risley < >
Cc: Mickey Macdonald < >
Subject: Re: Judi shares

Ok.

(3) (On Jun 27, 2017, at 11:50 AM, John Risley <. >wrote:

I have copied Mickey here as he is familiar with the deal. She has 100mIn of CSL shares and the right to sell up to 20 mln of these per year. I am comfortable with the risk of her doing so/not doing so.

(2) From: Stan Spavold
Sent: Tuesday, June 27, 2017 10:44 AM
To: John Risley
Subject: FW: Judi shares

I guess you are taking the risk she has the right but does not ask for the money?

(1) From: Shaw, Fae [mailto:fae.shawimcinnescooper.com]
Sent: June 27, 2017 9:19 AM
To: Stan Spavold

Cc: Fernando, Carolle <carolle.fernando@mcinnescooper.com>; Blucher, Jeffrey
<jeffrev.bIuchermcinnescooper.com>
Subject: Judi shares

Good Morning Stan,

I spoke with Mick Ryan of SMSS this morning. He is adamant that, however the transaction is papered, Judi is to get $20M tax free per year for 5 years. Before proceeding further, he has asked for confirmation that John agrees that this is the business deal.

Fae

4. January 15, 2018. "Re: Judi". 3 emails: John to Mickey and Spavold as to what was transferred and remains, Mickey's reply re dividends, and John's response re dividends.

(3) From: John Risley
Date: Monday, January15, 2018 at 10:10AM
To: Mickey Macdonald
Cc: Stan Spavold
Subject: RE: Judi

Sure,
So let's use Dec3l/17 as the cut-off and from Jan 1 she will get the dividends less the monthly cash we advance every month. Make sense?

(2) From: Mickey MacDonald
Sent: Monday, January 15, 2018 9:54 AM
To: John Risley
Cc: Stan Spavold
Subject: Re: Judi

That's what my understanding is as well but I don't think it has been done yet as I know she isn't receiving any dividends from the Clearwater shares and I don't think that the other Shares have been given as of yet. I guess it just needs to be finalized!

Mickey MacDonald

(1) From: John Risley
Date: Monday, January 15, 2018 at 9:44 AM
To: Mickey MacDonald

Cc: Stan Spavold - -
Subject: Judi

I think there is some confusion as to what has already being transferred to Judi, and what remains . . .
Thus far she has received,
25mlm in cash.
100 mlm in CSL shares
l5mln in GFL and Kingsett shares

She is still owed 10mm … we are going to transfer a further 10mm in GFL and Kingsett shares to her by way of the same instrument we used for the other share transfers and we will buy back that -10mm with cash as soon as I have the liquidity to do so.

(an earlier note to Stan suggested there was still 25mm to transfer).

5. August 30, 2018. "Re: Loan". seven emails between John and Mickey. John asks for a business loan to close a deal the next day. Mickey and John exchange information re John's leveraged position. Mickey at first ("with deep regret") declines, but in fifth email an hour later at 4:29PM, he writes to John:

OK, I will loan you the money against all the good advice I've gotten and from my gut instinct on the condition you pay Judi her money ASAP and that you separate her $100M shares from all the crazy investments in the future!"
John replies at 4:44PM: "That's the mission I am embarked upon – to monetize some of our CB stake so I can do just that. And Thank you".

Mickey replies at 8:09PM: "No problem, just don't let me down!

6. September 27, 2018. "Re: Judi's Dividend Account". 3 emails. John to Mickey, Mickey to John, and John's reply.

(3)Date: Thursday, September 27, 2018 at 5:00 PM
To: Mickey Macdonald -
Subject: RE:]udi;s dividend account

The number of shares was fixed as of the date of the agreement (at least as Stan advises). And yes, the 90k is the monthly advance.

(2) From: Mickey MacDonald

Senit: Thursday, September 27, 2018 3:57 PM
To: John Risley
Subject: Re: Judi's dividend account

I'm not getting your math but let me check the agreement on how you are coming up with the numbers. My memory is that it is based on $100,000,000M in Clearwater share value so the dividend should be more like $1.2m. I'm assuming the 90K advance is the monthly amount you have been sending her?

Mickey MacDonald

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

Sorry to be late with this. Hope this [sic] numbers make sense.....

The agreement took effect as of Feb 15th. Since then two dividend payments have been made, one for the period ended March 31st, and one for the period ended June 30. She was entitled to half the first dividend and 100% of the second for her share of the total dividend we received.

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

So that means 698,060.50 times 79.59% times 50 ¾ equals 277,793 Plus 698,060.5 times 79.59% equals 555,586.35.

Total 833,379.35

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

Any questions, please let me know.

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

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

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

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

John

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

Mickey MacDonald

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

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

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

Stan

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

Mickey MacDonald

(2) From John Risley
Date: Tuesday February 19,2019 at 1:21 PM
To: Mickey MacDonald and Stan Spavold.
Subject: RE: Judi
I had a quick look after we met and the deal was 150 mln,
115 was satisfied by the synthetic share deal (100 for CSL; 7.5 for GFL and 7.5 for Kingsett)
25 in cash (paid)
A further 10 in cash (not paid)
What is owing is the 10 plus the 7.5 from GFL . . . 17.5mln.
(I have avoided any calculation on dividends, monthly payments etc.)

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

From: Stan Spavold
Date: Tuesday, February 26, 2019 at 2:40 PM
To: Mickey MacDonald
Subject: Re: Judi
I have looked at this again and agree with John's analysis below.
I was wrong on the $22.5.

Stan Spavold
[Court note: attached was the exchange of February 19. 2019]

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

1. $10 million due to our client by Mr. Risley personally arising out of the divorce settlement agreement and evidenced by a Promissory Note in the amount of $10 million due May 31, 2018. A copy of the Note is attached. This amount is also guaranteed by Lobster Point Holdings supported by a written guarantee made on March 2, 2018, a copy of which is also attached;

5. Our client's holding company is also entitled to additional dividends on the tracking shares of Clearwater held by it in Lobster Point Holdings based on dividends declared in 2018. I understand these have been partially paid but not paid fully;

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

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

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

[59] John's emails in response to Mickey's inquiries are clear and unequivocal, especially those of January 15, 2018, September 27, 2018, September 28, 2018, February 19, 2019, and the contents of Exhibit 8 referred to in the email to Mickey on September 3, 2019.

[60] In this motion, John alleges that the periodic payments and Judi's tax payable respecting the periodic payments were payments on the $10-million Promissory Note. John was cross-examined on the email exchanges showing that the advances to Judi were in relation to her dividend entitlement. He acknowledged the email exchanges referring to Judi's entitlement to dividends, and the payment of dividends or advances on dividends. He acknowledged that Judi was entitled to dividend payments. When it was suggested that the periodic payments he made to Judi were a continuation of the payments she had received before the settlement agreement, as credits against dividends pursuant to the share transfer, John replied: "That was not my intent." He acknowledged that in his email exchanges he did not indicate that the $10-million Promissory Note was being reduced by the advances. In his responses to questions about the clear references to his and his corporate employees' calculations, and the acknowledgement of Judi's holding company's entitlement to dividends and of advances purportedly being made on this entitlement, John bluntly replied: "That is not my position today". In relation to his March 12, 2019 references to dividend payments, he testified, with words to the effect: "You could interpret my position as different than in that email. My position today is they were on the $10 million."

[61] He acknowledged that neither the Promissory Note, nor the Guarantee, nor the Settlement Agreement were ever amended. On cross-examination he suggested that the last line in his February 19, 2019 email to Mickey - ("I have avoided any calculation on dividends, monthly payments etc") - was somehow in respect of the "17.5 mln" that was said to be owing in the line above. The court notes that the reference to 17.5 mln was a reference to the Note and Judi's share in GFL, not just the Note. The words in brackets clearly refer to dividends or advances on dividends, as in all his earlier and later emails.

[62] He added that no dividends were declared by LPHL, that Judi never acknowledged the $41,000 payments as dividends, and that she did not report them to CRA. He did acknowledge that it was his company that determined the tax position of the periodic payments for Judi's tax filings. None of Judi's tax returns are in evidence.

[63] He was directed to his email exchanges of September 27 and 28, 2018, six months after the Settlement Agreement as to when Judi's new dividend entitlement was to take effect. He acknowledged the references in the emails to the two dividend payments and Judi's entitlement to 80% of the first payment and to 40K tax free each month. When directed to Mickey's question in the September 27, 2018 email: "I'm

assuming the 90K advance is the monthly amount you have been sending her?", he replied: " And yes, the 90K is the monthly advance." This is a clear and unequivocal admission that the advances to Judi were in respect to her entitlement to dividends.

[64] To challenge the clear email communications, John had a duty to put his best foot forward. Neither the corporate reorganization agreement signed on February 15, 2018, which appears to have also included a Share Purchase Agreement, nor any evidence of how John could receive dividends (per his March 12, 2019 email), is in evidence. The evidence in John's emails is totally to the effect that the periodic payments were advances on Judi's entitlement to dividends under the Agreement. Baldly stating that one's ***"position"*** at the hearing of the motion is different from the email communications is not evidence. It does not raise a genuine issue of material fact. It does not create a credibility issue.

[65] I conclude that the Applicant has established that there is no genuine issue of material fact for trial with respect to whether the periodic advances were on the unamended Promissory Note. They were not. There is no requirement for determination of a question of law in respect of this issue, except the limitations issue dealt with below.

[66] If I am wrong, and there is an issue of law, or mixed fact and law (even if not pleaded), it would relate to whether John could claim credit against the Note for his calculation of Judi's tax liability in relation to the payments that he now claims were payments on the Note. John's pleading is silent on this issue. The emails, and the calculation of credits claimed by John in his affidavit, show that the advances to Judi were net of tax. John claims credit for his calculation of Judi's tax liability (at 50%) against these payments.

[67] Payment of dividends, interest, capital gains, income or spousal support may create a tax liability to the recipient. A promissory note is a debt. This promissory note was for the payment of principal, without interest. The payment of a debt, in the context of the Settlement Agreement in evidence – that is, payable without interest - does not credit a tax liability to the recipient. The approximate $40,000.00 monthly cash advances to Judi, and the three other periodic cash payments of December 2018, April 2019, and September 2019, were expressly stated to be net of taxes; and the gross amounts (including Judi's tax liability) of $90,000.00 claimed in respect of each monthly payment, and the $541,666.71 calculated tax liability claimed in respect of the other three payments, could not relate to the payment on the promissory note for which Judi had no tax liability.

[68] The claim for credit from Judi in respect of income tax on the advances is further evidence that the payments to Judi were something other than payment on the principal of a debt evidenced by the Note. The claim for credit for Judi's purported tax liability negates the possibility that a genuine issue of material fact remains for trial. If John's claim for credit from Judi for taxes on the actual cash advances raises an issue of law, or mixed fact and law, it negates real chance that the payments were in respect of principal payments on the Note.

[69] This analysis in respect of his claim for credit against his liability on the Note for Judi's tax liability (at 50% of actual advances) on advances to Judi applies equally to what he claims is Judi's share of advances that he made, with her agreement, to or for the benefit of their children.

F. Is there a genuine issue of material fact, based on all the evidence from any source that Judi agreed to John's request to credit one-half, plus calculated tax at 50% on Judi's half, of any amounts that John advanced to or for the benefit of their children and their families?

[70] John swears in his affidavit as follows:

> 14. Judi and I have always focused on the welfare and happiness of Sarah and Michael and their families and during our divorce negotiations, Judi and I repeatedly discussed the fact that any proceeds from our settlement would ultimately flow to our children and their grandchildren, as beneficiaries of Judi's Estate. Judi also confirmed to me, and I believe, that she intended to use all cash payments from me for the benefit of Sarah and Michael and their families, as she understood she, personally, already had more money than she would ever need.
>
> …
>
> 16 In the time since I signed the Promissory Note on March 2, 2018, Judi and I have had multiple discussions about my providing cash for her and my providing cash for Sarah and Michael and their families. I have always been fully honest and transparent with Judi, including about my investing and the fact that I frequently do not have the liquidity necessary to fund all of Sarah's and Michael's demands. Judi's consistent response when such matters came up in our discussions was that she did not want to fight about money and that I should take care of the kids. Judi repeatedly indicated that she was in agreement with my giving cash to (or making payments on behalf of) Sarah and Michael and their families using funds which would otherwise have first gone to Judi before she gave them to one or both of Sarah and Michael (or paid amounts on their behalf)
>
> 17. Consistent with my discussions and agreement with Judi described above, in the time since I signed the Promissory Note on March 2, 2018, 1 have made

> payments to Judi to Sarah, to Michael, on behalf of Sarah, on behalf of Michael and for the benefit of each of Sarah's and Michael's families. Those payments have fully satisfied the amount due under the Promissory Note, and more.
>
> 18. In the time since I signed the Promissory Note, a total of $13,706,243 of payments have been made by me to or on behalf of Judi, Sarah and Michael. Finance staff within the companies I control, led by Kristen MacDiamid, CPA, CA, have kept records of the amounts paid.

[71] Judi's reply affidavit vehemently denies any such discussions or agreement.

[72] Relevant to the analysis of whether John's affidavit raises a genuine issue of material fact are these considerations.

[73] First, the words he used in Paragraphs 14, 16 and 17 of his affidavit do not expressly state that Judi agreed that he could credit against his $10 million overdue debt any monies he might have paid, or may in future pay, for the children's benefit. Nor do the words identify with any particularity when and under what circumstances any communications occurred.

[74] Second, his email exchanges up to and including those of March 12, 2019 acknowledge and confirm, as outstanding, $10 million on the Note. No document or communication before his May 25, 2021, affidavit, filed in this motion, claims an agreement for credit against the $10 million Note for advances he made after March 2018 to or for their children.

[75] Third, in response to a rhetorical question: surely you do not claim that Judi was in agreement to you claiming credit for advances you identify in your affidavit after Mr. Ryan's March 8, 2019 demand letter or at the latest, after Judi's Action was filed on January 29, 2021? – he answered words to the effect that: yes, it was after the March 8, 2019, Ryan letter that the communications occurred and/or the agreement was made. This evidence as to when John states that the agreement was made means that there was no agreement respecting any advances made before March 8, 2019. It cannot justify claiming credit for payments made to or for the benefit of the children before the communications or agreement. It is problematic that the largest credit that John claims against the Note is the April 15, 2021 payment to his son, Michael, of $6,266,500, described as "deposit for new house".

[76] Fourth, in the Statement of Defence filed February 24, 2021, John did not identify payments to or for his children and their families as agreed credits against the Note. In Paragraph 4 of the Defence, he admits execution of the Note and "further

states that he has made various payments in satisfaction of the obligation represented by the Note". His pleading does not set out the material fact in issue.

[77] In Paragraph 14 of his affidavit, John states that he and Judi discussed that ultimately any proceeds from their settlement would flow to their children and grandchildren as beneficiaries of Judi's estate. He further alleges that Judi confirmed, and he believed, that she intended to use all cash payments from John for the benefit of their children. Neither of these statements, if true, directly or indirectly imply an agreement that he could unilaterally, and without her further approval or accounting, claim credit for advances, plus income tax calculated of 50%, against the $10-million Note due May 31, 2018.

[78] In Paragraph 16 of his affidavit, John states that since he signed the Note, he and Judi discussed John providing cash to Judi and to their children's families. He adds that he was open about frequently not having the liquidity to fund the children's demands. He states that Judi responded that she did not want to fight about money, and finally he adds that Judi said that John should take care of the children. None of these statements directly or indirectly connote an agreement to credit any advances to the children against his obligation to her on the debt evidenced by the Note. He further states that Judi agreed with him that he could pay money to the children using funds that would otherwise have first gone to Judi. Even this statement does not directly or indirectly imply her agreement that he credit those advances against the Note.

[79] In Paragraph 17, John states that, consistent with "my discussions and agreement with Judi described above", he made payments to Judi, their children and their families. None of the discussions and agreements with Judi described in paragraph 14 and 16 constitute an agreement that Judi would credit against the $10-million Note any amount that John advanced to their children. None of Judi's alleged statements imply or state that she gave John a blank cheque to credit any payments he advanced to the children from March 2018 to April 2021 against the $10 million Note.

[80] On cross examination, John acknowledged that he understood that the Settlement Agreement, Promissory Note, and LPHL Guarantee, were binding obligations, and he understood the importance of honouring these obligations. This is consistent with the fact that he is an experienced businessperson, used to making and fulfilling contracts and agreements.

[81] In respect of the Agreement, he recalled having already paid $25 million, but he did not know how it was paid. When directed to the share transaction of February 15, 2018, in the amount of $115 million (Paragraph 13 of the Agreement), he only "vaguely" recalled it. He recalled it in principle as being for $115 million. He agreed that, when he signed the Agreement on March 2, 2018, the $25 million had been paid, the $115 million share transaction had been completed, and his only outstanding obligation to Judi was the $10 million Note due on May 31, 2018. He acknowledged it was not paid on May 31, 2018.

[82] John agreed that at the time of Mickey's August 30, 2018, email to him agreeing to advance him a loan on the condition that John pay Judi, that the reference was to the only obligation he owed Judi at that time - the $10 million Promissory Note. This is inconsistent with his ***"position"*** on cross-examination by which he claims credit against the Note for all amounts paid to or on behalf of Judi and their children's families from March 2, 2018.

[83] He acknowledged that he never discussed with Mickey that the $10 million debt was subject to a declining balance (that is, credit for any payments made to Judi or their children from March 2, 2018). When asked if he had anything in writing to suggest the $10 million was subject to a declining balance, he referred to his 1:21PM February 19th, 2019 email, in response to Mickey's 12:23PM email asking for a breakdown of the money he owed Judi, in which he acknowledged: "What is owing is the 10 plus the 7.5 from GFL... 17.5 mln." He acknowledged that the reference to "10" was to the $10-million Note, but he added that the sentence below it in brackets was a reference to the Note and not to dividends and advances on dividends that he wrote about in his other emails with Mickey. As noted above, he clearly acknowledged in his emails (both before and after February 19, 2019) that that was not so. His explanation on cross-examination was inconsistent with all of the emails both before and after February 19, 2019.

[84] John acknowledged that his May 21, 2021 affidavit is the first itemization of the particulars of the expenditures made by him since March 2, 2018 to or for the benefit of their children. He relied on the finance staff at his companies, led by Kristen MacDiarmid, for the list of payments set out at Paragraph 21, Exhibit A, and the 28 pages of Exhibit B.

[85] All the evidence is clear and unambiguous. It does not raise a genuine issue of material fact as to whether at any time Judi agreed to credit against the $10 million

dollar debt due May 31, 2018, one-half (plus tax at 50%) of any advances John made to or for the benefit of their children between March 2, 2018 and April 15, 2021.

[86] Baldly stating that the only evidence before the court that predates the summary judgment motion is not what his present position is does not create a genuine issue of credibility, or raise a genuine issue of material fact for trial.

[87] The answer to the first Shannex question on this issue is no.

[88] The challenged pleading does not require determination of a question of law, either pure, or mixed with a question of law. John has no chance of success.

G. Defendant's limitation defence

[89] On an organizational call, counsel for the Defendants advised that she had provided the Plaintiff with a draft Amended Defence adding the limitation issue respecting the Note and Guarantee. She had been awaiting the Plaintiff's consent to file the Amended Defence. Plaintiff's counsel advised that he had not yet received instructions to consent. In their prehearing briefs both sides argued the limitation issue. The Court agreed to deal with the limitation issue, but only with respect to the Note, because the Plaintiff's summary judgment motion only sought judgment against John on the Note, and not judgment against LPHL on the Guarantee.

[90] In a nutshell the Defendants submit that a two-year limitation applied from the date that the Note was due, and this limitation period had expired before Action was commenced.

[91] On this motion John submits that:

> 1. the first stage of the summary judgment analysis requires the moving party to prove that there is no genuine issue of material fact for trial, either pure or mixed with the question of law (*Hatch v Atlantic Subsea Construction*, 2017 NSCA 61, paragraph 23);
>
> 2. the limitation issue is grounded on an interpretation of the Note (*Sattva Capital v Creston Moly*, 2014 SCC 53, paragraph 50), and therefore involves issues of mixed fact and law; and,
>
> 3. if the answer to the first *Shannex* question is no, the limitation issue raises an issue of law that requires a determination as to whether the proposed amended defence has a real chance of success.

[92] The *Bills of Exchange Act*, RSC, 1985, c. B-4, applies to the interpretation and enforcement of promissory notes in Nova Scotia. A note may be payable on demand or at a fixed future time. A note payable on a fixed future date creates an obligation to pay on the maturity date, which in this case was May 31, 2018. The limitation period for the Note began to run on May 31, 2018. Pursuant to the *Limitation of Actions Act*, 2014, c. 35, s. 1 ("*Limitation Act"*), the regular two-year limitation period applies. That limitation period expired on May 31, 2020. Judi sued on January 29, 2021.

[93] Judi acknowledges all the above, but she submits that John acknowledged the debt due on the Note on several occasions in emails in 2018 and 2019, and that these acknowledgements reset the limitation period in compliance with section 20 of the *Limitation Act*.

[94] Subsections 20(1), (8-11) read:

> Acknowledgments
>
> 20 (1) Where, before the expiry of the relevant limitation period established by this Act, a person acknowledges liability in respect of a claim for
>
> (a) payment of a liquidated sum;
>
> (b) the recovery of personal property;
>
> (c) the enforcement of a charge on personal property; or
>
> (d) relief from enforcement of a charge on personal property,
>
> the limitation period begins again at the time of the acknowledgment.
>
> …
>
> (8) Subject to subsections (9) and (10), this Section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even if the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum owing.
>
> (9) This Section does not apply unless the acknowledgment is made to
>
> (a) the claimant;
>
> (b) the claimant's agent; or
>
> (c) an official receiver of or trustee for the claimant, acting under the Bankruptcy and Insolvency Act (Canada), before the expiry of the limitation period applicable to the claim.

> (10) Subsections (1), (2), (3), (6) and (7) do not apply unless the acknowledgment is in writing and signed by the person making it or the person's agent.
>
> (11) In the case of a claim for payment of a liquidated sum, part payment of the sum by the defendant or the defendant's agent has the same effect as an acknowledgment referred to in subsection (10). 2014, c. 35, s. 20

[95] Judi relies on section 9 of the Nova Scotia *Electronic Commerce Act*, 2000, c. 26, s. 1 ("*Electronic Commerce Act*"), and the common law to argue that the *Limitation Act* requirement for acknowledgement in writing is satisfied by provision of the information in an electronic document. Counsel cites several decisions from courts in other provinces with similar legislation. These courts relied on their legislation and the common law. The cited caselaw included:

1. *IDH Diamonds NV v Embee Diamond Technologies*, 2017 SKQB 79, paragraphs 44-55
2. *Columbos v QuinnCorp, 2019 ABQB 853*, paragraphs 72-73
3. *Johal v Nordic*, 2017 BCSC 1129, paragraphs 37-44
4. *Lev v Serebrennikov*, 2016 ONSC 2093, paragraphs 17-25
5. *1475182 Ontario v Ghotbi*, 2021 ONSC 3477; and
6. *University Plumbing v Solstice Two*, 2019 ONSC 2242.

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

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

[98] There can be no doubt that the emails, individually and collectively, contain John's acknowledgement that he still owed Judi the $10 million payable per the Note. On February 19, 2019, four days after Judi's lawyer's demand letter to John's lawyer, and in reply to Mickey's request for a breakdown of the money John still owed Judi, John recited the Settlement Agreement and confirmed that the $10 million remained unpaid. On March 12, 2018, four days after Judi's lawyer's second detailed demand letter, John wrote two emails to Judi, Mickey and his children, that

unequivocally acknowledged the debt of $10 million and that he was not able at that time to pay it.

[99] As for the first *Shannex* question, there remains no genuine issue of material fact, either pure or mixed with a question of law, for trial. John acknowledged owing the $10 million Note in emails to Judi and her agent in February and March 2019. These restarted the two-year limitation period. The limitation period had not expired when the plaintiffs commenced their Action.

[100] As for the second and third *Shannex* questions, I have explained my finding above that, as a matter of mixed fact and law, John's electronic communications meet the legal requirements of paragraph 9 of the *Electronic Commerce Act*. They constitute an acknowledgment of the outstanding $10 million debt in writing in compliance with paragraph 20 of the *Limitation Act*.

[101] The limitation defence has no real chance of success.

[102] John baldly states for the purposes of this motion that Judi agreed to change the terms of the Note. Nothing in the evidence supports this claim.

[103] Judi claims that she, at John's request, agreed to extend the due date on the Note, as stated in Mickey's May 27, 2019 email exchange with John. As an alternative to the "acknowledgment" submission, Judi relies on section 21 of the *Limitation Act,* which section provides that a limitation period may be extended by agreement.

[104] There is not evidence to support John's submission. For the purposes of this motion, the evidence supporting Judi's submission of the alternative that she granted extensions to John to pay the debt is not so clear as to meet the summary judgment test.

H. Conclusion

[105] Judi is granted summary judgment in the amount of $10 million on the debt evidenced by the Note.

[106] If the parties are unable to agree on costs within 30 days, the Court will receive written submissions, first from the Applicant within 2 weeks and the Defendants two weeks later.

Warner, J.

Schedule A

IRRELEVANT/PRIVILEGED
PORTIONS DELETED

From: John Risley <
Date: Tuesday, March 12, 2019 at 2:40 PM
To: Mickey Macdonald <
Subject: RE: Mick Ryan

I wish it were as simple as me giving you a specific date. I could give you a late date....or rather a date by which I was sure we could complete, but that would be a couple of years out and I'm not sure that's what you want.

Let me try and explain.

We have investments in about 20 companies. The most important or valuable are 40% stakes in each of ClearBank and World Energy. We think ClearBank is now worth over a billion and World Energy should get there by the end of the year. In both these companies we have other shareholders who have a say in when to sell the business and none are anxious to do so given what is going on in those companies.

Clearbank is quickly growing and bringing on new Bank customers but has still not reached " scale ". It applied last year for a license to open a Bank in the EU and we expect to be granted that license this summer. That will add significantly to the value of the Bank. We have had talks with a couple of folks, including John Malone, with a focus on selling a portion of our stake for 100mln. This would obviously be an important liquidity event but the uncertainty around Brexit is delaying those discussions although Brexit really has no impact on us.

World Energy. The company has announced an expansion to it's refinery in Los Angeles of some 350mln and that process is underway. The company is also subject to various regulatory matters including the Renewable Fuels Act . A bill is now before Congress to renew the legislation and it has bi-partisan support but nothing is happening in Congress these days so it's difficult to know when that will pass. Resolution to this issue will allow us to complete the financing of the expansion and will have a major impact on value.

HPS, our long-term lender, an offshoot of JP Morgan has a security interest in all our assets. We owe them 150mln . The relationship is a very good one and they allow us to move our assets around, as long as they stay subject to their security and this is important as several of our businesses continue to need follow-on funding. They also allow us to take enough money out of CFFI to pay all our obligations, dividends to me so I can pay Mum, Sarah and Michael their salaries/allowances etc. Moving 10 mln out from under their security blanket would be a problem and not something they would agree to absent some event which they would like....for example doing a Malone deal in which they would probably agree to pay down their facility by 50mln and allow us to keep the other 50.

There is speculation I am using money to build a new yacht and my new house, money that could be directed to Mum. In fact that is not the case. I am financing the house with a mortgage and my deal with the shipyard allows me to pay in 3 years time, on delivery.

So I hope this description of circumstances is helpful to you in appreciating why it is not possible for me to say on June 30th I will pay x.

I am more than willing to transfer the Montana house or anything else which might give Mum better comfort that I intend to honour my obligations.

From: Mickey MacDonald < >
Sent: Tuesday, March 12, 2019 12:38 PM
To: John Risley < >; judimacdonald ; Michael Risley < >; Sarah Risley < >
Subject: Re: Mick Ryan

John
My understanding is that Mick Ryan just wants you to give him a payment date or schedule that Judi will be paid!?

Mickey MacDonald
President & CEO

MICCO companies

Phone
Mobile
Fax: (
E-mail

From: John Risley <
Date: Tuesday, March 12, 2019 at 11:10 AM
To: "judimacdonald
Risley <
Subject: Mick Ryan

I have addressed this email to all of as it concerns and/or impacts all of you. Mick Ryan has sent me a Santa Claus letter which essentially says that as of this Friday there will no more Christmases for me.

The effect of him taking this matter to court, will as he acknowledges make the whole affair public. And it is not just the details of our settlement which will be made public it will be, by the time we get into it, all the spending habits of us all (except Mickey).

We may all be prepared to live with that. But the more important issue is that this will put me in a very difficult position with respect to my various business affairs. My Banks will worry, everyone will worry and that will put a stop to my ability to manage the finances of how each of us currently lives.

I acknowledge I owe Mum money. No question. I am doing all I can to put myself in a position to respond to those obligations. Going to Court is not going to result in making me pay money I don't have. But it will stop me from realizing on the plans I have to pay. And it will make our whole family the subject of a media feeding frenzy.

So what is Mickey's role ? To date he has been enormously helpful. We would not have to been able to accomplish all we have, outside the public eye, without his leadership. Mick Ryan has never wanted to settle this, he has always been super aggressive and can't wait to go to Court. Presumably both for the fees (I have paid him almost 400k myself) and the notoriety of handling one of what we be the tastiest of Canadian divorce cases. But Mickey (Barry) has asked to remove himself from the process and we need to try and respect that wish. But someone needs to step into his slot and that someone has to have Mum and the family's best interests at heart, and that should be you Michael and Sarah because all of this directly implicates you both and your children.

I have offered to put the Montana house in Mum's name , as security (we have over 15mln in equity in the house) and buy it back from her when I can afford it. There may be other things I can do to give her security . This was just an idea that would be very easy to implement.

We all need to understand something, and please don't take this as a threat because it's not, once the court process starts, there is no turning back or unwinding the clock. Mick Ryan files his case and I have to defend and from the moment he files everything is public.

Schedule B

Exhibit No.	8	File No.	Hfx. No. 503709
SUPREME COURT OF NOVA SCOTIA			
Judith Iris MacDonald and Judi's Holdings Limited v. John Carter Risley and Lobster Point Holdings Limited			
Date: June 10/21		Clerk:	

To: Elizabeth McEwen[EMcEwen@cffi.com]
From: John Risley
Sent: Tue 9/18/2018 1:17:59 PM
Subject: RE: CSL dividends

She is entitled only to dividends for the period beginning Feb 15/18. The dividend paid in April was for the period ended Dec 31/17. The dividend paid on June 1st was for the period ended March 31st/18.....so her entitlement would have been for half that period. That is 698,060.5 times 50% times 79.59% .

From: Elizabeth McEwen
Sent: Tuesday, September 18, 2018 10:08 AM
To: John Risley
Subject: RE: CSL dividends

Morning –

Based on the agreement, she is entitled to ~79.6% of the dividends received since Feb 15, 2018. We have received $2.09M in dividends since Feb 15, 2018 and she is entitled to ~79.6% of those dividends, or $1.7M.

CSI Dividends:

698,060.50	2-Apr-18
698,060.50	1-Jun-18
698,060.50	5-Sep-18
2,094,181.50	Total dividends up to September 18, 2018
11,111,111	# of tracking shares
13,961,210	Total number of CSI shares owned
79.59%	Tracking shares as % of total
$ 1,666,666.65	Portion of dividends owing to Judi

From: John Risley
Sent: Monday, September 17, 2018 11:49 AM
To: Elizabeth McEwen <EMcEwen@cffi.com>
Cc: Stan Spavold <SSpavold@cffi.com>
Subject: CSL dividends

Can you please determine the dividend allocation, of the last proceeds received, that is owing to Judi. The date at which her accrual rights started was the date of our divorce (March/18 ?), multiplied by the number of shares synthetically allocated to her.

To: Elizabeth McEwen[EMcEwen@cffi.com]
From: John Risley
Sent: Tue 9/3/2019 3:27:26 PM
Subject: RE: Clearwater Dividends

Thks, I need to reserve 200k f the dividend for Judi.

From: Elizabeth McEwen <EMcEwen@cffi.com>
Sent: Tuesday, September 03, 2019 12:27 PM
To: John Risley <JRisley@cffi.com>
Subject: FW: Clearwater Dividends

Clearwater dividends are received the first week of:

- April
- June
- September
- December

Kristen MacDiarmid | Director of Finance
CFFI Ventures Inc.
P 902.457.2365
E-mail: KMacDiarmid@cffi.com

To: John Risley[JRisley@cffi.com]
From: Mickey MacDonald
Sent: Fri 9/6/2019 8:49:17 PM
Subject: Re: Dividend

I'll let her know.

> On Sep 6, 2019, at 4:47 PM, John Risley <JRisley@cffi.com> wrote:
>
> I asked Elizabeth to transfer to Judi's account her dividend entitlement once the funds were received. Will provide you with a reconciliation once I'm back in the office.
>
> Thanks.
>
> Sent from John's iPad

IRRELEVANT/PRIVILEGED PORTIONS DELETED

From: Stan Spavold <
Date: Thursday, February 23, 2017 at 1:18 PM
To: Mickey MacDonald <
Subject: RE: Judi Newco

I will check availability

From: Mickey MacDonald
Sent: February 23, 2017 10:11 AM
To: Stan Spavold <
Cc: John Risley <
Subject: Re: Judi Newco

Stan
I just talked to Judi and she would prefer that it be simply named "Judi's Holdings Limited"

Mickey MacDonald
President & CEO

Phone
Mobil
Fax: (
E-mai

From: Stan Spavold <
Date: Thursday, February 23, 2017 at 12:26 PM
To: Mickey MacDonald
Cc: John Risley <
Subject: FW: Judi Newco

Mickey

As you will recall part of the reorganization of the trust requires Judi's Trust to establish a holding company.