SUPREME COURT OF NOVA SCOTIA

Citation: *Hardit Corporation v. Holloway Investments Inc.*, 2022 NSSC 328

Date: 20221110
Docket: *Hfx*, No. 486677
Registry: Halifax

Between:

Hardit Corporation

Plaintiff

v.

Holloway Investments Inc.

Defendants

and

Pacrim Hospitality Services Inc.

Summary Judgment Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	May 11, 2022, in Halifax, Nova Scotia
Counsel:	Gavin Giles, K.C., and Jeremy Rhyant, for the Applicant Charles Thompson and Sydney Hall, for the Respondent

By the Court:

[1] This is a motion by Holloway Investments Inc. ("Holloway") and Pacrim Hospitality Services Inc. ("Pacrim"), the defendants, as against Hardit Corporation ("Hardit") seeking summary judgment on evidence. The underlying proceeding is a loan recovery action advanced by Hardit against the two corporate defendants, which are Nova Scotia companies in the business of hotel development and management. In 2005 and 2006, Holloway and Pacrim became indebted to the plaintiff, which is a commercial real estate lender. The loans between Hardit and the defendants went into default in or around 2014 and 2015. The defendants seek summary judgment on the evidence pursuant to Civil Procedure Rule 13.04. They say the plaintiff's claim is statute-barred by the *Limitations of Actions Act*, SNS 2014 c. 35, and further argue that the plaintiff has no standing to bring or maintain an action in Nova Scotia by operation of s. 17 of the *Corporations Registration Act*, RSNS 1989, c. 101.

[2] There was an earlier motion, by individual defendants, seeking summary judgment on the pleadings, pursuant to Civil Procedure Rule 13.03. In that case, *Holloway Investments Inc. v. Hardit Corp.*, 2020 NSSC 132, Hunt J. stated:

> [69] The Applicant advanced an alternative argument that the claims were also statute barred as of September 1, 2017. They maintain the limitation period ought to be considered triggered as of September 1, 2015, based in a discoverability analysis. It is not plain and obvious to me that this issue is resolvable solely on the pleadings. Discoverability inferences, as asserted in this case, are not particularly well suited to treatment in summary judgement on pleading. I would not have granted Rule 13.03 summary judgment solely on this point.

[3] The defendants agree that the loans were not fully repaid. They argue, however, that Hardit is barred from pursuing the outstanding amounts because the claim was commenced outside the limitation period, and that s. 17(1) of the *Corporation Registrations Act* prevents Hardit, a non-Nova Scotia registered company, from maintaining an action.

Evidence

[4] The following is a review of the evidence proffered on this motion.

[5] The defendants filed an affidavit of W. Glenn Squires ("Squires"), sworn on March 1, 2021. Squires is a Secretary and Director of Holloway and President, CEO, and Director of Pacrim. There was no cross-examination requested of Squires and his evidence was unchallenged on this motion. Mr. Squires's evidence was relevant to the argument that without a signed, written acknowledgment of a debt the limitation period descended and the claim is therefore barred. The following portions of his affidavit are relevant to this motion:

> 4. I confirm that Holloway has made no payments to the plaintiff since July, 2015, as alleged in the Second Amended Statement of Claim herein.
>
> 5. I also confirm that Pacrim has made no payments to the plaintiff since December, 2014, as alleged in the Second Amended Statement of Claim herein.
>
> 6. At no time after July, 2015 did I provide a written and signed acknowledgement of Holloway's loan obligations to the plaintiff.
>
> 7. I am not aware of anyone with authority to do so providing, on behalf of Holloway, a written and signed acknowledgement of Holloway's loan obligations to the plaintiff, and I have searched, but found no record of any such acknowledgement in Holloway's files.
>
> 8. At no time after December, 2014 did I provide a written and signed acknowledgement of Pacrim's loan obligations to the plaintiff.
>
> 9. I am not aware of anyone with authority to do so providing, on behalf of Pacrim, a written and signed acknowledgement of Pacrim's loan obligations to the plaintiff, and I have searched but found no record of any such acknowledgement in Pacrim's files.

[6] Mr. Squires filed a supplemental affidavit on November 17, 2021. This affidavit evidences the fact that Holloway was a Nova Scotia company registered at the Registry of Joint Stock Companies, and that Pacrim is a federal corporation with its head office in Bedford. The affidavit further confirms that Hardit lent Pacrim $1,738,500.00 in 2005 (the "Pacrim loan"). The loan was made for a term of three years with an interest rate of 10% per annum, payable monthly. The affidavit further indicates that Hardit lent Holloway $1,000,000.00 in 2006. This loan was for a term of three years with an interest rate of 12% per annum calculated and payable monthly.

[7] The Court has before it a copy of the Holloway loan agreement, attached as exhibit C to the Squires affidavit of November 17, 2021. However, Mr. Squires indicates he was not able to locate the Pacrim loan agreement.

[8] The defendants also filed an affidavit of James Musgrave, K.C., sworn on October 1, 2021. According to Mr. Musgrave, a search of the Nova Scotia Registry of Joint Stocks showed no results for a corporation by the name of Hardit Corporation.

[9] The plaintiff filed an affidavit sworn on November 26, 2021 by Judy Goldring ("Goldring"), the owner, manager and directing mind of Hardit. Goldring confirms that Hardit is incorporated under the laws of Ontario, with its head office in Toronto, and it carries on business as a real estate management and lending company. Goldring did business with Squires and Edward Good ("Good"), the previous individual defendants in this matter. Ms. Goldring relays the history of the interactions between Squires and Good on behalf of Holloway and Pacrim.

[10] The Goldring affidavit confirms that Hardit lent Pacrim $1,738,500 for a term of three years, with interest being compounded monthly at a rate of 10%. This loan was made for the purposes of financing Pacrim's acquisitions of interest in hotel assets and management contracts throughout Canada. Goldring also confirms that Squires and Good approached Hardit again in November 2006 to secure a loan in the amount of $1,000,000.00 for Holloway. An agreement was entered into for a term of three years with interest to be calculated and paid monthly at a rate of 12% annually. The loan was made on the basis that Holloway was acquiring 300,000 Class A units of Winport Developments Limited partnership.

[11] According to the Goldring affidavit, representations were made by Squires and Good on behalf of Pacrim and Holloway between 2005 and 2006 that the companies were in a good credit position with positive cash flow. Between 2005 and 2006, the following specific representations were made either orally or in writing by Squires and Good as follows:

> (a) Pacrim possessed hotel management contracts and hotel partnerships valued at between $5,180,000 and $5,670,000 and that as security in favour of Hardit for its loans to Pacrim, the value of these hotel management contracts and hotel partnerships would not be less than $4 Million until such time as the loans had been repaid;
>
> (b) Pacrim would maintain the value of its hotel management contracts as security for Hardit's loans;
>
> (c) Pacrim would provide financial reporting to Hardit on an on-going basis to permit Hardit the opportunity to gauge the on-going value of its loan security;
>
> (d) Mr. Squires and Mr. Good would ensure that Pacrim's loan payment to Hardit remained current;

(e) Hardit's loan to Holloway was for the limited purpose of acquiring 300,000 Class "A" units of Winport Developments Limited Partnership;

(f) Winport Developments Limited Partnership was a profitable business operation which would generate cash flow for Holloway out of which Hardit's loan to Holloway would be re-paid;

(g) Holloway owned 47.5% of Pacrim and that Pacrim, on the basis noted above, contributed cash flow to Holloway out of which Hardit's loan to Holloway would be re-paid; and

(h) Holloway would pledge all of its assets to Hardit as collateral for Hardit's loan to Holloway and that Holloway would not impair any such collateral until all of its loan obligations to Hardit had been paid.

[12] No denial of these representations was made at the motion. No challenge to the Goldring affidavit was advanced.

[13] Over time, Hardit concluded that the representations were false. According to Goldring:

18. Among these falsehoods, Mr. Squires and Mr. Good have or had:

(a) Permitted the value of Pacrim's hotel management contracts and hotel partnerships to fall to less than $4 Million without having repaid its loans from Hardit;

(b) Failed to use their best efforts to preserve and maintain the value of Pacrim's hotel management contracts as security for Hardit's loans;

(c) Failed to ensure that Pacrim provided financial reporting to Hardit on an on-going basis to permit Hardit the opportunity to gauge the on-going value security for its loans to Pacrim;

(d) Failed to ensure that Pacrim's loan payment to Hardit remained current;

(e) Failed to confine Hardit's loan to Holloway to the limited purpose of acquiring 300,000 Class "A" units of Winport Developments Limited Partnership and instead permitted Holloway to use the proceeds of Hardit's loan to Holloway for Holloway's miscellaneous business purposes;

(f) Misrepresented Winport Developments Limited Partnership as a profitable business operation which would generate cash flow for Holloway out of which Hardit's loan to Holloway would be re-paid;

(g) Misrepresented Pacrim's contribution of cash flow to Holloway out of which Hardit's loan to Holloway would be re-paid;

> (h) Permitted Holloway's assets pledged to Hardit as collateral for Hardit's loan to Holloway to be impaired such that Hardit could have no real prospect of any realization on any seizure and sale of such assets.

[14] In or about December 2014, Ms. Golding was informed by Hardit staff that Pacrim was in arrears. In or about July 2015, she was informed that Holloway was in arrears. Between 2016 and 2019, Goldring met with Squires in person in Toronto or on the phone on at least a quarterly basis. During these meetings, Squires gave continued assurances that the debts of Pacrim and Holloway would eventually be repaid to Hardit in full and that enforcement measures would not be required.

[15] On or about April 25, 2016, Squires advised that the shareholder structure for Pacrim was now that he and Good each owned 23% of the shares and he was working through liquidating and monetizing assets to raise money to pay off Pacrim's loan to Hardit. In addition, Squires advised that he was pursuing various business opportunities to generate repayment of the outstanding amounts. Squires proposed setting a time schedule in the next 60 days to increase liquidity.

[16] On May 16, 2016, Goldring met Squires at the Hardit office, where he informed her that he was in Toronto for a business meeting concerning an immigration investment program. If this program succeeded, Good would further invest in Pacrim. Squires advised that if the immigration investment program failed, Good would sign shares of Pacrim and Holloway over to him and he would take on the remaining liability owed to Hardit. Squires advised that he or Pacrim held two properties that would be sold in July 2016, and the proceeds would be directed to Hardit as a sign of good faith. In a telephone call on September 28, 2016, Squires advised Goldring that Pacrim's cash flow position was poor but improving. There were further discussions held about the immigration investment program, and Good's agreement to repay Hardit in full if the program advanced. Goldring describes her response as follows:

> 40. In response, I voiced a disapproval, and I told Mr. Squires that I was disappointed that he always seemed to have a reason, or an angle, to try to explain why it was that Pacrim and Holloway could not repay their obligations to Hardit.
>
> 41. His response was that he would continue to monitor the situation and that he would follow up with me.
>
> 42. He refused my request to provide a timeframe for repayment.

[17] On May 4, 2017, Squires advised Rosa Dias, a bookkeeping administrative assistant at Hardit, that he would be able to pay off the obligations to Hardit in four

or five tranches over the next 12 to 18 months. On June 19, 2017, Squires spoke again to Goldring, promising business that would ostensibly increase Pacrim's cash flow sufficiently to pay off the Hardit debt in two to three years. Squires further indicated that Good had agreed to the retirement of the debt obligations as well.

[18] In a phone call on February 12, 2018, Squires indicated that Pacrim and Holloway's cash flow positions had improved, and that a portion of the money would be paid to Hardit by the end of 2019. On January 28, 2019, Squires informed Goldring that Pacrim and Holloway had new business opportunities that would enable them to retire the Hardit debt. In response, Goldring said the following:

> 55. My general response to Mr. Squires in the course of this telephone call was that Hardit was tired of the to that time never-ending representations of Mr. Squires' purported solutions and that it would be commencing legal proceedings.
>
> 56. In or about February, 2019, a meeting had been scheduled between myself and Mr. Squires.
>
> 57. Mr. Squires cancelled the meeting.

[19] Following the cancelled meeting of February 2019, Squires informed Goldring that Pacrim and Holloway had ceased to carry on business and that the indebtedness would not be repaid. In her affidavit, Goldring stated:

> 59. It was only at this time that I discovered that Hardit would not be repaid and that Pacrim and Holloway would be in permanent default on their loans.
>
> 60. As a result, on March 1, 2019, I sent letters to Mr. Squires and Mr. Good.
>
> 61. These letters served as formal notice that Pacrim and Holloway had defaulted in the repayment of the outstanding amounts owed to Hardit and as such were in breach of the terms of the loan agreements.
>
> 62. These letters emphasized that I had continued to dialogue in good faith, but that recent events (namely Pacrim's public bid on the historic hotel, Digby Pines) evidenced that there were assets behind Holloway, and accordingly, that my, and Hardit's, patience had run out.
>
> 63. The letters further advised that Hardit had retained legal counsel and was prepared to commence legal proceedings.

[20] Goldring spoke with Good on March 7, 2019. He informed her that he had left Holloway in 2008 and that the statements attributed to him by Squires had not in fact been made by him. Goldring stated in her affidavit:

> 69. As a result of these consistently-repeated representations by Mr. Squires from 2014 to 2019, I exercised forbearance in taking enforcement measures or bringing proceedings against the Defendants in these proceedings.
>
> 70. It was not until on or about February 19, 2019 that I discovered the loss to Hardit such that it was sufficiently serious to warrant commencing legal proceedings.

[21] Letters were sent to Pacrim, to the attention of Squires, on March 1, 2019, and to Holloway, to the attention of Squires and Good, advising of the defaults and the outstanding interest pursuant to the secured loan facility agreement dated May 18, 2005, and November 20, 2006, respectively.

[22] Hardit filed a Notice of Action on March 28, 2019, against Holloway, Pacrim, Squires and Good.

[23] As of October 31, 2021, Pacrim owed Hardit $200,014.00, and Holloway owed $1,775,301.37.

Notice of Action and Statement of Claim

[24] Hardit filed a second amended Notice of Action on November 19, 2020. The amended Statement of Claim states that in May of 2005, as owners, managers and directing minds, Squires and Good sought and obtained loans from Hardit for Pacrim, and in 2006 for Holloway. The claim states that both individual defendants made representations on behalf of Pacrim and Holloway in 2005 and 2006 as to the creditworthiness of the companies, and that at some point it was discovered that these representations were inaccurate.

[25] Pacrim serviced its loan obligations, paying interest only until December 2014, as did Holloway until July 2015. The plaintiff acknowledged that there were long periods in which the loans were in arrears, but stated that Hardit had open and frequent communications, predominantly with Squires, during which representations were made on behalf of Holloway and Pacrim that, in essence, the companies were experiencing business challenges but that the loans were secure and would be repaid. Furthermore, the amended Statement of Claim outlines as follows:

> 15. Additionally, and without limitation, between or about 2014 and 2019, when Pacrim's and Holloway's indebtedness to the Plaintiff were seriously in arrears, Squires would meet with the Plaintiff, either in person or by telephone, no less frequently than quarterly, to give his continued assurances to the Plaintiff that all of Pacrim's and Holloway's indebtedness to the Plaintiff would eventually be

> paid in full and that enforcement measures or proceedings by the Plaintiff against Pacrim and Holloway would not be required. Many of these meetings and telephone discussions were initiated by Squires.

[26] These representations ended in February 2019, as stated in the second amended Notice of Action at paragraph 19:

> Notwithstanding any and all of the foregoing on or about February 19th, 2019, Squires advised the Plaintiff that Pacrim and Holloway had effectively ceased carrying on business and that none of their remaining indebtedness as set out herein would be paid.

[27] The following claim is advanced by the plaintiff:

> 20. The Plaintiff repeats the forgoing claims:
>
> (a) From the Pacrim as follows:
>
> (i) The sum of $189.862.11;
>
> (ii) Interest on that sum at the rate of 15% annually from March 1st, 2019 until the date of judgment;
>
> (iii) Costs;
>
> (iv) Such other relief as This Honourable Court may deem fit.
>
> (b) From Holloway as follows:
>
> (i) The sum of $1,620,383.56;
>
> (ii) Interest on that sum at the rate of 12% annually from March 1st, 2019 until the date of judgment;
>
> (iii) Costs;
>
> (iv) Such other relief as This Honourable Court may deem fit.

[28] Hardit claims that in 2005 and 2006, Squires and Good made representations to influence and induce the provision of the loans. This claim is found in paragraph 8 of the Notice of Action:

> In both 2005 and 2006, Squires and Good, as owners, managers and directing minds of Pacrim and Holloway, made numerous representations to the Plaintiff both orally and in writing with respect to the creditworthiness of both Pacrim and Holloway and the abilities and intentions of both to repay the loans referred to herein. The sole purpose of these representations by Squires and Good to the Plaintiff was to influence and induce the Plaintiff to provide the loans to Pacrim and Holloway as referred to herein.

[29] Hardit claims that Squires and Good, on behalf of the corporate defendants made misrepresentations about profitable business operations and cash flow.

[30] The defences advanced by Pacrim and Holloway provide the following in separately filed defences. The defence advanced by Pacrim states:

> **Loan from Hardit Corporation**
>
> …
>
> 5. The last payment made on account of the Pacrim Loan was in December of 2014 and at no time thereafter has Pacrim admitted to the plaintiff, in writing, that it is indebted to the plaintiff on account of the Pacrim Loan or otherwise and, if any such admission was made, which is not admitted, it was not made before September 1, 2017.
>
> **Statute Barred**
>
> 6. Any claim the plaintiff had against Pacrim was known to the Plaintiff on September 1, 2015, or, in any case, more than two years before it commenced this action and, therefore, the plaintiff was barred from commencing this action against Pacrim pursuant to the *Limitation of Actions Act* (Nova Scotia).
>
> **No Standing to Bring or Maintain Action**
>
> 7. The plaintiff is an extra provincial corporation that has not been issued a certificate of registration pursuant to the *Corporations Registration Act* (Nova Scotia) that is in force, and therefore the plaintiff was not capable of bringing these proceedings and is not capable of continuing to maintain them.

[31] The defence advanced by Holloway states:

> **Loan from Hardit Corporation**
>
> …
>
> 5. The last payment made on account of the Holloway Loan was in July of 2015 and at no time thereafter has Holloway admitted to the plaintiff, in writing, that it is indebted to the plaintiff on account of the Holloway Loan or otherwise and, if any such admission was made, which is not admitted, it was not made before September 1, 2017.
>
> **Statute Barred**
>
> 6. Any claim the plaintiff had against Holloway was know to the Plaintiff on September 1, 2015, or, in any case, more than two years before it commenced this action and, therefore, the plaintiff was barred from commencing this action against Holloway pursuant to the *Limitation of Actions Act* (Nova Scotia).

No Standing to Bring or Maintain Action

7. The plaintiff is an extra provincial that has not been issued a certificate of registration pursuant to the *Corporations Registrations Act* (Nova Scotia) that is in force and, therefore the plaintiff was not capable of bringing these proceedings and it is not capable of continuing to maintain them.

Law and Analysis

[32] Motions for summary judgment on the evidence are governed by Civil Procedure Rule 13.04, which reads 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.

[33] The analysis on a Rule 13.04 motion is set out in *Shannex v. Dora Construction Ltd*., 2016 NSCA 89, where the court substituted five sequential questions for the analysis previously articulated in *Burton Canada Company v. Coady*, 2013 NSCA 95:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question:** Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton*'s first step.
>
> A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
>
> 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 and the judge answers the first question Yes. [Rules 13.04(4) and (5)]
>
> *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.
>
> • **Second Question:** If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
>
> If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

• **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

• **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[35] "Discretion": The judge's "discretion" under the amended Rule 13.04(6)(a) governs the option whether or not to determine the full merits – i.e. the Fourth Question. I disagree with Mr. Upham's factum that Rule 13.04(6)(a) gives the judge "unfettered" discretion to just dismiss Shannex's summary judgment motion. The Civil Procedure Rules do not

> authorize judges to allow or dismiss summary judgment motions on an unprincipled or arbitrary basis.
>
> [36] "Best foot forward": Under the amended Rule, as with the former Rule, 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", issue of law, and "real chance of success": Rules 13.04(4) and (5); Burton, para. 87.
>
> [37] Conversion to an application: Lastly, the judge and counsel "must" bear in mind Rule 13.08(1)(b):
>
> > 13.08(1) A judge who dismisses a motion for summary judgment on the 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.
> >
> > [Emphasis added]

[34] In *SystemCare Cleaning & Restoration Ltd. v. Kaehler*, 2019 NSCA 29, Bourgeois J.A. summarized the five sequential questions from *Shannex*:

> 34. In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to Rule 13.04 (paras. [34] through [42]):
>
> > 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
> >
> > 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
> >
> > 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
> >
> > 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
> >
> > 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[35] The first question is whether there is a genuine issue of material fact, either pure or mixed with a question of law.

Genuine Issue of Material Fact and the *Limitation of Actions Act*

[36] The question of what is a dispute of material fact, or a genuine issue of material fact, was dealt with in *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, as follows:

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

[37] Justice Saunders, speaking at para. 42 in *Burton*, described material facts as "important factual matters that anchor the cause of action or defence".

[38] In *Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52, the court considered a motion for summary judgment in the context of a limitation period defence. Roscoe J.A. described the proper approach as follows:

> [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?
>
> …
>
> [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 … Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.
>
> [Emphasis added]

[39] The first question, then, in determining whether there is no genuine issue of material fact, is whether the defendants have proved the facts supporting the expiry of the time period. If so, then the plaintiff must demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired because of discoverability.

[40] The relevant provisions of the *Limitation of Actions Act* include the following:

> 8 (1) Unless otherwise provided in the Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered;
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.
>
> 9(1) A claimant has the burden of providing that a claim was brought within the limitation period established by clause 8(1)(a).
>
> (2) A defendant has the burden of proving that a claim was not brought within the limitation period established by clause 8(1)(b).
>
> …

[41] Section 2(1)(a) defines a claim as "a claim to remedy the injury, loss or damage that occurred as a result of an act or omission." Section 2(2)(a) of the *Act* provides that a claim is brought "when a proceeding in respect of the claim is commenced."

[42] Section 20 deals with the effect of acknowledgements of liability on the limitation period:

> 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;

…

…

(9) This Section does not apply unless the acknowledgement 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 acknowledgement 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 acknowledgement referred to in subsection (10).

[43] Section 23, the transition provision, applies to claims based on acts or omissions that took place and were discovered before the "effective date" of September 1, 2015:

23 (1) In this Section,

(a) "effective date" means the day on which this Act comes into force;

(b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.

(2) Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.

(3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of

(a) two years from the effective date; and

(b) the day on which the former limitation period expired or would have expired.

[44] As these provisions demonstrate, the point at which the claimant discovered or ought to have discovered the claim is critical to determining whether the limitation period has expired. As a result, the moving party will not succeed unless the court is satisfied that there is no genuine issue of material fact, either on its own or mixed

with a question of law, as to when the claim was discovered or ought to have been discovered.

[45] The issue of discoverability is a question of mixed fact and law (*Salewski v. Lalonde*, 2017 ONCA 515, at para 45; *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 38; *York University v. Markicevic*, 2017 ONCA 651, at para 39; *The Graham-Aecon Joint Venture v. Malcolm Drilling Company Inc.*, 2022 BCCA 319, at para 18; *Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135 at para. 72; *Lonsdale v. Evans*, 2020 SKCA 30 at para 51).

[46] In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, the court said the following about discoverability:

> [34] The plain words of this provision are unambiguous. Section 5(1)(a) provides that no claim shall be brought after two years from the day on which the claim is "discovered". Section 5(2) further specifies that a claim is discovered on the day that a claimant knew or ought reasonably to have known the facts that are material, namely the occurrence of an injury, loss or damage that was caused or contributed to by an act or omission of the defendant. As evidenced by the words of the provision, there is no clear legislative language ousting or limiting the common law rule; in fact, quite the opposite. The event triggering the limitation period in s. 5(1)(a) is linked to the state of the plaintiff's knowledge in the same manner as the common law rule.
>
> [35] Moreover, there is nothing in the legislative scheme or the object of the *LAA* that alters the governing principles set out in the common law rule. The New Brunswick legislature enacted the general limitation period scheme in s. 5 to simplify the law of limitation periods. In doing so, it expressly modeled s. 5 on similar limitation provisions found in Ontario, Saskatchewan and Alberta …, all of which have been found to codify the common law rule of discoverability …The legislature's express intention to replicate provisions that codify the common law rule is compelling evidence that New Brunswick intended to follow suit.
>
> …
>
> [42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.
>
> [43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are

listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.

[44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise …

[45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). Although the question in both circumstances is whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds. As the British Columbia Court of Appeal observed in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217, at para. 77:

> As noted in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, some cases equate *prima facie* proof to a situation where the evidence gives rise to a permissible fact inference; others equate *prima facie* proof to a case where the evidence gives rise to a compelled fact determination, absent evidence to the contrary. [Omitted.]

Since the term *prima facie* can carry different meanings, using plausible inference in the present context ensures consistency. A plausible inference is one which gives rise to a "permissible fact inference".

[46] The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability … Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run …

[Emphasis added]

[47] The issue of diligence in the context of discoverability was addressed by Justice Hunt in *Morrisey v. Bulmer,* 2020 NSSC 294, as follows:

> [51] In *Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 146, the Court described the discoverability rule as follows (pp. 151):
>
> > ... 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.
>
> [52] Bourgeois, J. (as she then was) referenced the discussion in Rafuse and then went on to address discoverability in these terms in Sweeney-Cunningham, supra.:
>
> > 49 The issue before me is, when based upon the evidence presented, did the Plaintiffs know, or could have known by virtue of the exercise of reasonable diligence the material facts giving rise to a claim against AVG? In my view, this question must be considered objectively, as opposed to considering the subjective views of the Plaintiffs.
>
> [53] Accordingly, the question to be answered is 'When, with the exercise of reasonable diligence, was the cause of action against the insurer discoverable?'

[48] Discoverability in the context of a summary judgment motion was further discussed as follows in *Milbury, supra*:

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

[49] Holloway and Pacrim state that any claim against them by Hardit was discoverable before September 1, 2015, because the final payments were made in December 2014 and July 2015. In other words, the defendants equate discovery of the claim with Hardit's knowledge that Holloway and Pacrim were no longer making payments on the loans. The defendants submit that since the claim was discoverable prior to the effective date of September 1, 2015, the transition provision applies, and the limitation period was extended to August 31, 2017. The claim therefore became statute barred on September 1, 2017.

[50] Holloway and Pacrim contend that there is no reasonable argument that the plaintiff could not and did not discover its claim before September 1, 2015. They state in their brief:

> 53. The plaintiff knew the Pacrim Loan went into permanent default in 2008 and the Holloway Loan went into permanent default in 2009.
>
> 54. According to paragraph 12 of the second amended statement if [*sic*] claim, Pacrim "serviced its loan obligations to the Plaintiff consistently, frequently paying interest only, until December 24, 2014." While that statement is inconsistent with the allegation that its loan was for a term of only three years, it demonstrates the plaintiff knew or ought to have known by September 1, 2015 that it had not received a payment on the Pacrim Loan for approximately 9 months.
>
> 55. According to paragraph 13 of the second amended statement of claim, Holloway serviced its loan obligations to the plaintiff "relatively consistently, frequently paying interest only, until July of 2015." Similarly, by September 1, 2015, the plaintiff knew or ought to have known that no payment was made on the Holloway Loan in August of 2015.

[51] The defendants' evidence provides facts supporting the expiry of the limitation period. They have established that the loans were entered into in 2005 and 2006, and that the last payments were made in December 2014 and July 2015. They have also established that since that time, they have not provided a written and signed acknowledgement of Holloway's loan obligations to the plaintiff, which would have extended the limitation period.

[52] Before the court can conclude that the defendants have established that there are no genuine issues of material fact, however, it must consider the plaintiff's

evidence on discoverability. Has Hardit demonstrated a real chance of success by presenting evidence that the limitation period has not expired?

[53] Hardit argues that it was not when Holloway and Pacrim went into arrears, but when it was clear that those companies had no intention to rectify the default, that is relevant to discoverability. The default became permanent at that point, not simply at the point of non-payment. Hardit argues that there is "evidence that the Moving Parties consistently beguiled the Respondent into believing that a loan payoff would be forthcoming when such an event appears to have never been the Moving Parties' actual intention". The representations made on behalf of Holloway and Pacrim were that the arrears were temporary and that there was no abandonment of their repayment obligations. Hardit argues that the following evidence demonstrates that it discovered the claim for the debt when it learned of the defendants' lack of ability and intention to pay in February 2019:

- On or about April 25th, 2016, Ms. Judy Goldring, owner and director of the Respondent, spoke on the phone to Mr. Squires. Mr. Squires assured Ms. Goldring that he was working through liquidating and monetizing assets to raise money to pay off Pacrim's loan to the Respondent. During the same phone call, Mr. Squires informed Ms. Goldring of various business opportunities that would generate repayment of the outstanding amounts. He provided additional assurances to Ms. Goldring by proposing to send a schedule mapping out plans for increased liquidity.
- On or about May 16th, 2016, Ms. Goldring met with Mr. Squires at the Respondent's office in Toronto. Mr. Squires informed Ms. Goldring that he was in Toronto for a business meeting concerning an immigration/immigrant investment program. Mr. Squires indicated to Ms. Goldring that if this program became a success, Mr. Good would not tender his shares because he would invest further in Pacrim. Mr. Squires informed Ms. Goldring that this would lead to revenue opportunities – ostensibly to cover debt obligations to the Respondent. Mr. Squires informed Ms. Goldring that if the immigration investment program failed, he would ask Mr. Good to sign shares of Pacrim and Holloway to him and he would agree to take care of the remaining liability to the Respondent.
- In the same May 16th, 2016 meeting, Mr. Squires informed Ms. Goldring that he was in possession of two of Pacrim's properties that would be sold in July of 2016; at which time, he would commit to direct some re-payment funds to the Respondent as a sign of good faith.

- On or about September 28th, 2016, Ms. Goldring spoke on the phone to Mr. Squires. He informed Ms. Goldring that Pacrim's cash flow position was poor but improving. Mr. Squires informed Ms. Goldring that he had met with Mr. Good, who was working to put the new immigration/immigrant investment program in place. Mr. Squires reassured Ms. Goldring that Mr. Good had agreed that, if the immigration investment program advanced, Mr. Good was prepared to repay the Respondent in full.
- On or about May 4th, 2017, Ms. Goldring came to learn that Mr. Good had a venture fund in the United States and that he hoped he would get first draw against the fund. Ms. Goldring learned that it would take four or five tranches to pay off the obligations owed by Pacrim and Holloway to the Respondent. Ms. Goldring was led to believe – by Mr. Squires – that Messrs. Squires and Good could discharge the debt obligation in the next 12-18 months.
- On or about June 19th, 2017, Ms. Goldring spoke on the phone to Mr. Squires. He informed Ms. Goldring of new approved business projects that increased the cash flow position of Pacrim sufficient to retire the Hardit debt in two to three years. Mr. Squires informed Ms. Goldring that he had an agreement with Mr. Good and that Mr. Good agreed with the debt obligations.
- On or about February 12, 2018, Ms. Goldring spoke on the phone to Mr. Squires. He informed her that as Pacrim and Holloway's cash flow position improved, he would pay a portion of the distributions to the Respondent. However, he informed Ms. Goldring that this would likely not transpire until the end of 2019.
- On or about June 14th, 2018, Ms. Goldring spoke on the phone to Mr. Squires. He informed her of new business opportunities that generated income. He informed her that he had been in communication with Mr. Good and that he was prepared to resolve the outstanding debt himself as long as the Respondent released him from any related personal covenants.
- On or about January 28th, 2019, Ms. Goldring spoke on the phone to Mr. Squires. He informed Ms. Goldring again of new business opportunities that could generate income which would be used to repay Hardit.
- In or about February~~,~~ 2019, a meeting had been scheduled between Ms. Goldring and Mr. Squires. Following this cancellation, on or about

February 19, 2019, Mr. Squires informed Ms. Goldring that Pacrim and Holloway had effectively ceased carrying on business and that none of their remaining indebtedness would be paid. It was at this time that Ms. Goldring discovered that the Respondent would not be repaid and that Pacrim and Holloway were in permanent default on their loans.

- As a result, on March 1, 2019, Ms. Goldring sent letters to Mr. Squires and Mr. Good. These letters served as formal notice that the Moving Parties had defaulted in the repayment of the outstanding amounts owed to the Respondent and as such were in breach of the terms of the Loan Agreements. The letters emphasized that the Respondent had continued to dialogue in good faith, but that recent events (namely Pacrim's bid on the historic hotel, Digby Pines) evidenced that there were assets behind Holloway, and accordingly, the Respondent's patience had run out. The letters further advised that the Respondent had retained legal counsel and was prepared to commence legal proceedings.
- On or about March 7th, 2019 Ms. Goldring spoke on the phone to Mr. Good. During this phone call, Mr. Good informed Ms. Goldring that he left Holloway in 2008. To Ms. Goldring's shock, Mr. Good categorically denied that he made any of the representations Mr. Squires attributed to him – all as noted above. Mr. Good also informed Ms. Goldring that Holloway had no assets and, to the extent the loan from the Respondent was backed by units in Holloway, assets which have lost money, or ownership of Pacrim, he was prepared to hand everything over to the Respondent.

[54] Holloway and Pacrim argue that the evidence from Ms. Goldring does not raise a genuine issue of material fact as to whether the claim is barred by the *Limitation of Actions Act*. They submit that discoverability is assessed both subjectively and objectively, and that Hardit ought reasonably to have known that the claim had solidified and that no payments were forthcoming well before February 2019. By December 2014, the Pacrim loan was in arrears and by July 2015 the Holloway loan was in arrears. Pacrim and Holloway argue that regardless of Goldring's subjective beliefs, and any interaction she may have had with Squires, those subjective beliefs do not justify extending the discovery date until February 2019.

[55] One of the issues raised by Holloway and Pacrim is that the evidence raised by Hardit only relates to Goldring, who they have not contested is owner, manager,

and directing mind of Hardit. They suggest, however, that there were others involved in administering those loans and there is no evidence as to what others at Hardit knew and believed with respect to the status of loans. This is not a persuasive argument. There was no contest in relation to the Goldring affidavit. She has stated that she is the owner, manager and directing mind of Hardit. How many more individuals need to file an affidavit to satisfy Holloway and Pacrim? It matters not. The question is whether there is evidence sufficient to defeat the motion for summary judgment.

[56] Pacrim and Holloway are of the view that by September 2016 there were signs that should have alerted Hardit that the loans were in "real jeopardy". Despite the evidence by Goldring of the assurances and reassurances, the argument is that no reasonable interpretation of those conversations could or should have given any reasonable person, particularly someone involved in the business of lending money, any real assurance that payment was forthcoming. This is an interesting argument. Goldring listened to and exercised forbearance against Holloway and Pacrim, and now those same companies are arguing that this was foolhardy and she should have known better. This does not make for a successful summary judgment motion. In their brief, Holloway and Pacrim says "to the contrary, all indications from the conversation were of the prospect of Hardit being paid were dubious at best". Such a conclusion requires an assessment of witnesses.

[57] Their argument, taken at its most basic, is "too bad; so sad". Yes, there was a substantial sum of money borrowed. Yes, it was not repaid. Yes, Hardit was misled about the defendants' intention to repay, leading it to allow time to pay, and now it is too late. It is no matter that Holloway and Pacrim may have been making misrepresentations throughout; Hardit simply should have known better. I ask rhetorically, how is this consistent with the principle of good faith and the duty to act honestly in the performance of contractual obligations?

[58] While Hardit's pleadings are not as clear as they could be, a liberal interpretation of them makes clear that Hardit is advancing a claim that the representations made by Good and Squires on behalf of Holloway and Pacrim were either negligent or fraudulent, and that Hardit relied upon them, to its detriment, in exercising forbearance on the loans between 2016 and 2019. It was not until 2019 that Hardit learned that Pacrim and Holloway had ceased carrying on business and that none of their indebtedness would be paid.

[59] The uncontested and unchallenged evidence of Goldring on this motion is sufficient to demonstrate a genuine issue of material fact with respect to whether the limitation period has expired. Squires made repeated representations to Hardit which led Hardit to believe that the mere event of falling into arrears did not mean that Holloway and Pacrim were abandoning their obligations under the loans.

[60] There are genuine issues of material fact as to when Hardit knew or ought to have known by virtue of the exercise of reasonable diligence that the representations were negligent or fraudulent or were otherwise unreliable and that the claim should be made.

[61] Hardit has advanced uncontested evidence that there were representations made by individuals who were controlling minds of the defendant companies, and were intended to be relied upon.

[62] In *Thermal Exchange Service*, 2022 ONCA 186, the Ontario Court of Appeal upheld the trial judge's finding that a debtor's assurances extended the discoverability date. While this decision relates to a portion of the Ontario *Limitations Act* that is not of relevance, it does stand for a proposition that debtor's assurances can extend the discoverability date. Furthermore, that the discoverability analysis is context-specific is of importance to the assessment on this summary judgment:

> [1] This appeal concerns the application of s. 5(1)(a)(iv) of the *Limitations Act,* 2002, S.O. 2002, C. 24 Sched. B, and specifically, when the respondent Thermal Exchange Service Inc. ("Thermal Exchange') knew that a proceeding would be an appropriate means to seek to remedy a loss resulting from the appellant Metropolitan Condo Corp.'s (the "Condo Corp") non-payment of its invoices. <u>It is a question that can only be answered in the specific context of the parties' legal relationship and their business dealings</u>.
>
> [Emphasis added]

[63] Therefore the parties' relationship and business dealings, including the discussions and representations must be assessed.

[64] In *Wamboldt v. Wamboldt*, 2018 NSSC 163, the court discussed the policy reasons for the existence of limitation periods as follows:

> [26] There are good policy reasons why there are limitations on when an action can be brought" there comes a time when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations;

> the desire to foreclose claims based on stale evidence; and that plaintiffs are expected to act diligently and not "sleep on their rights" (*M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6).

[65] I pause here to acknowledge the hypocrisy of the defendants' position, which troubles me. It is concerning that on the one hand, there is evidence that Holloway and Pacrim led Goldring down the primrose path with the expectation that if she provided forbearance, the debts would be paid. Now they say she was foolhardy to listen to them and should have known that the debts would not be paid, and that Hardit is foreclosed from actioning the debt obligation because she listened to them and agreed to forebear.

[66] The defendants encouraged the court to draw inferences as to when Hardit knew or ought to have known of the liability and when the loans were in default. I will not do so on this motion. The defendants argue in their brief:

> 33. There is no reasonable interpretation of this conversation that could or should have given any reasonable person, particularly someone involved in the business of lending money, any real assurance that payment was forthcoming. To the contrary, all indications from the conversation were that the prospect of Hardit being paid were dubious at best.

[67] I do not accept that my role on summary judgment is to engage in this interpretive and inference drawing exercise. There is enough evidence to demonstrate a genuine issue of material fact mixed with a question of law, and a question of mixed law and fact for this issue to move to a trial. Inferences need to be drawn. A judge on a summary judgment motion can make inferences of fact based on undisputed facts as long as the inferences are strongly supported by the facts (*Canada (A.G.) v. Lameman*, 2008 SCC 14, at para. 11), but the inferences the defendants have asked me to draw are not so strongly supported in this motion.

[68] Before moving on, I will address the estoppel argument raised by Hardit. Essentially, Hardit argues that the defendants are estopped from relying on a limitation defence when there is evidence Holloway and Pacrim urged Hardit not to commence legal action against them, and pledged to pay what was owed. Estoppel was not pleaded in the Notice of Action and Statement of Claim, and no amendment was sought.

[69] Since I have found that the defendants have not successfully demonstrated that there is no genuine issue of material fact on the question of whether the plaintiff's action is statute barred because the limitation period has expired, I need

not consider whether estoppel needs to be specifically pleaded or, if not, whether the defendants should be estopped from relying on a limitations defence based on representations made by them to Hardit. These are matters for trial.

Corporations Registration Act and whether Hardit is Restricted from Bringing this Action is a Genuine Issue of Material Fact

[70] This issue engages a question as to whether the loan agreements were made in whole or in part in Nova Scotia. The question as to where the contract was entered into, in whole or in part, is a question of mixed fact and law.

[71] Section 17 of the *Corporations Registration Act* states:

> Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force, provided, however, that this Section shall not apply to any company incorporated by or under the authority of an Act of the Parliament of Canada or by or under the authority of an Act of the Legislature.
>
> [Emphasis added]

[72] Elsewhere, the Act provides:

> 2(c) "corporation" means a body corporate that is a Nova Scotia corporation, a federal corporation, an extra-provincial corporation or a foreign corporation;
>
> 2(d) "extra-provincial corporation" means a body corporate that is incorporated under the authority of a Act of a province of Canada other than Province and has gain for its purposes or object;
>
> …
>
> 4 Any corporation, whether incorporated before or on the first day of October, 1912, or at any time thereafter, may have a certificate, in this Act called a "certificate of registration", issued to it by the Registrar as hereinafter provided.

[73] Mr. Brian Stillwell, a solicitor at Burchell MacDougall LLP, filed an uncontested affidavit on October 29, 2021, advising that several searches of the records at the Registry of Joint Stock Companies were undertaken after the Notices of Action and amended Notices of Action were filed by the plaintiff. None of those searches indicated that Hardit Corporation is registered within the meaning of subsection 2(c) of the *Corporations Registration Act*, RSNS 1989 c 101.

[74] On November 18, 2021, Mr. Stillwell filed a supplemental affidavit indicating that he had done a search of records of Service Ontario and the Ontario Minister of Government and Consumer Services, finding that Hardit Corporation is incorporated, amalgamated, or continued under Ontario law.

[75] There is a genuine issue of material fact concerning where the loan agreements were entered into. A potential additional issue is whether the loans were made in connection with any part of Hardit's business done or carried on in Nova Scotia. These issues require a trial on an evidentiary record with *viva voce* evidence where credibility can be tested. These are questions of mixed fact and law. There is a real chance of success by Hardit, as the term has been interpreted, that Hardit can demonstrate that the contracts were made in another jurisdiction and that it was not carrying on business in Nova Scotia, so as to avoid the application~~s~~ of s. 17 of the *Corporations Registration Act*.

[76] There is a dearth of case law interpreting the words "carrying on business" within the meaning of the *Corporations Registration Act*. This too is sufficient to warrant the dismissal of the summary judgment motion, as this would be a mixed question of fact and law requiring a trial judge to apply principles of statutory interpretation in the context of the factual matrix. There is a reasonable chance of success to Hardit's contention that making a loan in this province does not amount to carrying on business here. See *Spring Garden Holdings Ltd. v. Ryan Duffy's Restaurants Ltd*., 2010 NSSC 71, and *Securities Development Corp. of New York v. Brethour (1911),* 20 O.W.R. 562, 1911 CarswellOnt 635 (Ont. Div. Ct.).

[77] Meanwhile, *Brekka v. 101252 PEI Inc.*, 2015 NSCA 73, endorses a broad interpretation of "carrying on business" for the purposes of the phrase in the *Corporation Registration Act*. There are questions of fact that underlie the legal question in this matter.

[78] In *Global Equity Corp. v. MKG Enterprises Corp.*, [1997] B.C.J. No. 1423 (S.C.), the court held that the mere act of entering into a loan agreement and advancing funds did not amount to carrying on business in the province. The court stated, at para. 7:

> Here Global entered into a loan agreement, advanced funds through its solicitors, and gave notice of default in British Columbia. It did nothing more. In my view, it cannot be said to have been carrying on business in this province. In so far as the loan is concerned, it was engaged in nothing other than one isolated transaction of lending money here.

[79] Here there is evidence that Hardit is an Ontario Corporation in the business of giving loans from its operational headquarters in Toronto, carrying on business in Ontario. Affidavit evidence indicates that the loans Pacrim obtained financed business activities across Canada, while the loan to Holloway financed the acquisition of shares in Windport Developments, a corporation with a registered address in Ontario. In *Global Equity Corp., supra*, the court discussed a creditor's ability to sue in the debtor's jurisdiction.

[80] It is neither fanciful nor farfetched to conclude that a creditor can pursue a claim in the jurisdiction where the debtor is resident, despite the underlying loan agreement being made wholly in another jurisdiction. In fact, the plain meaning of the *Corporations Registration Act* contemplates this very situation by carving out an exception in s. 17 for those contracts which are made wholly in a jurisdiction other than Nova Scotia.

[81] The question is, then, not whether the Hardit was registered to transact business in Nova Scotia when it entered into the Loan Agreements; rather, the question is whether, in extending the loans, Hardit carried on business in Nova Scotia.

Conclusion

[82] Rule 13.04 is clear that this court must grant summary judgment in the absence of a genuine issue of material fact for trial and when there is an absence of a question of law either on its own or mixed with fact requiring determination. Both parties are required to put their best foot forward with evidence and legal submissions on all the questions. In responding to this motion, Hardit was required demonstrate a real chance of success by presenting evidence that the limitation period had not expired, for example, by virtue of the discoverability rule. I find that it has done so.

[83] I agree with Hardit that there can no interpretation of the applicable provisions of either the *Limitation of Actions Act* or the *Corporations Registration Act* without consideration of the facts underpinning each interpretation.

[84] The Court of Appeal in *Burton, supra*, describes summary judgment as a tool to "weed out those matters doomed to failure". I do not consider this matter doomed to failure. There has been enough put forward in evidence and argument to support the conclusion that there is a reasonable chance of success by the plaintiff.

[85] There is a genuine issue of material fact, mixed with a question of law, as to whether it was reasonable for Hardit, through Goldring, to rely on assurances from Holloway and Pacrim and to consequently hold off commencing an action. There is also a genuine issue of material fact, mixed with a question of law, regarding the application of s. 17 of the *Corporations Registration Act*.

[86] For inferences and conclusions to be drawn and made, a trial is needed.

[87] The comments in *Lameman*, at para 10, are relevant.

> This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[88] This is a case disclosing real issues on which there is a real chance that the plaintiff may be successful. This requires a trial. The motion for summary judgment is dismissed.

Brothers, J.