SUPREME COURT OF NOVA SCOTIA
Citation: *Thornridge Holdings Limited v. Ryan*, 2023 NSSC 11

Date: 20230111
Docket: 5097252
Registry: Halifax

Between:

Thornridge Holdings Limited

Plaintiff

- and -

Michael Gordon Ryan

Defendant

DECISION

Judge:	The Honourable Justice Darlene Jamieson
Heard:	November 28, 2022, in Halifax, Nova Scotia
Counsel:	Christopher W. Madill & Sarah A. Walsh, for the Plaintiff Victor Goldberg, KC and Matt McEwen for the Defendant

By the Court:

Introduction

[1] On October 7, 2021, Thornridge Holdings Limited ("Thornridge") filed a Notice of Action against Michael Gordon Ryan ("Mr. Ryan") seeking payment of monies it alleges are owing pursuant to a promissory note dated February 26, 2015 (referred to as the "Large Note").

[2] Thornridge pleads that, as part of a series of transactions in February 2015, Thornridge agreed to advance the sum of $3,667,819 to Mr. Ryan. According to Thornridge, under the terms of the Large Note, Mr. Ryan was to pay the $3,667,819 to Thornridge on the date and to the extent that Mr. Ryan received any amounts owing to him in respect of the sale of his shares in Envirosystems Incorporated, or any successor thereof pledged as security for the Large Note. Thornridge pleads that in June 2018, the shares of the investors in Envirosystems were exchanged for shares of Terrapure Environmental Ltd., following Terrapure's acquisition of Envirosystems. Thornridge further pleads that on August 17, 2021, investors in Terrapure sold their shares to GFL Environmental Inc. in the course of GFL's acquisition of Terrapure. Thornridge says GFL's acquisition of Terrapure was a "Liquidity Event" triggering repayment under the Large Note.

[3] On December 1, 2021, Mr. Ryan filed a Notice of Defence pleading, in part, that Thornridge never requested that he pledge his shares of Envirosystems as security for the Large Note. He pleads that no other shares or property was ever pledged as security, the Large Note remains unsecured. Mr. Ryan further pleads that the Large Note was intended by all parties to be of limited recourse, with his repayment obligations limited to the net proceeds received upon either the sale of the shares of Envirosystems or the shares of successor corporations pledged as security for the loan, up to the face value of the promissory note.

[4] On April 29, 2022, Thornridge filed a motion for summary judgment. In the motion, Thornridge seeks an order granting summary judgment of the plaintiff's claim with costs. The motion was scheduled for hearing on October 27, 2022, before Justice Peter Rosinski. Affidavits and briefs were filed by the parties.

[5] Thornridge filed a rebuttal brief on September 13, 2022, which raised a number of objections to the affidavit of Mr. Ryan sworn on September 8, 2022 ("Ryan affidavit"). Mr. Ryan took the position that these admissibility issues should

be resolved prior to the summary judgment motion. On October 27, 2022, Justice Rosinski adjourned the motion to November 28, 2022 before me.

[6] On November 10, 2022, Mr. Ryan filed a motion seeking leave to file a supplemental affidavit pursuant to Civil Procedure Rules 13.06 (4) (b) and 23.12.

[7] I agreed to hear both motions together on November 28, 2022, and also to hear the motion for summary judgment on January 20, 2023.

Evidence on the Motions

[8] With reference to the admissibility objections, the issue relates to portions of the Ryan affidavit. The parties each filed briefs, and Thornridge filed a rebuttal affidavit sworn by Mr. Robert Gillis on September 13, 2022. On the motion by Mr. Ryan for leave to late file an affidavit, he filed a proposed affidavit with his brief. Thornridge filed a response affidavit sworn by Mr. Gillis on November 15, 2022.

Objections to the Affidavit Evidence of Mr. Ryan

[9] The Thornridge motion is for an order striking certain paragraphs, or parts thereof, from the Ryan affidavit. It seeks to strike the evidence on several bases, including that it:

> (a) is inadmissible hearsay and failure to identify the source of the information;
>
> (b) is evidence of a subjective belief about the terms of a written contract;
>
> (c) is irrelevant;
>
> (d) lacks foundation;
>
> (e) is a violation of the parol evidence rule;
>
> (f) is a plea/legal submission;
>
> (g) speaks to the state of mind of someone other than himself; and/or,
>
> (h) is speculation.

[10] As set out in the attached chart, Thornridge takes issue with 28 separate paragraphs of the Ryan affidavit. The bulk of Thornridge's objections are based on

hearsay, relevance and the parol evidence rule. Thornridge also asserts that the promissory note signed on February 26, 2015 in the amount of $529,800 (the "Small Note") referred to in Mr. Ryan's affidavit is irrelevant.

[11] With respect to the various hearsay objections, Thornridge submits, in part, that although Mr. Ryan states Thornridge advised or suggested the information to him, he does not state that an actual person told him anything. Although Thornridge agrees that corporations act and speak through their agents, it says Mr. Ryan has not identified any agent or employee of the plaintiff that advised him of the information contained at paras. 26, 28, 29, 43, 44, 45, 49 and 67. It says merely referencing "Thornridge" is insufficient, as it is not known whether these alleged statements were made by persons who had authority to speak on behalf of Thornridge, or authority to bind Thornridge. Without this information the evidence is patently unreliable and inadmissible hearsay.

[12] Mr. Ryan says none of the challenged paragraphs are hearsay but are descriptions of exhibits attached to the affidavit. He further says that most of the challenged portions are not offered for the truth of their contents, but rather as a description of the attached evidence, all of which is relevant to the surrounding circumstances leading to the Large Note. He further says that if the paragraphs are hearsay, they should be admitted because the statements they describe were made by representatives of Thornridge, and are admissible either as an admission by a party or under the principled exception to hearsay. He submits that where statements are made by a representative of a party, they are admissible against the principal as an admission as long as they were made within the scope of the agent's authority. Mr. Ryan refers to both Thornridge's Chief Financial Officer, Mr. Gillis, and Mr. Nick Betts, President of Thornridge at the relevant times, and says any proposals or representations they made in the course of their duty are admissible. Mr. Ryan says that Thornridge's affiant in the summary judgment motion is Mr. Gillis, and his admissions are admissible. He is available for cross-examination and has sworn evidence in this matter. He says that it is not hearsay that is at the heart of Thornridge's objections, but rather disagreement about the stated facts.

[13] Mr. Ryan says, alternatively, that any alleged statements made by Thornridge should be admissible under the principled exception to hearsay. He says the statements are necessary because they go to the surrounding circumstances and Mr. Ryan does not have access to anyone at Thornridge to testify to the statements directly. He says the evidence is reliable because it is supported by exhibits which were produced by Thornridge, and because Thornridge had Mr. Gillis available to dispute any of the statements if they had wished to do so.

[14] Mr. Ryan says the Small Note is relevant. I will further address the specific positions of the parties with regard to the Small Note in my analysis.

[15] In relation to the objection based on the parol evidence rule, Mr. Ryan says it does not apply to preclude evidence of surrounding circumstances. He says in instances of vague contractual wording, such as here, this evidence is vital. He says all of the evidence submitted by Mr. Ryan describes circumstances to aid the court in interpretation of the Large Note. He says none of it is intended to vary the wording of the Large Note. He says there were clear objective intentions of the parties when forming the Large Note, and he gives evidence of the relevant facts and discussions that occurred at the time. He says the challenged evidence is not purely subjective intention but rather pertains to the overall objective intent of the parties while negotiating and contracting at the time of drafting.

[16] Attached to this decision as Appendix "A" is a chart setting out Thornridge's objections and Mr. Ryan's responses.

The Law

[17] *Civil Procedure Rule* 39 addresses the contents of affidavits. It states:

> **39.01 Scope of Rule 39**
>
> A party may make and use an affidavit, and a judge may strike an affidavit, in accordance with this Rule.
>
> **39.02 Affidavit is to provide evidence**
>
> (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.
>
> . . .
>
> **39.04 Striking part or all of affidavit**
>
> (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> > (a) information that is not admissible, such as an irrelevant statement or a submission or plea;

> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.
>
> [Emphasis added]

[18] I note as well that Rule 22.15 deals with rules of evidence on motions. It sets out those instances where hearsay evidence is admissible. One of those is where the matter involves a procedural right. That is not the situation here. The Rule states:

> 22.15(1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.
>
> (2) Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:
>
> (a) an *ex parte* motion, if the judge permits;
>
> (b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;
>
> (c) a motion to determine a procedural right;
>
> (d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;
>
> (e) a motion on which a Rule or legislation allows hearsay.
>
> (3) A party presenting hearsay must establish the source, and the witness' belief, of the information.
>
> (4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

[19] Only admissible evidence is to be considered on motions for summary judgment. In *MacAulay v. Ali*, 2013 NSSC 271, Justice Wood (as he then was) said

the following with reference to the Nova Scotia Court of Appeal decision in *Abbott and Haliburton Company v. WBLI Chartered Accountants*, 2013 NSCA 66:

> [8] The principle that only admissible evidence should be considered on a motion for summary judgment was reiterated by the Nova Scotia Court of Appeal in the recent decision of *Abbott and Haliburton Company v. WBLI Chartered Accountants*, 2013 NSCA 66, where the Court stated at para. 159:
>
> > A judge hearing a motion for summary judgment should only hear admissible evidence. Here, the motions judge committed no error in striking the affidavit of Mr. O'Hearn. However, the motions judge did not articulate and apply the correct legal principles in determining if Ms. MacMillan's affidavit was admissible.

[20] *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71, remains the leading authority on proper affidavit evidence. It has been applied consistently by this court in motions to strike portions of affidavits and has been affirmed by our Court of Appeal. Justice Davison set out various principles regarding affidavit evidence at pp. 11-12:

> It would [be] helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
>
> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
>
> 2. The facts should be, for the mots part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
>
> 3. Affidavits used in applications may refer to facts based on information and belief but the course of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised."
>
> 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.
>
> 5. The affidavit must state that the affiant believes the information received from the course.

Relevance

[21] Before evidence can be said to be relevant, it must be probative of a fact in issue. The Supreme Court of Canada in *R. v. White*, 2011 SCC 13, said the following regarding relevance:

> [36] ...In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence".

[22] In addition, in *R. v. Arp* [1998], 3 S.C.R. 339, the court indicated that:

> [38] ... To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". ...

[23] David Paciocco, Palma Paciocco, and Lee Stuesser in *The Law of Evidence*, Eighth Edition (Toronto: Irwin Law Inc., 2020), discuss the concept of "materiality" at pp. 33-34:

> Regardless of the kind of proceeding, courts or tribunals resolving issues of fact are being asked to settle particular controversies. They are not interested in information about matters other than those that need to be settled. Evidence that is not directed at a matter in issue is inadmissible because it is "immaterial". By contrast, "evidence is material if it is directed at a matter in issue in the case."

[24] They explain the relationship between materiality and relevance at pp. 35-36:

> The concept of materiality describes the relationship between evidence and the matters in issue; logical "relevance" is about the relationship between evidence and the fact it is offered to prove. There is no legal test for identifying relevant evidence. Relevance is a matter of logic, based on inferences drawn from everyday experience and common sense. If it is not clear what a party is seeking to prove, they should be called upon to explain their theory of relevance. Then logic and human experience should be applied to judge whether the evidence supports the inference that the party seeks to have drawn. To continue with the robbery example, evidence that the alleged robber had downloaded a map of the area where a bank that was robbed was located would be relevant in linking the accused to the robbery. Evidence that the accused had downloaded movies about bank robbers would not be relevant because it is not specific enough to support a logical inference that the accused is the robber.

[25] The evidence must have some tendency to advance a material inquiry. It is a modest standard and evidence will be received if it meets the standard unless its probative value is outweighed by the prejudice it may cause if admitted. In this case, the issue on the motion is whether the court should grant summary judgment of the plaintiff's claims set out in the Notice of Action. As such, affidavits filed on the motion must be relevant to the claims advanced. The analytical framework to be applied on motions for summary judgment on the evidence pursuant to Rule 13.04 are set out in *Shannex Inc. v. Dora Construction Ltd*., 2016 NSCA 89 at para. 34. There are five sequential questions. The first question is as follows:

> [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 (CanLII), 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.

Hearsay

[26] In *King v. Gary Shaw Alter Ego Trust*, 2020 NSSC 288**,** which involved a motion to strike portions of an affidavit, Justice Norton said the following regarding hearsay evidence:

[12] Hearsay is one of the most common objections made to the introduction of evidence. It has been defined by the Supreme Court of Canada as follows:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered as proof of their truth or as proof of assertions implicit therein. [*R. v. Bradshaw*, 2017 SCC 35, at para. 1 and 20]

[13] Sopinka says:

> The usual hearsay circumstance covered by the rule is where the witness testifies as to what someone else, who is not before the court, said. However, the modern interpretation of hearsay also encompasses prior out-of-court statements made by the very witness who is testifying in court when such earlier statements of the witness are tendered to prove the truth of their contents. [*Supra*, at p. 249]

[14] The defining features of the rule are that the purpose of adducing the evidence is to prove the truth of its contents and the absence of the contemporaneous opportunity to cross-examine the declarant. It is the inability to test the reliability of the evidence by cross-examination of the declarant that makes the admission of such evidence unfair and inadmissible. The rule recognizes the difficulty of the trier of fact assessing the probative value, if any, to be given to a statement made by a person who has not been seen or heard and who has not been subject to cross-examination. [*R. v. Khelawon*, [2006] 2 S.C.R. 787]

[27] Justice LeBlanc in *Canadian National Railway Company v. Halifax (Regional Municipality)*, 2012 NSSC 300, said the following in relation to assessing hearsay objections:

> [6] The "essential defining features" of hearsay are ... "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant." (*Khelawon* at para. 35) It must be emphasized that it is "only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises." (*Khelawon* at para. 36) Further, Charron J. said for the court in *Khelawon*, (paras. 37-38) that while an out-of-court statement by a witness who testifies will be hearsay if adduced for the truth of its contents:
>
> > When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. ...

[7] Charron, J. went on to discuss the challenges of recognizing hearsay, at paras. 56-58:

> The first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay. This may seem to be a rather obvious matter, but it is an important first step. Misguided objections to the admissibility of an out-of-court statement based on a misunderstanding of what constitutes hearsay are not uncommon. As discussed earlier, not all out-of-court statements will constitute hearsay. Recall the defining features of hearsay. An out-of-court statement will be hearsay when: (1) it is adduced to prove the truth of its contents and (2) there is no opportunity for a contemporaneous cross-examination of the declarant.
>
> Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its truth should be considered in the context of the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

[8] Second, by putting one's mind, at the outset, to the second defining feature of hearsay — the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci, J. in *R. v. Starr*, [2000] 2 S.C.R. 144 identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer, C.J. in *U. (F.J.)* expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested" (para. 22).

[28] The Nova Scotia Court of Appeal in *McKinnon Estate v. Cadegan*, 2021 NSCA 79, discussed the governing framework for hearsay:

> [33] The development of the principled approach did not displace the traditional categories for hearsay exceptions. In fact, when evidence falls within an established common law exception, it will only be excluded in rare cases. The Supreme Court explained this in *Khelawon*:
>
> > 42 It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the

> application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, _ 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:
>
> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[29] The court in *McKinnon Estate, supra*, set out the law on party admissions as an exception to the hearsay principle:

> [35] As this passage indicates, once hearsay evidence is determined to fall within a common law exception, the burden shifts to the party opposing admission because inherent reliability is presumed. They must demonstrate the circumstances represent one of the rare cases where the evidence is not, in fact, necessary or reliable. In contrast, under the principled approach, the burden remains on the proponent to establish that the evidence is both necessary and reliable.
>
> [36] In my view, the proper sequence to be followed when considering the admission of hearsay evidence is as follows:
>
> 1. Can the proponent establish that the evidence falls within one or more common law exceptions?
>
> 2. If a common law exception applies, can the opposing party show this is the "rare case" where the evidence should be excluded because it is not necessary or reliable?
>
> 3. If it is not a "rare case", should the evidence be excluded because its prejudicial effect exceeds its probative value?
>
> 4. If not admissible as a common law exception, is the evidence admissible under the principled analysis from *Khelawon* ?

[37] Where a statement is made by a party, either orally, in writing, or by conduct, it represents an admission. It should be presumptively accepted into evidence at the request of an adverse party provided it is relevant and its probative value is not exceeded by its prejudicial effect. Dr. Cadegan argued Mr. McKinnon's notes were an admission which meant the trial judge should have started his analysis with that question. He erred by not doing so.

…

[40] In *Schneider*, the British Columbia Court of Appeal considered the admissibility of similar evidence — an incomplete fragment of conversation. The court described the trial judge's role in determining whether evidence was sufficiently relevant to go to the jury:

> [69] Applying this framework, the appellant is wrong to say that in assessing relevance, the trial judge was obliged to determine — in fact — whether the overheard words constituted an admission. Rather, the words said to have been spoken by the appellant were relevant if "capable of being an admission" (*Ferris* (C.A.) at paras. 26, 27, 29, 31, 38; emphasis added).
>
> [70] At this stage of the admissibility analysis, a trial judge is concerned with logical relevance. As explained by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624, leave to appeal ref'd [2010] S.C.C.A No. 125, logical relevance requires:
>
> > [82] ... that the evidence have a tendency as a matter of human experience and logic to make the existence or nonexistence of a fact in issue more or less likely than it would be without that evidence .... Given this meaning, relevance sets a low threshold for admissibility and reflects the inclusionary bias of our evidentiary rules ....
> >
> > [Internal references omitted; emphasis added.]
>
> [71] In *R. v. Arp*, 1998 CanLII 769 (SCC), [1998] 3 S.C.R. 339, it was made clear that to be logically relevant, "an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to 'increase or diminish the probability of the existence of a fact in issue'. ... As a consequence, there is no minimum probative value required for evidence to be relevant" (at para. 38; internal references omitted; emphasis added).
>
> See also *R. v. Blackman*, 2008 SCC 37at paras. 29 — 30.
>
> [72] The Crown sought to tender the words overheard by WS as an admission of responsibility for the death of Ms. Kogawa. Clearly, that was a material issue at trial. To meet its burden on logical relevance, the Crown was required to show that those words were capable of interpretation as an admission. In assessing whether the Crown met that burden, the question for the judge to decide was whether there was "some evidence upon which

> [the] jury could conclude the meaning of the uttered words": *Alcantara* at paras. 138 — 139.
>
> [73] If the answer was "yes", the judge was obliged to move to the second stage of the analysis and determine whether she should keep the evidence from the jury because its prejudicial effect outweighed its probative value. It is only then that a trial judge engages in a weighing of the evidence, albeit on a limited scale. The purpose of the limited weighing is to assess legal relevance. Again, with reference to para. 82 of *Abbey*:
>
> > ... Relevance can also refer to a requirement that evidence be not only logically relevant to a fact in issue, but also sufficiently probative to justify its admission despite the prejudice that may flow from its admission. This meaning of relevance is described as legal relevance and involves a limited weighing of the costs and benefits associated with admitting evidence that is undoubtedly logically relevant ....
> >
> > [Internal references omitted; emphasis added.]
>
> [41] The court summarized the principles to be applied as follows:
>
> > [75] It is apparent from the *voir dire* ruling in this case that the trial judge correctly instructed herself on the legal principles she was bound to apply in determining admissibility. She asked whether there was some evidence upon which the jury could conclude the meaning of the words conveyed through WS (at para. 19). Once satisfied the evidence was logically relevant, she went on to assess legal relevance by asking whether its probative value outweighed the "prejudicial effect that it might be used improperly" (at para. 21).

[30] With regard to the admissions by a party exception to the hearsay rule, I note that one need only illustrate that a statement is capable of being an admission to be admissible.

[31] As was pointed out in *Toronto Dominion Bank v. Cambridge Leasing Ltd.* 2006 NBQB 92, where no specific person from the referenced corporate entity is identified as having made the statement or statements (admission), the evidence as presented is very unreliable. This is clearly in keeping with our Civil Procedure Rule 39.02, which states that an “affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.”

[32] Finally, I note that when an out-of-court statement is offered simply as proof that the statement was made, it is not considered to be hearsay. Such evidence is admissible as long as it has some probative value. In this circumstance, the person

indicating that the statement was made is available for cross-examination. The question is one of relevancy. Does the statement have a purpose aside from the truth of its contents? If yes, it may be admissible for that limited purpose. The trier of fact must be cautious concerning the limited relevancy of the statement – its relevance lies in the fact that it was made, not in the fact that its contents are true.

Submissions

[33] As stated by the Court of Appeal in *Canadian National Railway v. Teamsters Canada Rail Conference,* 2017 NSSC 10, "Submissions do not constitute evidence" (para 49). In *Canadian Imperial Bank of Commerce v. CNH Capital Ltd*., 2013 NSCA 35, the Court of Appeal commented on the prohibition against statements in the nature of a plea or submission:

> [81] *First:* CNH Capital Canada says that the statements are a "submission" or "plea" which must be excluded under *Civil Procedure Rule* 39.04(2):
>
> > 39.04 (2) A judge must strike a part of an affidavit containing either of the following:
> >
> > > (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> CNH Capital Canada submits that Rule 39.04(2) codifies Justice Davison's statement in *Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)* (1993), 123 N.S.R. (2d) 46 (N.S. S.C.):
>
> > [20] It would be helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
> >
> > > Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea a summation.
>
> [82] I agree with Justice Davison's statement from *Waverley*. But I disagree that the challenged statements in the affidavits of Messrs. Bayne and Tucci are a "submission" or "plea". <u>What is objectionable under Rule 39.04(2)(a) is a conclusory statement that embodies or assumes a point of law. Whether, how, and the degree to which Ford Credit's identity was important to the Bank are questions of fact, as I have explained earlier (para 63).</u>
>
> [Emphasis added]

[34] It is important to note that a witness can describe an event they have experienced. As noted in *Armoyan v. Armoyan*, 2013 NSCA 99, solely because a

word has a potential legal meaning or use does not automatically mean that an affiant who uses the word does so for a legal purpose (paras. 146 – 147).

Speculation

[35] Cases are to be decided on facts, not guess-work. Speculation as to what the facts might be, what another person had in their mind, what could happen, etc., has little, if any, probative value. However, witnesses can give estimates or approximations of distance, time, etc.

Contractual Interpretation and Surrounding Circumstances

[36] It is important to remember that the affidavit evidence offered is in the context of a claim pursuant to a legal agreement – a promissory note. The interpretation of certain clauses of the Large Note are in issue. Neither ambiguity nor rectification have been pleaded. Mr. Ryan, in response to some of the admissibility objections of Thornridge, submits that the evidence is evidence of surrounding circumstances admissible in aid of interpretation of the promissory note. I will, therefore, spend some time dealing with interpretation of contracts and admissibility of surrounding circumstances.

[37] In the interpretation exercise, the words of the agreement are always the starting point. The Supreme Court of Canada said in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 that the overriding concern is to determine the objective intent of the parties, through the application of legal principles of interpretation and consistent with the surrounding circumstances:

> 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the

> court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> …

49.…Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation…

[Emphasis added]

[38] As the court said in *Sattva*, *supra*, while the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of the agreement:

> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).
>
> 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the

> knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added]

[39] Contracts are not made in a vacuum. The case law is clear that surrounding circumstances (context or factual matrix) are important in interpreting the words, as such evidence will assist a trier of fact in understanding the objective intention of the parties, as expressed in the words. In short, it is perfectly proper to look at surrounding circumstances to assist in determining what the parties were contracting about. Evidence of the surrounding circumstances is admissible even if there is no ambiguity in the wording of the agreement. However, the subjective intent of the parties is not a consideration. It is of no value to the interpretation process, where there is no ambiguity alleged, for a party to give evidence as to what the terms of the contract mean to them.

[40] Surrounding circumstances or the factual matrix is broad, and may include many things, but the case law is clear that it does not include evidence of negotiations leading up to the final agreement or the subjective intentions of the parties. Neither Mr. Ryan's subjective intention nor Thornridge's subjective intention in entering the agreement is admissible. Contractual interpretation is an objective endeavor, not a subjective one. As was said by Geoff R. Hall in *Canadian Contractual Interpretation Law*, 3rd ed. (Markham: LexisNexis Canada, 2016) at page 33:

> A further limitation on the scope of the factual matrix is the requirement that it must be assessed objectively. Since contractual interpretation is an objective exercise, the factual matrix consists only of objective facts known to the parties at or before the date of contracting. It also consists only of what is common to both parties, as opposed individualized versions of the factual matrix particular to only one of the contracting parties.
>
> [Emphasis added]

[41] Although predating *Sattva, supra,* the Ontario Court of appeal in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc*., [1998] O.J. No. 4368 (Ont. C.A.), said:

> 27 Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a

> commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.
>
> [Emphasis added]

[42] While also predating *Sattva*, the Manitoba Court of Appeal in *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71 discussed the rationale for excluding evidence of negotiations:

> 20 In the well-known decision *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K. H.L.), Lord Wilberforce began by noting the obvious reasons why evidence of negotiations should be excluded (at p. 240):
>
> > There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in cl 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience (although the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words?
>
> 21 He continued by commenting on the importance of evidence of the "genesis" and "aim" of the transaction (at p. 241):
>
> > In my opinion, then, evidence of negotiations, or of the parties' intentions, . . . ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction.
>
> 23 More recent cases, while recognizing the basic principle that evidence of negotiations is not admissible, have considered evidence of negotiations in reference to the commercial objective and factual matrix. One illustrative example is *Langley LowCost Builders Ltd. v. 474835 B.C. Ltd.*, [2000] 7 W.W.R. 46, 2000 BCCA 365 (B.C. C.A.), which relies on the principles articulated in *Prenn v. Simmonds*, McEachern C.J.B.C. opined (at para. 29):
>
> > [I]t is important to remember that negotiations between the parties are not relevant in determining the meaning of the language used by the parties. This is because parties often change their views and positions during negotiations. The fact that the parties were in negotiations, and the reasons for these negotiations, however, including the commercial objectives of the

> parties is relevant as a part of the factual matrix, or factual underpinning of the agreement: *Prenn v. Simmonds*, ...

24 When there is no ambiguity, the courts are not often called upon to consider the commercial reality of the transaction in the sense of determining a "sensible commercial result." Iacobucci J. commented on this in *Eli Lilly* (at para. 56):

> When there is no ambiguity in the wording of the document, the notion in *Consolidated-Bathurst* [[1980] 1 S.C.R. 888] that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words.

25 When is a contract or a phrase ambiguous? Difficulty in interpreting a contract is not synonymous with ambiguity (*PaddonHughes Development Co. v. Pancontinental Oil Ltd. (1998)*, [1999] 5 W.W.R. 726 (Alta. C.A.)). An ambiguous phrase has been described as one that is "reasonably susceptible of more than one meaning" (*Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (Ont. C.A.) at para. 18 (C.A.), and as one with a "double or devious meaning, that is to say, one word or one expression or a series of expressions capable on its face or in its application of two or more meanings" (*Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)* (2000), 5 C.L.R. (3d) 55, 2000 NFCA 21 (Nfld. C.A.) at para. 9, quoting *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (1968)*, [1969] 1 O.R. 469 at 524 (Ont. H.C.). This cannot be determined until the full text of the contract is considered, in light of the surrounding circumstances at the time of its execution, if necessary.

26 In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.

[Emphasis added]

[43] Regarding Thornridge's objections that some of the affidavit evidence violates the parol evidence rule, the court in *Sattva*, *supra*, addressed the relationship between surrounding circumstances and the parol evidence rule as follows:

> **Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule**
>
> 59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 341-42, *per* Sopinka J.).
>
> 60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.
>
> 61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (Ont. C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

[44] One of the objections raised by Thornridge is that some of the evidence offered is simply Mr. Ryan's subjective intention. As indicated above, surrounding circumstances do not include a party's subjective intent. It is on rare occasion that the court would consider a party's subjective intention during the interpretation exercise. This is not one of those occasions. As noted above, Mr. Ryan has not pleaded that the Large Note contains an ambiguity. I note there is reference to ambiguity in Mr. Ryan's brief on the merits of the summary judgment motion. However, on the issue of admissibility, it was not raised nor argued. In fact the opposite is the case -- he argues that it is not subjective intention that appears in the

impugned affidavit but the objective intention of the parties. He says in his brief on admissibility the following:

> All the evidence submitted by Mr. Ryan describes circumstances to aid the Court in the interpretation of the Large Note. None of it is intended to vary the wording of the Large Note. It is Mr. Ryan's position that there were clear objective intentions of the parties when forming the Large Note, and he gives evidence of the relevant facts and discussions being had at the time.
>
> … The challenged evidence is not pertaining to Mr. Ryan's purely subjective intentions, but rather to the overall objective intent of the parties while negotiating and contracting at the time of drafting. (pages 10 and 11)

[45] Mr. Ryan further says multiple times in his responses to the objections (see Appendix "A") that the evidence in Mr. Ryan's affidavit that is being challenged is not evidence of Mr. Ryan's subjective intention, but descriptions of exhibits or evidence of the objective intention of the parties or the objective factual matrix.

[46] He has argued that surrounding circumstances should be considered which, as I have pointed out above, is part of the interpretation exercise. The parties submit they have competing interpretations of the Large Note. Clearly an ambiguity must be something more than simply the existence of competing interpretations. If this were the definition of ambiguity, parol evidence would be admitted in most cases involving contract interpretation. To admit evidence of subjective interpretation, there must be more than simply an argument about competing definitions. At this preliminary motion on admissibility, without more, I am certainly not in a position to opine as to whether there is an ambiguity in the wording of the Large Note, nor was I asked to do so.

Analysis

[47] It is with the above legal principles in mind that I make my findings regarding the admissibility objections of Thornridge. It is important to note that there are two stages in which evidence is evaluated. We are at the initial stage, being the admissibility stage, where evidence is evaluated for its compliance with the rules of admissibility. Even when evidence passes the threshold of admissibility, that is not the end of the exercise. At the hearing on the merits, the trier of fact makes the ultimate decision in the case by weighing the evidence and applying its finding to the relevant rules of substantive law. The standards to be met before evidence is ruled admissible should not be confused with the ultimate standard of proof before

facts are found in the ultimate case. Evidence that is admitted is sometimes given little or no weight at the merits hearing or trial. The strength of the evidence and the ultimate use to which it is put is a question of fact, not to be resolved at this initial admissibility stage. In this motion, I am dealing solely with the first stage -- the admissibility of certain evidence contained in the affidavit of Mr. Ryan filed on the motion for summary judgment.

[48] The next step in the current matter, being a motion for summary judgment, is distinct from the second step of weighing evidence, as for example, would occur in a trial of the action on the merits. Here, the affidavit in issue has been filed on a motion for summary judgement. The Court of Appeal has been clear that a judge hearing a summary judgment motion is not to weigh evidence. In *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc*., 2017 NSCA 61, our Court of Appeal cautioned that, in determining whether the evidence is sufficient to support the pleading, the motion judge must not draw inferences or weigh evidence:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:
>
> > [87] . . .
> >
> > > 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
> > >
> > > 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

[49] This matter is early in the litigation process and I am considering admissibility objections to affidavit evidence prior to a summary judgment motion. My findings in relation to the affidavit evidence are confined to the context in which they are currently considered.

The Small Note

[50] Mr. Ryan says the Small Note executed on February 26, 2015 is relevant. He says it is relevant to determining how much – if anything – he owes on the Large Note. He says it is directly relevant that Thornridge is seeking payment for the amounts Mr. Ryan received from the shares pledged to the Small Note in two separate actions, particularly where this amount has already been repaid to Thornridge in other litigation.

[51] Mr. Ryan says in his Notice of Defence:

> 30. In the alternative that the promissory note is determined to be secured by shares of successor corporations to Envirosystems held by Mr. Ryan, Thornridge's right of recovery is limited to the net proceeds of any sale of such shares which may have already or might in the future occur.

[52] Mr. Gillis, Chief Operating Officer of Thornridge, says in his affidavit sworn on September 1, 2022 at para. 22:

> Based on my involvement in the these transactions, I know that Mr. Ryan owned 2,057,827 common shares in Terrapure when they were sold to GFL. Thornridge, for its common shares, received approximately 95 cents per share. On that basis, the proceeds from Mr. Ryan's shares in the GFL Acquisition were in the range of $1.9 M.

[53] Mr. Ryan says that within this referenced $1.9M is the amount he received on the Small Note. He asks how Thornridge can say the Small Note is not relevant when it is included by Mr. Gillis in his calculation of the $1.9M. Regardless, Mr. Ryan also argues that since the Small Note and the Large Note were signed the same day, and the Small Note includes shares pledged while the Large Note does not, this illustrates that Thornridge turned its mind to the question of share pledge and chose not to include it in the Large Note wording. He says the existence of another note for which shares were pledged is part of the factual matrix relevant to the interpretation of the Large Note.

[54] Thornridge says the Large Note is payable according to its own terms, and what is payable under the Small Note has no bearing whatsoever on the amount payable under the separate Large Note. It is not "central" to the cause of action, as suggested by the defendant Mr. Ryan.

[55] Thornridge disputes Mr. Ryan's suggestion that it is seeking payment only up to the extent of the amounts Mr. Ryan received from pledged shares. Thornridge

says that is not an accurate characterization of its position in the litigation related to the Large Note or the Small Note. Thornridge says it is seeking payment for the full amounts owing under both the Large Note and the Small Note.

[56] I am satisfied the Small Note has relevance. It can be said to have some tendency to advance a material inquiry.

[57] On February 26, 2015, there were a number of contracts entered into that formed part of the overall transaction including both the Large Note and the Small Note. Thornridge describes the February 2015 agreements as a series of corporate transactions. The Envirosystems transaction closed on February 26, 2015.

[58] The exhibits to Mr. Ryan's affidavit indicate that on February 26, 2015, a number of agreements were executed between the parties. These include a Promissory Note (the Large Note) with Mr. Ryan as the debtor and Thornridge Holdings Limited as the creditor, and also a General Release referencing the long term incentive plan of Thornridge Holdings Limited for Mr. Ryan; an Option Agreement between 3287166 Nova Scotia Limited and Mr. Ryan; an Exercise Note executed but with the day in February 2015 left blank; a Promissory Note between 3287166 Nova Scotia Limited and Mr. Ryan (the Small Note); a Share Pledge Agreement with Mr. Ryan as the pledgor and Thornridge Holdings Limited as the creditor; an Appointment of Agent Agreement with Thornridge Holdings Limited as creditor, Mr. Ryan as primary agent, and Michael Tringali as secondary agent.

[59] The Small Note says that Mr. Ryan, the debtor, has subscribed to a certain number of shares of 3287166 Nova Scotia Limited. Thornridge is described as the creditor. Mr. Gillis in his affidavit sworn September 1, 2022 says that the Envirosystems transaction involved Thornridge selling the majority of its shares to 3287166 Nova Scotia Limited on February 26, 2015.

[60] The principle that a contract is to be interpreted as a whole also requires consideration of related contracts entered into as part of a single overall transaction. While, on this preliminary motion, I have not digested all of these documents, it would appear, given the parties noted as being involved in the transaction and the fact the documents were all executed on February 26, 2015, that each has some relevance to the overall transaction. Individual contracts that are part of a series of related contracts should not be interpreted in isolation. The doctrine of related contracts is simply an extension of the principle that a contract is to be interpreted as a whole. It also incorporates the principle of context for contract or surrounding circumstances. The doctrine can, where appropriate, help to achieve interpretive

accuracy and give effect to the intentions of the parties. If contracts are considered in isolation from related contracts, different interpretive results could ensue. (See *Canadian Contractual Interpretation Law, 3rd ed., supra)*

[61] The Ontario Court of Appeal elaborated on the related contracts doctrine in *Salah v. Timothy's Coffees of the World Inc.* [2010] O.J. No. 4336 (Ont. C.A.):

> 16 The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. Where a transaction involves the execution of several documents that form parts of a larger composite whole — like a complex commercial transaction — and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements. See *3869130 Canada Inc. v. I.C.B. Distribution Inc.* (2008), 66 C.C.E.L. (3d) 89 (Ont. C.A.), at paras. 30-34; *Dumbrell v. Regional Group of Cos.* (2007), 85 O.R. (3d) 616 (Ont. C.A.), at paras. 47-56; *SimEx Inc. v. IMAX Corp*. (2005), 11 B.L.R. (4th) 214 (Ont. C.A.), at paras. 19-23; *Kentucky Fried Chicken Canada v. Scott's Food Services Inc*. (1998), 41 B.L.R. (2d) 42 (Ont. C.A.), at paras. 24-27; and Professor John D. McCamus, The Law of Contracts (Toronto: Irwin Law Inc., 2005), at pp. 705-722.
>
> [Emphasis added]

[62] At this stage, it is not clear to me whether each and every one of the February 26, 2015 agreements forms parts of a larger single transaction. However, there is sufficient evidence before me to conclude that the Small Note has relevance at least insofar as it is a contract entered into on the same date as the Large Note, along with various other contracts, and it has some relationship to the Envirosystems transaction that closed on the same date, being February 26, 2015.

[63] As to the merits of the admissibility objections raised by Thornridge, in the attached Appendix "A", I have reviewed each of the statements objected to and have made rulings on each as to admissibility.

Mr. Ryan's Motion for Leave to File a Supplementary Affidavit

[64] The motion brought by Mr. Ryan seeks leave to file a supplemental affidavit. The affidavit was first referenced in correspondence to the court on October 31, 2022. Mr. Ryan says the information contained in the proposed affidavit was received by him on October 18 and 28, 2022. The proposed affidavit contains facts that he says are relevant to the term "successor", as used in the Large Note. He says the evidence in the supplemental affidavit concerns whether Terrapure BR LP ("BatteryCo") is a "successor" to Envirosystems.

[65] Rule 23.12 contemplates the filing of affidavits, with permission, after the deadlines set out in Rule 23.11. It states:

> **23.12 No further affidavit**
>
> (1) A party may only file an affidavit after a deadline in Rule 23.11 with permission of a judge.
>
> (2) On a motion to permit a late affidavit, the judge must consider all of the following:
>
> (a) the prejudice that would be caused to the party who offers the affidavit, if the motion proceeds without that affidavit;
>
> (b) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice caused by an adjournment, if an adjournment would result;
>
> (c) the prejudice caused to the public if motions set by appointment are frequently adjourned when it is too late to make the best use of the time of counsel, the judge or court staff.
>
> (3) A judge who allows a late affidavit may order the party filing the affidavit to indemnify any other party for expenses resulting from the filing, including expenses resulting from an adjournment.

[66] Rule 13.04(6) addresses the issue of new evidence sought to be adduced in a summary judgment motion. The Rule states:

> 13.04 (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.

[Emphasis added]

[67] The Nova Scotia Court of Appeal said in *Shannex Inc. v. Dora Construction Ltd.*, *supra*, summary judgment is not an ambush, nor is an adjournment permission to procrastinate. Justice Fichaud specifically referred to Rule 13.04 (6)(b) and indicated the subsection allows the judge to balance these factors:

> *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. (para.34)

[68] Rule 13.04(6) makes it clear that it is within the court's discretion, on the hearing of the motion, to adjourn the hearing for any just purpose, including to permit the "collection of other evidence."

[69] I addressed the filing of a late affidavit on a motion for summary judgment in *Trout Point Lodge Limited v. Automattic Inc*., 2019 NSSC 317, where I said the following:

> 27 The filing of late affidavits is typically unusual and requires the leave of the Court. A moving party should be very careful to ensure it has marshalled all evidence necessary for its summary judgment motion. It cannot assume an adjournment will be available for ill-prepared attempts at summary judgment. However, in appropriate circumstances, where it is just to do so under rule 13.04, late evidence may be allowed. As an example, a late affidavit of the Plaintiffs was also allowed. This motion was originally scheduled for March 19, 2019, but was adjourned due to the Plaintiffs' request to file a late surrebuttal affidavit. This Court granted the request, as the Plaintiffs argued that the March 2019 affidavit of Ms. Zhu, filed by the Defendant, raised "a very important point" that was previously unknown to the Plaintiffs and "may seriously prejudice the Plaintiffs."
>
> 28 The exercise of the Court's discretion under Rule 13.04 (6)(b) will depend on the circumstances. The Court should be concerned with such factors as whether there will be prejudice to either party that cannot be adequately compensated in costs, whether the affidavit is relevant to a determination under Rule 13, whether the requesting party has caused unreasonable delay, whether there has been an oversight, etc. In addition, as Rule 23.12 contemplates, not only prejudice to the parties but also possible prejudice to the public, caused by motions being frequently adjourned when it is too late to make use of the time set aside by counsel, the judge and court staff, should be considered. Where the interests of justice favour the Court

admitting the late affidavit, the opposing party should be provided with an opportunity to respond.

29 Here, I find there will be no prejudice to the Plaintiffs caused by the late filing of the Zhu supplemental affidavit and no prejudice was argued by the Plaintiffs. There is no evidence the Defendant has unduly delayed the motion for summary judgment, as the prior adjournment was due to the Plaintiffs seeking to file a surrebuttal affidavit after all filing timelines had passed. The supplemental affidavit is relevant to the issue of whether, as a host, the Defendant has immunity for copyright infringement by blog creators in both Canada and the United States. The Defendant's position is that it is exempt from liability under either the United States or Canadian legislation. Automattic seeks to introduce the affidavit in response to questions from the Court as to the sufficiency of the evidence in relation to this issue. The Defendant says it was an oversight in not presenting this evidence which only became apparent as a result of the questions posed by the Court during oral argument. The Defendant may well be prejudiced if the evidence is not allowed, as a further affidavit could potentially allow the Court to determine that the issue has no prospect of success under Rule 13, thereby avoiding a full trial of the issue. In light of the above, and the fact the Plaintiffs will be provided with an opportunity to respond to the evidence and file further submissions addressing the affidavit, I am prepared to exercise the discretion provided under Rule 13.04(6)(b) to allow the late filing of the affidavit.

30 In *Voltage Pictures, LLC v. Salna*, 2019 FC 1047 (F.C.), although dealing with the Federal Court Rules, Justice Boswell noted the factors that should be considered when determining whether to allow a late filed affidavit:

> 31 The relevant factors to be taken into account in deciding whether leave to file a further affidavit should be granted are:relevancy of the proposed affidavit; absence of prejudice to the opposing party; assistance to the Court; and the overall interest of justice (*Pfizer Canada Inc. v. Rhoxalpharma Inc.*, 2004 FC 1685 (F.C.) at paras 15 and 16).

. . .

31 Late introduction of evidence has been allowed even in situations involving a trial, where the trial was complete and the decision had been rendered. The Nova Scotia Court of Appeal in *Griffin v. Corcoran*, 2001 NSCA 73 (N.S. C.A.), was addressing an issue of whether to reopen a trial to consider new evidence after the trial was complete and a written decision had been issued (although not the final Order). The Court of Appeal said, where key evidence has been overlooked or an untruth only lately detected, there are strong arguments of justice in favour of allowing the Court to reopen its consideration of the matter:

> 62 The principles which guide the exercise of this discretion attempt to balance the requirements that parties bring forward their whole case and that there must be finality in litigation with the need to reach a result that is

> just in substance. In other words, the judge must take account of the, at times, competing goals of employing fair procedure and achieving right results.
>
> . . .
>
> 64 The application to reopen a trial is one that may be made in an almost limitless variety of situations. A considerable degree of flexibility is needed in the applicable law if it is to deal justly with such diverse situations. It is preferable, therefore, for this Court to articulate the fundamental principles that must be considered, weighed and balanced and leave their application to the discretion of the trial judge. In saying this, however, I would emphasize that the reopening of a trial after the judge has given a decision is an extraordinary and rare step that must be undertaken with great caution.
>
> 65 The decision must be informed by a balancing of the risk of both procedural and substantial injustice to both parties...
>
> . . .
>
> 68 While fair and orderly procedure is essential, so is reaching a correct result on the merits. Genuine mistakes, oversights or even poor judgment should rarely defeat a just cause. If key evidence has been overlooked or an untruth only lately detected, there are strong arguments of justice in favour of allowing the court to reopen its consideration of the matter. The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception. To rephrase a familiar adage, justice must not only appear to be done; it must in fact be done.
>
> [Emphasis added]

(See also *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.*, 2004 NSSC 180 (N.S. S.C.))

[70] In considering the relevant factors, I find there will be no prejudice to the plaintiff caused by the late filing of the Ryan supplemental affidavit. The only prejudice claimed by Thornridge is that it will have to respond to evidence which it claims is irrelevant. However, I note that Thornridge has already filed a response affidavit sworn by Mr. Gillis on November 15, 2022. There is no evidence before me that Mr. Ryan has delayed the motion for summary judgment, as the prior adjournment was due to the plaintiff seeking to advance objections to the admissibility of Mr. Ryan's affidavit. The motion to file the late affidavit was efficiently addressed at the same time.

[71] In essence, the opposition advanced by Thornridge is on the basis of relevance. It says the proposed affidavit goes well beyond a mere clarification of timing; it introduces an entirely new issue, which is ultimately not relevant to the matters in dispute on the summary judgment motion.

[72] Thornridge submits that leave to file the affidavit should be denied because it does not meet the threshold for relevance to the Rule 13 motion. It is not relevant to any material fact in issue. Thornridge says in its brief (pages 2-4):

> On March 15, 2021, the majority shareholders of Terrapure entered into an agreement to sell Terrapure and its subsidiaries, excluding the battery recycling business owned by Terrapure which now operates as Terrapure BR LP ("**BatteryCo**"), to GFL Environmental Inc., a waste management company with headquarters in Toronto, Canada ("**GFL**"). BatteryCo and the battery recycling business were to be carved out of the transaction and retained by the existing shareholders.
>
> …
>
> The BatteryCo was created from a number of other partnerships and wholly owned subsidiaries of Terrapure which were formed between January 14 and 20, 2015, more than three years before Terrapure acquired Envirosystems.
>
> BatteryCo is entirely separate from Envirosystems. At no time prior to the GFL Acquisition did Envirosystems ever own or operate a battery recycling business. Battery recycling was not an industry in which Envirosystems carried on business.

[73] Thornridge's says its position on the summary judgment motion is that: (1) Terrapure was a successor to Envirosystems; (2) GFL acquired all of the shares of Terrapure; (3) the interests of the investors in Terrapure, as a successor to Envirosystems, have been disposed of; and (4) this, by definition, is a "Liquidity Event" as defined in the Large Note.

[74] Thornbridge says it does not matter – and it is not relevant for the Rule 13 motion – whether the battery recycling business is a "successor" or not. The issue on the motion is simply whether any successor to Envirosystems was sold, not whether "the" successor was sold. It says on this point, the court does not even need to determine whether Terrapure was a "successor" to Envirosystems because Mr. Ryan has admitted in his Defence that Terrapure was "the successor" to Envirosystems.

[75] Thornridge says that even if the battery business is a "successor" (which is not admitted), the fact remains that the interests of the investors in a successor (Terrapure) of Envirosystems have been sold or disposed of. The legal status of the battery business is completely moot, and that issue is entirely irrelevant to the position being advanced by Thornridge on the summary judgment motion.

[76] Mr Ryan says the proposed affidavit does not raise a new legal issue; instead, it provides further relevant evidence in support of an issue – the existence of successor corporations – already raised in his submissions and addressed by Thornridge in its rebuttal submittal. Mr. Ryan further says the information included in the proposed affidavit corrects his previous understanding regarding the creation of BatteryCo as described at para. 65 of his initial affidavit. He submits that the information, at the very least, puts in question whether BatteryCo is a successor to Envirosystems Incorporated.

[77] I am not, on this preliminary motion, determining the merits of the summary judgment motion. The parties each advance competing interpretations of the wording of the Large Note. The Large Note uses the words "any successor" in the following clause:

> Place and Time of Payment. All amounts shall be paid to the Creditor at its registered office or designated location on the date and to the extent that the Debtor, or his personal representative or heirs, receives any amounts owing to the Debtor in respect of the sale of Debtor's shares of Envirosystems Incorporated, or any successor thereof pledged as security for this Note, upon a "Liquidity Event", as such term is defined in the Envirosystems Incorporated Stock Option Plan adopted as of February 26, 2015 as amended from time to time (the "Plan") or any other liquidation in which the Debtor receives any alternative consideration. Proceeds shall not include dividends for purposes hereof and the date of the receipt of such proceeds on a Liquidity Event shall be the "Maturity Date".
>
> [Emphasis added]

[78] Mr. Ryan specifically references his holding shares in successor corporations in his Defence. He pleads the following at paras. 26 to 30:

> 26. Through a series of corporate transactions, Mr. Ryan's shares of Envirosystems were transferred for shares in successor corporations after February 2015.
>
> 27. At no time did Mr. Ryan ever pledge any shares held in any successor corporations of Envirosystems as security for the Promissory Note.
>
> 28. As Mr. Ryan has never received proceeds from the sale of shares pledged as security for the Promissory Note, no "Maturity Date" has occurred.
>
> 29. As no "Maturity Date" has occurred Thornridge is unable to demand payment of the Promissory Note, and no amount is currently due.
>
> 30. In the alternative that the promissory note is determined to be secured by shares of successor corporations to Envirosystems held by Mr. Ryan, Thornridge's right

> of recovery is limited to the net proceeds of any sale of such shares which may have already or might in the future occur.

[79] Before evidence can be said to be relevant, it must be probative of a fact in issue. While I have some difficulty understanding the position advanced by Mr. Ryan in relation to BatteryCo, I do understand that he argues it is also a successor of Envirosystems and, in light of the terms of the Large Note, the fact of its existence as a successor means the liquidity event requirement has not been met under the Large Note. This motion is not the time to determine whether this argument has merit or not. I am of the view Mr. Ryan should be allowed to advance this argument on the summary judgment motion. I am not prepared to make a final determination that Mr. Ryan's argument is meritless, rendering the affidavit irrelevant, as was encouraged by Thornridge. Responding parties to summary judgment motions are required to put their best foot forward and I am of the view Mr. Ryan is attempting to do so with this request to file a supplemental affidavit. I am satisfied the affidavit has some relevance. Whether this evidence raises a "genuine issue of material fact", either pure or mixed with a question of law, under the *Shannex* test, is a question for the summary judgment motion.

[80] The defendant may well be prejudiced if the evidence is not allowed. Mr. Ryan is required to put his best foot forward or risk the consequences. All relevant evidence should be brought to the summary judgement motion. I have weighed the various factors for consideration and am prepared to exercise the discretion afforded to me to allow a late filed affidavit. I am of the view that it is in interests of justice to allow the affidavit.

[81] Based on the above, I grant leave for Mr. Ryan to file a supplemental affidavit. I am prepared to allow Mr. Ryan, as a shareholder of BatteryCo, to file a supplemental affidavit attaching the Balance Sheet of August 2021, as well as the Consolidated Financial statements issued by Deloitte LLP March 31, 2022. This addresses the evidence Mr. Ryan wishes admitted in the supplemental affidavit. Thornridge raised concern about hearsay in the proposed affidavit. The hearsay is to be removed from the proposed affidavit (for example, I refer to para. 9). Given the summary judgment hearing is scheduled for January 20, 2023, the revised affidavit is to be filed by no later than January 16, 2023.

[82] The plaintiff has already filed an affidavit of Mr. Gillis in response, sworn on November 15, 2022. However, if required, Thornridge will be provided with an opportunity to respond with further evidence and submissions. Such materials to be filed by January 18, 2023.

Conclusion

[83] In summary, I find:

1. The motion to strike portions of Mr. Ryan's affidavit sworn on September 8, 2022 is allowed in part. Appendix "A" to this decision contains a chart setting out Thornridge's objections, Mr. Ryan's submissions on the various objections and my ruling on each of the objections.
2. The motion for leave to admit a supplementary affidavit of Mr. Ryan, as described above, is granted.

[84] I ask that counsel for Thornridge prepare the Order which shall include a direction that counsel for Mr. Ryan prepares a copy of the Ryan affidavit with the various passages I have ordered struck, either removed or struck-through. The revised affidavit is to be filed with the court by January16, 2023.

[85] The applicant in each motion is entitled to costs. If the parties are unable to agree on costs, I will entertain brief written submissions within 30 days.

Jamieson, J.

APPENDIX "A"

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
12. ... My understanding is that the distribution was to occur on March 31, 2016.	Evidence of subjective belief about the terms of a written contract. Irrelevant.	This is not an interpretation of the Note but Mr. Ryan's understanding of his LTI entitlements at the time. Not irrelevant as it pertains to the LTI that the Large Note was exchanged for. Exhibit 3 states that Mr. Ryan's LTI will be payable on the fifth anniversary of the execution of the amendment to his employment agreement.	Admitted – Evidence is within the knowledge of the affiant
19. Beginning in or about 2014 efforts to find a third party to purchase all or most	Inadmissible hearsay and lacks foundation. Mr. Ryan was not a	Mr. Ryan had personal knowledge of this in his role at Envirosystems.	Admitted -- Evidence is within

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
of Thornridge's interest in Envirosystem began in earnest.	director or officer of Thornridge and does not identify any source of this knowledge.		the knowledge of the affiant - Evidence of surrounding circumstances
22. Torquest became aware of my LTI, which they considered to be 'phantom equity' in Envirosystems. As a condition of completing the purchase, Torquest wanted this `phantom equity' converted into me having 3.5% actual equity in Envirosystems. Attached as Exhibit 10 is a December 31, 2014, email from Nick Betts to John	Inadmissible hearsay. This paragraph offers an out of court statement from Torquest for the truth of its contents. Lacks foundation.	This is a description of the attached Exhibit 10. The email in that exhibit clearly lays out that Torquest expected Mr. Ryan to roll over his 3.5% phantom equity as a condition. This is not being adduced for the truth of its contents. I.e. it does not matter whether Torquest actually wanted the phantom equity converted. The statement is adduced only to prove that it was made by a	Struck –first and second sentence - hearsay / double hearsay - and also the words "which I was copied on explaining this situation." As no objection to Exhibit, it remains.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
Roy, a tax accountant with Grant Thornton, which I was copied on explaining this situation.		representative of Thornridge and believed by Mr. Ryan at the time, forming the background to the negotiations that ensued.	
26. I told Mr. Gillis when we initially discussed the matter that I would prefer to be paid the full amount in cash rather than in shares. Thornridge's proposal was that I would receive my LTI as a loan on closing of the sale of Envirosystems. I would simultaneously be granted an option to purchase 3.5% of the outstanding shares	Inadmissible Hearsay. The source of the alleged proposal from Thornridge is not identified. Last sentence: violation of parol evidence rule and plea/submission.	The "source of the alleged proposal" is clearly the **actual** proposal attached as an Exhibit 11 to the Affidavit. Mr. Ryan is describing the proposal document that is attached. The last sentence is not Mr. Ryan's subjective view of the Large Note, but his description of the proposal that was presented to him at the time. This is relevant as it forms the surrounding circumstances of the	Struck -- Includes subjective intention of one party. Also submission as to meaning of the terms of the proposal.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
in Envirosystems' new operating company for $1, and then immediately execute the option. Thornridge's recovery under the note would be limited to the extent I received any amounts related to shares in Envirosystem or successors when all such shares were sold, and not before then.		drafting of the Large Note and speaks to objective intention of the parties. A discussion of a proposal is not a subjective view of a contract-- it is a statement of fact. It is not hearsay—Thornridge is a party to this action and the proposal is attached as an Exhibit. Mr. Ryan is entitled to describe it in his evidence.	
28. Thornridge suggested that if I took the full amount of my LTI on closing that I would face approximately	Inadmissible hearsay. The source of the alleged suggestion from	This is a description of the proposal in Exhibit 11, where it is clearly laid out that Mr. Ryan could face a $2,400,000.00 tax liability.	Struck -- Hearsay and evidence of negotiations leading to executed agreement.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
$2,400,000.00 million in taxes as it would be taxed at approximately 50% if I received it as income.	Thornridge is not identified.	Alternatively, Thornridge is a party to this action and their admissions are admissible, or this would be admissible under the principled exception. The memorandum attached in the exhibit was written by Mr. Gillis, the affiant in this matter.	Not an admission as an exception to hearsay – No declarant identified rendering statement unreliable.
29. Thornridge proposed to cut my tax cost by approximately half. I would be paid $3,667,819.00 in total, while Thornridge would withhold $1,222,181.00 of my LTI they otherwise	Inadmissible hearsay. The source of the alleged proposal and "idea presented" from Thornridge is not identified.	This is a description of the proposal in Exhibit 11, where the tax benefits to Mr. Ryan are clearly laid out. Alternatively, Thornridge is a party to this action and	Struck – proposals and ideas presented are hearsay – Not admission as no declarant identified, so unreliable.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
would have had to pay to me. The idea presented to me was that when I sold the shares I received under the proposed option, I would be responsible to pay the capital gains tax with the net proceeds after that to go to Thornridge with any deficit forgiven, and that I would still make more money in this transaction than if I paid 50% of my LTI in tax as income.		their admissions are admissible, or this would be admissible under the principled exception. The memorandum attached in the exhibit was written by Mr. Gillis, the affiant in this matter.	Also represents Mr. Ryan's subjective interpretation, negotiations, plus submission.
30. I agreed to this proposal because, as the promissory note would be non-recourse, it protected	Legal submission regarding the note being "non-recourse".	This is not a legal submission. Mr. Ryan is permitted to describe the circumstances and intention of the parties	Struck – Mr. Ryan's subjective intention as to why he agreed to the

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
my entitlement to my LTI, gave me the possibility to earn more if the exercised shares increased, but also protected me in the event the shares lost value. While this was considered unlikely at the time of the transaction, I would not have agreed to Thornridge's proposal without that protection.	Inadmissible evidence of one party's subjective intention in forming a contract. Violation of parol evidence rule.	when contracting. It is his evidence that the parties agreed to a non-recourse note. That the Note was intended to be non-recourse to protect Mr. Ryan's interests is not his subjective view of the contract but his evidence regarding the intention of the parties and the discussions being had at the time of drafting.	proposal plus submission.
31. The agreement was that Thornridge would be entitled to up to $3,667,819.00 under the note upon certain events	Inadmissible evidence of one party's subjective intention in forming a contract.	This is not Mr. Ryan's subjective view of the contract but rather a description of the objective factual matrix surrounding this contract—that the	Struck – Mr. Ryan's subjective intention plus submission as to

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
occurring. The Note was at no interest and with legal fees to be paid by Thornridge. The note specifically states that amounts shall be paid to Thornridge only to the extent that I receive amounts in respect to the sale of my shares of Envirosystems or successors pledged as security for the note upon a "Liquidity Event".	Legal submission regarding the terms of the note.	agreement was for $3, 667, 819.00 upon certain conditions, was at no interest, and with legal fees to be paid by Thornridge. Objective intentions are relevant to a contract's interpretation and Mr. Ryan submits that this was the objective intent of the parties at the time. The last sentence is quoting directly from the wording of the Note. While the parties interpret it differently, that is objectively what the Note says.	the terms of the Promissory Note.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
32. Mr. Betts remained concerned throughout January/February 2015 that Torquest would become aware of the plan to pay me LTI entitlement in this manner.	Mr. Ryan cannot speak to the state of mind of anyone other than himself.	This is a description of Exhibit 13, an email from Mr. Betts stating his concerns that an option agreement raise suspicion or open the door for "digging".	Struck – Affiant cannot speak to Mr. Betts' state of mind.
33. Mr. Gillis drafted the promissory note on behalf of Thornridge. The repayment terms were altered considerably from my 2013 and 2014 promissory notes to reflect that repayment was only to be made to the extent I received amounts on the sale of shares on an after tax	Legal submission regarding the terms of the note.	That Mr. Gillis drafted the note and that the repayment terms were altered from the previous notes are statements of fact. Thornridge is free to disagree with them. That it was altered to limit repayment is a fact that makes up the factual matrix. It is not a legal submission but his evidence regarding	First sentence admitted as evidence within the knowledge of the affiant. Remainder struck – submission plus subjective intention.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
basis, I felt secure that my financial position was protected.		the intention of the parties and the discussions being had at the time of drafting. The description of "to the extent" is a direct quote from the wording of the Large Note.	
34. I would not have agreed to the note, or to any other part of Thornridge's proposal, if I felt I was jeopardizing any part of my LTI entitlement. By stating that I only had to repay the note to the extent that I received amounts on the sale of shares on an after tax basis, I felt	Inadmissible evidence of one party's subjective intention in forming a contract. Violation of parol evidence rule. Inadmissible hearsay. "By stating..." does	This is Mr. Ryan stating a relevant fact pertaining to the circumstances at the time. It is his evidence that the proposal at the time, and the objective intention of the parties, was to draft a note repayable only to the extent that he received amounts on the sale of shares pledged.	Struck – Evidence of one party's subjective intention.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
secure that my financial position was protected. To reiterate, without this protection I would not have agreed to this transaction and would have simply taken my LTI payment in March 2016.	not even identify the declarant. Goes to the objective intention of the parties.		
37 (iii) (iv) and (v)	The small note is irrelevant to the matters at issue in this proceeding.	Mr. Ryan disagrees about the relevance of the Small Note, as noted in this brief under "Relevance".	Admitted
39, 40, 42	The small note is irrelevant to the matters at issue in this proceeding.	Mr. Ryan disagrees about the relevance of the Small Note, as noted in this brief under "Relevance".	Admitted
43. Contrary to this, the Large Note was not disclosed to	Legal submission on the scope of the transaction.	The first sentence is simply a fact. It is not a legal submission. Mr. Ryan has	First sentence admitted as evidence within

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
Torquest as it was not officially part of the overall transaction. Thornridge specifically did not want Torquest to be aware of The Large Note as its existence contradicted the representation that I was the legal and beneficial owner the shares issued to me per the Option	Inadmissiblehearsay without even identifying the alleged declarant.	personal knowledge of this. Exhibit 23, the closing book, shows that it was not included. The second sentence is not hearsay. It is not relevant for the truth of its contents but for the state of mind of Thornridge. Alternatively, it should be admitted under the principled exception.	the knowledge of the affiant. Remainder struck – Hearsay with no declarant identified. Affiant cannot speak to state of mind of another party. Speculation as to what Thornridge wanted / submission.
44. This is the same reason that Thornridge never requested that I pledge any of the shares issued pursuant to the Option to them.	Speculation. Mr. Ryan cannot speak for Thornridge, or anybody but himself. Inadmissible hearsay. No	This is Mr. Ryan's understanding of the intentions of the parties at the time. Further, Thornridge agrees that they	Struck – speculation, plus submission.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
Torquest would have to become aware of any shares being pledged which would raise questions about Thornridge's representations and possibly delayed the transaction.	identification of the representative of Thornridge making the alleged statements. Legal submission.	never requested a pledge of shares. Mr. Ryan is not alleging Thornridge made any statements here, and thus there is no hearsay. He is simply stating his understanding of what would have happened had the share pledge occurred.	
45. My understanding is that Thornridge would have had difficulties satisfying its obligation to pay LTI entitlements to myself, Mr. Hennigar, Mr. Betts, and Mr. Gillis if the sale of Envirosystems to	Speculation. Inadmissible hearsay with no Identification of the source of this information from Thornridge.	This is not being offered for the truth that Thornridge was having difficulties satisfying its obligation, but rather Mr. Ryan's understanding at the time.	Admitted as evidence within the knowledge of the affiant --"My understanding is that … did not occur." Remainder after the word "occur" is struck as

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
Torquest did not occur, and therefore issues such as the advance payment of my LTI entitlement which may have caused issues were not disclosed.			speculation and submission.
47. The Small Note is noted at tab 50 of the index.	The small note is irrelevant to the matters at issue in this proceeding.	Mr. Ryan disagrees about the relevance of the Small Note, as noted in this brief under "Relevance".	Admitted
49. As Thornridge did not want Torquest aware of the Large Note, it is not included as part of the closing book.	Speculation. Mr. Ryan cannot speak for Thornridge, or anybody but himself.	Mr. Ryan had personal knowledge that Thornridge did not want Torquest aware of the Large Note. Exhibit 23, the closing book, shows that it was not included.	Struck - speculation except wording "large note is not included as part of the closing book" which is admitted.
51. Torquest, as the party holding a	Inadmissible hearsay.	This is just a fact that Mr. Ryan has personal	Admitted – evidence within the

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
controlling interest in Envirosystems following February 2015, began discussions about merging most Envirosystems' Canadian operations with Terrapure Environmental ("Terrapure") by July 2017.	Speculation. The source of this information is not identified.	knowledge of. He is not stating the specific content or statements made at discussions for the truth of their content. He was president of Envirosystems and thus had personal knowledge that this was occurring. He is the source of this information.	knowledge of the affiant as President of Envirosystems at this time.
53. ... While Terrapure wished to acquire the Envirosystems name, Torquest and the other owners of Envirosystems identified these portions of	Inadmissible hearsay. Mr. Ryan cannot speak for anybody but himself. Speculation. The source of this	This is all personal knowledge of Mr. Ryan, who was president of Envirosystems. Not out of court statements being tendered for the truth of their contents, but Mr.	Struck --“while Terrapure wished to acquire the Envirosystems name” and “so Torquest was seeking to dispose of those portions of Envirosystems via

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
Envirosystems' operations as those with growth potential and desirable to continue ownership of. Most of the Canadian operations did not have similar growth potential, so Torquest was seeking to dispose of those portions of Envirosystems via the Terrapure transaction.	information is not identified.	Ryan's personal understanding of what was occurring at the time.	the Terraputre transaction" --- Hearsay and speculation Remainder admitted as evidence within the knowledge of the affiant.
54. In June 2018, prior to the merger with Terrapure, all shareholders in Envirosystems were issued shares in Maviro Holdings L.P.	Lacks foundation as it describes events after his departure as CEO.	Mr. Ryan is an investor and exhibit 25 spells this fact out and provides foundation. This is Mr. Ryan's statement of the relevant facts.	Admitted-- "In June 2018 … issued shares in Maviro Holdings L.P." – evidence is within the knowledge of the

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
("Maviro"), the successor to Envirosystems set up to maintain ownership of the successor operations. These shares were issued on a pro rata basis to all shareholders in Envirosystems and not as consideration for any Envirosystems shares.	Legal submission describing Maviro as a "successor".	Whether Maviro is a successor for the purposes of the contract or the determination of a Maturity Date is a question left to the court.	affiant. Remainder of the sentence is struck—portion submission and portion lacks foundation.
55. Page 209 of Exhibit 25, at recital (3), explains that prior to the merger, Envirosystems completed a reorganization. As	Legal submission describing Maviro as a "successor".	This is Mr. Ryan's statement of the relevant facts. Whether Maviro is a successor for the purposes of the contract or the determination of a Maturity	Struck – Portion stating "to create Maviro as a successor to Envirosystems" – submission.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
part of this process, Mattawa and Envirosystems USA were spun off from Envirosystems to create Maviro as a successor to Envirosystems.		Date is a question left to the court.	Remainder admitted as evidence within the knowledge of the affiant.
61. Overall, I estimate that approximately 87.5% of my share holdings in Envirosystems, and later its successors, were because of the shares issued to me through the Large Note and associated Option. The remaining 12.5% of my shareholdings in Envirosystems and	Legal submission regarding successorship.	It is Mr. Ryan's submission that he owns shares in successors of Envirosystems. The impact of this on the contract is to be determined by the court.	Admitted – evidence within the knowledge of the affiant.

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
its successors are a result of the Small Note and a small number of shares I acquired personally			
65. At the same time that I received payment for the Terrapure shares traceable but not pledged to the Large Note, payment was also issued regarding the shares issued to me pursuant to the Small Note and my personal shares. I also received 276,639 shares in a post transaction partnership created in relation to a battery	Irrelevant.	This is relevant for determining the amount—if any-- that is owed under the Large Note.	Admitted (*Mr. Ryan's proposed supplemental affidavit corrects portion of this evidence.)

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
recycling business not purchased by GFL, of which approximately 87.5% is traceable to the Option.			
66. I have directed the amount…	The small note is irrelevant to the matters at issue in this proceeding.	Mr. Ryan disagrees about the relevance of the Small Note as noted in this brief under "Relevance".	Admitted
67. I was advised on May 19, 2022 by Took Whiteley, Terrapure's General Counsel, that funds from the sale of shares to GFL were released to me as Thornridge advised	Double hearsay. No source of the information from Thornridge identified.	This is not adduced for the truth of its contents but just for the fact that the statement was made.	Struck – Double hearsay – No declarant from Thornridge identified--Not reliable Mr. Ryan has not identified any

PARAGRAPH	BASIS OF OBJECTION	RESPONSE OF MR. RYAN	DECISION
him that it had no claim to additional funds other than those pledged as security for the Small Note. Attached as Exhibit 26 is an email from Mr. Whiteley advising of this.			relevance for the " fact the statement was made" - No probative value. Exhibit is also struck.