NOVA SCOTIA COURT OF APPEAL
Citation: *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72

Date: 20231024
Docket: CA 523480
Registry: Halifax

Between:

Arguson Projects Inc.

Appellant

v.

Gil-Son Construction Limited, SOT Maritime Centre Inc., and Slate Asset Management L.P.

Respondents

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: September 20, 2023, in Halifax, Nova Scotia

Subject: Summary judgment on pleadings; *Shannex* analysis

Summary: The appellant, Arguson Projects Inc., brought a motion for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04 seeking to have the claim filed against it by the respondent, Gil-Son Construction Limited, dismissed. Each party filed an affidavit from their representative, and both were cross-examined.

At the motion hearing, the appellant submitted there were no material facts in dispute, and no question of law for determination. It further argued that if the court determined there was a question of law, the respondent had failed to demonstrate its claim had a real chance of success. Consequently, summary judgment ought to be granted.

The respondent argued the pleadings and evidence demonstrated a dispute of material facts, along with questions of law and therefore, the motion should be dismissed.

The motion judge agreed with the respondent, and found that summary judgment was not appropriate in the circumstances before her.

On appeal, the appellant says the motion judge misapplied the test for summary judgment on evidence. It asserts a proper application of the principles should result in summary judgment being granted, and requests this Court to do so.

Issues:

1. Should leave to appeal be granted?

2. Did the judge err in her application of the principles relating to summary judgment on evidence?

3. Should this Court grant summary judgment?

Result: Leave to appeal was granted. The motion judge failed to properly apply the *Shannex* factors, and as such, erred in principle. The appeal was allowed on this basis.

The Court was satisfied the record permitted it to apply the test for summary judgment on evidence. Summary judgment was granted and the respondent's claim dismissed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 23 pages.

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Respondents

Judges: Farrar, Bryson and Bourgeois, JJ.A.

Appeal Heard: September 20, 2023, in Halifax, Nova Scotia

Held: Leave granted and appeal allowed with costs, per reasons for judgment of Bourgeois, J.A.; Farrar and Bryson, JJ.A. concurring

Counsel: Joseph M. Herschorn and Sarah Dobson, for the appellant
Tracy Smith, for the respondent Gil-Son Construction Limited
Nicola Watson for Nathan Sutherland, on watching brief for the respondents SOT Maritime Centre Inc. and Slate Asset Management L.P.

Reasons for judgment:

[1] The appellant, Arguson Projects Inc., brought a motion for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04 seeking dismissal of the claim filed against it by the respondent, Gil-Son Construction Limited. Each party filed an affidavit from their representative, and both were cross-examined.

[2] At the motion hearing, the appellant submitted there were no material facts in dispute, and no question of law for determination. It further argued that if the court determined there was a question of law, the respondent had failed to demonstrate its claim had a real chance of success. Consequently, summary judgment ought to be granted.

[3] The respondent argued the pleadings and evidence demonstrated a dispute of material facts, along with questions of law and, therefore, the motion should be dismissed.

[4] The motion judge, Justice Mona Lynch, agreed with the respondent, and found that summary judgment was not appropriate in the circumstances before her.

[5] On appeal, the appellant says the motion judge misapplied the test for summary judgment on evidence. It asserts a proper application of the principles should result in summary judgment being granted, and requests this Court to do so.

[6] I am satisfied the motion judge erred in her application of the principles governing summary judgment on evidence. Given the record before us, and applying the well-established test, I would grant summary judgment and dismiss the respondent's claim.

Background

[7] The dispute before the Court involves the re-development of the Maritime Centre in downtown Halifax. The building owner, SOT Maritime Centre Inc. hired the appellant as Project Manager to oversee the re-development.

[8] The appellant then sub-contracted with the respondent to undertake mechanical and electrical work on the project. The parties entered into standard form Canadian Construction Association stipulated price contracts for each scope

of work. Both subcontracts contained identical provisions, and those relevant to the issues before the Court will be set out later in these reasons.

[9] Work on the project started in 2020, but encountered delays. The respondent sought to be compensated for additional costs arising from the project delays. A total of five invoices were sent, and email communication was exchanged between the parties. The total amount of the delay claim was $572,195.62, inclusive of tax.

[10] There was no issue regarding the authenticity of the email communications between the parties' respective representatives. They are summarized as follows:

- On August 4, 2021, the respondent emailed two invoices to Michael Kelly, the appellant's Project Manager. The first referenced delay from April 2020 to January 2021; the second covered the following period up to July 2021;

- On September 14, 2021, Mr. Kelly emailed the respondent's Lead Project Manager, Tet Soon, and advised:

  > We have reviewed your delay claim invoices for additional costs. Unfortunately, with the limited amount of information and/or documentation provided, it is unclear if Gilson are entitled to additional compensation.
  >
  > It is questionable if Gilson has forwarded the claim in a timely manner as required by the contract. Gilson states the delay started in April, 2020 and we did not receive the claims until a year later.
  >
  > There is a complete absence of any documentation to support the claim.
  >
  > The contract specifically requires that a claim for delay has to be attributable to an act or omission by the owner, consultant or contractor. Gilson has not provided the information to support this.
  >
  > Claims for lost productivity and/or profit are not a recoverable cost under the contract.
  >
  > Considering the foregoing we cannot accept the claim invoices. However, on a without prejudice basis, should Gilson provide sufficient documentation to support its position we would reconsider re-evaluating the claim.

- On March 28, 2022, Mr. Soon emailed a third delay invoice covering the period from August 2021 to February 2022. Mr. Kelly responded the same day as follows:

  Hi Tet,

  We will review your claim and respond within the terms of the contract.

- On May 10, 2022, Mr. Soon emailed a fourth delay invoice covering the period of March 2022;

- Mr. Kelly emailed Mr. Soon on May 12, 2022 and stated:

  Tet,
  Could you confirm if this is the final claim submission? Also, I notice the claim is in the form of an Invoice. Please be advised this is not an approved or accepted invoice. All invoices must be submitted within terms of the contract. Please ensure your records are revised accordingly. This would apply to previous submissions as well.

- Mr. Soon emailed to Mr. Kelly on June 7, 2022, a fifth and final delay invoice covering the period of April 2022;

- On July 4, 2022, Mr. Soon again emailed Mr. Kelly, writing:

  Hello Michael,

  To date I've had not heard back from you regarding your plans to resolve the number of delay claims we sent you. I believe Gerard reached out to you last week requesting to discuss this.

  Please let us know if you or someone senior to you will be able to address this issue.

  Looking forward to your immediate response.

  Thank you,

  Tet

- On July 6, 2022, Mr. Kelly emailed Mr. Soon writing:

  Hello Tet,

  The claim has been reviewed and there is no significant change since our email response of Sept 14/21 (copy attached).

  As such we accept no responsibility.

- On July 25, 2022, Mr. Soon emailed Mr. Kelly and stated:

  Michael,

  Please be advised that this email serves as a formal notice our intention to file a lien.

  You will be given until July 27th, 2022, noon to settle payment for our 5 delay claims.

  Sincerely,

  Tet Soon

[11] The respondent registered a Notice of Lien on July 27, 2022. It subsequently filed a Notice of Action and Statement of Claim naming the appellant, SOT Maritime Centre Inc., and Slate Asset Management L.P. (“SOT/Slate”), as defendants. The respondent sought payment of the above referenced invoices. In its pleadings, the respondent acknowledged that the work was performed pursuant to the two subcontracts, and asserted as follows:

> 12. Throughout the project, work was delayed by factors outside of the control of Gil-Son. The delays were the result of actions or omissions of Arguson Projects Inc., the Owners (SOT Maritime Centre Inc. and/or Slate Asset Management L.P.) and/or their respective agents or consultants.
>
> 13. These delays resulted in delay to Gil-Son’s work, for which Gil-Son is entitled to compensation. The delay caused additional costs, including but not limited to the following:
>
> a) Extended management and supervision costs;
> b) Extended overhead costs;
> c) Extended labour costs;
> d) Lost opportunity costs and lost profit;
> e) Extended rental and equipment costs;

f) Extra costs resulting from material cost increases;
g) Any other additional costs incurred as a result of Arguson or owner caused delays, as they may appear.

[12] The appellant filed a Notice of Defence in which it asserted the delay claim was contractually barred. The appellant pled that the bar arose from the respondent's failure to meet its contractual notice obligations, and there was a resulting deemed release of all claims against it:

> 11. Arguson was the construction manager, with responsibility to manage and perform construction services, retained by SOT for the redevelopment of the commercial and office building in downtown Halifax known as the Maritime Centre, located at 1505 Barrington Street (the "**Property**").
>
> 12. In December 2019, Arguson and Gil-Son entered into two contracts for the project, one a subcontract for the mechanical work and the other a subcontract for the electrical work (together the "**Subcontracts**"). Arguson pleads and relies on the relevant provisions of the Subcontracts.
>
> 13. Condition 8.1.1 of the Subcontracts provided that Arguson was to decide questions arising under the Subcontracts and interpret the contractual requirements. Condition 8.2.1 provided that
>
> > **The *Subcontractor* shall be conclusively deemed to have accepted a decision of the *Contractor* under paragraph 8.1.1 of SCC 8.1 -INTERPRETATION AND INSTRUCTION OF THE CONTRACTOR and to have expressly waived and released the *Contractor* from any claims in respect of the particular matter dealt with in that decision unless, within 7 *Working Days* after receipt of that decision, the *Subcontractor* send a *Notice in Writing* of dispute to the *Contractor*, which contains the particulars of the matter in dispute and the relevant provisions of the *Subcontract Documents*.** The *Contractor* shall send a *Notice in Writing* of reply to the dispute within 10 *Working Days* after receipt of such *Notice in Writing* setting out particulars of this response and any relevant provisions of the *Subcontract Documents*.
>
> 14. In August 2021, Gil-Son sent to Arguson the first two invoices of the five in total that would end up constituting the delay claim of $572,195.62 (including HST) that Gil-Son asserts in this action. The first of these invoices referenced alleged delay beginning in early 2020 – more that a year before Gil-Son first notified Arguson of alleged delay.

> 15. In September 2021, Arguson confirmed in writing its decision to reject Gil-Son's delay claim. **Gil-Son did not provide written notice of dispute within 7 working days. Accordingly, Gil-Son is deemed to have accepted Arguson's decision and to have waived and released Arguson from any claim for alleged delay, and Gil-Son's claim should be dismissed on that basis**.
>
> 16. Despite Arguson's decision, and having failed to provide written notice of dispute as required by the Subcontracts, Gil-Son continued to send Arguson invoices for its delay claim, submitting its final delay invoice in June 2022. On July 6, 2022, Arguson repeated that it had decided in September 2021 to reject Gil-Son's delay claim. Gil-Son did not respond until July 25, 2022, only to indicate by email that it intended to record a claim of lien. This only reemphasizes that Gil-Son failed to comply with Condition 8.2.1 and that its claims should be dismissed as a result.
>
> (Emphasis added)

[13] SOT/Slate filed a Statement of Defence and Crossclaim. In the Crossclaim, SOT/Slate sought indemnification from the appellant for any funds found to be owing by virtue of the respondent's claim.

[14] The lien was vacated by order of Justice Norton, based upon the consent of the parties and the payment into court of funds by SOT/Slate.

[15] SOT/Slate did not participate in the motion for summary judgment or appeal, but maintained a watching brief.

Decision under appeal

[16] As noted earlier, the appellant filed a motion for summary judgment on evidence, supported by the affidavit of Michael Kelly. In its motion brief, the appellant summarized its position as follows:

> 2. This action should be dismissed now because the Plaintiff subcontractor, Gil-Son Construction Limited, undeniably failed to meet strict contractual requirements for pursuing its claims against Arguson, its contractual counterparty. Those requirements were conditions precedent to legal action. They are part of the array of contractually mandated rules that Gil-Son agreed to be bound by when it freely entered into sophisticated construction contracts with Arguson to perform mechanical and electrical work on a large commercial renovation project in downtown Halifax.

> 3. It cannot be genuinely disputed that Gil-Son failed to meet those conditions precedent. And by the plain terms of the applicable contracts--and as the relevant case law, including appellate authority and similar summary judgment decisions, unequivocally shows--Gil-Son's failure to meet those conditions precedent is fatal to its action.

[17] As to the material facts, the appellant submitted it was not in dispute that: the parties were bound by the terms of the subcontracts, notably SCC[1] 8.1.1 and 8.2.1; the respondent had submitted delay claims; it had advised the delay claims would not be paid, and the respondent had not provided a "Notice in Writing" of dispute. Applying these uncontested facts to the contractual provisions, the appellant argued the respondent was deemed to have released any claim it had in relation to the delay invoices.

[18] In response, the respondent filed the affidavit of Gerard Bonang. In its written submissions, the respondent summarized its position as follows:

> 1. Gil-Son states that the motion by Arguson seeking summary judgement (sic) on the evidence should be denied.
>
> 2. Arguson alleges that Gil-Son failed to abide by certain Contractual notice requirements under s.8 of their Contracts and further allege that Gil-Sons (*sic*) lien action for delays and extras should be dismissed. However, their argument mischaracterizes what occurred on the Project. Specifically, their arguments related to the delay claim focus on an alleged failure of Gil-Son to provide a "Notice of Dispute" within 7 working days of a "<u>decision</u>" of the Contractor (Arguson). However, <u>there was no "decision" on the project giving rise to the timeline for a Notice of Dispute to be provided, in any event</u>. Gil-sons (*sic*) delay claim was appropriately advanced under section 6 of the Contract, and there was no "question" posed by Gil-Son which gave rise to a "decision" having to be made by Arguson under s.8 of the Contract.
>
> 3. Additionally, and of significance, is that the current claim before this Honourable Court was commenced as a lien claim. It is very clear in the Contract that nothing in s.8 of the Contract (which Arguson bases its summary judgement (*sic*) motion upon) in any way limits Gil-Son's right to assert it's (*sic*) lien rights, which it is doing though (*sic*) this proceeding.
>
> (Underlining in original)

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[1] The parties interchangeably refer to the provisions of the subcontracts as "Conditions", "SCC" and "sections". For consistency, I will refer to the contractual provisions as "SCC", the term used in the contract documents.

[19] With respect to "genuine issues of material fact", the respondent asserted there were two clear matters in contention:

> First, whether the September 14, 2021 email and the July 6, 2022 emails were "decisions" as contemplated by the Contract. This requires the matter be further tried or heard as the parties disagree on this point and have filed evidence to that effect, but the ultimate outcome will depend on what the trier decides as fact; and
>
> Secondly, and alternatively, whether Arguson has waived the requirements for strict contractual compliance based upon their actions and statements dealing with, and responding to, the Delay Claims advanced by Gil-Son. This requires the matter be further tried or heard as the parties disagree on this point and have filed evidence to that effect.

[20] The respondent submitted the above disputed facts should preclude the granting of summary judgment, but went on to argue the application of SCC 8.3.2, the provision allowing for the filing of a lien claim, was a question of law which ought to be answered following a full trial, as was the applicability of SCC 6 pertaining to delay claims.

[21] The motion was heard on March 16, 2023. The two affiants were cross-examined. Immediately after hearing submissions from counsel, the motion judge rendered a brief oral decision. She commenced her reasons as follows:

> I don't think it's going to come as any surprise that I do not think that the conditions have been met for summary judgment on the evidence. There is a genuine issue of material fact on its own or mixed with a question of law for trial for the claim. As I've indicated, whether that decision is made under 8.1.1 is a question of material fact, because only that would trigger the other section and the requirement to respond within the seven working days or to reply a note of dispute within the seven working days. So, there's a question.

[22] The motion judge continued, noting the emails exchanged between the parties were not, in her view, clear and it was open to question whether they constituted "decisions" that triggered the notice obligation in SCC 8.2.1. She commented further:

> In the **W.A.** case, as I said, the – it was -- I find it's incumbent on the contractor, or it may be incumbent on the contractor – and that's a question for trial – to indicate that it is a final decision under 8.1.1 with some clarity and formality so that the subcontractor knows exactly what they're faced with and what has to be done. And there's certainly some question as to whether or not that was done in this case.

[23] The motion judge identified a further question of law:

> The other question is 8.3.2, and that's a claim that is being made under a lien, and it's a question of law as to whether or not that 8.3.2 allows the – to continue on a lien and not use the dispute provisions under the contract. So there's a right to builders' liens and there – you know, the **Builders' Lien Act** says you can't contract out of them, so you're left with those considerations. So, that's a question of law, which may be able to be resolved if it wasn't for what I find to be the genuine issue of material fact as well.

[24] The motion judge did not comment on the waiver issue raised by the respondent. The motion was dismissed.

Issues

[25] In its Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory), the appellant set out the following grounds of appeal:

> 1. That the learned Chambers Judge erred in law in dismissing the Appellant's summary judgment motion by incorrectly applying the test for summary judgment on evidence in concluding that there is a dispute of material fact about whether the Appellant made a decision under the subcontracts on the Respondent Gil-Son Construction Limited's delay claim.
>
> 2. That the learned Chambers Judge erred in law by failing to properly consider whether the Respondent Gil-Son Construction Limited's argument that the Appellant had not made a decision under the subcontracts had a real chance of success.
>
> 3. Such other grounds as may appear.

[26] In its Notice of Contention, the respondent set out additional grounds for upholding the motion judge's decision as follows:

> Gilson (*sic*) contents that there is a genuine issue of material fact as to whether Arguson Projects Inc., ("Arguson") by its words or conduct, waived any requirements for strict contractual compliance [with] the timelines under their Contract:
>
> a. Gilson (*sic*) states that Arguson's conduct throughout the Project and in dealing with the delay claim(s) waived any requirements for strict contractual compliance [with] the timelines under the Contract;

b. The learned motion Judge found that there was a genuine issue of material fact or mixed fact and law that the emails constituted s. 8.1.1 "decisions". The Decision does not address the alternative submission regarding waiver. Gilson (*sic*) will reiterate its submissions on this alternative argument, on appeal as required.

[27] Having heard the parties and considered the record, I would re-frame the issues for determination as follows:

1. Should leave to appeal be granted?

2. Did the judge err in her application of the principles relating to summary judgment on evidence?

3. Should this Court grant summary judgment?

Standard of Review

[28] The standard of review is not in issue. In *Burton Canada Company v. Coady*, 2013 NSCA 95 ("*Burton*"), Justice Saunders wrote:

> [19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating affect, is now extinct. There is only one standard of review. We will not intervene unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. (citations omitted)

Analysis

1. Should leave to appeal be granted?

[29] The issue of leave can be dealt with quickly. In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 ("*Shannex*"), Justice Fichaud wrote:

> [27] This is an appeal from an interlocutory motion, for which leave is required. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Justice Saunders, for the majority, set out the test for leave to appeal:
>
> > 18. …The question of whether leave to appeal ought to be granted is one of first instance. The well-known test on a leave

> application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed. [citations omitted]

[30] As conceded by the respondent, the appellant has raised an arguable issue and leave ought to be granted.

2. *Did the judge err in her application of the principles relating to summary judgment on evidence?*

i) *The principles*

[31] The principles governing a motion for summary judgment on evidence have been set out and explained in multiple decisions. See *Burton*, *Shannex*, *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29 ("*SystemCare*"), *Harding v. 3021386 Nova Scotia Limited*, 2021 NSCA 4, and most recently *Risley v. MacDonald*, 2022 NSCA 76 ("*Risley*"). I will attempt to provide a useful consolidation of the relevant principles.

[32] A motion for summary judgment is brought pursuant to *Civil Procedure Rule* 13.04, which provides:

> **13.04 Summary judgment on evidence in an action**
>
> **(1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

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

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

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

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

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

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

[33] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to the then recently amended Rule 13.04 (paras. [34] through [42])[2]:

1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?

2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?

[2] The Supreme Court of Canada has applied the *Shannex* test in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 at paras. [62] [63].

4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?

5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[34] A motion judge who fails to ask the questions in the above order, or combines one or more of them, risks falling into error.

[35] The first question's focus is solely whether there is a dispute of material fact. A material fact can be one that stands on its own (*i.e.*, whether an email was sent and received) or it can be mixed with a question of law (*i.e.*, an email was sent, but does it constitute a "decision" pursuant to the notice provisions of the contract?). At the first stage, a motion judge looks only at whether the material fact – was an email sent and received – is in dispute. It is irrelevant at this stage whether there is a question of law mixed with the material fact (*i.e.*, the application of the contractual provisions in determining the legal significance of the email) – that consideration belongs in the second step.

[36] In *Shannex*, Justice Fichaud noted " 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" (para. [34]). And further:

> 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.

[37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.

[38] To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the <u>evidence</u> presented on the motion that must be considered. As noted recently by Justice Farrar in *Risley*, bald assertions in a responding affidavit, without more in terms of an evidentiary foundation, will not give rise to a dispute of material fact. It is critical to emphasize that a dispute of material fact

cannot arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings or what evidence could possibly be called at the time of trial.

[39] The second question requires a court to determine whether a question of law arises from the pleadings. If there is no dispute of material fact and no question of law, either pure or mixed with fact, then summary judgment must follow. For the purposes of this appeal, the interpretation of a contract is a question of law. As referenced above, the application of contractual provisions to the factual context, is a question of law mixed with fact.

[40] If there are no disputed material facts, but there is a question of law, the motion judge must proceed to the third question – does the challenged pleading have a "real chance of success"? In *Shannex*, Justice Fichaud wrote:

> Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.
>
> It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

[41] In *Burton,* Justice Saunders explained how to ascertain if there is a "real chance of success":

> [42] . . .Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: **has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?**
>
> [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.

> [44] The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. **In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation**. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> *Is there a reasonable prospect for success on the undisputed facts?*
>
> the answer would be yes.
>
> (Emphasis added)

[42] From the above, it is clear that the second and third questions are anchored in the evidence presented on the motion. As reiterated in *Shannex*, it is expected that each party "put its best foot forward":

> [36] **"Best foot forward":** Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.

[43] As will become clear, the fourth and fifth questions posed in *Shannex*, are not engaged in the matter before the Court.

ii) The judge's application of the principles

[44] The appellant argues the motion judge failed to follow the required analysis, resulting in a flawed and unsupportable outcome. The motion judge's alleged mis-steps are summarized in the appellant's factum as follows:

> 1. This appeal is about a motion judge's erroneous application of the test for summary judgment on evidence. Required to first ask herself whether there were genuine disputes of material fact, the motion judge made an erroneous analytical leap, identifying disputes about the application of contractual provisions as disputes of fact. In doing so, she ran afoul [of] *Civil Procedure Rule* 13.04 and the framework set by this Court in *Shannex v. Dora Construction*.
>
> . . .

> 5. Instead of examining the evidence and asking herself whether there was a genuine dispute of material fact, whether on its own or bound up with a question of law, the motion judge cast a disputed question of law as her reason for dismissing the motion on the first step of the summary judgment analysis. She thereby erroneously reordered the test and implicitly excused Gil-Son from having to prove that its claim had a real chance of success. And on that latter point, appellate authority and case law interpreting similar contractual provisions make clear that Gil-Son's claim was barred by its failure to submit notice of dispute as the subcontracts required.

[45] The respondent submits the motion judge made no error and was correct in finding there were material facts in dispute. In its factum, the respondent says:

> 1. Is it an email sent in the context of two companies trying to resolve a claim, or is it a formal decision under specific provisions of a Contract? The Learned Justice found that this material fact is in dispute.
>
> . . .
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> 3. The Learned Justice accurately applied the test for summary judgment when she determined there were material facts in dispute. The Applicants attempt to suggest that it is somehow "undisputed" that an email from Arguson to Gil-Son amounted to a formal "decision" under a very specific provision (SCC8.1.1) of the Contract, simply because Gil-Son's affiant on cross examination agreed the email contained a "decision" in the common vernacular sense (without being referred to the provision of the Contracts at issue). The Learned Justice rejected this argument as there was evidence present that Gil-Son did *not* recognize that email as a formal decision under the Contracts, and that the relevant provision of the Contracts were not yet even engaged permitting a decision to be rendered at that time. It is clear these material fact *are* in dispute, as rightfully determined by the Learned Justice.
>
> . . .
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> 5. At the time the motion for summary judgement (*sic*) was filed, document disclosure was not started, and discovery did not occur. The motion was premature. Thus, the Notice of Appeal filed by the Appellant should be dismissed with costs payable to the Respondents.
>
> 6. Gil-Son has filed a Notice of Contention in the Appeal raising that there is a genuine issue of material fact as to whether the Appellant, by its words or conduct waived any requirements for strict compliance with respect to the timelines under its Contract with Gil-Son.

[46] I am satisfied the motion judge erred, and agree with the appellant's description noted above. The motion judge conflated the identification of a material fact in dispute with a question of law. In doing so, she collapsed the first two stages of the *Shannex* analysis into one. In particular, she identified the disputed application of the contractual provisions, and the potential for alternative interpretations as a dispute of material fact. This was clearly erroneous – the interpretation and application of contractual provisions are extricable questions of law.

[47] The motion judge further identified as being in dispute, whether the contract permitted the respondent to advance a lien claim, notwithstanding it failing to meet the notice provisions in SCC 8.2.1. This is a question of law; however, having identified it the motion judge did not proceed to ask whether there was a real chance of success to the respondent's claim of waiver.

[48] In short, the motion judge did not undertake a proper analysis of what material facts, if any, were in dispute. She mistook questions of law for disputed material facts which short-circuited the remainder of the *Shannex* analysis. The appeal should be allowed on this basis.

3. *Should this Court grant summary judgment?*

[49] The appellant says, as was done in *SystemCare*, this Court should consider the record, apply the *Shannex* analysis, and grant summary judgment. I agree that we are in the same position as the motion judge, and can readily undertake the analysis to determine if summary judgment is warranted. Before commencing the analysis, I will address the respondent's claim that the summary judgment motion was premature and ought not to have been brought, or now considered on appeal.

[50] Rule 13.04(6)(b) allows a motion judge "to 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". However, in the court below the respondent did not ask that the motion be adjourned or assert that it was premature. The affidavit filed by the respondent made no mention of prematurity or an inability to advance the necessary evidence on the motion. Further, the respondent did not raise the issue of prematurity in its Notice of Contention on appeal. Given these circumstances there is no need to give any further consideration to this late-in-the-day argument.

i) Is there a material dispute of fact?

[51] The pleadings identify two broad issues. The respondent (plaintiff) claims money owing under contract for unpaid work. The appellant (defendant) says the claim is barred because the respondent failed to meet a condition precedent under the contract. In relation to these issues, there is no material dispute that:

- The parties entered into subcontracts that govern their relationship with each other;
- The subcontracts contain the terms relied upon by the parties;
- The respondent submitted invoices for delay claims under the subcontract via email;
- The appellant did not pay the invoices;
- The appellant communicated in writing to the respondent on July 6, 2022, indicating it accepted no responsibility for payment of the delay claim;
- The respondent's affiant, Mr. Bonang, in his cross-examination testified he understood based on the July 6th email, that the appellant had made a decision not to pay the delay claims; and
- The respondent has never provided a "Notice in Writing" of dispute in relation to the delay claims.

[52] I am satisfied there are no material facts in dispute. The disputes of material fact as alleged by the respondent are properly framed as questions of law.

ii) Is there a question of law to be determined?

[53] The motion materials raised two questions of law. Firstly, did the email of July 6, 2023 constitute a "decision" under SCC 8.1.1 and 8.2.1 of the subcontract? Secondly, did the appellant, through its conduct, waive strict adherence to the contractual provisions?

[54] The motion judge identified a third question of law, namely the application of SCC 8.3.2, and whether that provision would permit the respondent another avenue to advance its claim.

iii) Is there a real chance of success?

[55] The focus at the third stage is whether the respondent has demonstrated, in light of the undisputed facts and questions of law identified, its claim has a real chance of success.

[56] The first question of law engages SCC 8.1.1 and 8.2.1. The appellant says they apply, the respondent says they do not. For ease of reference, I will set them out:

> 8.1.1 The *Contractor*, in the first instance, shall decide on questions arising under the *Subcontract* and interpret the requirements therein. Such decisions shall be given in writing. The *Contractor* shall use the *Contractor's* powers under the *Subcontract* to enforce its faithful performance by both parties hereto.
>
> 8.2.1 **The *Subcontractor* shall be conclusively deemed to have accepted a decision of the *Contractor* under paragraph 8.1.1 of SCC 8.1 - INTERPRETATION AND INSTRUCTION OF THE CONTRACTOR and to have expressly waived and released the *Contractor* from any claims in respect of the particular matter dealt with in that decision unless, within 7 *Working Days* after receipt of that decision, the *Subcontractor* send a *Notice in Writing* of dispute to the *Contractor*, which contains the particulars of the matter in dispute and the relevant provisions of the *Subcontract Documents*.** The *Contractor* shall send a *Notice in Writing* of reply to the dispute within 10 *Working Days* after receipt of such *Notice in Writing* setting out particulars of this response and any relevant provisions of the *Subcontract Documents*.
>
> (Emphasis added)

[57] The relevant case authorities establish that the above provisions create a condition precedent. If a contractor has made a decision, a subcontractor is precluded from bringing a claim in relation thereto, unless it has sent a "Notice in Writing" of dispute. See *Corpex (1977) Inc. v. The Queen in right of Canada*, [1982] 2 S.C.R. 674; *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597 at paras. 28 to 45; *Urban Mechanical v. University of Western Ontario*, 2018 ONSC 1888 at paras. 101 to 116.

[58] The more critical question is whether here, the appellant had made a "decision" within the meaning of SCC 8.1.1. The respondent says it did not, and therefore, the condition precedent in SCC 8.2.1 has no applicability in the present case. The respondent says the appellant did not clearly specify the "decision" it conveyed in the July 6, 2022 email was being made pursuant to SCC 8.2.1, therefore it cannot be considered to have triggered an obligation to send a "Notice in Writing" of dispute.

[59] There is nothing in the evidentiary record to support the respondent's assertion. Indeed, its witness confirmed he understood the appellant had, on July 6, 2022, decided it would not be paying the delay claim. The respondent's assertion the appellant's email advising it was not responsible for the delay claim is not a "decision" as contemplated in SCC 8.1.1, has no real chance of success. In reaching this conclusion I note:

- The provisions in question are not specific to particular types of disputes, but are rather an agreed mechanism for all questions that arise between the parties under the subcontract to be resolved. The contractor, here the appellant, makes a decision in the first instance, which is communicated in writing to the subcontractor. The question in the present instance was whether the delay claims were payable under the terms of the contract. That question was answered, in writing, in the negative by the appellant; and

- The provisions in question do not mandate that a contractor is required to specify a decision is being made pursuant to SCC 8.1.1. The case authority relied on by the respondent that suggests otherwise, *W.A. Stephenson Construction (Western) Limited v. Metro Canada Limited*, [1987] B.C.J. No. 2075, is easily distinguishable in the present case. In any event, given that SCC 8.1.1 governs the resolution of all questions that arise between the parties, it is obvious any "decision" made by the contractor is made pursuant thereto.

[60] Contrary to the respondent's assertion, the appellant did make a decision on the question of whether the delay claims were payable under the terms of the subcontract pursuant to SCC 8.1.1. It was conveyed in writing to the respondent. The respondent did not file a "Notice in Writing" of dispute in response. As a result, by virtue of SCC 8.2.1, the respondent was deemed to accept the decision, and to release its claim in relation thereto. Subject to the other questions of law

raised herein, the respondent's failure to abide by the contractual notice provision is fatal to its ability to seek payment from the appellant of the delay claim.

[61] The respondent argues in the alternative, that if SCC 8.1.1 and 8.2.1 are found to apply, the appellant waived strict reliance on these provisions. With respect, the respondent has failed to demonstrate its claim of waiver has a real chance of success.

[62] In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, Justice Major explained the concept of waiver as follows:

> **19** Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp*. (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):
>
>> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.
>
> **20** **Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them.** The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.
>
> (Emphasis added)

[63] There is nothing in the evidence presented which suggests the appellant held an unequivocal and conscious intention to abandon its rights under the subcontracts. In fact, there is considerable evidence that in its dealings with the respondent, the appellant continually asserted it would govern their dealings within the contractual terms. It is the respondent's burden to establish, on the evidence,

there is a real chance of success to their assertion of waiver. It has not met this burden.

[64] The final question of law, as identified by the motion judge, pertains to the application of SCC 8.3.2 which provides:

> Nothing in Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION shall be construed in any way to limit a party from asserting any statutory right to a lien under applicable lien legislation of the jurisdiction of the *Place of the Work* and the assertion of such right by initiating judicial proceedings is not to be construed as a waiver of any right that party may have under paragraph 8.2.5 of SCC 8.2 – NEGOTIATION, MEDIATION AND ARBITRATION to proceed by way of arbitration to adjudicate the merits of the claim upon which such a lien is based.

[65] In my view, the above provision does not lend assistance to the respondent in advancing its claim, and specifically does not provide a means of circumventing the condition precedent in SCC 8.2.1. The purpose of SCC 8.3.2 is to permit a subcontractor to file a lien claim within the statutory time limit, without fear that doing so would prevent it from taking advantage of the contractually prescribed dispute resolution processes. The provision does not make a claim barred by SCC 8.2.1 actionable. The respondent has presented nothing to suggest otherwise.

[66] The respondent has failed to demonstrate that its claim has a real chance of success in relation to the identified questions of law. Based on the *Shannex* analysis, summary judgment must follow.

Disposition

[67] For the reasons above, I would allow the appeal, grant summary judgment and dismiss the respondent's claim in its entirety. I would further direct that the monies paid into court by SOT/Slate to vacate the lien, be released and their cross-claim against the appellant be dismissed.

[68] I would direct the costs ordered by the motion judge in favour of the respondent be reversed. I would further order that the appellant be entitled to costs on appeal in the amount of $2,500.00, inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.