SUPREME COURT OF NOVA SCOTIA
Citation: *Thompson v. Scotia Capital Inc.*, 2023 NSSC 409

Date: 20231214
Docket: 491298
Registry: Halifax

Between:

Charles Thompson and Charles Thompson as Executor of the Estate of Glenda Thompson

Plaintiffs/Respondents

v.

Scotia Capital Inc/Scotia Capitaux Inc. carrying on business as ScotiaMcLeod

Defendant/Applicant

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	December 6, 2023, in Halifax, Nova Scotia
Written Release:	December 14, 2023
Counsel:	Colin D. Bryson, K.C. and Thomas Morehouse for the Plaintiffs/Respondents Michelle C. Awad, K.C., Melanie Gillis, and Oliver Grant (articled clerk) for the Defendant/Applicant

By the Court:

INTRODUCTION

[1] The Defendant/Applicant Scotia Capital Inc. (Scotia) moves for an Order for summary judgment on evidence, dismissing all claims in the amended Statement of Claim, with costs pursuant to Civil Procedure Rules 23, 13 and 77.

[2] The Plaintiffs/Respondents (Thompson) resist the motion and ask for a dismissal with costs.

[3] By correspondence filed by Scotia on June 19, 2023 the parties agreed to a filing schedule. This was subsequently amended with the ultimate consent of the parties. In the result, the Court has before it various letters and these briefs:

- Scotia's brief filed October 13th;
- Thompson's brief filed November 10th; and
- Scotia's reply brief (with para. 38 deleted by agreement of the parties) filed November 21st.

[4] On the motion the Court also received and reviewed the books of authorities filed October 13th, November 17th and 21st, along with cases and a statute handed up on December 6th. In terms of evidence, the Court considered the following:

- affidavit of Scotia's Atlantic Regional Director Gregory Payne, sworn and filed October 13th;
- affidavit of Charles Thompson, sworn November 10th and filed November 17th;
- supplementary affidavit of Mr. Payne, sworn and filed November 23rd;
- supplementary affidavit (with amendments agreed upon by the parties) of Mr. Thompson filed December 6th (sworn and filed later this month); and
- exhibit 1, an excerpt from Charles Thompson's January 26, 2023 discovery examination.

The affiants were not cross-examined and their affidavits (with exhibits) went in by consent.

[5] The lawsuit was initially commenced on August 19, 2019 and subsequently amended. By Amended Notice of Action and Amended Statement of Claim filed October 3, 2019, Thompson seeks damages from Scotia for breach of contract, negligence and breach of fiduciary duty arising out of alleged wrongdoing by one of Scotia's investment advisors, David Chabassol (Chabassol) in his dealings with Thompson. By Defence filed January 21, 2020, Scotia denies all allegations as did Chabassol in his Defence filed February 10, 2020. Chabassol died on May 6, 2021 and on November 1, 2021, Thompson filed a Notice of Discontinuance with respect to the claims against Chabassol.

ISSUE

[6] The sole issue on this motion is whether Scotia is entitled to summary judgment dismissing Thompson's lawsuit on the basis that the claims are statue-barred pursuant to the *Limitation of Actions Act*, SNS 2014 c 35 ("*LAA*"). The *LAA* was the statute handed up during the hearing.

BACKGROUND AND PARTIES' POSITIONS

[7] Charles Thompson and his wife, Glenda Thompson (who died on June 27, 2011) became clients of Scotia in or about September, 2001. Their investment advisor at the time was Chabassol, who joined Scotia in July, 2001 and worked continuously at Scotia until taking a medical leave on October 14, 2014. He never returned to work. Thompson and his wife had been investment clients of Chabassol's for many years prior to Chabassol joining Scotia.

[8] After Chabassol went on medical leave in mid-October, 2014 Scotia investment advisor, David Bugden took over the advisory role. Following Mr. Bugden's departure from Scotia in 2016, Wayne Fraser became the Scotia investment advisor who worked with Thompson. Thompson alleges no wrongdoing by Mr. Bugden or Mr. Fraser.

[9] Thompson pleaded, at para. 7 of the Amended Statement of Claim that throughout their dealings with Scotia, "…the communication between Chabassol/Scotia and Charles and Glenda were exclusively through Charles". Thompson had power of attorney over the only account which was in his wife's name, alone. He was either sole account holder or joint account holder on all other Scotia accounts.

[10] Once again, Scotia's motion is for summary judgment on evidence. Scotia seeks an order dismissing Thompson's claims on the basis that pursuant to the *LAA*, the applicable limitation period expired long before Thompson commenced the proceeding on August 19, 2019. Scotia says that all claims after October 14, 2016 (two years after Chabassol left Scotia) are statue-barred.

[11] Given the role which Thompson played in his dealings with Scotia, Thompson's own evidence is central to the allegation in the proceeding and to the limitations issue on the motion. Scotia submits that all evidence leads to the conclusion that Thompson was an experienced, sophisticated investor who paid close attention to his accounts and had a high tolerance for risk.

[12] Thompson takes issue with this and says that he was not so sophisticated and that he relied on Chabassol/Scotia for advice. Thompson says that he trusted Chabassol to provide advice that met industry standards but that his trust was misplaced.

[13] In addition, Thompson says that trading on their relationship and given his trust of Chabassol, that in July, 2008 Chabassol convinced Thompson to lend him a substantial amount of money for treatment of an alleged life-threatening illness. A total of $1,050,000 was advanced by Thompson in instalments from July 2008 to January 2009. This loan was only partially repaid by Chabassol. In his Amended Statement of Claim, Thompson also claims that Scotia is responsible for the remainder of this loan debt.

[14] Thompson concedes that the limitation period expired before the action was commenced for any claims against Scotia for failing to ensure that the holdings in Thompson's accounts were consistent with his goal of having a 70%/20%/5% split between banks, oil, and new issue investments and for failing to follow Thompson's instructions to purchase certain Bank of Nova Scotia stock. Thompson has also withdrawn his claim relating to alleged unauthorized purchases of Pacific and Western stock.

[15] Notwithstanding these concessions, Thompson focuses on para. 13, 14 and 15 of the amended pleading in maintaining that his claim is not statue-barred. For example, he argues as follows in his brief at paras. 58-60:

> 58. There is normally not any confusion about what issue the summary judgment analysis is to focus on. Here there is. The main issue as described in paragraphs 13 to 15 of the Amended Statement of Claim is that with Mr. Thompson having

> accumulated more than enough to meet his lifetime needs and those of his disabled children, Mr. Chabassol failed to counsel Mr. Thompson to dial it back and set aside money in more conservative investments. The secondary issue is ScotiaMcLeod's liability for the $1,050,000 loan.
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> 59. ScotiaMcLeod's motion has ignored Mr. Thompson's primary claims, and rather, has chosen to focus on three isolated complaints that Mr. Thompson testified to in his discovery, but is not advancing in this litigation.
>
> 60. It is ScotiaMcLeod's motion, so it can choose what it wants to focus on in putting its best foot forward. But having done so, it is stuck with that, and cannot now in its reply memorandum, respond to the plainly made allegation in the pleadings that Mr. Chabassol failed to advise Mr. Thompson to dial it back, as paragraph 87 of this memorandum suggests that it might do, particularly when Mr. Thompson was asked about that issue in his discovery.

[16] In their submissions, Scotia challenges the above as set out in their reply brief at paras. 6-8:

> 6. In the face of these significant concessions, the Plaintiffs attempt to argue that their two 'primary claims' in this proceeding are distinct from those 'isolated complaints' (Plaintiffs' Brief, para 59). They are not.
>
> 7. The first alleged 'primary claim' concerning Scotia Capital's alleged failure to advise the Plaintiffs to reduce the risk in their accounts at 'some point prior to 2008' (Plaintiffs' Brief, para 7) are also suitability claims. Failing to advise Thompson to "dial it back" to more conservative investments is a suitability claim by another name. It is indistinct from alleging that the client's instructions were not followed or that the investments made were not consistent with the client's goals and objectives. Furthermore, there is no merit to the suggestion that this version of the suitability claims was not discoverable until 2018. It is therefore statue-barred along with the other suitability claims, and it is not revived by operation of the discoverability principle.
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> 8. The second 'primary claim' is that Scotia Capital is vicariously liable for the repayment of a $1,050,000 personal loan advanced to Daryn Chabassol by Thompson (through corporate entity, Blue Ox Heritage Co-operative Ltd.), in 2008 and 2009. Again, there is no basis for finding that the loan and the requirement for repayment were not discoverable before the limitation period for this action commenced in August 2019. Any vicarious liability for Scotia Capital for the loan (which is not admitted) is therefore also statute-barred as the first default under the loan occurred at the end of August 2009, which gave rise to discoverability.

GOVERNING LAW

[17] Before providing my analysis and disposition, I wish to touch on the governing law. The parties agree and I find that this motion is based on the law

relating to summary judgment in general and its application in *LAA* cases. Section 8(1) of the *LAA* imposes a two-year limitation period. It provides:

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

[18] A motion for summary judgment is brought by Civil Procedure Rule 13.04, which states:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
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> (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.

[19] The test applicable to a Rule 13.04 motion was articulated by Justice Fichaud in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 at paras 33-34 (the *Shannex* test):

> [33] The amended Rule 13.04 frames, but does not materially change *Burton*'s tests. On the first test, instead of the former Rule's "genuine issue for trial", the new Rule 13.04(1) speaks of a "genuine issue of material fact, whether on its own or mixed with a question of law". On the second, the amended Rule 13.04(3) repeats the former Rule 13.04(2), that the judge may grant judgment, dismiss a proceeding, and allow or dismiss a claim or defence. These provisions remain consistent with Justice Saunders' formulation in *Burton*.
>
> [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)]
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> 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.
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> A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

- Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

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

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

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

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

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

This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons

> for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[20] As noted by Justice Bourgeois in *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72 at para. 31:

> [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.

[21] After setting out the text of Rule 13.04, Bourgeois, JA continued at paras 33-42 by providing a helpful roadmap for counsel and trial judges faced with interpreting and applying the *Shannex* test. I will return to certain of Justice Bourgeois' helpful paras. within my analysis and disposition.

[22] In *Wright v. Ratcliffe*, 2023 NSSC 287, Justice Norton reviewed the proper application of the *Shannex* test for cases involving limitations defences, citing the Nova Scotia Court of Appeal's decision in *Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52 at para. 31:

> [31] The Nova Scotia Court of Appeal in *Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52, (hereinafter "*Milbury*") described the approach to summary judgment on the evidence in the context of a limitations defence at paras. 20 and 23-24:
>
> [20] Did the defendants establish that there are no genuine issues of fact on the question of whether the plaintiff's action is statute barred because the limitation period has expired? ...
>
> ...
>
> [23] When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule ...
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> [24] In the context of a summary judgment application where a limitation defence is pleaded, the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in

> 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.

[23] Based on the foregoing, Scotia must establish that there is no genuine issue of fact for trial on the question of whether the limitation period for Thompson's claims has expired. Once Scotia does that, the burden shifts to Thompson to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired by operation of the discoverability principle.

[24] The parties agree and I find that the leading case on discoverability is *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31. The test on discoverability is set out by the Supreme Court of Canada (per Justice Moldaver) at paras. 42-46, as follows:

> [42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.
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> [43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.
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> [44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise (*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).
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> [45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that

> are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). Although the question in both circumstances is whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds. As the British Columbia Court of Appeal observed in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217, at para. 77:
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> > As noted in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, some cases equate *prima facie* proof to a situation where the evidence gives rise to a permissible fact inference; others equate *prima facie* proof to a case where the evidence gives rise to a compelled fact determination, absent evidence to the contrary. [Citation omitted.]
>
> Since the term *prima facie* can carry different meanings, using plausible inference in the present context ensures consistency. A plausible inference is one which gives rise to a "permissible fact inference".
>
> [46] The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability (*Kowal v. Shyiak*, 2012 ONCA 512, 296 O.A.C. 352) or "perfect knowledge" (*De Shazo*, at para. 31; see also the concept of "perfect certainty" in *Hill v. South Alberta Land Registration District* (1993), 1993 ABCA 75 (CanLII), 8 Alta. L.R. (3d) 379, at para. 8). Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run (*HOOPP Realty Inc. v. Emery Jamieson LLP*, 2018 ABQB 276, 27 C.P.C. (8th) 83, at para. 213, citing *Peixeiro*, at para. 18).

[25] In *Rudolph v. Nova Scotia (Attorney General)*, 2021 NSSC 279, Justice Coughlan had this to say about the applicability of the *Grant Thornton LLP* standard at paras. 30 and 31, and I agree:

> [30] The standard to be applied to determine whether a plaintiff has the requisite degree of knowledge to discover a claim under the New Brunswick *Limitation of Actions Act*, was set out by Moldaver J. in giving the Court's judgment in *Grant Thornton LLP v. New Brunswick*, as follows:

> (3)…In my view, a claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. If follows from this standard that a plaintiff does not need knowledge of all the constituent elements of a claim to discover that claim.
>
> [31] The only difference between the New Brunswick section and the equivalent provision in the Nova Scotia *Limitation of Actions Act, supra*, s.8 is the Nova Scotia section has an additional subsection 2(d) which provides "(d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.". I find the standard to be applied as set out by the Supreme Court of Canada in *Grant Thornton LLP v. New Brunswick*, also applies to the Nova Scotia *Limitation of Actions Act*.

[26] In another recent decision of our Court, *Install-A-Floor Limited v. The Roy Building Limited*, 2022 NSSC 67, Justice Norton had cause to consider the *LAA* (referred to as *LOAA* in the quote below) and explained his interpretation of s. 8(2)(d), which I endorse:

> [36] The Roy argues that a plain language reading of these two provisions demonstrates that they are distinct. Subparagraph 5(1)(a)(iv) of the Ontario Act asks if a proceeding is "an appropriate remedy." Comparatively, paragraph 8(2)(d) of the LOAA asks about the seriousness of the injury, loss or damage alleged. The former is a question of timing: it is not appropriate to commence an action if you are not yet able to under an agreement. The latter is not concerned with time, but rather the gravity of the injury: the phrase "sufficiently serious to warrant a proceeding" suggests that one discovers the claim the moment it is apparent that the loss is serious enough to warrant pursuing by legal means. LOAA paragraph 8(2)(d), does not ask about whether it is appropriate to file at the time of discovery or not. It is simply concerned with whether the size of a potential claim can be ascertained. Whether the proceeding can be filed on that day or sometime later is not relevant.

[27] In *Hardit Corp v. Holloway Investment Inc.*, 2022 NSSC 328, Justice Brothers stated as follows regarding the issue of discoverability:

> [39] The first question, then, in determining whether there is no genuine issue of material fact, is whether the defendants have proved the facts supporting the expiry of the time period. If so, then the plaintiff must demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired because of discoverability.
>
> …
>
> [44] As these provisions demonstrate, the point at which the claimant discovered or ought to have discovered the claim is critical to determining whether the limitation period has expired. As a result, the moving party will not succeed unless

> the court is satisfied that there is no genuine issue of material fact, either on its own or mixed with a question of law, as to when the claim was discovered or ought to have been discovered.
>
> [45] The issue of discoverability is a question of mixed fact and law…

[28] Given the authorities, I am of the view that the discoverability issue is one of mixed fact and law. If there is any factual dispute that is material to the discoverability issue, summary judgment should not be granted.

ANALYSIS AND DISPOSITION

[29] Once again, pursuant to the *Shannex* test, Scotia must establish that there is no genuine issue of fact for trial on the question of whether the limitation for Thompson's claim was expired. If Scotia establishes this, then the burden shifts to Thompson to show that there is a real chance of success by presenting evidence that the limitation period was not expired, given the operation of the discoverability principle.

[30] The *Shannex* test requires the Court to zero in on whether there is a genuine issue of material fact for trial. In answering this, the Court should first consider whether any material facts are in dispute. A dispute concerning an immaterial or incidental fact, i.e. one that will not affect the outcome, does not affect the summary judgment analysis.

[31] In *Arguson,* our Court of Appeal provided this helpful explanation concerning whether there is a dispute of material fact at paras. 35-38:

> [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 evidence 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.
>
> [Underlining added by Bourgeois, JA]

[32] Having regard to the above, I have carefully read and considered the four affidavits filed on this motion together with exhibit 1 and the pleadings. In so doing, I have been careful not to weigh the evidence or make credibility determinations.

[33] In the present motion, the materiality of facts is to be determined with reference to the issue of whether the applicable limitation period under the *LLA* has expired.

[34] In making this determination I am alive to the cases put forward by both sides referrable to discoverability. In this regard, I agree with the principle advanced by Scotia that knowing the totality of the alleged wrongdoing is not the test for discoverability (see *Tender Choice Foods Inc. v. Versacold Logistics Can. Inc.*, 2013 ONCA 474). I am also mindful of the due diligence requirement as set out in *Grant Thornton LLP* and applied in numerous decisions including *Rudolph*.

[35] Scotia submits that there are no material facts in dispute on this motion. Specifically, Scotia points to the uncontested evidence which demonstrates:

- Chabassol ceased work at Scotia on October 14, 2014;
- Thompson does not allege any wrongdoing on the part of any Scotia employee other than Chabassol;

- The two aforementioned facts taken together mean that any acts of wrongdoing alleged by the Plaintiffs had to have occurred on or before October 14, 2014; and
- The Notice of Action and Statement of Claim was not filed until August 19, 2019.

[36] Regarding discoverability, Thompson asserts through his Amended Statement of Claim as follows at para. 27:

> The Plaintiffs state that for the purposes of section 8 of the Limitation of Actions act, SNS 2014, c 35, their claims herein were not "discovered" until the spring of 2018 when they received advice that their investment losses were not just market losses, but were caused by or contributed to by the negligence and/or breach of fiduciary duty of the Defendants.

[37] In his first affidavit, Thompson gives considerable evidence concerning discoverability at paras. 19, 20, 23, 24, 28, 49 and 53.

[38] In my view, Thompson in his amended pleading and affidavits provides a foundation for his dispute with Scotia. For example, his first affidavit (at paras. 19-28) there is evidence referrable to his loan to Chabassol. As for his investments, the first affidavit provides detailed evidence at paras 29-35 and again in his second affidavit (referrable to his savings or in trust accounts) at paras 4-8. As for his investment knowledge and strategy, this is detailed at paras 36-48 of his first affidavit.

[39] Having considered all of the evidence on the motion, I am satisfied that there clearly is a dispute of material fact. Unlike the situation in *Risley* (see para. 31 where I quote from *Arguson* which discusses this), what we have here from Thompson's affidavit evidence amounts to far more than bold assertions in a responding affidavit. Thompson's two affidavits, combined with Mr. Payne's affidavits and the pleadings, provide demonstrable evidence that there are material facts in dispute between the parties that will affect the result at trial. From all of the evidence I can readily conclude that there are live issues concerning the know-your-client (KYC) letters and forms, the loan, Mr. Thompson's level of knowledge and sophistication as an investor, the overall performance of his investments under Scotia and whether Chabassol should have "dialed back" the ongoing high risk/margin investment strategy.

[40] The critical aspect of this motion comes down to discoverability. Scotia points to the evidence that Thompson reviewed his monthly statements "line by line", as received. They say that he had years to sue but did not until it was way too late. Scotia says that Thompson's rationale for doing something only came years later based on a conversation with his nephew which led him to consult with an investment advisor and ultimately, legal counsel.

[41] Scotia says that being an experienced and sophisticated, engaged investor should have prompted Thompson to commence the lawsuit back when Chabassol was with Scotia. As for the loan, they note the initial default was back on August 17, 2009 and that given s. 8(2)(b) of the *LAA*, that is when the clock started ticking.

[42] In summary, Scotia says that Mr. Thompson did not exercise proper due diligence to discover his claims. They say he had actual or constructive knowledge from which a plausible inference should have been clear. Scotia submits that in all of the circumstances, Thompson has failed to meet his burden on the motion.

[43] Thompson responds by emphasizing that the entire context must be examined, particularly given the backdrop of the trust relationship that existed between Thompson and Chabassol. He points to the evidentiary record which shows that back in 1996, Thompson had just under $1 million in investments. With just $237,000 added, this figure grew to approximately $3.7 million by 2002.

[44] Thompson's total investments blossomed to approximately $8 million by 2006 and then there were significant declines within the 2008 recession. By 2015 Thompson's investments totaled just under $500,000. In the words of Thompson's counsel, the investment strategy of high risk and utilizing margin, "worked great until it didn't".

[45] While acknowledging that he carefully and regularly reviewed his investment statements, Thompson says that there were no "triggers" to cause him to believe Chabassol was negligent. While admitting that he lost a significant sum of money, Thompson maintains that he did not know that Chabassol provided negligent advice until he had his conversation with another investment advisor (Vince Byrne) years later.

[46] Thompson acknowledges that he did not act on the three potentially negligent events which he concedes are not part of the claim. He adds that the circumstances involving what he now perceives as negligent conduct were effectively smoothed over by Chabassol. Further, Thompson says that the "much more than normal" trust

that he had in Chabassol masked Chabassol's negligent behaviour. To illustrate his point, Thompson points to the fact that Thompson authorized Chabassol to have his Power of Attorney, made him a director of Blue Ox Heritage Co-operative (his charitable organization), and loaned him over one million dollars. In all of the circumstances, Thompson says that he only recently recognized his "blind spot…there was a spell of Chabassol over Thompson."

[47] Thompson adds that with respect to the loan that (as he states in para. 22 of his first affidavit) monthly payments were made by Chabassol against the loan until February, 2021. It was only with Chabassol's death that they stopped. Relying on s. 20(1) of the *LAA*, Thompson says that the limitation clock only began on this date, just months before he commenced action.

[48] The evidence causes me to conclude that with respect to discoverability, there are material facts in dispute referrable to Thompson:

- not receiving any expert advice that he had a claim against Scotia until 2018;
- having no reason to think that his losses were anything more than market losses;
- placing trust in Chabassol (as evidenced by, among other things, the loan);
- not appreciating that he may have a claim until it was suggested to him that he get legal advice; and
- being not as knowledgeable or as sophisticated as the KYC forms prepared by Chabassol make him out to be.

[49] As is made clear in *Grant Thornton LLP*, the limitation clock does not start based upon mere suspicion or speculation of liability; there must be "a plausible inference of liability". The evidence led on this motion convinces me that it will be a "live issue" as to whether there was a plausible inference of liability to trigger Thompson making a claim or even retaining an expert any sooner than he did.

[50] I am alive to the competing arguments which are all rooted in the pleadings and affidavit (with appended discovery excerpts and other exhibits) evidence. Having said this, it is not the role of the Court on a Rule 13 summary judgment motion to weigh the evidence or make credibility findings. This must be left for a future day and I note the trial in this matter is set for June, 2025.

[51] When I consider all of what is before me on the motion, I am abundantly satisfied that the matter does not progress beyond the first part of the *Shannex* test. This is because the pleadings and provided evidence demonstrate that there are questions of material facts which require adjudication. There are genuine issues of material fact (solely or mixed with a question of law) as to when the claims were discovered or ought to have been discovered. In the result, I dismiss the application with costs to Thompson. If the parties cannot agree on costs, I will receive written submissions on or before January 31, 2024.

Chipman, J.