IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42
Date: December 11, 2020
Docket Number: 201901H0076

BETWEEN:

BROOK CONSTRUCTION (2007) INC. APPELLANT

AND:

NORTH ATLANTIC CEMENT AND CONSTRUCTION LTD. RESPONDENT

Coram: Green, Hoegg and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201701G1276 (2019 NLSC 142)

Appeal Heard: February 11, 2020
Judgment Rendered: December 11, 2020

Reasons for Judgment by: Green J.A.
Concurred in by: Hoegg J.A.
Dissenting Reasons by: Butler J.A.

Counsel for the Appellant: Adam Crocker
Counsel for the Respondent: John Sinnott Q.C.

Green J.A.:

[1] The respondent, North Atlantic Cement and Construction Ltd., claimed money allegedly due under a construction sub-contract with the appellant, Brook Construction (2007) Inc. In an application for summary judgment, or in the alternative for summary trial, in which the main issue in contention was Brook's submission that its sub-contract was with another company, not North Atlantic, the summary trial judge held that a contract between Brook and North Atlantic did exist and ordered that judgment be entered against Brook for the full amount claimed by North Atlantic.

[2] On this appeal, Brook accepts the finding that a contract with North Atlantic did exist but contends that the summary trial judge erred in proceeding to enter judgment for the claimed amount of $38,496.77 instead of ordering a conventional trial to determine the amount to which North Atlantic was entitled. The position of Brook was that by denying North Atlantic's allegation that it had performed the contract in accordance with the plans for the job, Brook had put the question of deficiencies in performance in issue and that because that issue could not have been resolved on a summary trial, the summary trial judge should have referred the question of what in fact was owing under the contract to a conventional trial.

[3] The resolution of this appeal involves, amongst other things, consideration of:

- The interrelation and the distinctions between the summary judgment procedure under rule 17 of the *Rules of the Supreme Court, 1986* and the summary trial procedure under rule 17A;
- The tests to be employed and the analytical framework to be used when applying rules 17 and 17A;
- The scope and operation of the so-called "threshold question" that is engaged when a summary trial application is made; and
- The procedure to be employed on a summary trial application.

Procedural and Legal Background

[4] Because the parties were at cross-purposes throughout the proceeding, both in the court below and in this Court, about the nature of the application and what was required to establish their respective positions, thereby leaving a confusing landscape for the applications judge to navigate, it is appropriate to

review the process of such applications to clarify what is expected with respect to these matters.

(a) The Pleadings

[5] North Atlantic issued a statement of claim against Brook alleging: the formation of a sub-contract with Brook, as general contractor, for the installation of a sewer line for a school at St. Anthony, NL; the performance of that sub-contract; and the failure to pay the amount due thereunder. For a claim for money due under a contract, that was all that was necessary to be pleaded. Regarding the allegation of performance, the statement of claim stated:

> 6. [North Atlantic] … carried out the contract …in accordance with the plans for the job and the directions of a Government engineer onsite throughout the performance of the job.
>
> (Emphasis added.)

[6] The defence filed by Brook collectively denied each of the paragraphs in the statement of claim, including the above-quoted paragraph 6, and stated that it was putting North Atlantic "to strict proof thereof". The only substantive allegation in the defence asserted that a contract existed between Brook and another company, C & T Enterprises Ltd., not with North Atlantic, that it had paid C & T all sums due under that contract and asked for a dismissal of North Atlantic's claim.

(b) The Summary Judgment Application

[7] North Atlantic then filed an application for summary judgment under rule 17 of the *Rules of the Supreme Court, 1986*. The application asserted facts relating to the formation of the contract, the price claimed, the performance of the contract by North Atlantic, the submission of an invoice, and the failure to pay. The application referred to the assertion in Brook's defence that the contract was not with North Atlantic but stated that there was no defence to the action and asked for summary judgment under rule 17.

[8] The affidavit of the manager of North Atlantic accompanying the summary judgment application deposed to further details, supported by exhibits, relating to the formation of the contract and its performance by North Atlantic. It repeated the deponent's belief that there was no defence to the claim as outlined in the statement of claim and that the sum of $38,496.77 was "justly and truly owing" by Brook to North Atlantic. In effect, North Atlantic was seeking

judgment for a liquidated sum (an additional claim in the statement of claim for "general damages for breach of contract" was apparently not pursued), claiming there was "no defence" to the claim.

[9] Rule 17 provides:

> 17.01 (1) Where the defendant has filed a defence … the plaintiff may, on the ground that the defendant has no defence to a claim in the originating document or a part thereof or has no defence to such a claim or part except to the amount of any damages claimed, apply to the Court to enter judgment against the defendant.
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> (2) This rule applies to every proceeding begun by statement of claim other than one which includes … [not applicable]
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> 17.02 On the hearing of an application under rule 17.01, the Court may on such terms as it thinks just
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> …
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> (b) grant an order in favour of the plaintiff on the claim or any part thereof;
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> …
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> (e) where the defence is to amount only, order an assessment of the amount or reference or accounting to determine the amount;
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> …
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> (j) award costs; or
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> (k) grant any other order as it thinks just.
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> 17.03 Where a plaintiff obtains an order under rule 17.02, the plaintiff may continue the proceeding in respect of any remaining part of the claim or any other claim or against any other defendant.

[10] The proper approach to the application of the rule was succinctly outlined by Cameron J.A. in this Court's decision in *LeDrew v. Brake* (1999), 176 Nfld. & P.E.I.R. 288, 49 R.F.L. (4th) 319 (Nfld. C.A.):

> [6] … The wording of Rule 17 requires that before summary judgment is granted the defendant have "no defence" to the claim. Applications for summary judgment involve a two step procedure. First, the plaintiff must, by affidavit, verify her claim and state her belief that the defendant has no defence. If that hurdle is overcome, in order to successfully resist the claim for summary judgment, the defendant, by his

> affidavit, must disclose facts which, if proven, would constitute a defence. It is not intended that an application for summary judgment require the applications judge to assess credibility, weigh evidence or make findings of fact.

[11] It is important to note that the defendant must do more than stand on a simple denial of the claim in the defence coupled with a demand that the plaintiff be put to the strict proof of his claim (*Abbott v. Sharpe* (1994), 121 Nfld. & P.E.I.R. 57, 48 A.C.W.S. (3d) 54 (Nfld. S.C. (T.D.)); *Newfoundland and Labrador (Child, Youth and Family Services) v. T.J.*, 2010 NLTD(F) 21, 300 Nfld. & P.E.I.R. 90, per LeBlanc J. at para. 9). A simple denial in pleading is not a "defence" for the purpose of the rule. The defendant must plead the defence(s) he or she is relying on and provide affidavit evidence of material facts which would disclose a potential defence.

[12] Although Cameron J.A. used the phrase "would constitute a defence", that should not be read as requiring the demonstration of a defence that was bound to succeed. Later in her judgment, she referred to various phrases that have been used in the cases to describe what the defendant must show to defeat the plaintiff's assertion that the defendant has "no defence" to the claim – a fair probability of a *bona fide* defence; reasonable grounds for setting up a defence; not a sham defence; a triable issue; or something capable of argument. She observed that these differences were "more a matter of semantics than substance" (para. 9). It is clear she was not purporting to impose any higher standard than is implied by these different terminological formulations.

[13] Any potential defence raised by the defendant on a summary judgment application must, however, be one that could exist within the scope of the defence as drafted (*Bank of Nova Scotia v. Atlantic Ocean Dinner Cruises Limited* 2010 NLTD(G) 132, 300 Nfld. & P.E.I.R. 15; *Newfoundland and Labrador (Child, Youth and Family Services) v. T.J.*, per LeBlanc J. at para. 9). This is necessarily so because the pleadings define the scope of the controversy between the parties and are intended to identify the basis of the claim or defence to which the other side must respond (*Humby Enterprises Ltd. v. Humby*, 2003 NLCA 20, 225 Nfld. & P.E.I.R. 268, per Welsh J.A. at paras. 14-19).

[14] If the defendant proposes to raise a defence that does not fairly fall within the pleadings, he or she must successfully make an application to amend the pleadings to allow the proposed defence to be properly considered as a response to the summary judgment application (*Centennial Realties Limited v. Retail Sales Limited* [1979] 2 A.C.W.S. 11; Court file 1979 No. 207). Alternatively, he or she could obtain the other party's consent to having the matter dealt with.

[15] Furthermore, a plea that simply denied the plaintiff's allegations and insisted upon strict proof, without more, would in any event not be sufficient as a pleading under the general rules of procedure and would be liable to be struck out as frivolous and vexatious (*Centennial Realties Limited*). Rule 14.03 requires a defendant to set out in summary form the "material facts" on which he or she relies for the defence and rule 14.11 reinforces this by requiring "necessary particulars" in the defence.

[16] This requires more than a simple denial and instead requires positive assertions of what specifically the defendant takes issue with in the plaintiff's claim. Rule 14.16 stipulates that a party must "specifically deny" any material allegation of fact in the opposing party's claim. To do that, the defence should identify what is being taken issue with in the opposing pleading and assert what the contrary position is. This approach is mandated because of the general policies underlying the rules of procedure that issues be narrowed as much as possible and that parties should not be taken by surprise by what they are expected to deal with (see rule 14.13).

[17] In the current case, Brook did identify the question of whether any contract existed between it and North Atlantic and made particular assertions of fact that, if proven, would have had the potential of defeating North Atlantic's claim. In respect of that matter, it complied with what was required as a matter of pleading. It did not do so with respect to any other matter. In particular, it did not assert any material facts supporting a failure to perform the contract and identifying in what particulars the performance was not in accordance with the plans for the job.

[18] On its face, and without considering anything subsequently filed in response by Brook, it can fairly be said that North Atlantic's application had properly engaged the summary judgment procedure and complied with the first step referred to by Cameron J.A. in *LeDrew*. It put forward by affidavit a factual substratum to the allegations in the statement of claim, provided an explanation for the amount claimed and asserted that Brook had no defence. It is clear from the summary judgment application that North Atlantic was seeking judgment, not only with respect to a declaration that liability existed, but also for the full liquidated amount that was claimable upon completion of the work. Although the applications for summary judgment and summary trial did not expressly use words to the effect "I want payment of the contract price", that is implicit from the structure of the allegations in the applications themselves. No reasonable reading of the applications could lead to any other conclusion. At the time when the applications under rule 17 and 17A were filed, Brook had not filed any

affidavit or other material raising any question about alleged deficiencies in the work. Consequently, it is not possible for a party to draw any inference from the language in the applications that would suggest that North Atlantic was merely seeking a declaration of contractual entitlement without entry of judgment for the claimed amount. There would be no rational basis for North Atlantic to so limit its claims. In any event, what may have been implicit in the language of the applications was made explicit in North Atlantic's pre-trial memorandum:

> … the Plaintiff asks that the defence be dismissed and the Plaintiff be awarded judgment for the full amount of its claim.

(Appeal Book, Tab 8, para. 31)

[19] Accordingly, I do not accept my colleague's assertion in her dissenting reasons that North Atlantic's pleadings did not set out with sufficient particularity that the contract price was being claimed in the summary judgment application or the later-filed summary trial application.

[20] At that point, the burden shifted to Brook to disclose by affidavit evidence of facts which, if proven, could constitute a defence within the pleadings or, more correctly, convince the court that it could not be said there was "no defence."

(c) The Summary Trial Application

[21] Before Brook filed any material in response to the summary judgment application, North Atlantic amended it to claim, as an alternative to summary judgment, a summary trial under rule 17A. The substantive allegations in the application remained the same and North Atlantic relied on the same affidavit material that it had previously filed with respect to the summary judgment application.

[22] At the hearing of the application, counsel for North Atlantic explained that he added the summary trial application as a result of conversations he had had with counsel for Brook as to what he perceived to be the nature of Brook's response to the original application. Brook had not at that point filed an affidavit deposing to facts that would potentially support its position, as stated in Brook's defence, that the contract was with C & T and not North Atlantic.

[23] Perhaps out of an abundance of caution and anticipating affidavit evidence that would be advanced in support of Brook's position, that the contract was with someone other than it, North Atlantic added the claim for a

summary trial. Certainly, if the affidavit material ultimately filed by Brook were to have demonstrated an arguable case for such a defence, North Atlantic might have been hard pressed to maintain that Brook had "no defence" within rule 17. Adding a request for a summary trial under rule 17A increased North Atlantic's maneuverability with respect to obtaining judgment for the amount claimed short of a conventional trial, because of the greater reach of the rule.

[24] The salient features of rule 17A are found in the following provisions:

> 17A.01(1) A plaintiff or defendant may, after defence has been filed and at any time prior to the proceeding being placed on a trial list, apply to the Court with supporting affidavit material or other evidence for summary trial seeking judgment on or dismissal of all or part of the claim in the statement of claim, as the case may be.
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> …
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> 17A.02(1) On an application under this rule, a party may adduce evidence by any or all of
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> (a) affidavit;
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> (b) an answer, or part of an answer, to interrogatories that may have been previously administered;
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> (c) any part of the evidence taken upon an examination for discovery.
>
> (2) In response to affidavit material or other evidence supporting any application for summary trial, a responding party may not rest on the mere allegations or denials in the party's pleadings, but shall set out, in affidavit material or otherwise, specific facts showing that there is a genuine issue for trial. …
>
> …
>
> 17A.03(1) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.
>
> (2) Where the Court decides that there is a genuine issue with respect to a claim or defence, a judge may nevertheless grant judgment in favour of any party, upon an issue or generally, unless
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> (a) the judge is unable on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law; or
>
> (b) it would be unjust to decide the issues on the application.

> (3) Where the Court is satisfied that the only genuine issue is the amount to which a party is entitled, the Court may order a trial of that issue or grant judgment with a reference to determine the amount.
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> …
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> 17A.07(1) Where an application for summary trial is dismissed, either in whole or in part, the Court may order the proceeding or the issues in the proceeding not disposed of, to proceed to trial in the normal course or upon the request of any party may order an expedited trial …
>
> (2) Where a proceeding is ordered to proceed to trial, in whole or in part, the court may give such directions or impose such terms as are just …

[25] Rule 17A.01(1) allows a plaintiff, following filing of a defence, to apply, with supporting affidavit material or other evidence from interrogatories or examination for discovery, for "summary trial seeking judgment" on all or part of the claim in the statement of claim. The defendant cannot "rest on the mere allegations or denial in the party's pleadings" but, similarly to the case of summary judgment under rule 17, must set out in evidence "specific facts showing that there is a genuine issue for trial" (rule 17A.02(2)). In this regard, the defendant has to "put his best foot forward" from the best sources available and cannot argue that the matter should go to a full trial where other evidence under his control could have been presented on the application but was not. Limited cross-examination on affidavit evidence is permitted and the court may draw an adverse inference from the failure of a party to cross-examine on or file affidavit evidence in reply to, another affidavit (rules 17A.02(3), (5)).

[26] As Cameron J.A. observed in *Petten v. Stubbs Estate*, 2003 NLCA 38, 226 Nfld. & P.E.I.R. 353, there are important differences between applications for summary judgment and applications for summary trial:

> [8] … Rule 17 and Rule 17A are not the same in their application. For the purpose of this case, the most crucial difference is that Rule 17 has been interpreted to require the applicant to demonstrate that the defendant has no defence to the claim. If there is any conflicting evidence or any basis on the facts or the law to conclude that there is an arguable case an application under Rule 17 would be denied. Rule 17A, however, permits a judge to grant summary judgment in circumstances where it would be refused under Rule 17. …

[27] The key matter that differentiates the summary trial application from a summary judgment application relates to the scope of the inquiry that can be undertaken on the application. There are two stages to the process. First, in

much the same way in which the matter is approached in a summary judgment application, the court can, on a finding that there is "no genuine issue for trial with respect to a … defence" (compare: "no defence" under rule 17), give summary judgment on that issue (rule 17A.03(1)). Unlike rule 17, however, a defendant as well as a plaintiff can raise a genuine issue argument under rule 17A.

[28] The general principles applicable as a guideline for dealing with an application for a summary trial were discussed in some detail in *Marco Ltd. v. Newfoundland Processing Ltd.* (1995), 130 Nfld. & P.E.I.R. 317, 55 A.C.W.S (3d) 477 (Nfld. S.C. (T.D.)) [*Marco No.* 2]. This approach has been approved and followed on a number of occasions by this Court: *Petten v. Stubbs Estate*, per Cameron J.A. at para. 10; *Daley Brothers Ltd. v. Taito Seiko Co.*, 2001 NFCA 29, 201 Nfld. & P.E.I.R. 139, per Roberts J.A. at paras. 12-14; *Seadane International Inc. v. Morgan International Marketing Co.*(1999), 180 Nfld. & P.E.I.R. 97 (Nfld. C.A.), per Green J.A. at para. 52.

[29] In *Marco No. 2*, the existence of a genuine issue was described as follows:

> [76]…
>
> 9. There will be a "genuine issue for trial" if the issue in question is not spurious and the issue relates to a material fact or point of law that is necessary to be decided to resolve the ultimate controversy between the parties. Obviously, there will not be a genuine issue for trial if the responding party can put forward no evidence that could constitute either a defence or a claim in law.

[30] If the judge is satisfied that there is no genuine issue for trial with respect to a claim or defence, he or she must grant summary judgment in respect of that claim or defence. If there are no other genuine issues identified, that will amount to a final disposition of the litigation.

[31] The converse situation – the identification of one or more genuine issues – does not however necessarily result in dismissal of the application and the ordering of a conventional trial. The second stage of the summary trial process requires the court to go on and consider whether it can nevertheless deal with the matter and grant judgment on an issue or generally unless, in the words of rule 17A.03(2):

> (a) the judge is unable on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law; or

(b) it would be unjust to decide the issues on the application.

[32] Effectively, this means that if the record is sufficient to enable adjudication to be made fairly to both sides (i.e. "there is a sufficient evidentiary backdrop against which findings of fact can be made and in which there are no material unanswered questions": *Marco No. 2* at para. 76, #13), the court should proceed to do so. This approach has been reinforced in recent years by the decision of the Supreme Court of Canada in *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87, which emphasized the utility of using summary trials as a means of improving the efficiency of civil justice. For a more detailed discussion of considerations relevant to determining whether the record is sufficient to enable the court to find the facts necessary to decide some or all of the extant questions of fact or law and whether it would be otherwise unjust to decide the issues on the application, see *Marco No. 2* at para. 76, # 13-16.

[33] Just as in the case of a summary judgment application under rule 17, the issues that may be dealt with on a summary trial under rule 17A must, of course, fall within the pleadings. This necessarily follows from the fact that the pleadings define the issues that are in dispute. It is those issues which must be scrutinized to determine whether there is a "genuine issue" for trial and may lead to an adjudication even if there is a genuine issue, provided the court can be persuaded that the record is sufficient and it is not otherwise unfair to do so.

[34] Procedurally, the case law that has been developed in applying rule 17A recognizes that there is a threshold question that, in the absence of consent by both parties, the court may deal with before addressing the questions whether there is a genuine issue for trial and/or whether the matter can, even if there is a genuine issue, nevertheless be dealt with by summary trial. See *Marco Ltd. v. Newfoundland Processing Ltd.* (1995), 130 Nfld. & P.E.I.R. 308, 55 A.C.W.S. (3d) 277(Nfld. S.C. (T.D.)) [*Marco No. 1*] at para. 5; *Young v. Noble*, 2016 NLCA 58, 1 C.A.N.L.R. 197 at paras. 21-28; *L.H.E. v. D.A.E.*, 2019 NLCA 66 at paras.12-13.

[35] This threshold consideration, when raised by a party or the judge, is whether in all the circumstances it is "appropriate" to hear the summary trial application (*Marco No. 1*). In *Dalley v. Northern Arm (Town)*, 2016 NLTD(G) 68, 381 Nfld. & P.E.I.R. 286, Butler J., parsing the analysis in *Marco No. 2* at para. 76, # 3 and 7, described the threshold question as consisting of two sub-questions: (i) whether on the face of the application the applicant has brought himself or herself within the formal requirements of the rule, and (ii) whether, even if he or she has done so, it would be appropriate to deal with the issues

presented by way of summary trial as opposed to a conventional trial or some other means of disposition.

[36] The first sub-question essentially involves a determination whether the applicant has complied with the formal requirements of rule 17A and has put forward some evidentiary basis for the applicant's position which, if unanswered, could establish all or part of the claim. Thus if it is obvious from the face of the summary trial application that the application does not fit the formal requirements of the rule (as, for example, if the application is not accompanied by "supporting affidavit material or other evidence" (rule 17A.01(1)) which on its face could, without considering anything more, establish the applicant's claim or defence) then it would be open to the judge to put a stop to the application immediately (although in appropriate circumstances, an adjournment to allow the application to be perfected could also be granted).

[37] The second sub-question is whether there may be any other reason, evident at that preliminary stage, why it may be inappropriate to deal with the issues by way of summary trial. In *Young*, this question was described as

> [27] … whether the nature of the case is such that it is potentially capable of being dealt with in the attenuated manner contemplated by a summary trial, bearing in mind the comments of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 about the salutary uses of such a procedure to ensure access to justice in appropriate cases.

[38] *Hryniak* amounted to a reminder by the Supreme Court of Canada that the court should be alert to try to find a proportionate means of resolving disputes that could avoid lengthy, expensive and unnecessary conventional trials. The summary trial is a means of achieving this in appropriate cases. Yet, *Hryniak* also recognized that there would be some circumstances where a proportionate response would not involve a summary trial and that a summary trial could be "used inappropriately", thereby requiring judges to "play a role in controlling such risks" (para. 32).

[39] It is these potentially inappropriate cases that the threshold inquiry is designed to address. Absent from the cases that have recognized a role for threshold screening, is an attempt at definition of the scope of the inquiry and the approach that should be undertaken at this preliminary stage.

[40] Care should be taken not to elevate the threshold inquiry to the status of a stand-alone, separate mandatory requirement additional to the requirements set

out in rule 17A. The threshold inquiry is in reality only designed as a screening device based, as noted in *Marco No. 1*, on the notion of the inherent power of the court to control its own process so as to ensure its powers are employed properly, or as expressed in *Hryniak*, to ensure that "clearly unmeritorious motions for summary judgment [are not] abused and used tactically to add time and expense" (para. 68).

[41] The inquiry does not require a searching investigation in every case to ensure that the summary trial process is appropriate to *be* invoked; rather it is to ensure that the process is *not* invoked in wholly *inappropriate* circumstances. This follows from the Court's endorsement in *Hryniak* of the more widespread use of summary trial. There is in reality an acceptance of the use of a summary trial in most cases, with the burden of persuasion resting on the opposing party to raise the issue and to convince the court that the summary trial is an inappropriate process to invoke in all the circumstances. Of course, the applications judge of his or her own motion, may raise questions at the threshold stage relating to summary trial appropriateness as well.

[42] How a proportionate disposition in a given case, as encouraged in *Hryniak*, is achieved will depend on the structure of the applicable summary trial regime. Summary trial regimes are not the same across the country. Ontario was the region that formed the backdrop for the emphasis in *Hryniak* on whether the record as presented, or as augmented by fact-finding mechanisms within the summary trial process, is adequate to enable adjudication by summary trial. That is not identical to the one in Newfoundland and Labrador.

[43] The question of the adequacy of the record to enable an adjudication by way of summary trial to be achieved fairly in this jurisdiction is built into the summary trial analysis in rule 17A itself (see rule 17A.03(2)). It does not need to be duplicated as part of the threshold analysis. That said, there may be cases where it is obvious at the threshold stage, from the nature of the intertwining of the issues, the apparent length and complexity of the case, and the potential for lengthy and possibly conflicting *viva voce* evidence that will necessarily involve credibility assessments, that a summary trial would be inappropriate. In such cases, it is not inappropriate to weed such cases out at the threshold stage. But such situations must be obvious from the outset. The real fight on record-adequacy should in most cases be left for the application of the second stage of the summary trial rule itself.

[44] Other circumstances that could be weeded out at the threshold stage because they would be inappropriate to decide without a conventional trial or

other form of disposition might include an extremely complex case involving multiple issues with cross-claims or alternate claims by multiple parties. Another circumstance of inappropriateness might involve the inappropriate timing of the summary trial application, such as the application's proximity to a trial date that has already been set, as in *Marco No. 1*.

[45] As emphasized in *Young*, the threshold question (involving the two sub-questions outlined above) is separate from and logically preliminary to the dual questions to be answered on the summary trial application itself. In *L.H.E.*, Welsh J.A. described the whole procedure as a "two-step" process, the first step involving the threshold issue and its two sub-questions and the second step (assuming the threshold hurdle is satisfied) also involving potentially two further questions on the summary trial application itself, namely, (i) whether there is a genuine issue for trial and (ii) even if there is a genuine issue, whether the court is able to find the facts necessary on the existing record to decide the questions of fact or law and whether to do so would not be unjust. A suggested Decision Tree is set out in diagrammatic form as a schedule to these reasons. The reference to a "two-step" process in *L.H.E.* should not, however, be taken as mandating a threshold analysis in all cases. The reference to there being, in some cases, a threshold question in *Marco No. 1* and *Marco No. 2*, was not intended to, and should not, be regarded as requiring a threshold analysis whenever the possibility of a summary trial is raised.

[46] Although the threshold question, when raised by a party or the judge, must logically be dealt with first, that does not mean that there should be a separate hearing in advance of the summary trial application proper to resolve the threshold questions. If a threshold question is raised by a party or the judge, it could be conducted in a separate hearing, leaving time to regroup and reorganize their positions in light of a threshold ruling before proceeding further. But the parties or the judge may alternatively think it more appropriate to address the threshold issues in the context of submissions relating to all issues, recognizing that if at the end of the hearing, the judge's decision is that the threshold has not been met, there will be a dismissal on the preliminary point, with the rest of the argument, with hindsight, being regarded as unnecessary.

[47] It cannot be said in the abstract that dealing with the threshold question one way or the other (i.e. in a separate preliminary hearing or as part of the summary trial application proper) will necessarily promote trial efficiency. A separate preliminary hearing may in certain circumstances be more efficient in terms of time- and cost-effectiveness, especially if the result is a determination that it is not appropriate to proceed further by way of summary trial, thereby

eliminating the necessity of preparation for and participation in a full summary trial. On the other hand, if there is a good possibility of finding that a summary trial proceeding is appropriate, it would make more sense to deal with all matters in one hearing.

[48] It is not necessary in all cases to address the threshold question in any detail. In fact, dealing with the threshold question will often involve a simple process that can be dealt with quickly and summarily. In some cases, all that may be required is for the judge, having satisfied himself or herself that the application on its face fits within the rule, to confirm with the parties that there is no other consideration (other than possible record-adequacy or other matters properly dealt with under rule 17A.03(2)) that would raise the question of the appropriateness of a summary trial application in the circumstances. Further, the parties themselves might, by not raising a threshold issue, be content to move directly to a summary trial application. If so, the applications judge might be justified in passing over the threshold question and moving directly to consideration of the summary trial application issues unless, of course, the judge of his or her own motion considers it appropriate to raise a concern, given the nature of the case, about the appropriateness of using the summary trial procedure as a proper mechanism for resolving the issues in dispute.

[49] Whether the threshold question, if engaged, should be dealt with in a separate hearing with a ruling being given before proceeding further, or whether submissions should be received at the beginning of the summary trial application hearing itself with the ruling delivered either before or at the same time as final judgment on the merits, is a matter of discretion for the applications judge, taking into account the position of the parties on the point and the nature of the issues presented. On appeal, such decisions attract deference, absent an error of law or principle (*Hryniak*, para. 81).

[50] An example of a circumstance where it would be appropriate to make a ruling on the threshold question (if one has been raised by a party or the judge) before proceeding further can be found in the facts of *L.H.E.* The majority in that case concluded that the parties had proceeded on the understanding that the judge would determine the threshold question first and that if the judge decided that the matter was appropriate for summary trial and judgment, the parties would have an opportunity to present further evidence by cross-examination on affidavits. This Court ruled that it was a denial of procedural fairness (para. 20) for the judge not to have ruled on the threshold (appropriateness) issue first and thereby given the parties an opportunity to cross-examine before proceeding

with the summary trial proper. In other words, the judge made an error in principle in the exercise of his discretion.

[51] In the current case, the applications judge decided to deal with all issues together and stated he would "give a decision with respect to both issues after the fact" (Transcript, February 21, 2009 at p. 18). In other words, he was going to deal with all matters together following the hearing, whether arising from the issue of summary judgment under rule 17 or from the issue of summary trial under rule 17A including the threshold issue. Neither party took issue with this approach.

(d) Combined Applications

[52] In this case, both a summary judgment application and a summary trial application were presented to the judge. In principle, there is no reason why both could not be dealt with, so long as care is taken to ensure that the differing principles applicable to each application are segregated and properly applied.

[53] Alternatively, the applications judge has a discretion to proceed to deal with the issues presented under the more expansive rule 17A rather than under the more restrictive rule 17. In *Ledrew v. Brake*, Cameron J.A. noted that if the applications judge determines summary trial is more appropriate, as where there are questions of credibility to be resolved – something that is not possible on a summary judgment application – he or she can move directly to a consideration of whether a summary trial would be appropriate (para. 9). I would add that should only be done where there will be no prejudice in the result affecting the other party.

(e) Subsequent Filings

[54] Subsequent to North Atlantic's amending its application to include the application under rule 17A, Brook filed an extensive affidavit from Brook's engineering project manager in which, amongst other things, he deposed to interactions between North Atlantic, Brook and the principal of C & T which he said showed that the sub-contract was with C & T and not North Atlantic and that North Atlantic was in fact a sub-sub-contractor with C & T. He also deposed to what he said were deficiencies in the conduct of the work by North Atlantic.

[55] North Atlantic replied with a counter-affidavit responding to the evidence given by Brook as to the contractual relationships of the parties. It also asserted that the only defence pleaded by Brook was a "denial of a contract between

[North Atlantic] and [Brook] with respect to the placement of the sewer line. There is no defence by [Brook] as to quality of work" (Appeal Book, Tab 16, at para. 10). The deponent nevertheless went on and made evidentiary submissions which, he said, established that the work had been satisfactorily completed.

[56] Rule 17A.02(6) requires each party in a summary trial application to file with the court and serve on the other party a memorandum consisting of a concise statement of the facts and law relied on by the party. In the context of a summary trial application, this is an important requirement which helps define the issues really in dispute and enables the parties to set out a framework as to how the various sub-issues on the application should be addressed and dealt with. Counsel who ignore this requirement or do not take it seriously do so at their peril. It is almost in the nature of a quasi-pleading. If issues are not dealt with in the memorandum, the judge may be justified in disregarding them.

[57] In this case, both parties filed a memorandum. Their contents are relevant and instructive to the disposition of this case.

[58] In North Atlantic's case, it asserted that it had made out a case for summary judgment and that Brook had not deposed to facts that if proven would constitute a defence. It also reasserted that the only defence pleaded related to whether the contract was with C & T and not North Atlantic. It also asserted that the issue of quality of work was not properly before the court because it was not pleaded as a defence. But, it went on, "without prejudice… that the defence of deficient work cannot be a defence against the summary judgment application", (Appeal Book, Tab 8, at para. 19) and presented argument based on the affidavit evidence that Brook had in any event failed to show that the work was in any way deficient. North Atlantic's approach was to place primary emphasis on the summary judgment application. It did not address whether the threshold test under rule 17A had been met nor did it address whether there was a genuine issue for trial or whether, even if there was a genuine issue, the court should nevertheless grant judgment or remit it for a conventional trial.

[59] Brook's memorandum, on the other hand, approached the matter as if the battleground was under both rule 17 and rule 17A. It submitted, first, that Brook had presented sufficient evidence in response to North Atlantic's rule 17 application to establish that there was "a triable issue, a substantial question of law, a fair case for a defence, reasonable grounds for setting up a defence, a fair probability of a *bona fide* defence and a basis for an arguable case on a matter of

substance" relating to who the parties to the sub-contract were, and that therefore the application had to be dismissed (Appeal Book, Tab 9, at para. 16).

[60] The memorandum then went on and addressed both the threshold issue and the substantive issues that present themselves on a summary trial application under rule 17A. It asserted that the threshold test was not met because it was not appropriate to decide the case by way of summary trial due to the absence of any evidence as to the formation of the contract from a principal player from C & T. Alternatively, it submitted:

> … in the event that the court decides that the threshold test is met, there is a genuine issue for trial in this matter. That issue is of course whether there was a contract between [North Atlantic] and [Brook] with respect to the Revisions.
>
> (Appeal Book, Tab 9, at para. 26; underlining added.)

[61] In support of the argument that there was a genuine issue, Brook referred to the conflicting affidavit evidence relating to contract formation which showed, in effect, that it was not a spurious issue and related to a material fact that was necessary to be decided to resolve the ultimate controversy between the parties. Finally, Brook also submitted that it would not be appropriate for the court, even if there was a genuine issue, to proceed to decide the matter because credibility issues were engaged that could not be properly resolved without hearing evidence from other witnesses not presently before the court. Brook therefore asked for the summary trial application to be dismissed as well.

[62] What is significant, however, is that Brook's memorandum did not address North Atlantic's submission that the deficiency issue could not be raised because it was not pleaded, and presented no substantive argument on the evidence relating to whether deficiencies existed.

The Application Hearing

[63] At the commencement of the hearing both parties and the judge accepted that a "threshold" issue had to be dealt with but counsel differed as to what that threshold issue was.

[64] Counsel for North Atlantic took the position that the matter should be dealt with as a summary judgment application under rule 17. He submitted that North Atlantic had provided sufficient affidavit evidence to satisfy the first step outlined by Cameron J.A. in *LeDrew* and that therefore the "threshold" issue for the purpose of a rule 17 application had been met, thereby requiring Brook to

respond. He further submitted that Brook's response failed to establish that a contract did not exist between North Atlantic and Brook.

[65] Counsel for Brook insisted that the application should be dealt with under rule 17A. He took the position that the threshold issue that had to be dealt with was the one, described earlier, that should be decided before the court proceeds to deal with the summary trial application, not a summary judgment application. He also argued that the rule 17 application should be dismissed because Brook had presented an arguable case in support of its position as to who the contract was with.

[66] Little progress was made in clarifying what it was that should be initially dealt with as a threshold issue. The discussion among counsel and the judge degenerated into an unfocused discussion that ranged over what the threshold issue was, what the nature and strength of the affidavit evidence disclosed with respect to who the contract was with, whether there should be cross-examination on affidavits for either or both the rule 17 and 17A applications and whether additional evidence from C & T should have been called, amongst other things. This preliminary discussion (which occupied 18 pages of transcript) did not resolve what the threshold question was; instead, as indicated previously, it ended with the judge saying he would give a decision on all matters at the end of the hearing. The matter then moved into cross-examination on the affidavits.

[67] I would observe at this point that the failure to define what application was being dealt with, what threshold questions, if any, were necessary to resolve, and how the submissions should be structured and presented made for a situation where the parties were essentially "punching into the fog" and not necessarily engaging with each other in a common debate. It made the applications judge's job that much more difficult.

[68] In final summation, counsel for North Atlantic again reiterated that the application was for summary judgment but also suggested that his case was made out under the principles relating to summary trial set out in *Marco No. 2*. He focused on the issue of whether there was a contract between Brook and North Atlantic and stressed that Brook had not put its evidentiary "best foot forward." He submitted that on the evidence, the case for liability had been made out. He made no further submissions relating to the threshold issue and also made no reference to Brook's allegation of deficiencies except to assert again that Brook had not pleaded deficiencies as a defence.

[69] Counsel for Brook reiterated that there was sufficient evidence to resist a summary judgment application. He also submitted that that same evidence demonstrated there was a genuine issue for trial under rule 17A and, further, that the court should not proceed to adjudicate the issue of whether there was a contract between North Atlantic and Brook because the available record was not sufficient to enable the court to make a fair determination of that issue. The absence of a sufficient record also meant, counsel submitted, that the threshold test had not been met because first hand evidence from a principal of C & T as to the relationship between the parties was not before the court.

[70] No submissions were made by Brook responding to North Atlantic's argument that the issue of deficiencies had not been properly raised on the pleadings. Nor did Brook make specific submissions on the issue of deficiencies or suggest that the issue of deficiencies could not be adjudicated on a summary trial even if the issue of the existence of the contractual relationship could.

The Decision

[71] The applications judge treated the case as an application for summary trial under rule 17A. He made no reference to rule 17. Although he gave no reasons for proceeding under rule 17A as opposed to rule 17, he was justified in treating the case as an application for summary trial. From a review of the record, I agree with counsel for Brook that Brook had, within the second step of the summary judgment analysis in *LeDrew v. Brake* as discussed in these reasons, presented sufficient evidence to establish an arguable case or a triable issue that was not a sham as to the possibility of the contract being with C & T and not North Atlantic. Accordingly, it could not be said that Brook had "no defence" within the meaning of rule 17.01(1). The summary judgment application would not therefore have succeeded.

[72] In the circumstances of this case, therefore the real issue was whether there could be a summary trial of one or more of the issues relevant under rule 17A and a ruling made on the existing record as to whether North Atlantic's claim had been established.

[73] As to the threshold issue under rule 17A, the judge simply stated as follows:

> [5] [North Atlantic] satisfied the threshold test for the application of the Rule by putting forward an evidentiary basis for its position.

[74] The only other reference by the judge to a threshold test occurred in a quotation of the summary trial principles outlined in *Marco No. 2* at para. 76, #7:

> If the applying party satisfies the threshold test for the application of the rule by putting forward an evidentiary basis for his or her position, the responding party then has an evidentiary burden to demonstrate that there is a genuine issue for trial...

[75] It is obvious from the similarity of the language chosen by the applications judge and this quotation from *Marco No. 2* that the judge was purporting to apply that formulation of the test. While the test has been elaborated and refined somewhat in *Dalley* and subsequent cases, it cannot be said that the judge misapplied or did not apply the correct approach to determining the threshold issue. While, since *Dalley*, a further sub-question has been postulated for the court to consider, or the parties to raise, (namely, whether there was any other apparent reason making it inappropriate to deal with the issues on summary trial), the parties did not identify any, such as length and complexity of the case or inappropriate timing issues, that would have had application, and the judge was apparently content with this approach.

[76] The only submission made by Brook that could possibly have related to the threshold issue was that the insufficiency of the record relating to contract formation made it inappropriate to deal with the matter as a summary trial. But that in fact was not a matter appropriate to be raised as part of the threshold issue. The sufficiency of the record is more properly dealt with on the summary trial application itself as part of the analysis, following a determination that there is a genuine issue for trial, of whether, under rule 17A.03(2) the judge is able "on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law."

[77] Accordingly, there being no other reason raised for not allowing the summary trial application to proceed, the judge was justified in not dismissing the application on a threshold analysis. It was proper in these circumstances to proceed to determine whether there was a genuine issue for trial and, if not, grant judgment to North Atlantic or, if there was a genuine issue, to go on and consider whether he should determine the issues in the context of a summary trial instead of a conventional trial. If so, he was then mandated to proceed to make an appropriate disposition.

[78] The judge next addressed the evidence submitted by each party as to whether a contract existed between Brook and North Atlantic. Having concluded

that North Atlantic had shown on the evidence it had submitted that "there was an offer, an acceptance of the offer and performance" (para. 4), and noting that Brook had the burden to demonstrate there was a genuine issue for trial and in discharging that burden had to put its evidentiary "best foot forward" to demonstrate that a contract existed between Brook and someone other than North Atlantic (paras. 7-8), he concluded that Brook's evidence was wanting. It had not put its best foot forward because crucial first hand evidence from a principal of C & T as to the existence of key conversations relevant to contract formation could have been presented by affidavit by Brook but was not. (I would observe that counsel for Brook had correctly pointed out in argument that the relevant witness was not under its control and could not be compelled to provide such an affidavit; however, that is not a full answer because he could have been compelled to answer questions on discovery and that evidence could, under rule 17A.02(1)(c), have been used on the application).

[79] The judge summed up his conclusion on the issue of whether a contract existed between North Atlantic and Brook as follows:

> [16] It was incumbent upon [Brook] to show that the contract was between itself and a party other than [North Atlantic]. It could have done so easily with an affidavit from the third party. It chose not to do so. It is therefore, caught by lack of evidence on an issue that is material, if not critical, to its defense of the application.

[80] Without further analysis or discussion, the judge then concluded that North Atlantic was entitled to judgment for the amount of its claim:

> [17] Under the circumstances, I have no option but to grant to [North Atlantic] the relief that it seeks, namely judgment in the amount of $38,496.77, together with pre-judgment interest thereon.

[81] It is this final step (entering judgment for the amount claimed, rather than simply declaring that a contract between North Atlantic and Brook existed) that is the focus of this appeal.

Appeal Issues

[82] Brook submits that the summary trial judge erred by failing to order a conventional trial on the issue of damages following the decision that a contract did in fact exist between North Atlantic and Brook.

[83] Brook focuses on the general denial in paragraph 2 of the defence, which denied all of the substantive allegations in the statement of claim, including the

allegation in paragraph 6 to the effect that North Atlantic had "carried out the contract … and all work in accordance with the plans for the job and the directions of a Government engineer on site throughout the performance of the job". It submits that this denial, coupled with its assertion in the defence that it put North Atlantic "to the strict proof thereof", effectively put the correct performance of the work – and the determination of what was actually owed under the contract – in issue.

[84] The sufficiency and quantum of the work being in issue, the judge was required, so Brook argues, to apply a proper analysis of summary trial principles to that issue, something he failed to do.

[85] Specifically, Brook submits the summary trial judge:

- failed to apply the "threshold" test to the sufficiency/quantum issue;
- failed to determine whether there was a genuine issue for trial with respect to the sufficiency/quantum issue; and
- misapplied the applicable principles with respect to pleadings (by concluding that he could not consider Brook's evidence relative to whether North Atlantic carried out the work in accordance with the plans for the job) and thereby committed a palpable and overriding error in his dealing with evidence that was relevant.

Analysis

[86] In *Marco No. 2*, item #10 of paragraph 76 states:

> The court must approach the test for application of Rule 17A on an issue by issue basis. Just because it is determined that a particular issue must go to trial, it does not follow that the court cannot adjudicate summarily on other issues if the pre-conditions for the application of Rule 17A have been made out in respect of those other issues.

[87] Applied to the instant case, this would mean that just because North Atlantic established that it had a contract with Brook, it did not follow that the court could automatically adjudicate as well on the amount due under that contract.

[88] Counsel for Brook is correct when he asserts that on a summary trial the relevant issues must be dealt with severally. That requires application of the summary trial principles on an issue by issue basis. It is only if the

determination is made that all relevant issues can and should be determined in favour of the applicant that the judge is entitled to enter final judgment in the applicant's favour. Otherwise, if some of the issues are, in the opinion of the judge, not capable of being decided summarily, those issues must be referred to conventional trial or some other form of adjudication.

[89] Brook therefore says that if the judge had turned his mind to the question of whether the principles for application of a summary trial justified dealing with the sufficiency/quantum issue summarily, he would and should have concluded that that issue should have been dealt with by a conventional trial. In not doing that, counsel says that the judge erred in law.

[90] I will deal with Brook's specific arguments in the context of an analysis of the applicable summary trial principles.

(a) The Threshold Questions

[91] The purpose of applying a threshold test to an application for summary trial is to weed out at a preliminary stage those cases which, because of the way in which the application has been made, or the nature and complexity of the case, in terms of issues or parties, or its timing, it is clear that the purpose of the rule will not be met by allowing the application to proceed.

[92] In *Marco No. 1*, the point was explained this way:

> [5] As a matter of general principle, the court, as a threshold matter, may decline to hear a summary trial application if, considering all the circumstances it is appropriate to do so. This follows from the inherent jurisdiction of the court to control its own process and from the language of Rule 17A.01(1) which talks in terms of a party being able to "apply" for a summary trial rather than having a "right" to a summary trial in all circumstances. Thus, where an application is brought close to trial in respect of an issue which is not severable from other issues, and where substantial time will be required for hearing the application, these are factors which may persuade an applications court to decline to hear a Rule 17A application…

[93] The example given in *Marco No. 1* of denying a summary trial as a threshold matter – where an application is brought too close to a trial that has already been scheduled – is, of course, only one circumstance that may justify the court in refusing to hear the application. As mentioned earlier, the court may decline to hear a summary trial application if the application itself and the affidavit evidence supporting it does not on their face bring it within the formal requirements for the application of the rule or do not disclose any evidentiary

basis for the claim or defence asserted (the first sub-question mentioned in *Dalley*).

[94] Further, if it is apparent from the face of the application that the circumstances of the case, such as its length, complexity, timing or the degree to which credibility issues may be involved, make it likely that a conventional trial would be required to resolve a substantial portion of the issues (even if a summary trial might be able to resolve some of them), the court may also, as a threshold matter, decline to allow the summary trial process to proceed at all. This is the second branch of the threshold question mentioned in *Dalley.*

[95] I would reiterate the point mentioned earlier that the second branch of the threshold inquiry is not the place to embark on a detailed examination of whether the summary trial record is sufficient to enable the summary trial judge to decide a particular issue. Resolution of that question is reserved as part of the summary trial process itself when the court is required, under rule 17A.03(2)(a) and (b) to address the question whether, even if there is a genuine issue for trial, it is nevertheless appropriate and not "unjust" to adjudicate a particular issue summarily.

[96] At the threshold question stage, the focus is on the more general question of whether the summary trial, *as a process*, is appropriate to be invoked *at all*. Thus, for example, it might be suitable to have a summary trial for one discrete issue but the presence of a substantial number of other interconnected issues that would likely not be capable of being resolved other than by a conventional trial, might nevertheless lead to the conclusion that the summary trial process would not result in resolution of enough of the outstanding issues to make it efficacious to invoke the summary trial process at all, or, as mentioned in *Hryniak,* it might "run the risk of duplicative proceedings or inconsistent findings of fact" (para. 60).

[97] Conversely, once the application to invoke the summary trial process passes the threshold hurdle, it is not necessary to apply the threshold considerations again on an issue-by-issue basis where the question arises in the course of the process as to whether a particular issue can be resolved on the existing record. Once the summary trial process is engaged, all issues will be subjected to the two-step summary trial analysis. Those issues that cannot be resolved justly on the record will be identified as part of the rule 17A.03(2) analysis and directed to some other form of resolution, be it a conventional trial or, say, a determination of fact or law under rule 38.

[98] In the current case, the applications judge decided to proceed by way of summary trial because the threshold hurdle had been cleared. The record of argument in the court shows that the submissions were almost exclusively directed to the question of whether the evidence established that a contract existed between North Atlantic and Brook as opposed to being a contract between North Atlantic and a third party. Although the judge did not explicitly say so, it seems clear from the way the matter was argued that the significance of the question of whether the contract existed (which, as he said, was supported by an evidentiary base, in the context of the whole litigation) is what justified him not rejecting the summary trial application on the basis of not clearing the threshold hurdle.

[99] Admittedly, as counsel for Brook pointed out, the judge did not appear to consider, as a threshold issue, the appropriateness of whether the sufficiency/quantum issue was appropriate for a summary trial. In the circumstances, however, he did not have to do so as part of a separate threshold analysis applied to that issue. Having decided that the summary trial process was appropriate for at least some issues (in this case, the main question of whether a contract existed), he did not have to go through the same threshold exercise for every other issue individually. He was simply required, as part of the summary trial process, to apply the summary trial tests to each issue and, if a particular issue, applying the correct tests, was determined not to be suitable for summary trial adjudication (because, for example, the record was not adequate), to decline to resolve that issue.

[100] A further consideration (even though it was not argued as a ground of appeal) is whether it was appropriate for the applications judge to consider and pronounce his decision on the threshold issue at the same time as his decision on the merits, rather than giving a separate and earlier ruling, thereby giving the parties time to consider the implications of the threshold decision before proceeding to deal with the merits of the summary trial application. It is arguable that knowing the matter would proceed to a summary trial might have prompted one or both of the parties to change their strategy. For example, Brook might have applied to amend its defence to raise further issues regarding sufficiency of performance of the contract or might have sought to present further evidence or engaged in a broader cross-examination. Of course, such applications would not necessarily have been successful in any event.

[101] I am not satisfied that the decision of the judge to proceed as he did showed any error of law or error of principle. The decision of how to deal with the question of appropriateness or proceeding by way of summary trial is a

discretionary one (*Hryniak*). There is no basis for disturbing the judge's discretion in this regard. This case is materially different from this Court's decision in *L.H.E.,* on which my colleague relies in her dissenting reasons. Unlike that case, the parties in the current matter had not expressed expectations that they would have an opportunity to cross-examine deponents or to take other steps before proceeding with a summary trial proper.

[102] An expectation that the threshold issues would be dealt with and announced before proceeding to a summary trial, as my colleague in essence imputes to Brook, is not borne out by the record. In fact, when the judge advised them that he was going to deal with all issues at the end of the full hearing, the parties did not object or even indicate that such a procedure was contrary to their expectations. Furthermore, Brook made no submissions regarding inappropriateness except with respect to the accuracy of the record (which was in any event to be dealt with on the summary trial itself under rule 17A.03(2)) and then only in relation to the contract-existence issue, not the deficiency/quantum issue.

[103] In these circumstances, there was no denial of procedural fairness to either of the parties by ruling on the threshold question at the end of the hearing. In the circumstances of this case, requiring the judge to decide otherwise and deliver a ruling on the threshold issue before proceeding to deal with the application of rule 17A.03 would be tantamount to ruling that a separate hearing on the threshold issue is necessary in virtually all cases. That is something that is not required. It is only the exceptional case where that is necessary as a matter of law or principle, as in *L.H.E.,* where the majority found that procedural fairness considerations were engaged.

[104] I would also add that the record of pre- and post-application submissions on behalf of Brook discloses that the only submission on the threshold question related to the insufficiency of the record to enable the contract-existence issue to be resolved. Nothing was said about the appropriateness of the record to enable the deficiency/quantum issue to be decided. In either case, however, these submissions were, for reasons explained above, more appropriate to be considered under rule 17A.03(2)(a) and (b) if the analysis got that far.

[105] Accordingly, Brook's argument that the applications judge erred in law by not conducting a separate threshold analysis of the deficiency/quantum issue cannot succeed.

(b) Summary Trial Question – Genuine Issue

[106] If the threshold hurdles are cleared, the first question for determination on a summary trial application itself is whether there was a genuine issue for trial (rule 17A.03(1)). If there is no genuine issue, then summary judgment can be granted. In this case, North Atlantic was seeking judgment on the basis that there was no defence to their contractual claim. The judge addressed Brook's pleaded defence that the contract was with a third party and not Brook. He analyzed the evidence on the record and found that Brook had not put its best foot forward in support of its "third party" defence and that "the evidentiary underpinning of [Brook's] position has crumbled" (para. 14). He effectively concluded that a contract did exist with Brook. As noted earlier, this point has not been appealed.

[107] In conducting this analysis, the judge did not expressly deal with whether there was a genuine issue for trial on the issue of contract formation. It is obvious, however, that from his recitation of the principles summarized in *Marco No. 2* (in particular, para. 76, item #7) and his proceeding to an analysis of the evidentiary record that he must have concluded that a genuine issue had been disclosed and that the case had to be dealt with under rule 17A.03(2).

[108] With respect to the deficiency/quantum issue, the judge said nothing except to note that, having dismissed Brook's "no contract" defence, he had "no option but to grant to [North Atlantic] the relief that it seeks, namely judgment in the amount of $38,496.77" (para. 17). Under rule 17A, he was required to apply the genuine issue test separately to each identified issue and, even if he found there was a genuine issue to be tried under rule 17A.03(1), he had to go on and decide under rule 17A.03(2) whether he was able on the whole of the evidence to find the facts necessary to decide the questions of fact or law and whether it would in all the circumstances be just to do so. Brook submits that the judge's apparent failure to conduct such an analysis amounted to legal error.

[109] In the circumstances of this case, considering the pleadings and the submissions of the parties, I am not satisfied that any error has been disclosed that would justify the overturning of the judge's decision. The deficiency/quantum issue was not properly identified as a live issue to be addressed.

[110] It is open to this Court to decide from a review of the pleadings and the application record whether there was in fact a genuine issue for trial on the deficiency/quantum issue.

[111] Regarding the pleadings, I have already noted that Brook asserts that the statement in its defence simply denying North Atlantic's assertion in the statement of claim that it carried out the work "in accordance with the plans and specifications of the job" and putting North Atlantic "to the strict proof thereof", coupled with affidavit evidence filed on the application suggesting there were deficiencies in the work, was sufficient to show there was a genuine issue for trial.

[112] As noted earlier, North Atlantic took issue with the appropriateness of Brook leading affidavit evidence suggesting there were deficiencies in the work because, it says, the pleadings did not put any question of the amount of the claim in issue. It took this position in its pre-trial brief and in its submissions at the end of the case.

[113] In its pre-trial brief, North Atlantic put the point starkly:

> [Brook] in its Defence pleaded one defence only namely that it denied there was a contract between [North Atlantic] and the [Brook]. No claim was made in the defence concerning quality of the work … [T]he question of quality of work is not properly before the court because it has not been pleaded and no application to amend the defence has been made. In [North Atlantic's] respectful submission the question of quality of work is not a defence because it has not been pleaded.
>
> (Appeal Book, Tab 8, para. 17; emphasis added.)

[114] North Atlantic referred to and relied on *Bank of Nova Scotia v. Atlantic Ocean Dinner Cruises Ltd*., where in an action on a guarantee, Hall J. held that in an application under the summary judgment rule (rule 17) the existence of evidence supporting facts that could theoretically be a defence to a claim could nevertheless not constitute a good defence if that defence had not been properly pleaded. The defendant must show a good defence within the pleading as drafted.

[115] Although the *Atlantic Ocean Dinner Cruises* case was decided under rule 17, the same point is applicable under rule 17A. All litigation must be conducted within the scope of the pleadings as originally drafted or as properly amended. If a litigant wishes to defend a contract claim on the basis that the claimant breached the contract through defective performance and that claims for such deficiencies can be set off against the contract price, he or she must plead the breach and give reasonable particulars so that the claimant will not be taken by surprise.

[116] On the appeal, Brook nevertheless submitted that because the question of deficiencies was referred to in Trent Burden's affidavit evidence, and Brook denied in its defence that North Atlantic carried out the contract, the judge had an obligation to address whether there was a genuine issue regarding proper performance and even if there were, whether the matter could be resolved summarily. In essence, Brook says that the denial of North Atlantic's allegation of proper performance without any positive assertion of defective performance was sufficient to put the matter in issue.

[117] In support of its position, Brook relied on *Master Charge v. Price* (1977), 42 N.S.R. (2d) 244, [1978] 1 A.C.W.S. 236 (N.S. Co. Court). In an action for recovery of amounts due as a result of use of a credit card, the defendant denied "each and every allegation set forth in the plaintiff's statement of claim…" but with the exception of challenging the status of the plaintiff as a legal entity, pleaded no other specific defence. The plaintiff applied to strike out the defence and for summary judgment. O'Hearn, C.C.J. refused to strike out the defence on the ground that a "rolled-up plea" was permitted under the Nova Scotia rules of civil procedure to obviate the necessity of traversing every claim allegation individually to avoid being deemed to have admitted everything not specifically denied, as was required under the former rules of pleading. The Nova Scotia rules at that time were very similar to the *Rules of the Supreme Court, 1986* when later adopted in this province.

[118] *Master Charge* does not, however, stand for Brook's proposition that the making of a rolled-up plea or general denial eliminates the necessity of a defendant having to plead specific defences he or she wishes to raise. It merely allows a defendant to deny the plaintiff's factual allegations compendiously without having to do so individually. O'Hearn, C.C.J. recognized this when he said the rolled-up plea:

> [9] … simply constitutes a denial, in fact, of whatever was pleaded and not a denial of the legality or sufficiency in law of the contract and not a pleading of any matter in justification, or excuse, or otherwise …

[119] The position is the same in this province. If a defendant has a specific defence to the claim, he or she must positively plead it so as not to take the other party by surprise. This follows from rule 14.03 which requires every pleading to contain in summary form "the material facts on which the party pleading relies for a … defence"; rule 14.11 which requires a pleading to contain the "necessary particulars of any … defence…"; and rule 14.13 (c) which requires a party to "specifically plead any matter, for example, performance, release, payment …

that if not specifically pleaded might take the opposing party by surprise" or "raise issues of fact not arising out of the preceding pleadings".

[120] Counsel for Brook also referred the Court to three other decisions, a trial division decision of the Nova Scotia Supreme Court (*Colbourne v. MacLean* 2005 NSSC 324), a decision of a Master in Alberta (*Bartle & Gibson Co. Ltd. v. Spicer* (1982), 35 A.R. 324), 13 A.C.W.S. (2d) 358 (Alta. Q.B.) and an appeal from a Master in Alberta (*Alberta Mortgage and Housing Corp. v. Delisle Holdings Ltd.*, 1999 ABQB 721 which, he submitted, supported his position that a general denial was sufficient to enable a defence to be raised even if the particular issue was not specifically mentioned in the pleading. I am not satisfied that these decisions stand for the broad proposition asserted and, even if they do, they are not binding on this Court and I would not be prepared to follow them.

[121] In *Colbourne*, which involved an action for damages arising out of a motor vehicle accident, the court held that the entry of default judgment with damages to be assessed did not disentitle the defendant from still seeking pretrial procedures, such as discovery and obtaining an independent medical examination, to deal with causation and the extent of the injuries, on a damages assessment hearing. The circumstances of this case are too far removed from the current situation for it to have any influence.

[122] In *Bartle,* the plaintiff sought summary judgment before a Master on a guarantee of the debts of a company due to the plaintiff. The defence compendiously denied "each and every allegation … in the statement of claim" and put the plaintiff to the strict proof thereof. On the summary judgment application, the defendant asserted that he had given notice that he would no longer be bound by the guarantee in accordance with a provision in the guarantee permitting this procedure. This plea was not contained in the statement of defence. The Master held that a "good defence" on a summary judgment application did not necessarily have to be raised on the pleadings if the court can determine that the defence might succeed if the pleadings were amended. The Master dismissed the summary judgment application so as to give the defendant an opportunity to amend his defence, but also ruled that if no application to amend was made within a reasonable time, the plaintiff was at liberty to renew the summary judgment application. This decision in fact recognizes that the pleadings are controlling unless an amendment is permitted. This is the same position as in this jurisdiction. In the current case, Brook did not seek an amendment.

[123] In *Alberta Mortgage and Housing*, a Master had dismissed an application for summary judgment on the basis that a potential defence (material variation of a loan agreement thereby releasing guarantors from their guarantee obligations), though not specifically pleaded, could constitute a triable issue. There was, however, a general denial of the allegations in the statement of claim. On appeal to the Court of Queen's Bench, Lee J. held that "a general denial of the allegations in the Amended Statement of Claim, without more, is insufficient to raise a triable issue" (para. 40). He also held, however, that a triable issue based on material variation could have existed if it had been properly pleaded and granted the defendants leave to apply to amend their pleadings. If they failed to apply within 60 days or were unsuccessful, the plaintiff would be granted summary judgment. This case also recognizes that a triable issue must exist within the scope of the pleadings and that summary judgment on the basis of lack of a triable issue will be granted unless the resisting party is successful in applying to amend the defence to raise that issue. As noted previously, Brook did not make a counter application before the applications judge to amend its pleadings in the current case, and it is by no means clear that if such an application had been made it would have been successful.

[124] It follows from this discussion that in a case involving a claim for money due under a construction contract a defendant whose defence is that all or part of the money was not due because the claimant was in breach of the contract by failing to perform it properly would have to plead the breach and provide particulars of the nature of that breach. To resist an application for summary judgment under rule 17 on the basis that there is no defence to the action or for judgment under rule 17A on the basis that there is no genuine issue for trial, it will be necessary for the defendant to rely on facts disclosing a defence that has been pleaded. This was certainly the case for rule 17 (*Centennial Realties Limited* and *Atlantic Ocean Dinner Cruises*) and the same result should follow for applications under rule 17A.

[125] The failure of Brook to do that meant that it was not, as a matter of pleading, putting the deficiencies in issue. As a matter of pleading, therefore, the deficiency/quantum issue was not a genuine issue for trial.

[126] Quite apart from this conclusion, however, the positions taken by Brook subsequent to pleading leading up to trial, during the summary trial and at its conclusion only served to reinforce the notion that the deficiency/quantum issue was not regarded by Brook or North Atlantic as a genuine issue for trial.

[127] In its pre-trial brief, Brook did not respond to North Atlantic's position that the deficiency/quantum issue had not been properly pleaded, nor did it raise any matters concerning alleged deficiencies in the work. In fact, in asserting there was a genuine issue for trial, Brook stated:

> That issue is of course whether there was a contract between [North Atlantic] and [Brook]…
>
> (Appeal Book, Tab 9, para. 26; underlining added).

[128] Brook did not go on and submit in the alternative that in the event that a contract between Brook and North Atlantic existed, there was nevertheless a genuine issue for trial relating to the work's sufficiency and the quantum of damages flowing therefrom. Further, when addressing whether the record was adequate to decide the case summarily, all of Brook's submissions related to the gaps in the evidence relating to contract formation and not to the sufficiency of the work.

[129] During opening statements at the commencement of the hearing, the applications judge addressed the issues as he saw them:

> Well, as I understand, having read the materials, what the Court needs to determine is whether the appropriate parties are before the Court. That's, that's essentially where we're going to end up here is, has the Plaintiff sued the appropriate Defendant, or has it not? Correct?
>
> (Transcript, February 21, 2019 at 7)

[130] Counsel for Brook replied: "Yes, that is, that is a big issue" (Transcript, February 21, 2019 at 7). While he used the indefinite article in saying it was "a" big issue, not "the" issue, he did not at any point attempt to define any other issues that, from his point of view, were in play.

[131] In summation at the end of the hearing, counsel for North Atlantic argued that whether the matter was dealt with under rule 17 or 17A, he had established that a contract was formed between North Atlantic and Brook, that it was performed, that the contract price was due and owing, and there was no defence established on the evidence. He made no submissions on the suggestions in the affidavit evidence filed by Brook that there were deficiencies in the work. In the circumstances, this was understandable in view of his pre-trial submission that that matter was not a live issue because it was not pleaded as a defence and the absence of any response by Brook taking issue with that position.

[132] In his summing up, counsel for Brook also focused on whether the admissible affidavit evidence and cross-examination thereon raised an issue as to whether there was a contract between North Atlantic and Brook and whether that could be decided on a summary trial or a conventional trial. He submitted: "So the crux of the defence to the claim of my client is captured in his [i.e. Trent Burden's] affidavit at paragraphs 5 and 6" (Transcript, May 27, 2019 at 15). Those paragraphs related solely to the question of whom the contract was with. Counsel made no submissions on the question of the quantum of the claim. As submitted by counsel for North Atlantic, one could reasonably conclude from this approach that Brook had abandoned its arguments regarding the sufficiency of the work.

[133] When called upon for submissions in reply, counsel for North Atlantic addressed Brook's submissions but also reasserted that Brook:

> … has pleaded that he didn't have a contract with Rose [the principal of North Atlantic]. He hasn't pleaded deficiency.
>
> (Transcript, May 27, 2019 at 22; underlining added.)

[134] Under these circumstances, especially in light of Brook's lack of challenge to North Atlantic's submissions, both before the hearing started and at its conclusion, that deficiency had not been identified as an issue, and in light of Brook's lack of submissions in support of the existence of deficiencies, it is understandable that the judge would have concluded that the deficiency/quantum issue was not regarded by the parties as a genuine issue for trial.

[135] This is, in fact, reflected in the judge's comments in his judgment describing the scope of Brook's pleaded defence:

> [6] The Statement of Defence filed by [Brook] denied that there was any contract with [North Atlantic] and stated that the contract was with a third party – with [North Atlantic] to act as a sub-sub-contractor. There was no allegation that the Plaintiff did not provide the equipment or labour and materials to construct the sewer line. Neither was there any allegation in the Statement of Defence that [North Atlantic's] work was deficient or substandard in any manner.
>
> (Emphasis added.)

[136] Thus, both as a matter of pleading and as a matter of the way in which the defence was presented, there was no genuine issue for trial with respect to the

amount of North Atlantic's claim for the money due under the contract. North Atlantic had put forward evidence verifying the amount claimed, which in any event was the contract amount (plus HST). Furthermore, although counsel for Brook cross-examined Lorne Rose, the director of North Atlantic, on his affidavit regarding some matters; he did not cross-examine him on his assertions of proper performance of the contract and the amount owing. If he was taking issue with those assertions, he ought to have done so, under the rule in *Browne v. Dunn* (1894), 6 R. 67 (H.L.), if he still regarded the deficiency issue as being a live one. In these circumstances, the applications judge was entitled to conclude that the amount of the claim had been proven and to enter judgment accordingly.

[137] Brook's submissions that the judge erred in not finding that there was a genuine issue for trial on the deficiency/quantum question cannot succeed.

[138] The result of this conclusion is that the judge's decision that North Atlantic was entitled to the contract price should not be disturbed. There was evidence submitted by North Atlantic as to the amount due and owing under the contract upon completion of performance. Reaching this conclusion did not involve having to consider any deficiency claim to be set off against the contract price. The onus was on Brook to raise and prove such a claim. However, the claim was not properly pleaded and, considering the way it was treated by Brook in both written and oral submissions, was effectively abandoned. Accordingly, the deficiency evidence submitted by Brook would not have been admissible and should not have been – and was not – considered.

(c) Summary Trial Question – Appropriateness and Fairness of Adjudication

[139] The second step in the summary trial analysis only engages if the court determines that there is a genuine issue for trial. In that case, the judge must go on and determine, pursuant to rule 17A.03(2), whether he or she is nevertheless able on the record before the court to find the facts necessary to decide the applicable questions of fact and law and whether it would not be unjust to decide them. If the answer to these two questions is in the affirmative, the judge must then adjudicate the substantive issues.

[140] In this case, however, there was no genuine issue for trial and the applications judge did not err by not finding otherwise. It is therefore not necessary or appropriate to address the issues of adequacy of the record or the fairness of adjudicating on it.

[141] I will observe, however, that the positions of both parties on the allegations of the existence of deficiencies were disclosed in the record and, unlike the situation involving the issue relating to the existence of the contract, the persons who could give pertinent evidence on the deficiency question had filed affidavit evidence. The question involved an interpretation of the significance of, and inferences to be drawn from, such evidence and whether it related specifically to the performance obligations which North Atlantic had undertaken to perform. Credibility issues would not have figured prominently in such an analysis.

[142] Had the applications judge directed his mind to this in relation to the deficiency/quantum issue he likely would have concluded (as would I) that the record could fairly support an adjudication. In such circumstances, it was certainly open to accept the interpretative analysis of the evidence advanced by counsel for North Atlantic on the appeal and to conclude on a balance of probabilities that the claim for the contract price had been made out. This is especially so since the deficiency evidence submitted by Brook would not have been admissible within the issues disclosed in the existing pleadings, absent a proper amendment to allow for that issue to have been raised. Despite North Atlantic's having raised the question of the scope of the pleadings, no steps were taken by Brook to seek an amendment even on appeal.

[143] Had it been necessary to address this aspect of the test for summary trial adjudication, I would not have been prepared to disturb the judge's conclusion that the amount of money to which North Atlantic was entitled was the contract price.

Summary and Conclusion

[144] Although the applications judge did not expressly advert in his judgment to parts of the accepted analytical framework for resolving summary trial issues, his failure to do so does not, in the circumstances, justify overturning his decision and remitting the issue of the quantum of North Atlantic's claim to the Supreme Court for a conventional trial on that issue. The judge did not err by not applying a rule 17A threshold analysis specifically to the deficiency/quantum issue. Further, there was no genuine issue for trial in respect of that matter disclosed on the pleadings and the parties did not present it as an issue to the judge for adjudication.

[145] I would therefore dismiss the appeal.

[146] Considering the seniority of counsel and the nature of the issues, but noting that the amount at stake was relatively low, I would award party and party costs on the appeal to North Atlantic on the basis of column 4 of the scale of costs in the *Court of Appeal Rules*.

J.D. Green J.A.

I Concur:

L.R. Hoegg J.A.

Butler J.A.:

INTRODUCTION

[147] I endorse my colleague's Summary Trial Application Decision Tree and, except as stated below, the principles addressed in those portions of his decision identified as "The Summary Trial Application", "The Threshold Questions", and "The Summary Trial Question". Specifically, I part company with my colleague on the effect of the judge's failure to identify and apply what my colleague recognizes as the second sub-question on the threshold test for summary trial.

[148] Respectfully, I am of the view that this failure resulted in a denial of procedural fairness which is a reversible error. I would therefore have allowed the appeal and remitted the issue of the amount due to North Atlantic back for a new hearing (*L.H.E.*, at para. 20).

ANALYSIS

The Pleadings

[149] To appreciate the circumstances in which the error was made I will first make some additional comments on the pleadings.

[150] North Atlantic's statement of claim pleaded what was required to establish a contract between the parties, breach thereof and a claim for liquidated damages. Brook's defence contained a denial of the contract and put North Atlantic to the strict proof of the assertions made in its statement of claim, which included damages. It also asserted that the contract for the work was with another company (C & T) and that it had paid C & T all sums due under the contract.

[151] The sufficiency and shortcomings of Brook's defence have been addressed by my colleague, and in my view, the principles upon which he relies apply equally to North Atlantic's application (and amended application) which formed the basis for the summary trial. Both parties were required to comply with the applicable rules.

[152] *Halsbury's Laws of Canada, First Edition, Civil Procedure (2017 Reissue)* (Toronto, ON: LexisNexis Canada Inc., 2017) at 474, lists the four main purposes of pleadings as:

> 1. To define and inform other parties and the court of the nature of the cause of action and the issues of fact (and, at least implicitly, law) that are in dispute among the parties;
>
> 2. To state the material facts that each party respectively alleges to be true and on which each relies in support of his or her side of the dispute;
>
> 3. To identify the nature of the relief that each party seeks; and
>
> 4. To serve as the basis of the record of the proceeding.

[153] Collectively, these serve to avoid the opposing party being taken by surprise (rule 14.13(c)(ii)).

[154] In most actions, the statement of claim and defence are the documents relied upon to ascertain the questions of fact and law to be determined. However, this matter proceeded under rule 17A and in such a case, there must also be reliance upon the application to ascertain what was to be decided on the summary trial.

[155] Even if an application for summary trial is not a "pleading" in the customary sense it is, at the very least, in the nature of a "quasi-pleading" similar to my colleague's characterization of the memorandum required under rule 17A.02(6). I agree with my colleague's conclusion that these records are

important and that counsel who ignore the requirements of a rule applicable to their content, do so at their peril.

[156] Rule 29 applies to both originating and interlocutory applications and rule 29.02(2) requires that an application shall: set out (a) “the nature of any claim being made or of any question sought to be determined”; and (b) “the relief or order claimed …”.

[157] In its initial application, North Atlantic sought summary judgment under rule 17 but it did not specify particulars of the relief it claimed. Since rule 17 is not restricted to a claim for liquidated damages, and Brook’s defence had denied the existence of a contract at all, it was not apparent whether North Atlantic was seeking summary judgment merely for a declaration of the existence of the contract or for liquidated damages in addition.

[158] Consistent with rule 29.02(2)(a) and (b) North Atlantic was required to include in its claim for relief on the application under rule 17, more than just a mere request for a “summary judgment”; it was required to specify the relief sought, which it asserted on this appeal was a declaration that it was a party to a contract with Brook, with payment due in the amount of $33,475.45 plus HST.

[159] Similarly, on its amended application, paragraph 15 sought only “summary judgment against [Brook] pursuant to rule 17, or in the alternative summary trial pursuant to rule 17A.” The amended application did not specify with sufficient particularity what issues it sought to have addressed on the summary trial.

[160] There were therefore shortcomings not only in Brook’s defence as noted by my colleague but also in North Atlantic’s applications as referenced above.

The Hearing

[161] The second circumstance to appreciate is the parties’ divergent positions.

[162] I agree that North Atlantic’s approach was to place primary emphasis on the summary judgment application and that it did not address the threshold test under rule 17A, whether it was met and/or, whether there was a genuine issue warranting trial in the conventional form.

[163] In comparison, as my colleague acknowledges, Brook relied on rule 17A. Its memorandum comprehensively addressed both the threshold issue, the

substantive issues, and it referenced the relevant authorities including *Marco No. 2* and *Dalley*.

[164] I agree that the transcript of the proceeding reflects disagreement and confusion about the nature of the application, what was being sought and the lack of progress made in the preliminary discussion between counsel and the judge. My colleague has described the situation as akin to the parties "punching into the fog" which "made the applications judge's job that much more difficult".

[165] The preliminary discussion did not resolve what the threshold question was; the judge made no determination on the rule under which he would proceed and he gave no indication of the issues that he was satisfied had been placed before him. He merely conceded to counsels' requests to allow cross-examination of the deponents and said he would give a decision on "both issues after the fact". The transcript does not reflect any agreement or direction from the judge on what the "issues" were or whether "after the fact" meant once the judge had addressed the rule 17A threshold question or later.

[166] The shortcomings of the pleadings and the utter confusion at the hearing raised obvious concerns about the appropriateness of proceeding to summary trial without direction and/or clarification.

The Threshold Question

[167] As the Decision Tree reflects, the second sub-question on the threshold issue is whether there is any apparent reason evident that would make it inappropriate to deal with some or all of the issues by summary trial. As *Young* explains, this consideration requires "bearing in mind the comments of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 about the salutary uses of such a procedure to ensure access to justice in appropriate cases" (para. 27).

[168] My colleague acknowledges that the judge made no reference to this second sub-question. In my view, there is nothing in the judge's reasons to suggest that he was aware that as a threshold matter, he must consider whether it would be appropriate to deal with the issues by means of summary trial bearing in mind the *Hryniak* considerations of access to justice.

[169] I conclude that the judge's failure to identify and consider whether there was "any apparent reason evident" at the threshold stage "making it inappropriate to deal with some or all of the issues by Summary Trial" was an

error that manifestly affected the result. As the Decision Tree reflects, where a judge considers only the first sub-question on the threshold test, a summary trial is not available.

Applying the Threshold Test to the Issues

[170] I agree that the second sub-question is not the place to embark on a *detailed* examination of whether the summary trial record is sufficient to enable the summary trial judge to *decide* a particular issue and that instead the focus is on whether the summary trial *as a process* is appropriate to be invoked *at all*.

[171] *Marco No. 2* principle 10 established that "the court must approach the test for application of rule 17A on an issue by issue basis" (para. 76). I acknowledge that it did not specify that this approach applied to both the threshold and substantive tests but that is how it was interpreted and applied in *Dalley*, at paras. 28-42. Depending on the circumstances, a judge may consider that this manner of addressing the threshold test best assists the required analysis.

[172] What *is* required however, is that the judge (having identified the issues and applied the threshold test to them) must "as part of the 'interests of justice inquiry' ", consider "the consequences of the application 'in the context of the litigation as a whole' " (*L.H.E.*, at para. 19, citing *Hryniak*, at para. 60).

[173] This consideration may cause a judge at the threshold stage to make the determination that while it might be suitable to have a summary trial on an individual issue, the presence of interconnected issues (likely not capable of being resolved) suggests that a summary trial is inappropriate.

[174] Conversely in my view, at the threshold stage, a judge may conclude that a summary trial on a discrete issue is appropriate because:

- Other issues raised for which the necessary evidentiary base does not exist are not sufficiently connected or related;
- There is no prejudice to either party if a summary trial is held on one issue only; and
- To proceed in this manner would represent a proportional procedure tailored to the needs of the particular case (*Dalley*, at paras. 43-45).

[175] In either case, I agree that this involves an exercise of discretion. However, "… discretion must be exercised with regard to legal principles and procedural requirements … while decisions taken within that legal framework will not be disturbed, decisions taken outside that legal framework (or without regard to it) are not a proper exercise of discretion and, as such, are subject to appellate review" (*K.M. v. J.F.*, 2004 NLCA 67, 241 Nfld. & P.E.I.R. 257 at para. 13).

Failure to Rule on the Threshold Issue

[176] I would not say that it is *required* for a judge to rule on the threshold test before proceeding to summary trial. A judge's decision on the timing of the ruling on the threshold test is also an exercise of discretion but it must ensure procedural fairness.

[177] In this case there is no evidence that the judge considered whether the circumstances I have described made it appropriate to advise counsel of his conclusions on the application of the threshold test. They did not know what he had determined to be the issues that were appropriate to be determined by summary trial. On the facts and in the unusual circumstances of this case, as the Decision Tree reflects, this failure deprived the parties of the right to seek directions, re-group and reorganize or advise the judge that (in light of his ruling) they were not ready to proceed.

[178] It is apparent from the record that counsel did not appreciate what issues were being addressed by the judge. Brook presented both affidavit and *viva voce* evidence (through cross-examination of North Atlantic's witness) touching on the issue of the amount due without any indication from the judge that he considered this evidence irrelevant to the issues placed before him.

[179] In response to the amended application, Brook had filed an affidavit of Trent Burden (professional engineer and the appellant's project manager). At paragraph 15 thereof, Mr. Burden attested to the truth of the following statement:

> Brook paid C&T the sum of $66,876.82 with respect to the work regarding the revisions pursuant to The Subcontract. This includes the work C&T engaged the Plaintiff to carry out, which was, as stated hereinbefore, valued at $6,846.45, and the work of another contractor carried out to remedy the deficiencies in the said work the Plaintiff carried out. …

[180] The attachments to this affidavit included emails exchanged between the parties alleging deficiencies in North Atlantic's work warranting deduction of $26,629.00 from the contract price.

[181] On behalf of North Atlantic, Lorne Rose provided an affidavit in reply which addressed, in part, his company's performance on the contract and whether Brook's failure to pay was associated with the position taken by the Province, with whom Brook had the primary contract (see paragraph 20).

[182] At paragraphs 21-25, Mr. Rose addressed the emails relied upon by Brook respecting alleged deficiencies in the work and the amount due to North Atlantic.

[183] There was therefore documentary evidence before the applications judge which touched on the issue of damages.

[184] Both parties filed Memorandums of Fact and Law. In the alternative to its principal argument (that the issue of deficient work was not before the court) paragraphs 19-31 of North Atlantic's memorandum addressed "consideration of the defence of deficient work".

[185] Under cross-examination, North Atlantic's witness, Lorne Rose was asked principally about the contractual arrangements but I note that the following issues were canvassed by counsel for Brook:

- which "plan" was the correct plan on which his bid was placed (Transcript, February 21, 2019, at 21-22);
- whether another contractor had been required to finish the sewer line work due to deficiencies in North Atlantic's work (Transcript, February 21, 2019, at 20);
- who had been on site to supervise performance of North Atlantic's work and certify that it met the contractual specifications; and
- the email exchange which suggested that the job had been "charged back" to Brook (Transcript, February 21, 2019, at 27).

[186] This evidence was relevant to North Atlantic's claim for damages.

[187] When North Atlantic's counsel cross-examined Brook's witness, Trent Burden, the focus was on the existence of a contract. However there was also reference to Mr. Rose being asked to leave the job site due to complaints

(Transcript, February 21, 2019, at 47-49), a fact upon which Brook had relied, in part, as relevant to the issue of damages.

[188] The record reflects no indication that the judge considered this evidence to be irrelevant.

[189] The sufficiency of the parties' pleadings and quasi-pleadings on the issue of damages has been noted. Despite these, it is clear that Brook claimed the contract was with another contractor (C & T) to whom it had already paid $66,876.82 which sum included payment for the work C & T had engaged North Atlantic to carry out. In addition, it was clear that Brook claimed there were deficiencies in the work performed by North Atlantic as sub-contractor to C & T.

[190] As previously noted, the parties' preliminary discussions with the judge made no progress on the issues that were to be determined. In particular, North Atlantic never stated that the relief it sought on the summary trial was a declaration on the existence of a contract and liquidated damages in the amount of $33,475.45 plus HST.

[191] Even in final summation, counsel for North Atlantic focused on the issue of whether there was a contract between Brook and North Atlantic and stressed that Brook had not put its evidentiary "best foot forward" (Transcript, May 27, 2019, at 12). He submitted that on the evidence, the case for liability had been made out. He made no further submissions relating to the threshold issue and also made no reference to Brook's allegation of deficiencies except to insist that Brook had not pleaded deficiencies as a defence. His final request was only "I ask for judgement …" (Transcript, May 27, 2019, at 23).

[192] Throughout the hearing Brook rightfully considered that the judge would apply the jurisprudential considerations to both the threshold and substantive tests applicable to the issue of the contract and to damages. Following cross-examination of Mr. Rose and Mr. Burden, counsel for Brook confirmed his understanding that "in my view, the evidence is in, but we're not past the threshold for summary trial" (Transcript, February 21, 2019, at 60).

[193] This statement reflects Brook's expectations and are inconsistent with the judge's conclusion that, having found a contract existed, he had "no option" but to award the damages sought (para. 17).

[194] The judge's conclusion reflects his determination that Brook had not put forward an evidentiary basis for its position on damages (the first sub-question

on the threshold test had not been met). Procedural fairness entitled Brook to know this before the summary trial was held (*L.H.E.*, at para. 15) because Brook may have determined that (in light of this decision) it was not ready to proceed and/or it may have sought to amend its pleadings to address the lack of an evidentiary basis.

[195] In the context of an application to strike, this Court held in *Montreal Trust Co. of Canada v. Hickman*, 2001 NFCA 42, 204 Nfld. & P.E.I.R. 58, at paras. 13 and 53:

> [13] In *Kavanagh v. Newfoundland (Minister of Education)*, 2000 NFCA 2 this Court observed that "one of the considerations which a court must consider on an application under Rule 14.24(1)(a) is whether any defects in pleading could be cured by an appropriate amendment" (para. 23). Of course, before allowing an amendment as a defensive response to an application to strike, the appropriate grounding in affidavit evidence or otherwise (or leave given to make such a grounding) must be provided according to the applicable principles respecting amendments under Rule 15**.** See *Seadane International Inc. v. Morgan International Marketing Co.* (1999), 180 Nfld. & P.E.I.R. 97 (Nfld. C.A.) at para. 16. It is only when the court is satisfied that no basis for an amendment exists or the defect could not be cured by any realistic amendment, as for example, where no matter what amendment could be made no cause of action known to the law could possibly exist, should the remedy of striking out be employed: *De La Penha v. Newfoundland* (1984), 46 Nfld. & P.E.I.R. 26 (Nfld. T.D.) [appeal dismissed on different grounds (1986), 63 Nfld. & P.E.I.R. 356 (Nfld. C.A.)].
>
> [53] I can agree with substantially all of what the applications judge has said in his description of the difficulties which he was having with the claim as pleaded. Where I differ is as to the consequences that flow from the deficiencies that he has identified. I do not agree that if a statement of claim suffers from the deficiencies described - even those amounting to failure to plead particulars of fraud or breach of trust contrary to rule 14.11 - it necessarily follows that the deficiencies are fatal and must result in the striking of the claim. So long as it discloses an intention to assert a skeleton, or even a ghost of a claim known to the law (even though all of the constituent elements may not be properly pleaded), then the court may, if it is of the opinion that the claim can be properly described and fairly asserted without irremediable prejudice to the other side, allow the claimant to put flesh on the skeleton (and maybe even supply a few missing bones), by permitting or ordering amendments and/or particulars to ensure, amongst other things, that: (i) the pleading clearly indicates which of the facts alleged relate to which cause of action against which defendant; and (ii) sufficient particulars are given to enable the defendant to know what particular factual scenarios are being alleged that, if proven, will constitute each cause of action and will justify each of the remedies sought.

[196] I conclude similarly that unless the judge was satisfied either that no basis for an amendment of Brook's defence existed or that no matter what amendment could be made, no cause of action known to the law could possibly exist, Brook should have been provided with the opportunity to address any defects before the summary trial was held.

[197] As Karakatsanis J. stated for the Court in *Hryniak*, at para. 5, that:

> … summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

[198] In *Shoal Investments Ltd. v. Murphy*, 2019 NLCA 78, this Court held, consistent with the guidance of *Hryniak* that it was appropriate to take "a broad view" and ask "in every case on appellate review when questions of sufficiency of pleadings are raised … whether regardless of technical compliance with the rules, the complaining party [has been] prejudiced in being able to know the case he or she was facing and to be able to respond to it" (para. 124).

[199] North Atlantic was aware that Brook claimed deficiencies in the work and payment to a third party. North Atlantic would not have suffered non-compensable prejudice if the judge ruled on the threshold issue first, allowing Brook the opportunity to reconsider its pleadings. In my view, deprivation of this opportunity was a denial of procedural fairness.

[200] Finally, with respect I disagree with my colleague's suggestion that the circumstances in *L.H.E.* are distinguishable. The majority of this Court in *L.H.E.* held that counsel understood the judge would first determine the threshold question and if a summary trial was to proceed, they would have an opportunity for cross-examination. In the within case, the parties proceeded without any understanding of what was to be determined and whether (if the judge decided that the applicant had failed to meet either of the sub-questions on the threshold test for some or all of the issues) the parties, and in particular, Brook would have the opportunity to seek directions, to seek a postponement or to file an application to amend pleadings.

CONCLUSION

[201] To summarize, I would conclude that the judge erred in:

> (1) Failing to identify and apply the second sub-question of the threshold test to the issues;

(2) Failing to consider whether there was any apparent reason evident at the threshold stage making it inappropriate to deal with some or all of the issues by summary trial; and

(3) Proceeding to summary trial without advising the parties of the judge's decision on the application of the threshold test and which amounted to a denial of procedural fairness (*L.H.E.*, at para. 15).

[202] Since denial of procedural fairness is a reversible error, I would have set aside the judge's decision on the amount due under the contract and remitted it to trial division for a new hearing (*L.H.E.,* at para. 20).

[203] In light of my conclusion on the error of law made in the application of the threshold test, it is unnecessary to address the summary trial itself.

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G. D. Butler J.A.

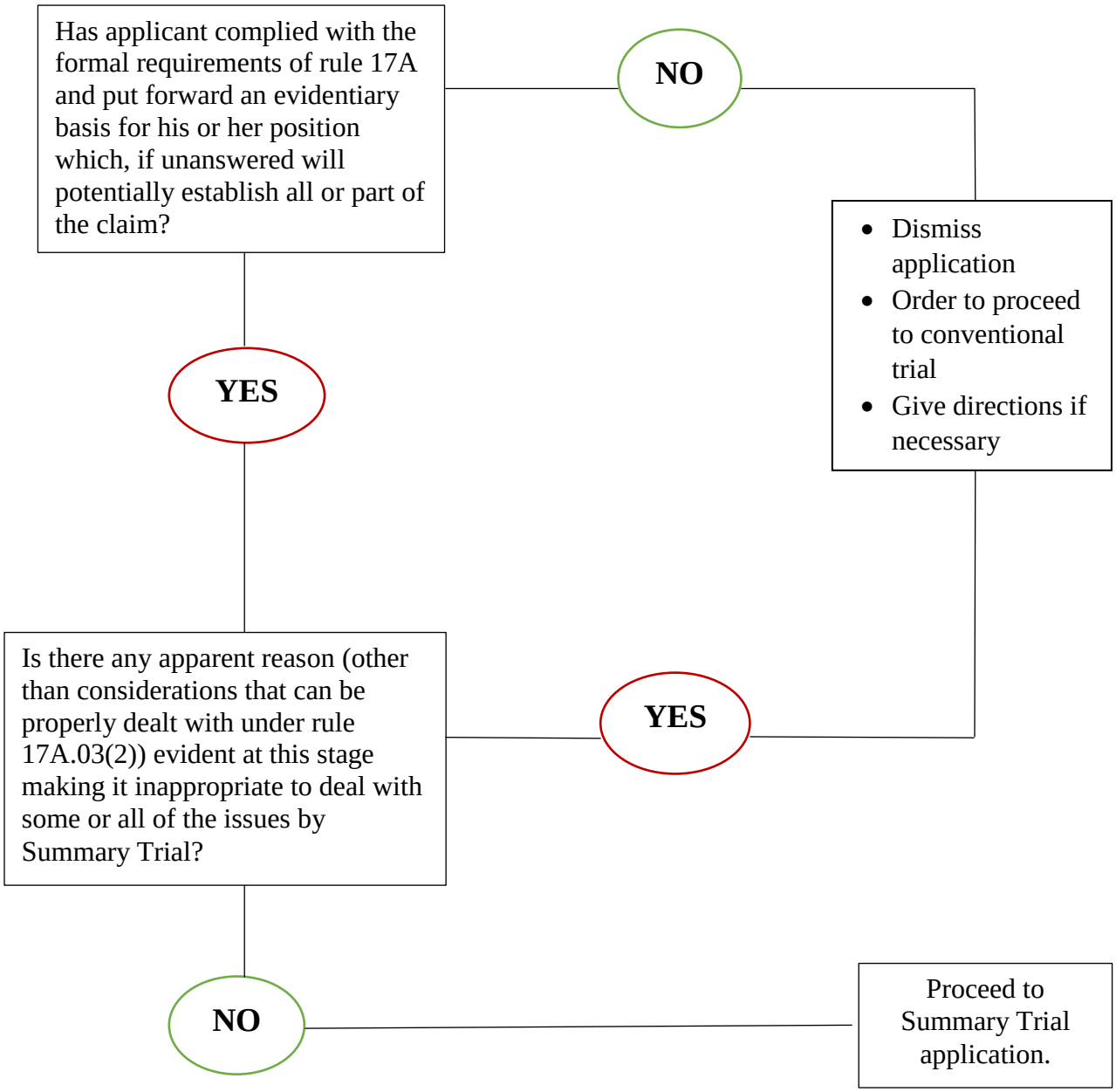
SCHEDULE

(Reasons for Judgment – Paragraph 45)

RULE 17A SUMMARY TRIAL APPLICATION DECISION TREE

(1) Threshold Questions

(when raised by a party or flagged for consideration by the judge; may be determined at same hearing as Summary Trial)



(2) Questions on Summary Trial Application