IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Parsons v. Babb Construction Limited*, 2022 NLCA 16
Date: March 15, 2022
Docket Number: 202001H0063

BETWEEN:

JOHN PARSONS — FIRST APPELLANT

AND:

THE VALES DEVELOPMENT INC.
(formerly known as 52182 NEWFOUNDLAND AND LABRADOR LIMITED) — SECOND APPELLANT

AND:

BABB CONTRUCTION LIMITED — RESPONDENT

Coram: Green, O'Brien and Goodridge JJ.A.

Court Appealed From Supreme Court of Newfoundland and Labrador, General Division 201901G1433 (2020 NLSC 115)

Appeal Heard: April 15, 2021
Judgment Rendered: March 15, 2022

Reasons for Judgment by: O'Brien J.A.
Concurred in by: Green and Goodridge JJ.A.

Counsel for the Appellants: Peter O'Flaherty Q.C. and Ryan Belbin
Counsel for the Respondent: John Bruce

Authorities Cited:

CASES CITED: *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543; *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365, 59 O.R. (3d) 74 (Ont. C.A.); *Hayward v. Hayward*, 2021 ONCA 175; *Quinlan Brothers Limited v. Coady*, 2013 NLCA 31, 336 Nfld. & P.E.I.R. 75; *Rubens v. Sansome*, 2017 NLCA 32, 1 C.A.N.L.R. 727; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3; *John Doe (G.E.B. #113) v. Canada (Attorney General)*, 2021 NLCA 21; *Bussey v. White*, 2001 NFCA 7; *Rich v. Bromley Estate*, 2013 NLCA 24, 336 Nfld. & P.E.I.R. 107; *Estate of Michael Burke and 1021256 Ontario Inc. v. Royal & Sun Alliance Insurance Company of Canada*, 2011 NBCA 98; *Regal Realty Limited v. Pentagon Holding Limited*, 2013 NLCA 45, 338 Nfld. & P.E.I.R. 66; *Humby Enterprises Ltd. v. A.L. Stuckless & Sons Ltd*., 2003 NLCA 20, 225 Nfld. & P.E.I.R. 268; *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500; *RJG Construction Limited v. Marine Atlantic Inc*., 2019 NLCA 51, 4 C.A.N.L.R. 694, leave to appeal to SCC refused, 38847 (5 March 2020); *Mangrove v. Newfoundland and Attorney General of Canada*, 2009 NLTD 115, 289 Nfld. & P.E.I.R. 151.

STATUTES CONSIDERED: *Corporations Act*, RSNL 1990, c. C-36, section 374.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rules 5, 7.16.

O'Brien J.A.:

OVERVIEW

[1] This appeal concerns procedural fairness in the litigation process and the requirement to consider relevant evidence.

[2] In 2013, Babb Construction Limited and John Parsons entered into a contract. Parsons agreed to pay $500,000 for shares that Babb Construction owned in a corporation formerly known as 52182 Newfoundland and Labrador

Limited (now known as The Vales Development Inc.). Babb Construction claimed that Parsons only paid $100,000 of the purchase price, leaving $400,000 outstanding.

[3] In 2019, Babb Construction filed an application in the Supreme Court of Newfoundland and Labrador and sought two specific remedies.

[4] First, it requested a declaration (pursuant to rule 7.16 of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D) that there was a fundamental breach of the contract, and that the contract was void *ab initio* due to non-payment. Second it sought a rectification order (pursuant to section 374 of the *Corporations Act*, RSNL 1990, c. C-36) to rectify the corporate records of 52182 (now Vales) in order to indicate that Babb Construction, not Parsons, was the owner of the shares. Babb Construction also requested that it receive a share certificate; in essence, it wanted the shares returned.

[5] In his reply to the application, Parsons argued that the outstanding $400,000 had been paid in 2016 by way of two written agreements between him and Babb Construction. Parsons submitted that, through these agreements, he had assigned a debt to Babb Construction as payment in full of the $400,000.

[6] The judge rejected Parsons' position for two reasons. First, he found that Parsons did not properly sign the agreement in which he purported to assign the debt to Babb Construction. This issue of Parsons not properly signing the agreement was not pleaded or argued during the application. The first mention of it was in the judge's written reasons. The appellants argue that this was procedurally unfair. Second, the judge found that Parsons was required to prove the existence of the debt that was referenced in the 2016 written agreements, and that he did not do so.

[7] The judge concluded that because Parsons failed to sign the agreement and prove the debt, he could not use the 2016 agreements to establish that he paid the $400,000. Therefore, the $400,000 remained outstanding.

[8] With regard to the appropriate remedy, the judge concluded that he was not able to grant the relief Babb Construction requested in the application, namely a declaration and rectification order. This was because he found there had been partial performance of the contract to purchase the shares (i.e. $100,000 of the $500,000 purchase price had been paid) and there was no fundamental breach of the contract.

[9] Instead, the judge ordered that Parsons pay Babb Construction $400,000 in damages. In its application, Babb Construction had not requested monetary damages nor sought payment of the outstanding $400,000.

[10] Parsons and Vales have appealed. They allege a denial of procedural fairness because the judge made findings and awarded damages on a basis that was not argued or pleaded. They also argue that the judge erred in his consideration of the written agreements.

[11] For the reasons that follow, I would allow the appeal, set aside the order, and remit the matter to the Supreme Court without prejudice to Babb Construction's right to pursue whatever claims it may have, and without prejudice to Parsons' and Vales' right to rely on any pleaded defences.

BACKGROUND

The 2013 Share Transfer Agreement - Parsons and Babb Construction

[12] The genesis of the litigation was a 2013 contract between Parsons and Babb Construction, referred to as an "Agreement of Intent to Share Transfer (In Trust)". Parsons agreed to pay the $500,000 for Babb Construction's shares in 52182 (now Vales) in instalments of $10,000 a month for 50 months. At the time, the owner of Babb Construction was Brian Babb.

[13] Parsons made payments during the first year of the agreement, totaling $100,000. He testified that he subsequently became aware, through a review of 52182's financial records, that Babb Construction owed 52182 more than $400,000. Babb Construction had not disclosed this before Parsons purchased the shares. As a result, Parsons testified, he made no further payments on the remaining $400,000.

[14] The issue of the outstanding $400,000 remained unresolved until addressed in two 2016 agreements, a debt swap agreement and an assignment of debt agreement.

The 2016 Debt Swap Agreement - Parsons, Babb Construction and Vales

[15] In 2016 Parsons, Babb Construction and Vales entered into a contract referred to as a debt swap agreement. Vales was a party to this contract because, by this time, 52182 Newfoundland and Labrador Limited had amalgamated with, and continued as, Vales.

[16] The evidence was that the debt swap agreement was a contract under seal prepared, in consultation with legal counsel and accountants, to address debts existing among the three parties.

[17] The agreement dealt with three items.

[18] First, the parties acknowledged that debts were owed among them. Second, they agreed to issue promissory notes regarding these debts. Third, and with specific reference to the $400,000 owed by Parsons to Babb Construction for the shares (i.e. the subject matter of the application), Parsons agreed to assign to Babb Construction a promissory note issued to him from Vales, and Babb Construction agreed to accept that promissory note as payment in full of the $400,000.

The debts

[19] The parties acknowledged the following: Parsons owed Babb Construction $400,000; Vales owed Parsons more than $400,000; and Babb Construction owed Vales more than $400,000.

[20] The agreement stated:

> That Parsons "agreed to purchase the shares of [Babb Construction] … for a purchase price of $500,000";
>
> That "$100,000 of the said purchase price for the shares has been paid by Parsons, leaving a balance of $400,000 outstanding";
>
> That Vales owed Parsons "in excess of $400,000 as set forth in the corporate financial records" of Vales;
>
> That Babb Construction owed Vales "in excess of $400,000 as set forth in the corporate financial records" of Babb Construction.

The promissory notes

[21] Having acknowledged their respective debts, the parties agreed to issue three promissory notes respecting these debts, as follows:

> "Parsons will issue an assignable promissory note to [Babb Construction] in the amount of $400,000, being the balance of the purchase price for the Shares owed by Parsons to [Babb Construction]…"

> "[Vales] will issue an assignable promissory note to Parsons in the amount of $400,000, in partial payment of the money owed to Parsons by [Vales] …"
>
> "[Babb Construction] will issue an assignable promissory note to [Vales] in the amount of $400,000, in partial payment of the money owed to [Vales] by [Babb Construction] …"

[22] The three promissory notes were then issued, accordingly.

The agreement to assign a promissory note

[23] The debt swap agreement specifically addressed the outstanding $400,000 owed by Parsons to Babb Construction for the purchase of the shares.

[24] Parsons agreed to assign to Babb Construction the $400,000 promissory note issued to him by Vales. Babb Construction agreed to accept this promissory note as payment of the $400,000 owed by Parsons to Babb Construction for the shares.

[25] The debt swap agreement stated in this respect:

> Parsons shall assign and [Babb Construction] shall accept the assignment of the promissory note from [Vales] to Parsons … in full and final satisfaction of the promissory note from Parsons to [Babb Construction]…

The 2016 Assignment of Debt Agreement - Parsons and Babb Construction

[26] In a separate document, referred to as an Assignment of Debt agreement, Parsons assigned the promissory note (issued from Vales) to Babb Construction. Both Parsons and Brian Babb signed this agreement in 2016, at the same time as the debt swap agreement.

[27] While the promissory note, a negotiable instrument, could have been transferred though an endorsement and delivery of the note, the parties used the terminology of an "assignment of debt". The transfer of debt from Parsons to Babb Construction will therefore be referred to in this way, as an assignment.

[28] The parties to the assignment of debt agreement were John Parsons as the "Assignor" and Babb Construction Limited as the "Assignee".

[29] The agreement stated:

> "WHEREAS by a certain Promissory Note … The Vales Development Inc., as Borrower did promise to pay to the Assignor [i.e. Parsons], as Lender, the sum of … $400,000 (hereinafter the "Note"), attached hereto as Schedule "B";
>
> AND WHEREAS the Assignor [i.e. Parsons] has agreed to assign the Note to the Assignee [i.e. Babb Construction] herein;
>
> NOW THIS INDENTURE WITNESSETH that for and in consideration of Two Dollars ($2.00) and other good and valuable consideration now paid by the Assignee [i.e. Babb Construction] to the Assignor [i.e. Parsons], the receipt and sufficiency of which is hereby acknowledged, the Assignor [i.e. Parsons] … hereby assigns and sets over unto the Assignee [i.e. Babb Construction] all the benefit of the hereinbefore recited Note and all money now owing as aforesaid."

[30] This agreement was "Signed, Sealed and Delivered in the presence of" legal counsel as witness.

[31] Parsons submitted that the parties intended that the debt swap agreement and assignment of debt agreement would satisfy the outstanding $400,000 amount owed to Babb Construction for the shares that Parsons purchased in 2013.

[32] As will be discussed below, the applications judge did not agree that these agreements satisfied this $400,000 owed.

The 2018 Sale of Babb Construction

[33] Babb Construction changed ownership in 2018. Brian Babb had been the owner of Babb Construction in 2013, when the corporation entered into the share transfer agreement, and in 2016 when the corporation entered into both the debt swap agreement and the assignment of debt agreement.

[34] Brian Babb signed these agreements on behalf of the corporation. There was no issue with his authority to do so, and it was uncontested that Babb Construction was a party to the agreements.

[35] In 2018, Brian Babb sold his shares in Babb Construction to his brother Randell Babb. Brian Babb had no further interest in Babb Construction and Randell Babb controlled the corporation from that point.

The 2019 Originating Application

[36] In 2019, Babb Construction filed an originating application in the Supreme Court, supported by an affidavit from Randell Babb as sole director.

[37] The application referenced the 2013 share transfer agreement and indicated that Parsons had paid $100,000 and that $400,000 remained unpaid. Significantly, the application did not reference the 2016 debt swap agreement or the assignment of debt agreement entered into between Parsons and Babb Construction to satisfy the outstanding $400,000. In response, Parsons provided copies of these agreements as evidence that the $400,000 had been paid.

[38] Parsons also raised a procedural objection. He argued that the facts in the application upon which Babb Construction sought relief were in dispute. As such, he submitted that the matter should not proceed by an originating application, but rather by a statement of claim under rule 5 of the *Rules of the Supreme Court, 1986*. I will discuss this procedural point at the end of this decision.

[39] The matter proceeded by originating application and the judge ordered that Parsons pay Babb Construction $400,000.

ISSUES

[40] Parsons and Vales argue that they were denied procedural fairness because the judge decided the application on a basis that was not pleaded or argued. They further contend that the judge erred in his analysis of the debt swap agreement and the assignment of debt agreement, and in awarding $400,000 in damages as a remedy when it was not requested.

[41] Babb Construction argues there was no breach of procedural fairness. It submits that the judge made no error in his analysis of these agreements, or in concluding that the $400,000 remained unpaid and awarding monetary damages.

[42] The appeal will consider the following issues:

1. Was there a denial of procedural fairness or a breach of natural justice?

2. Did the judge err in his analysis of the debt swap agreement and the assignment of debt agreement?

3. Did the judge err in awarding monetary damages?

ANALYSIS

Issue 1: Was there a denial of procedural fairness or a breach of natural justice?

[43] Appellate intervention may be warranted where procedural fairness is denied or natural justice is breached.

[44] As the Supreme Court of Canada observed in *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 9, "each party is entitled to know and respond to the case that it must answer" and "cases should not be decided on grounds not raised".

[45] In *Saadati*, the Supreme Court referred to the Ontario Court of Appeal decision in *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365, 59 O.R. (3d) 74, in which the Court of Appeal reversed a decision made on a basis that was never pleaded or argued, and which appeared for the first time in the judge's reasons.

[46] The Court in *Rodaro* stated that this was fundamentally unfair, as there was no opportunity to respond to the issue before judgment was entered:

> [60] It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in *460635 Ontario Limited v. 1002953 Ontario Inc.*, [1999] O.J. No. 4071 at para. 9 (C.A.):
>
> > . . . The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. . . .
>
> [61] By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to RBC and Barbican.

[47] As well as being unfair, the Court in *Rodaro* raised concerns with the reliability of a decision made on a basis that was not pleaded or argued, and "with respect to which battle was never joined":

> [62] In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial

> process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. …
>
> [63] Spence J. erred in finding liability on a theory never pleaded and with respect to which battle was never joined at trial. This error alone requires reversal. …

[48] The reasoning in *Rodaro* has been widely adopted, including recently in *Hayward v. Hayward*, 2021 ONCA 175, where the concerns expressed in *Rodaro* relating to fairness and reliability were echoed.

[49] In *Quinlan Brothers Limited v. Coady*, 2013 NLCA 31, 336 Nfld. & P.E.I.R. 75, this Court endorsed the approach in *Rodaro* when considering a trial judge's decision that was based on a theory that had not been pleaded or argued by the parties:

> [54] Quinlans argues that the trial judge decided the case on the basis of abandonment principles which were neither pleaded nor argued at trial.
>
> …
>
> [56] The trial judge's decision shows that he decided the case on the basis of abandonment of contract. In so doing, he adopted a theory of the facts which was at odds with the position of both parties and the law. …Quinlans was not only denied the opportunity to argue the law of abandonment of contract, but it may also have been denied the opportunity to adduce evidence specific to abandonment of contract. In this regard, I endorse the comments of Doherty J.A. in *Rodaro v. Royal Bank of Canada …*

[50] *Quinlan Brothers* also recognized the potential for unfairness and unreliability arising in such circumstances:

> [57] In a trial where both sides are represented by counsel, it is generally unfair to decide a case on principles which the parties did not have opportunity to address, with the possibility, like in *Rodaro*, that the result is not reliable.

Applying these considerations in the present context

[51] The same concerns of fairness and reliability arise in this appeal because the judge decided the application based on an issue that was not pleaded or argued; namely, whether Parsons properly signed the assignment of debt agreement.

The Judge's findings

[52] The assignment of debt agreement was signed by Brian Babb "of and for Babb Construction Limited". It was also signed by Parsons. However when Parsons signed it, he did so above a signature line that read *"of and for the Vales Development Inc."*

[53] Because of this, the judge made two findings. First he concluded that the agreement had not been properly signed by Parsons:

> [29] The "Assignment of Debt" is executed on behalf of Babb Construction Limited and The Vales Development Inc. but it is not executed either by or on behalf of John Parsons, the Assignor.

[54] Second, the judge found that, even if Parsons did sign the agreement, he did not do so in his personal capacity:

> [47] "The Assignment of Debt", dated July 12, 2016, is part of the suite of documents intended to wipe out Mr. Parsons' debt to Babb Construction. It is drawn between him as "Assignor" and Babb Construction as "Assignee". The Assignment is signed by someone "OF AND FOR BABB CONSTRUCTION LIMITED" and by someone (possibly Mr. Parsons) "OF AND FOR THE VALES DEVELOPMENT INC."; but John Parsons, if he signed the document at all, does not sign it in his own right. …

[55] The result of this, the judge determined, was that the debt that Parsons purported to assign to Babb Construction was never actually assigned:

> [47] ...Therefore, he did not, by that instrument, assign the $400,000 that The Vales owed him to Babb Construction to offset the $400,000 that he owed to Babb Construction. So, the debt still belongs to Mr. Parsons and Babb Construction has no claim to it.

[56] This determination was consequential. It led directly to the judge's conclusion that, because Parsons had not assigned the debt (which was being assigned to pay the outstanding $400,000 for the shares), Parsons still owed Babb Construction $400,000:

> [48] In the result, The Vales still owes Mr. Parsons $400,000 and he still owes Babb Construction $400,000, the balance of the $500,000 that he agreed to pay to the company for the 1000 common, voting shares he bought from Babb Construction in 52182, now The Vales. This may appear to be a harsh result for Mr. Parsons, but he relies heavily on the agreement of July 12, 2016 and the documents supporting it to answer Babb Construction's claim that he is not entitled to hold onto the shares he

> acquired on January 24, 2013. The obligation is on Mr. Parsons to ensure that the documentation supports his position; and it does not. …

This issue was first raised in the written decision

[57] The first mention of Parsons not properly signing the agreement was in the judge's written reasons.

[58] Babb Construction did not plead this point. It was not raised in the affidavit evidence or testimony of the witnesses during the two-day application hearing. The parties did not refer to it in oral or written submissions. The judge did not identify it as a potential issue during the application hearing. It was introduced in the decision, without seeking submissions of counsel.

[59] The appellants argue they could not have reasonably anticipated that this would be a determinative issue. They submit that, had they been given the opportunity, they would have presented evidence to refute the judge's findings.

The finding that Parsons did not sign the agreement at all

[60] The judge held that Parsons had not signed the assignment of debt agreement at all:

> [46] … It is true that Mr. Parsons (as I noted above) purported to assign the $400,000 that The Vales owed to him, to Babb Construction, but he did not effect that assignment, simply because Mr. Parsons did not execute the document entitled "The Assignment of Debt". His signature is not on it.

[61] The appellants argue that, had this been contentious, they would have established that this was Parsons' signature by calling evidence. They claim it was unfair that they had no opportunity to address this point, especially since no party, including Babb Construction, disputed that this was Parsons' signature.

The finding that Parsons did not sign the agreement in his personal capacity

[62] The judge also found that, even if Parsons did sign the agreement, he did so on behalf of Vales and not in his own right.

[63] The appellants argue that, had this been a contested point, they would have called evidence to establish that this reference to *"of and for the Vales Development Inc."* under Parsons' signature line was a drafting error, made when the agreement was prepared for signature by legal counsel.

[64] When Parsons signed the debt swap agreement, the promissory notes, and the assignment of debt agreement, he did so in some instances in his personal capacity and in others on behalf of Vales. The appellants submit that, had submissions or clarification been sought, they would have shown that Vales was inadvertently referenced under the signature line, and they would have sought rectification, if necessary.

[65] Babb Construction argues that, although the issue of Parsons' signature was not pleaded or argued, Parsons submitted a "defective document" to the Court (i.e. one that was not properly executed). It submits that the judge was entitled to conclude that the agreement was defective, without inviting further argument or submissions.

Potential unreliability

[66] In addition to fairness, the appellants argue that the judge's finding is potentially unreliable. They submit that it ignores the parties' intention that Parsons (not Vales) would assign a promissory note to Babb Construction in order to satisfy the $400,000 outstanding for the shares.

[67] This intention, they submit, is clear from the language of the assignment of debt agreement and the debt swap agreement. For example, the parties to the assignment of debt agreement are Parsons (as assignor of the promissory note) and Babb Construction (as assignee or recipient of the note). Vales is not a party. In addition, the assignment of debt agreement states that Parsons assigns the promissory note (that he received from Vales) to Babb Construction. It does not reference Vales or state that Vales assigns anything to Babb Construction. In fact, as Vales had issued the promissory note in question to Parsons, it would have had nothing to assign.

[68] Further, pursuant to the terms of the debt swap agreement, Parsons (not Vales) and Babb Construction made mutual promises. Parsons promised to assign the promissory note to Babb Construction. Babb Construction agreed to accept it as payment in full of the $400,000 for the shares. Again, there is no reference to Vales. These mutual promises between Parsons and Babb Construction were implemented through the assignment of debt agreement, wherein Parsons actually assigned the promissory note to Babb Construction. By contrast, Vales made no promise to assign anything to Babb Construction.

[69] It is unknown what, if any, impact these or other arguments would have had on the judge's decision. The parties had no opportunity to argue the issue.

Conclusion on this issue

[70] A review of the pleadings, evidence, argument and submissions on the application reveals that the issue of whether Parsons signed the assignment of debt agreement, at all or on his own behalf, was never raised. This issue was decided without the parties having been given an opportunity to address it (see *Rubens v. Sansome*, 2017 NLCA 32, 1 C.A.N.L.R. 727, at para. 106).

[71] Applying the rationale of *Saadati*, *Rodaro* and *Quinlan Brothers*, discussed above, concerns regarding litigation fairness and reliability arise in this context because the judge decided the application based on an issue not pleaded, and "to which battle was never joined" (*Rodaro*, at para. 63). I conclude that this was an error and that it constitutes a denial of procedural fairness and a breach of natural justice in this circumstance.

Issue 2: Did the Judge err in his analysis of the debt swap agreement and the assignment of debt agreement?

The Judge failed to consider relevant evidence

[72] Failing to consider relevant evidence when making factual determinations may constitute an error, justifying appellate intervention.

[73] As observed by the Supreme Court of Canada in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352:

> [104] A Court of Appeal will be justified in intervening where the trial judge's factual findings are "based on a failure to consider relevant evidence or on a misapprehension of the evidence": *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84; see also *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 794; *Housen*, at para. 72.

[74] In *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3, at para. 50, the Supreme Court of Canada noted that no deference is afforded where a determination "involved a complete misapprehension of, or failure to consider, material evidence". See also *John Doe (G.E.B. #113) v. Canada (Attorney General)*, 2021 NLCA 21, at para. 28.

[75] In the present case, the debt swap agreement and the assignment of debt agreement were relevant evidence of the debt owed by Vales to Parsons. The agreements were also relevant to (and potentially determinative of) the main issue to be decided on the application, whether Parsons had paid Babb Construction the outstanding $400,000 for the shares. Yet the judge did not

consider or give effect to the agreements in his analysis of the issues. For the reasons that follow, I would conclude that the judge erred in failing to consider these agreements.

The Judge found that Parsons had not proved the debt (owed to him from Vales) that he assigned to Babb Construction

[76] In addition to rejecting the assignment of debt agreement because of Parsons' failure to properly sign it, as discussed above, the judge also rejected it because he found that Parsons did not prove that Vales owed him money.

[77] The parties, in both the debt swap agreement and the assignment of debt, acknowledged that Vales owed Parsons in excess of $400,000. However, the judge required Parsons to provide additional information, beyond these agreements, to prove this debt existed. He concluded that Parsons did not provide this additional proof, and this was fatal to his position.

The agreements were evidence of the debts

[78] The judge found that Parsons was deficient in "failing to document the offsetting debts he relies on to claim payment" (para. 70). However, this finding ignores the fact that these debts were documented in the debt swap agreement and the assignment of debt agreement. The agreements were part of the record on the application and were evidence of the debts and the parties' intentions in dealing with these debts.

[79] There is nothing in the decision to explain why additional proof of these debts was required. The evidence on the application was that the parties negotiated and drafted the agreements, on the advice of legal counsel and accountants, to address their mutual debts. The parties accepted these debts as underlying terms of the agreements.

[80] Further, there was no issue or argument respecting failure of consideration. These agreements, contracts executed under seal, expressly stated that they were being entered into for "good and valuable consideration", "the receipt and sufficiency of which is hereby acknowledged".

There was no finding that the debt swap agreement or the assignment of debt agreement was invalid

[81] An agreement may be vitiated or impugned on various grounds recognized by the common law, equity or statute. Examples include

unconscionability, fraud, duress, undue influence, misrepresentation, and illegality. An invalid agreement need not be considered.

[82] However in this case nothing was pleaded or argued, and the judge made no finding, that the agreements should be set aside on these or any other grounds. Accordingly, the agreements should have been considered as operative when deciding the application.

Babb Construction's skepticism of the 2016 agreements does not render them invalid

[83] The judge stated that Babb Construction was "understandably skeptical of the process that Mr. Parsons effected … [in] 2016", and of "what Mr. Parsons transacted at that time" (para. 49). This language suggests that Parsons acted nefariously or somehow misled or duped Babb Construction into signing the 2016 agreements. However, as noted, Babb Construction did not plead or establish any recognized common law, equitable or statutory basis on which to challenge their validity.

[84] Moreover, these were not the unilateral acts of Parsons. Babb Construction was also a party to the contracts, and there was no evidence that Babb Construction was anything other than an independent, informed party.

[85] While the decision suggests that Babb Construction's current owner, Randell Babb, may have been "skeptical of the process", there was no evidence that Brian Babb, who executed the contracts on behalf of Babb Construction in 2016, questioned their validity. Further, there was no evidence that the agreements did not reflect the intentions of the parties.

[86] The fact that the new ownership might have viewed the agreements entered into under the previous ownership with skepticism, or perhaps as improvident or ill advised, is not a basis on which to vitiate or disregard them. Babb Construction agreed to accept (in the debt swap agreement) and then did accept (in the assignment of debt agreement) an assignment of debt from Parsons, in order to satisfy the outstanding $400,000 for the shares.

Parsons did provide information to support the debt owing from Vales

[87] The judge concluded that "Mr. Parsons provided no information to support [the debt owed to him from Vales] beyond his own unsubstantiated claims and his repeated assertions that the Canada Revenue Agency accepted them; and then inferring that I should accept them as well" (para. 64).

[88] The record does not support this conclusion.

[89] First, as discussed above, the contracts themselves evidence the debt owed by Vales to Parsons. The judge did not need to rely solely on Parsons' "unsubstantiated claims" in order to accept his position; the agreements, had they been considered, would have supported it. The debt was included as a term of the agreements and there was no need for further proof.

[90] Second, Parsons provided information that the Canada Revenue Agency (CRA) had reviewed the agreements between him and Babb Construction. The CRA had initially assessed Parsons a tax liability based on the understanding that Parsons had paid only $100,000 for shares valued at $500,000.

[91] However, the CRA ultimately reversed this original finding when it considered the debt swap agreement and the assignment of debt agreement. The CRA determined that, for its purposes, these agreements established that Parsons paid the outstanding $400,000 owed to Babb Construction for the shares.

[92] The judge found that this was not persuasive. He required additional proof of the underlying debt owed by Vales to Parsons:

> [53] So, to relate it to what happened [in] 2016: The CRA may be content with the assignment of offsetting debts allegedly owing by The Vales to Mr. Parsons and the debt that Mr. Parsons owed to Babb Construction to establish that Mr. Parsons did not benefit personally from the transaction; but I want to know if The Vales actually owed John Parsons $400,000 and, if so, why. …

[93] While it is true that the CRA decision was not determinative of the application, it appears the judge failed to consider whether it was due any weight at all.

[94] Third, at the application hearing, Parsons gave evidence about the money that Vales owed him. He stated that the reason he purchased the shares in 52182 (now Vales) was because the company owed him a substantial debt. Buying these shares, he testified, would enable him to get security for the debt:

> …We had ... an extensive meeting on January the 25th and the reason…that I bought the shares in the first place was because of the debt that 52182 owed me and I could not get any security for that debt … so at that meeting [which included legal counsel] … we just said the best way out of this was for me to buy [Brian Babb's] shares and that way then the company could be run by myself… and then I would get security for my debt, which I did.

(Transcript, July 20-21, 2020, at 221-222)

[95] On cross-examination, Parsons further testified that the debt that Vales owed him was recorded in the corporation's financial records, prepared by the accounting firm Noseworthy, Chapman. This was reflected in the language of the debt swap agreement, where it was stated that Vales owed Parsons in excess of $400,000 "as set forth in the corporate financial records" of Vales.

Whether Vales' debt to Parsons was proved or not, Babb Construction accepted this debt as payment of the outstanding $400,000 for the shares

[96] Further, even accepting the judge's view that the debt from Vales to Parsons was not proved, it is not clear how this would be determinative. Freedom to contract is relevant in this context. Whether the judge believed the debt was proved or not, it was uncontested that Parsons assigned this debt and Babb Construction accepted it as payment of the $400,000 for the shares.

[97] There was no evidence that Babb Construction was concerned about proof of the debt. It agreed to accept it. Babb Construction did not plead or argue that the debt was never assigned to it, or that it received no value.

[98] The parties were free to deal with their financial affairs, and debts, through these agreements. They were competent to decide the terms of the agreements, and rely upon and enforce these terms.

Conclusion on this point

[99] The agreements were relevant evidence. As there was no finding and no basis to find that they were invalid, they were operative and should have been considered.

[100] The judge did not consider these agreements because he found that a term (regarding the debt owed by Vales to Parsons) was not proved. However, the parties had accepted and relied on that term. There was nothing in the agreements requiring further proof of this debt; it was acknowledged and accepted by the parties.

[101] In the result, the failure to consider these agreements, which were relevant and material to the ultimate question of whether Parsons had paid Babb Construction the outstanding $400,000 for the shares, was an error.

The Judge considered irrelevant evidence - The agreement to pay a third party

[102] Before leaving this discussion of the judge's consideration of the evidence, the judge also considered and relied on evidence that was irrelevant to the issue of whether Parsons had paid Babb Construction for the shares.

[103] That evidence was an agreement between Parsons and a third party, Dianne Hollett, which occurred before the 2016 debt swap agreement and assignment of debt agreement.

[104] Subsequent to the share purchase agreement in 2013, Brian Babb (the then owner of Babb Construction) asked Parsons to pay the $400,000 outstanding for the shares to Ms. Hollett, ostensibly for consulting services, instead of to Babb Construction. The judge noted that "Mr. Parsons identified Ms. Hollett as Brian Babb's girlfriend" (para. 56).

[105] The judge acknowledged that Brian Babb made this request in order to benefit himself or Babb Construction, and potentially to avoid claims made against the money from creditors, including the CRA:

> [58] … Mr. Parsons may have agreed to pay the $400,000 to Dianne Hollett to assist Brian Babb to avoid paying taxes to the Canada Revenue Agency because of the sale and/or to assist Mr. Babb in not paying his creditors, one of whom may have been the CRA.

[106] There was no evidence, and no finding by the judge, that this was done to benefit Parsons.

[107] Parsons originally agreed to Brian Babb's request that he (Parsons) sign an agreement indicating that he owed the money to Ms. Hollett. However, Parsons testified that shortly thereafter he obtained legal advice and determined that the debt owed to Babb Construction for the shares could not be paid in this manner. Therefore, he testified, no money was paid to Ms. Hollett. The $400,000 remained unpaid until addressed in the 2016 agreements.

[108] There was also evidence that Ms. Hollett brought a claim against Parsons in Supreme Court based on this agreement to pay her. Parsons filed a defence to the claim, stating that the money was rightfully owed to Babb Construction and not Ms. Hollett. The judge noted that the claim did not proceed beyond this point (para. 31).

[109] Parsons also testified that he explained what had occurred to the CRA in the context of their assessment of the transactions. The CRA ultimately concluded that the $400,000 owed to Babb Construction had been paid through the 2016 agreements.

[110] The agreement to pay Ms. Hollett did not relate to the main issue on the application, namely whether Parsons paid Babb Construction the outstanding $400,000 through the debt swap agreement and the assignment of debt agreement in 2016. Nonetheless, the judge focused on it, stating that the arrangement with Ms. Hollett gave him "concern" about "the reliability of the documents from … 2016 [i.e. the debt swap agreement and the assignment of debt agreement] that Mr. Parsons bases his defence on" (para. 54).

[111] However, the judge does not explain how the earlier circumstances with Ms. Hollett impugned the reliability of the 2016 contracts. Again, the evidence on the application was that Parsons had originally agreed to the request to pay Ms. Hollett, for Brian Babb's benefit. Subsequently, and without having paid Ms. Hollett anything, Parsons confirmed that he would pay only Babb Construction the outstanding amount for the shares, not Ms. Hollett. Then, in 2016, Babb Construction and Parsons agreed to satisfy the outstanding $400,000 through the debt swap agreement and the assignment of debt agreement.

[112] The judge's "concern" suggests suspicion of possible malfeasance, fraud or collusion between Brian Babb and Parsons with respect to the 2016 agreements. However, this would be speculative as no malfeasance, fraud or collusion was pleaded or proved, and the judge made no finding that the 2016 agreements were invalid or unreliable because of the earlier circumstances involving Ms. Hollett.

[113] In the context of the evidence and the record, the judge's focus on and consideration of this as a significant factor was misplaced. First, it is not explained how this arrangement to pay Ms. Hollett was relevant to the ultimate issue of whether Parsons paid Babb Construction the outstanding $400,000. Second, the evidence and the record do not support a conclusion that this undermined the reliability of the 2016 agreements.

[114] A factual finding based on irrelevant evidence may constitute an error. See *Bussey v. White*, 2001 NFCA 7, at para. 7, and *Rich v. Bromley Estate*, 2013 NLCA 24, 336 Nfld. & P.E.I.R. 107, at para. 17.

[115] The conclusion follows that the circumstances involving Ms. Hollett were irrelevant to the issue to be determined on the application, namely whether Parsons had paid Babb Construction the $400,000 for the shares. The judge erred by considering and relying on this in deciding the application.

Issue 3: Did the judge err in awarding a remedy of monetary damages?

[116] For substantially the same reasons as those set out in Issue 1 above, which dealt with procedural fairness, I would conclude that the judge erred in awarding monetary damages in this circumstance.

[117] In so doing, I reference the authorities and discussion above, relating to fairness and reliability concerns that may arise from a decision reached on a basis that is not pleaded, not argued, and that "emerges for the first time in the reasons for judgment" (*Rodaro*, at para. 62).

[118] Granting a remedy different from the relief requested in the pleadings, argument or submissions, and one that was not contemplated by the parties, may constitute a breach of procedural fairness and natural justice.

[119] In *Estate of Michael Burke and 1021256 Ontario Inc. v. Royal & Sun Alliance Insurance Company of Canada*, 2011 NBCA 98, it was held that the trial judge had "erred in law in resting his decision on facts that were neither pleaded nor proven, and in disposing of the case though an unrequested equitable remedy…" (para. 48).

[120] In *Regal Realty Limited v. Pentagon Holding Limited*, 2013 NLCA 45, 338 Nfld. & P.E.I.R. 66, this Court, citing its earlier decision in *Quinlan Brothers* and the Ontario Court of Appeal decision in *Rodaro*, concluded that the trial judge erred in granting a remedy in circumstances where the "relief had not been requested and was not fully argued" (para. 16).

[121] In the present case, as noted above, Babb Construction requested specific relief. It asked for a declaration under rule 7.16 of the *Rules of the Supreme Court, 1986* that the contract was void *ab initio*, and an order under section 374 of the *Corporations Act* that the share register be rectified to reflect Babb Construction's ownership of the shares, and that a share certificate be provided.

[122] Babb Construction's position on the relief sought was consistent throughout the litigation. On two occasions, it specifically advised the Court that it was not seeking monetary damages. First, during an early court appearance on this matter, before the application was heard, counsel for Babb Construction

advised the Court with respect to the remedy sought: “We’re not looking for a $400,000 debt, we’re saying it is way past due, void *ab initio*, we want to go back to where we were before this, simple as that” (Transcript, March 12, 2019, at 10). Then, in final submissions on the application, Babb Construction’s counsel confirmed this position: “This is not an action for collection of the debt. This is an action to have declared void *ab initio* the agreement” (Transcript, July 20-21, 2020, at 452). Despite this, the judge awarded Babb Construction damages of $400,000 and entered judgment against Parsons in this amount.

[123] The appellants contend that when the judge concluded that he could not grant the remedies that Babb Construction had requested, the application should have been dismissed at that point, as it was unsuccessful. They argue that the judge should not have awarded an alternative remedy that did not accord with how the litigation was framed and the relief sought.

[124] The application was not styled, pleaded or argued as a claim for breach of contract resulting in monetary damages. It was not brought by Babb Construction, or defended by Parsons or Vales, as a claim for damages.

[125] Litigants frame their claims and the relief proposed. This application was brought seeking a rectification of corporate records and the return of shares. That is markedly different from the remedy granted. Judgment was entered for $400,000 against Parsons for payment of a debt that the judge found to be outstanding, despite Babb Construction advising the Court that this was “not an action for collection of the debt” and it was “not looking for a $400,000 debt”.

[126] Had it been Babb Construction’s intention to claim damages for $400,000, its pleadings and argument would have been required to reflect this. The other parties would have had notice and been able to respond accordingly. (See *Humby Enterprises Ltd. v. A.L. Stuckless & Sons Ltd*., 2003 NLCA 20, 225 Nfld. & P.E.I.R. 268, at paras. 14-19, and *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42, at para. 13).

[127] There was no argument or discussion at any time, among the parties or the judge, that it might be appropriate to award monetary damages as an alternative remedy. Again, this came as a surprise in the written decision. In the result, the judge erred in treating the application as if it were a claim for damages for debt, and awarding damages accordingly. This constituted a breach of procedural fairness and natural justice.

Case authorities referenced in deciding the remedy

[128] The judge referenced case authorities with respect to fundamental breach of contract (paras. 13-14) and total failure of consideration (paras. 15-16). He later applied the principles set out in these cases when considering the appropriate remedy available on the application (paras. 71-74).

[129] While not determinative of this appeal, it is noted that the law regarding fundamental breach of contract (including the judge's discussion of total failure of consideration and exclusionary clauses) has been impacted by subsequent Supreme Court of Canada judgments that are not referenced in the decision. See, for example, *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, and *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500. (*Potter* was applied by this Court in *RJG Construction Limited v. Marine Atlantic Inc*., 2019 NLCA 51, 4 C.A.N.L.R. 694, leave to appeal to SCC refused, 38847 (5 March 2020)).

[135] The Supreme Court of Canada in *Potter* noted that fundamental breach has a "specific meaning in the context of exclusionary or exculpatory clauses" (para. 35). The Court stated that, to avoid confusion in circumstances (like the present application) where there is no exclusion clause, the analytical focus should be on whether there has been a repudiation of the contract (i.e. whether there are there acts and conduct that "evince an intention no longer to be bound by the contract"), as opposed to a fundamental breach (see paras. 35 and 148). Further, in *Tercon*, even in circumstances where the Supreme Court considered a contract that did have an exclusion clause (unlike the circumstances of the present application) both the majority and minority decisions explicitly eschewed the language and analysis of fundamental breach (see paras. 62 and 81-82). The analytical framework articulated by the Supreme Court of Canada should guide any future consideration of these issues.

SUMMARY AND DISPOSITION

[130] For the reasons provided above, the judge erred by denying procedural fairness in finding that Parsons did not assign the debt, by ignoring relevant evidence in concluding that Parsons did not prove the debt from Vales, by relying on irrelevant evidence regarding Ms. Hollett, and by awarding a monetary remedy that was not pleaded or otherwise requested.

[131] In the result, I would allow the appeal, set aside the order, and remit the matter to the Supreme Court. This is without prejudice to Babb Construction's right to pursue its claim in the Court below, including a claim for the balance due under the 2013 share transfer agreement, and without prejudice to Parsons' and Vales' right to plead and, if proved, rely on the 2016 agreements as constituting payment of the balance due on the purchase of the shares.

[132] As the appellants, Parsons and Vales, have been successful on the appeal, they are entitled to their costs on Column 3, for one counsel, on this appeal and on the application in the Supreme Court.

Procedural considerations

[133] As the matter is remitted to the Supreme Court, consideration should be given to the submissions of Parsons and Vales noted earlier, that, because significant facts were in dispute, the litigation should have been commenced by way of a statement of claim under rule 5 of the *Rules of the Supreme Court, 1986*, and not an originating application.

[134] The choice of procedure will depend on a number of factors outlined in the *Rules*, including the degree to which the facts are in dispute. It was apparent on appeal that, despite the matter having been commenced by an originating application, there were important factual issues in dispute on the application. This point was illustrated in Babb Construction's written submissions on appeal, where it was stated: "The Applications Judge's decision was primarily based on findings of fact".

[135] In any future litigation in this matter, the parties should consider and determine the appropriate procedural route, either by consent or through a judicial determination. In this respect, the parties should reference the requirements in the *Rules*, as well as the relevant authorities on point (see, for example, *Mangrove v. Newfoundland and Attorney General of Canada*, 2009 NLTD 115, 289 Nfld. & P.E.I.R. 151).

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F. P. O'Brien J.A.

I concur: _____

J. D. Green J.A.

I concur: _____

W. H. Goodridge J.A.