



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Hennessey v. Eastern Regional Integrated Health Authority*,
2022 NLCA 45

Date: July 20, 2022

Docket Number: 202001H0008

BETWEEN:

GARY HENNESSEY, trading as Administrative
Services and GARY HENNESSEY in his own
right

APPELLANT

AND:

EASTERN REGIONAL
INTEGRATED HEALTH AUTHORITY

FIRST RESPONDENT

AND:

HER MAJESTY THE QUEEN IN
RIGHT OF NEWFOUNDLAND AND
LABRADOR, as represented by the Minister
of Health and Community Services

SECOND RESPONDENT

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

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201301G3794
(2019 NLSC 239)

Appeal Heard: March 16, 2021

Judgment Rendered: July 20, 2022

Reasons for Judgment by: Green J.A.

Concurred in by: O'Brien and Goodridge JJ.A.

Counsel for the Appellant: William Hiscock

Counsel for the First Respondent: Ruth Trask

Counsel for the Second Respondent: No Appearance

Authorities Cited:

CASES CONSIDERED: *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42; *Bridge Shipping and Transport Co. Ltd. v. Avis*, 2018 NLSC 11; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Marco Ltd. v. Newfoundland Processing Ltd. et al.* (1995), 130 Nfld. & P.E.I.R. 308 (Nfld. S.C. (T.D.)).

STATUTES CONSIDERED: *Limitations Act*, SNL 1995, c. L-16.1, section 13; *Mechanics' Lien Act*, RSNL 1990, c. M-3.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rule 17A.

Green J.A.:

[1] The appellant, Gary Hennessey, made a claim against the first respondent, Eastern Regional Integrated Health Authority, based on an allegation of fraudulent misrepresentation. Eastern Health applied to have the matter heard by way of summary trial, arguing that Hennessey's claim failed to disclose a reasonable cause of action or a genuine issue for trial and that the claim was, in any event, barred by the *Limitations Act*, SNL 1995, c. L-16.1. The applications judge agreed that the matter could proceed by summary trial. He concluded that although there were genuine issues for trial, the claim could be heard fairly and properly on the existing record. He dismissed the claim of fraudulent misrepresentation based on the evidence, and concluded, in addition, that the claim was statute-barred.

[2] In this appeal, Hennessey challenges some of the applications judge's findings. The appeal raises issues relating to the nature, scope and application of the "threshold test" for summary trial as well as the application of limitation periods. Hennessey does not however challenge the judge's conclusions that the claim of fraudulent misrepresentation was not proven.

BACKGROUND

[3] For the purposes of this appeal, the background can be summarized as follows. Hennessey had a book-keeping business that provided payroll services. He contracted to provide such services to clients of Eastern Health who needed to employ a home care worker. The arrangement was such that the 'clients' were the employers, but Eastern Health funded 100% of the wages and paid for the payroll services. Hennessey would receive funds from Eastern Health, and then issue salary to the homecare workers and make the appropriate payroll deductions and remittances to the Canada Revenue Agency.

[4] Hennessey alleged that at the time clients were referred by Eastern Health to Hennessey, they had (unknown to Hennessey but known to Eastern Health) outstanding balances owing to Canada Revenue Agency due to past failure by those clients to make payroll remittances. Hennessey further alleged that he was pressured by Canada Revenue Agency to pay these outstanding remittances, together with interest and penalties, either out of his own funds or by applying current payments from Eastern Health to past outstanding balances instead of applying them to the current remittance liability. As a result, Hennessey alleged, he could never get current with the remittance liability and suffered large personal losses, leading to his bankruptcy.

[5] The matter was treated at the summary trial as if Hennessey's alleged losses flowed from a fraudulent misrepresentation by silence on the part of Eastern Health. Hennessey alleged: (i) an intentional decision by Eastern Health not to divulge to Hennessey, at the time a client was referred to him, the fact that the client had pre-existing arrears; (ii) reliance by Hennessey on the asserted false representation (by silence) in circumstances which called for information to be provided and which, had it been divulged, would have caused Hennessey to refuse to accept the referral of the client; and (iii) resulting economic loss.

[6] Almost six years after the filing of the statement of claim (and three years after the filing of an amended defence) Eastern Health applied for a summary trial on the grounds that there was no genuine issue for trial or that even if there was a genuine issue, the matter could be appropriately determined by way of summary trial. Among the matters raised that are relevant to this appeal were the allegations that the claim disclosed no reasonable cause of action and that the available evidence could not establish that any cause of action could be made out. Eastern Health also alleged that even if there were a genuine issue for trial, the claim was barred by operation of the applicable limitation period.

[7] As noted earlier, the applications judge, with the concurrence of counsel, treated the statement of claim as containing an allegation of fraudulent misrepresentation founded on omission or silence when circumstances called for information to be provided. This part of the claim was not struck out or dismissed on the ground that it disclosed no reasonable cause of action. The judge – with the concurrence of counsel – therefore proceeded to consider the application on the basis:

[15] ... whether the issue raised [relating to fraudulent misrepresentation] passes the summary trial “threshold test” and, if so, whether it poses a genuine issue for trial, and, if so, whether it can be fairly adjudicated on this summary trial application...

[8] In describing the approach to the application in that way, the judge was generally using an analytical framework which was recently described as the appropriate approach by this Court in *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42.

THE DECISION

(a) Threshold Issue

[9] The applications judge addressed the threshold inquiry on an issue-by-issue basis (para. 26). He stated that he did not consider the threshold question to “represent a high bar” especially when the application is brought by a defendant who is essentially putting the plaintiff to proof of the plaintiff’s case (para. 41).

[10] On the question of whether the claim of fraudulent misrepresentation was capable of being made out, he reviewed the law with respect to representation by silence and concluded that “for silence to constitute a fraudulent misrepresentation, there must be either a relationship, the nature of which requires disclosure or an active concealment intended to prevent the other party from discovering the fact in question” (para. 38). He then addressed whether Eastern Health had put forward an evidentiary base to show that the other party’s claim had no substance and concluded that the affidavit evidence submitted by Eastern Health met this requirement. The affidavit deposed to the truth of the allegations in the summary trial application to the effect that Hennessey was effectively the author of his own misfortune because he failed to maintain proper financial records, had a choice to take on new clients and was not in any event liable for their pre-existing balances with Canada Revenue Agency. On the threshold issue, the judge summed up:

[42] The issue raised by the claim of fraudulent misrepresentation appears to bring the case within the summary trial rule and is an issue that potentially could be dealt with by way of summary trial. The threshold requirement has been satisfied.

[11] As to the application of the threshold inquiry to the limitations issue, the applications judge pointed to the disagreement in the record between Hennessey and Eastern Health as to when Hennessey would or should have known of Eastern Health's knowledge of the Canada Revenue Agency arrears at the time of transfer of a client and concluded that Eastern Health's knowledge was a material fact that was relevant to whether the discoverability rule applied so as to keep the limitation period alive (paras. 64 to 67). He then stated simply that "[t]he issue of the date on which Hennessey's cause of action for fraudulent misrepresentation arose meets the summary trial threshold test" (para. 68).

(b) Genuine Issue

[12] Having noted the conceded sufficiency of the pleading and the evidentiary differences in the application record on both whether the elements of fraudulent misrepresentation and the operation of the discoverability principle were satisfied, the judge concluded that there were genuine issues for trial on these matters (paras. 43 and 68).

[13] He then moved on to summarily try the issues on the record before him.

(c) Summary Trial of the Fraudulent Misrepresentation Claim

[14] The judge examined the affidavit and other material submitted by Hennessey and concluded that while the non-disclosure of the arrears by Eastern Health was deliberate to protect client confidentiality, "there is no evidence to support the suggestion that the non-disclosure was intended to induce Hennessey to take on the work for the client in question" nor was there any evidence "of any intent to conceal or to prevent Hennessey from himself discovering the fact of the arrears" (para. 48).

[15] He also concluded that there was nothing in the evidence to support the view that, by virtue of assuming responsibility for the payroll administration of a client with a pre-existing balance, even if there was reliance on a representation by silence, Hennessey came under any legal liability to Canada Revenue Agency with respect to the outstanding arrears. He therefore concluded that "[t]he evidence does not suggest a causal link between the alleged misrepresentation, the asserted reliance, and the financial losses alleged to be suffered by Hennessey" (para. 50).

[16] Finally, the judge also noted that the facts did not bring the case within the legal principles dealing with misrepresentation by omission or silence because the evidence did not disclose any omission of any qualification of an absolute statement made by Eastern Health and there were no circumstances to suggest that Eastern Health was under any duty, fiduciary or otherwise, to Hennessey to ensure he was aware of the arrears (para. 53).

(d) Summary Trial of the Limitations Issue

[17] Having decided the fraudulent misrepresentation claim against Hennessey on the merits, it was strictly not necessary to deal with Eastern Health's limitations defence. Nevertheless, the applications judge did address the matter and concluded on the available evidence that the claim was in any event statute barred.

[18] The issue that was presented was whether the discovery principle, as enunciated in section 13 of the *Limitations Act*, applied to extend the start of the limitation period, thereby enabling Hennessey to maintain his cause of action, if he had one. Where the discovery principle operates, the cause of action is deemed to arise for the purposes of the operation of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the exercise of reasonable diligence (*Bridge Shipping and Transport Co. Ltd. v. Avis*, 2018 NLSC 11). It is up to the claimant to present evidence establishing lack of knowledge of the material facts and that he or she, even with the exercise of reasonable diligence, could not have discovered those facts before the expiration of the limitation period.

[19] As noted above, the judge concluded that the issue of the date on which Hennessey's cause of action for fraudulent misrepresentation arose met the summary trial threshold test and was a genuine issue for trial (para. 68). He then went on to consider whether under rule 17A.03(2) of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, he could, notwithstanding there was a genuine issue for trial, nevertheless decide the issue fairly on the record before him.

[20] In addressing the matter, the judge considered the correspondence passing between Hennessey and Eastern Health as well as the affidavit evidence submitted by Hennessey, including the statement that he was first alerted to the fact that Eastern Health was aware of the clients' arrears in 2009. Because there were contradictions between what Hennessey deposed and other evidence which could not be resolved in the absence of cross-examination, the judge concluded

that it would not be just to decide the question of Hennessey's actual knowledge on the basis of the existing record; accordingly, that question would have to be determined following a conventional trial.

[21] The judge then considered whether, even if Hennessey did not have actual knowledge, Hennessey, with reasonable diligence, could have acquired that knowledge. On this subject, he concluded that the record was sufficient for this purpose because "there is no suggestion that there is relevant evidence not presently available to Hennessey that could later become available" (para. 106). Reviewing the documentary evidence, he concluded, on the basis of the communications passing between Hennessey and respondent about the problems, that "with the exercise of reasonable diligence, Hennessey ought to have discovered by August 6, 2007, that Eastern Health knew, at the time that accounts were transferred to Hennessey, that certain of those accounts were in arrears with CRA" (para. 114).

[22] The judge determined that Hennessey therefore could not rely on the discovery principle to extend the limitation period beyond August 6, 2013, the date when the statement of claim was issued.

ISSUES

[23] Hennessey's submissions on appeal were limited to two issues:

1. Whether the applications judge formulated the correct test to determine the "threshold question" as to the appropriateness of the case for summary trial; and
2. Whether the applications judge properly applied the correct threshold test to: (a) the fraudulent misrepresentation issue; and (b) the limitations issue.

[24] Even a cursory perusal of the transcript of the application hearing discloses that there was no congruence of thought among the judge and each counsel as to the questions to be asked and the analytical framework to be applied to determining the threshold question, as opposed to determining the questions to be answered on a summary trial itself. This persisted to some extent into the appeal argument as well. Consequently, some of the submissions, while presented as part of the argument relating to the threshold question, in reality should more properly have been dealt with as argument in relation to the actual

summary trial which the applications judge conducted before dismissing Hennessey's claims.

[25] As noted earlier in these reasons, however, Hennessey does not challenge the applications judge's conclusion that, on the available record, the fraudulent misrepresentation claim was not proven.

[26] In approaching this appeal, I have chosen to analyze Hennessey's submissions and Eastern Health's reply in accordance with what I believe is the proper analytical framework for the issues that have been presented.

[27] Accordingly, I would recast the issues as follows:

1. Whether the applications judge formulated and applied the correct test to determine the threshold question as to the appropriateness of the case for summary trial of the fraudulent misrepresentation claim; and
2. Whether the applications judge properly determined the limitations issue.

The Threshold Question: Applicable Principles

[28] Rule 17A of the *Rules of the Supreme Court, 1986* sets out the circumstances when it is appropriate to determine a question by way of summary trial instead of a conventional trial, and also sets out the procedure and methodology to be followed. Decisions of the courts applying the rule have, however, determined that before applying the rule there is a threshold question which, in appropriate cases, should be addressed.

[29] The role of the threshold inquiry, as well as the questions to be addressed if it is determined that the threshold question has been satisfied or need not be addressed, have recently been discussed in detail by this Court in the *Brook Construction* decision. That decision was not available to the applications judge when he heard the summary trial in the current case. However, it now represents the law to be applied when dealing with summary trial applications. The submissions on the current appeal must therefore be filtered through that lens. Counsel approached the argument on that basis in this appeal.

[30] In *Brook Construction*, the majority (with the concurrence of the dissenting judge on this point) commented on the threshold question as follows:

[34] ... 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 ... [citations omitted].

[35] This threshold consideration, when raised by a party or a judge, is whether in all the circumstances it is “appropriate” to hear the summary trial application... 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. ...

[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. ...

[31] The Court in *Brook Construction*, relying on the philosophy expressed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, emphasized that the Court should be alert to try to find proportionate means, by way of summary trial, of resolving disputes short of conventional trial. It is only in clearly inappropriate cases that an application for summary trial should be derailed at the threshold inquiry stage. The Court cautioned:

[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 ... 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...

(Underlining added.)

[32] Given this approach, the threshold inquiry can be regarded as commencing prior to the hearing in the applications judge's chambers as part of his or her hearing preparation. That would include a review of the application to determine whether it appears that the applicant has brought himself or herself within the formal requirements of the rule (the first sub-question in the threshold inquiry); for example, determining whether the application is supported by an affidavit or other evidentiary material which on its face could, without considering anything more, establish the applicant's claim or defence. The review would also address the second sub-question to determine whether, given the nature of the claim, its complexity, the number and interrelationship of the parties and the timing of the application, there are any "red flags" that might raise a question as to whether the issues in dispute could be effectively dealt with by way of summary trial.

[33] If the judge has any concerns following this pre-hearing review, he or she should raise them with the parties at the outset of the hearing. If consensus is not reached, then argument on the threshold issue would be entertained at an appropriate point at the hearing. On the other hand, if the judge, following pre-hearing review, has no concerns, it would be open to him or her simply to indicate at the outset that, from a preliminary review, he or she has no concerns on threshold issues and invite counsel to state their position. If they also do not raise anything of substance, the matter could then proceed directly to the summary trial application itself. If counsel do raise an issue, then a threshold inquiry would have to be addressed at an appropriate point. Of course, even if the judge does not reference the threshold issue at the outset, it is always open to counsel to raise it.

[34] It is important to stress here that the issues dealt with on a threshold inquiry – especially those relating to the second sub-question – necessarily involve only a broad, high-level look to address whether it is appropriate to invoke the summary trial process *at all*. A threshold analysis is not to be applied on an issue-by-issue basis; rather, it is designed to screen out the entirely inappropriate case. If some (but not all) issues may be able to be dealt summarily, and those issues can be effectively segregated from other more intertwined ones, and there appears to be practical utility and efficiency in disposing of those issues separately, then the summary trial application should generally be heard, leaving to that process the question of what issues can be effectively dealt with on the basis of the application record, and which cannot. In *Brook Construction*, the matter was explained as follows:

[96] At the threshold 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 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 ...

[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...

[35] In this process, it is also important to recognize that if no threshold issue is raised, that does not mean that there will necessarily be a summary trial on substantive issues raised in the application. Rule 17A.03(1) provides that if the resisting party cannot show there is a genuine issue for trial, that will be the end of the matter and judgment will be entered accordingly. On the other hand, even if there is a genuine issue for trial, the court may try the substantive issues on the material submitted by the parties unless it 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 “it would be unjust to decide the issues on the application” (rule 17A.03(2)). It is at this stage where it is most appropriate to raise such questions as the adequacy of the record (remembering, of course, the requirement for each party to put their “best foot forward” in the application), the necessity of extensive cross-examination and the inability to resolve credibility issues without full *viva voce* evidence. As emphasized in *Brook Construction*, these considerations are “built into the summary trial analysis in rule 17A itself ... It does not need to be duplicated as part of the threshold analysis” (para. 43).

[36] That is not to say that, in a clear case, issues of record sufficiency, case complexity and the like can never also be relevant considerations – in a broad, high-level sense – at the threshold inquiry stage. In some situations, it may be potently obvious that the presence of such roadblocks may doom the summary trial process from the start. In *Brook Construction*, the Court observed:

[43] ... 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.

(Underlining added.)

Analysis of the Application Judge’s Decision on the Threshold Inquiry

[37] The applications judge proceeded on the basis that “on an issue-by-issue basis, the application judge must consider whether the issue crosses the threshold for summary trial adjudication” (para. 26). *Brook Construction* now establishes that the threshold inquiry does not involve an issue-by-issue analysis; rather, it requires a broad high-level look to see if there is anything that indicates that the application does not fall within the rule at all or that it is obvious that the summary trial process is entirely inappropriate for the adjudication task that is presented.

[38] However, this failure on the part of the judge to approach the threshold issue in this way is not fatal. This Court has before it the same record that the applications judge had and can conduct its own analysis of the threshold issues. Further, it has the benefit of the judge’s issue-by-issue analysis of threshold considerations which can nevertheless be helpful in determining whether, on a high-level analysis, the threshold test has been satisfied.

[39] As to the first threshold sub-question, the application for summary trial appears, on its face, to fall within the rule. It alleges that there was no genuine issue for trial and presents in affidavit form the evidence which it says does not disclose any potential claim. Considering, without more, the evidentiary base put forward by Eastern Health, it is sufficient to engage the question of whether there is a genuine issue. It in effect calls upon Hennessey to put his “best foot forward” to show by affidavit evidence or otherwise that the evidence does raise a potential claim that requires adjudication.

[40] Turning to the second threshold sub-question – whether on the application there was anything disclosed as to the lack of appropriateness of the case for summary adjudication – the parties had indicated to the applications judge that issues were clearly defined and easily segregated. There was no complex interconnection of multiple parties or interrelated cross-claims. Further, the parties had indicated to the applications judge that there was no need to cross-

examine any of the deponents on the affidavits that had been filed (Transcript, at 28). In that regard, therefore, there was nothing to raise a red flag as to the appropriateness of the case for summary adjudication.

[41] On the appeal, counsel for Hennessey submitted that it was nevertheless inappropriate for the case to proceed to summary trial *at the current stage of the proceedings*. I agree that the timing of a summary trial application may be an important consideration in resolving the summary trial-appropriateness issue under the second threshold sub-question. Timing (in the sense of close proximity of the summary trial application to an already-scheduled conventional trial which had been set under the special trial-assignment provisions of the *Mechanics' Lien Act*, RSNL 1990, c. M-3) was recognized as a possible reason for denying a summary trial application at the threshold stage in *Marco Ltd. v. Newfoundland Processing Ltd. et al.* (1995), 130 Nfld. & P.E.I.R. 308, at para. 5 (Nfld. S.C. (T.D.)).

[42] In the current case, counsel argued that the summary trial application was *premature* rather than too late, as in *Marco*. He submitted that oral discoveries had not been conducted and documents had not been exchanged. He further suggested that the nature of the claim (fraudulent concealment by silence) was such that full disclosure of what Eastern Health knew at critical times was important and much of that information lay within the possession or control of Eastern Health. It would therefore be necessary for Hennessey to gain access to that information first before being called upon to respond to the summary trial application.

[43] Although this argument was not the focal point of the hearing before the applications judge, it is clear from the record that Hennessey did raise the prematurity issue in the course of his argument (Transcript, at 35-36; 40; 48). Furthermore, in his affidavit responding to the application, Hennessey asserted that a summary trial was premature as pre-trial discovery of documents and related processes had not then been completed.

[44] The applications judge did not, however, address this point in his judgment. He should have. It was a legitimate question to be dealt with as part of the threshold analysis.

[45] Given the failure of the applications judge to deal with this issue, it is open to this Court to make the determination that the applications judge should have made. Ordinarily, the absence of an opportunity for parties to obtain discovery of potential witnesses and documents before a summary trial

application is dealt with might have some traction as a justification for the court to exercise its discretion to deny, or at least defer, the application as part of its threshold analysis, if it were not for the fact that six years had elapsed since Hennessey had commenced his action. He had ample time to initiate procedures to obtain the discovery he needed.

[46] While it is true that the rules of court place an obligation on each party to make automatic time-limited document disclosure to the other party without demand or without the other party having to make court application, the rules allow for the court to make an order for production against a defaulting party. There comes a point where, in the face of non-compliance with the automatic production requirements of the rules, a party should be expected to take steps to force compliance. That did not happen here. Indeed, Hennessey himself did not comply with his own obligation under the rules to make disclosure of documents in his possession. Furthermore, Hennessey did not pursue the oral discovery process to completion, nor did he seek answers to interrogatories even when he was faced with the summary trial application and before the matter was called in court. Had he done these things, it would at least have been an indication that he was seriously wishing to pursue discovery as a means of advancing his case.

[47] Under the foregoing circumstances, and in the absence of an explanation for the delay in this case, I would not exercise my discretion to delay the summary trial application until further discovery was undertaken.

[48] Accordingly, even though the applications judge did not conduct a full analysis of the threshold issue, I conclude that a proper application of the threshold analysis results in the same conclusion that was reached by the trial judge.

The Limitations Issue

[49] Hennessey also submitted that the applications judge failed to apply the threshold analysis to the limitations issue that had been raised by Eastern Health. This submission has no merit. As already noted, *Brook Construction* has established that the threshold analysis is not to be applied on an issue-by-issue basis. The analysis relating to the application of the threshold test set out above is equally applicable here.

[50] The proper place to consider the submissions on the limitations issue was in the summary trial itself, not as part of the threshold question.

[51] The applications judge dismissed Hennessey's submissions on the application of the discovery principle on the basis that Hennessey ought to have known, at least six years (the applicable limitation period) before the issuance of the statement of claim, of the material facts from which he could conclude that Eastern Health knew that the accounts were in arrears at the time of their transfer to him.

[52] Hennessey's submissions that the record was incomplete related to matters that could possibly have established that Eastern Health *actually* knew of the state of the arrears. But the existence of such material (if it did exist) was not relevant to whether Hennessey *ought* to have known. The information relating to this latter matter would have to come from Hennessey and the inferences that could have been drawn from it as to whether Hennessey exercised due diligence.

[53] Accordingly, I see no error on the part of the judge in concluding that the record was appropriate to make a judgment on the due diligence aspect of the discoverability issue. Although there was conflicting evidence, it was open to him to reject some of that evidence and to rely on other parts. There was no palpable and overriding error disclosed in the approach he took.

CONCLUSION

[54] I would dismiss the appeal and award costs to Eastern Health based on column 3 of the scale of costs.

J.D. Green J.A.

I concur: _____
F.P. O'Brien J.A.

I concur: _____
W.H. Goodridge J.A.