

CITATION: Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764
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COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., Laskin, Sharpe, Armstrong and Rouleau JJ.A.

C51986

BETWEEN

Combined Air Mechanical Services Inc., Dravo Manufacturing Inc. and Combined Air
Mechanical Services

Plaintiffs (Appellants)

and

William Flesch, WJF Investments Inc., Service Sheet Metal Inc. and James Searle

Defendants (Respondents)

C52912

AND BETWEEN

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli,
Stephen Yee, Marvin Clear, Carolyn Clear, Richard Hanna, Douglas Laird, Charles
Ivans, Lyn White and Athena Smith

Plaintiffs (Respondents)

and

Cassels Brock & Blackwell LLP, Gregory Jack Peebles and Robert Hryniak

Defendants (Appellant)

C52913

AND BETWEEN

Bruno Appliance and Furniture, Inc.

Plaintiff (Respondent)

and

Cassels Brock & Blackwell LLP, Gregory Jack Peebles and Robert Hryniak

Defendants (Appellant)

C53035

AND BETWEEN

394 Lakeshore Oakville Holdings Inc.

Plaintiffs (Respondent)

and

Carol Anne Misek and Janet Purvis

Defendants (Appellant)

C53395

AND BETWEEN

Marie Parker, Katherine Stiles and Siamak Khalajabadi

Plaintiffs (Appellants)

and

Eric Casalese, Gerarda Dina Bianco Casalese, Pino Scarfo, Antonietta Di Lauro and
Mauro Di Lauro

Defendants (Respondents)

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Heard: June 21, 22 and 23, 2011

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated April 8, 2010, with reasons reported at 2010 ONSC 1729 (C51986); and on appeal from the order of Justice A. Duncan Grace of the Superior Court of Justice, dated October 22, 2010, with reasons reported at 2010 ONSC 5490 (C52912/C52913); and on appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated November 2, 2010, with reasons reported at 2010 ONSC 6007 (C53035); and on appeal from the order of the Divisional Court (Justices Emile R. Kruzick, Katherine E. Swinton and Alison Harvison Young J.J.), dated October 21, 2010, with reasons reported at 2010 ONSC 5636 (C53395).

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By the Court:

I. Introduction

[1] On January 1, 2010, a significant package of amendments to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, came into effect. Motivating the amendments was the overriding objective of making the litigation system more accessible and affordable for Ontarians. Reflecting this objective, the touchstone of proportionality was introduced as a guiding interpretative principle under the *Rules*. To this end, rule 1.04(1.1) requires courts to “make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”

[2] Of the changes introduced, the amendments to Rule 20, which governs motions for summary judgment, were arguably the most important. Simply put, the vehicle of a motion for summary judgment is intended to provide a means for resolving litigation expeditiously and with comparatively less cost than is associated with a conventional trial. Although such motions have long been available in this province, their utility had

been limited in part by a line of jurisprudence from this court that precluded a judge on a summary judgment motion from weighing the evidence, assessing credibility, or drawing inferences of fact. These powers were held to be reserved for the trial judge.

[3] The 2010 amendments to Rule 20 effectively overruled this line of authority by specifically authorizing judges to use these powers on a motion for summary judgment unless the judge is of the view that it is in the interest of justice for such powers to be exercised only at a trial. One of the objectives behind enhancing the powers available to judges on a summary judgment motion was to make this form of summary disposition of an action more accessible to litigants with a view to achieving cost savings and a more efficient resolution of disputes. Indeed, the principle of proportionality is advanced by the expansion of the availability of summary judgment.

[4] However, it is equally clear that the amendments to Rule 20 were never intended to eliminate trials. In fact, the inappropriate use of Rule 20 has the perverse effect of creating delays and wasted costs associated with preparing for, arguing and deciding a motion for summary judgment, only to see the matter sent on for trial.

[5] In the months following the amendments to Rule 20, it has become a matter of some controversy and uncertainty as to whether it is appropriate for a motion judge to use the new powers conferred by the amended Rule 20 to decide an action on the basis of the evidence presented on a motion for summary judgment. Judges of the Superior Court of Justice have expressed differing views on this and other interpretative issues raised by the

amendments. Both the bench and the bar have turned to this court for clarification on what the amended rule does, and does not, accomplish.

[6] To provide some guidance to the profession, this court convened a five-judge panel to hear five appeals from decisions under the amended rule. In some of these cases, summary judgment was granted, while in others the motion was dismissed in whole or in part. With their varying outcomes, these cases raise a number of issues concerning the interpretation of the new Rule 20, including the nature of the test for determining whether or not summary judgment should be granted, the scope and purpose of the new powers that have been given to judges hearing motions for summary judgment, and the types of cases that are amenable to summary judgment.

[7] In addition to hearing from counsel representing the parties on the appeals, the court appointed the following five *amicus curiae* to provide submissions on how the amended rule should be interpreted and applied: the Attorney General of Ontario, The Advocates' Society, the Ontario Bar Association, the Ontario Trial Lawyers Association, and The County and District Law Presidents' Association. The *amicus* were asked to address the meaning and scope of the amended Rule 20, but advised to take no position on the facts or merits of any of the decisions under appeal.

[8] These reasons will proceed as follows. First, there will be a historical review of Rule 20 before the 2010 amendments, including a review of some of the leading cases interpreting the former rule. Next, there will be an examination of the findings and

recommendations of the former Associate Chief Justice of Ontario, the Honourable Coulter A. Osborne, Q.C., in his report entitled *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) (“the Osborne Report”). This will be followed by an analysis of the 2010 amendments to determine the extent to which Mr. Osborne’s recommendations concerning summary judgment were implemented. We will then explain the general principles to be followed in applying the amended Rule 20. Finally, we will apply these principles to the five appeals before the court.

II. The Former Rule 20

[9] Rule 20 came into force in Ontario on January 1, 1985. Prior to this, there had been a summary judgment mechanism for resolving an action in the *Rules of Civil Procedure*, but it operated on a very limited basis – only a plaintiff was entitled to move for summary judgment and only on enumerated claims for a debt or liquidated demand. With the introduction of Rule 20, the remedy of summary judgment appeared to be more widely available. For example, summary judgment could be requested by either plaintiffs or defendants in the context of any action.

[10] The pertinent provisions of the former Rule 20 state:

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

...

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

...

20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

...

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried and may order that the action proceed to trial by being,

(a) placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or

(b) set down in the normal course, or within a specified time, for trial.

[11] Under the former Rule 20, a motion for summary judgment was heard entirely on the basis of a paper record that typically consisted of affidavits sworn by the witnesses, transcripts of examinations of the witnesses on their affidavits, and, if available, any transcripts of examinations for discovery.

[12] Based on this written record, the court was required to determine whether there was any genuine issue for trial with respect to a claim or defence. If the court was satisfied that there was no such genuine issue, the court was required to grant summary judgment and the action would either be allowed or dismissed without the need for a full trial.¹ If the court was satisfied the only genuine issue was a question of law, then the judge had the discretion to determine the issue on the motion. If the court determined that a trial was necessary to resolve a genuine issue of fact or law, then the motion would be dismissed and the matter would proceed to trial. It was also open to the motion court to grant a motion in part, as well as to specify what material facts were not in dispute, to define the issues to be tried, and to order that the trial be heard on an expedited basis.

¹ Typically the power to grant summary judgment would be exercised in favour of the party bringing the motion. However, as the Supreme Court of Canada held in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, at p. 448, *per* Iacobucci J. dissenting, it is open to the court under rules 20.04(2) and (4) to grant summary judgment in favour of the responding party, even if that party did not bring a motion requesting such relief. The majority agreed with Iacobucci J. on this issue, at p. 421.

[13] The leading case on the meaning of “genuine issue for trial” under the former Rule 20 is the decision of Morden A.C.J.O. in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at p. 551:

It is safe to say that “genuine” means not spurious and, more specifically, that the words “for trial” assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. [Emphasis in original.]

[14] Morden A.C.J.O. also described the function served by the mechanism of summary judgment as follows, at pp. 550-51:

A litigant’s “day in court”, in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. Rule 20 exists as a mechanism for avoiding these failures of procedural justice.

[15] Another often-cited decision under the former Rule 20 is that of Henry J. in *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.). Henry J. explained at p. 237 that a summary judgment court is to take “a hard look at the merits” and “decide whether

the case merits reference to a judge at trial.” If there are “real issues of credibility, the resolution of which is essential to determination of the facts”, the case will “no doubt, have to go to trial”. However, parties to the motion are required to “put their best foot forward” through filing sworn affidavits and other material. In Henry J.’s words at p. 238: “It is not sufficient for the responding party to say that more and better evidence will (or may) be available at trial. The occasion is now.”

[16] Henry J. also held at p. 238 that the motion judge is “expected to be able to assess the nature and quality of the evidence” and to determine if “the case is so doubtful that it does not deserve consideration” through a “long and expensive trial”. The court can draw inferences from the evidence on a common sense basis and “look at the overall credibility” of a party’s position. The court is to ask: does the party’s case have “the ring of truth about it such that it would justify consideration” at a regular trial?

[17] Henry J.’s view that it was open to a judge to assess the cogency of the evidence on a summary judgment motion was superseded by a subsequent decision of this court in *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161. Borins J. (sitting *ad hoc*) held, at p. 173:

In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court’s role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

[18] To similar effect is Borins J.A.'s decision in *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at paras. 20 and 28:

However, in my respectful view, in determining this issue [of the necessity of a trial] it is necessary that motions judges not lose sight of their narrow role, not assume the role of a trial judge and, before granting summary judgment, be satisfied that it is clear that a trial is unnecessary.

...

[A]t the end of the day, it is clear that the courts accord significant deference to the trial process as the final arbiter of the dispute which has brought the parties to litigation. If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue.

[19] In *Aronowicz v. Emtwo Properties Inc.*, 2010 ONCA 96, 98 O.R. (3d) 641, at para. 15, Blair J.A. recently commented on the effect of the *Aguonie* and *Rexcraft Storage* decisions in restricting the analytical approach of judges on a summary judgment motion:

The proper test for summary judgment – as articulated by Morden A.C.J.O. in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545, at pp. 550-51 – is whether there is a genuine issue of material fact that requires a trial for its resolution. Neither *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.), nor *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) – the two summary judgment authorities most referred to in this province – alter this test. Indeed, they affirm it. What *Aguonie* and *Dawson* and their jurisprudential progeny have done is develop a more restricted view of the analytical approach to be adopted by the summary judgment motion

judge and of the judge's role in determining the "genuine issue for trial" question.

[20] As noted in the Osborne Report, the strict limits that the jurisprudence of this court placed on a judge's power to assess the quality and cogency of the evidence in determining the "genuine issue for trial" question were viewed as undermining the efficacy of Rule 20 and as deterring litigants from using this mechanism for summarily resolving disputes.

III. The Osborne Report

[21] In June 2006, the Government of Ontario commissioned the former Associate Chief Justice of Ontario, the Honourable Coulter Osborne, to provide recommendations for making the civil justice system in Ontario more accessible and affordable. Following extensive consultations with members of the bench, the bar and the public, in November 2007, Mr. Osborne released his report containing detailed recommendations relating to 81 substantive areas of law, including numerous proposed changes to the *Rules of Civil Procedure*.

[22] In the section of his report, "Summary Disposition of Cases", Mr. Osborne observed at p. 33 that there was general agreement that Rule 20 was not working as intended: "Both lawyers and Superior Court judges said that the Court of Appeal's view of the scope of motion judges' authority is too narrow." Mr. Osborne considered the proposal of replacing the "no genuine issue for trial" test in Rule 20 with the "no real

prospect of success at trial” test, as appears in the *Civil Procedure Rules* in England and Wales. However, Mr. Osborne expressed doubt that such a wording change would accomplish the objective of expanding the scope of summary judgment, noting that English case law interpreting the “no real prospect of success” test is as, or even more restrictive than, this court’s interpretation of the “no genuine issue for trial” test.

[23] Mr. Osborne recommended the following three changes to Rule 20. First, he proposed eliminating the jurisprudential restrictions that had been placed on the powers of a motion judge or master. In the words of the Report, at p. 35:

[F]rom my reading of the Court of Appeal’s decisions on summary judgment, it is how the court has confined the scope of the powers of a motion judge or master under rule 20, not the “no genuine issue for trial” test itself, that has limited the effectiveness of the rule.

If the objective is to provide an effective mechanism for the court to dispose of cases early where in the opinion of the court a trial is unnecessary after reviewing the best available evidence from the parties, then it seems to me to be preferable to provide the court with the express authority to do what some decisions of the Court of Appeal have said a motion judge or master cannot do. That is, permit the court on a summary judgment motion to weigh the evidence, draw inferences and evaluate credibility in appropriate cases. Therefore, any new rule 20 should provide a basis for the motion judge to determine whether such an assessment can safely be made on the motion, or whether the interests of justice require that the issue be determined by the trier of fact at trial.

[24] Second, Mr. Osborne proposed, at p. 36, that Rule 20 be amended to address the situation where a court is unable to determine the motion without hearing *viva voce* evidence on discrete issues:

In my view, amendments to rule 20 ought to be made to permit the court, as an alternative to dismissing a summary judgment motion, to direct a “mini-trial” on one or more discrete issues forthwith where the interests of justice require *viva voce* testimony to allow the court to dispose of the summary judgment motion. The same judge hearing the motion would preside over the mini-trial.

[25] Mr. Osborne’s third suggested amendment to Rule 20 was to eliminate the presumption in rule 20.06 that substantial indemnity costs be awarded against an unsuccessful moving party. As noted in the Osborne Report, at p. 36, there was concern that Rule 20 was not being used in appropriate cases because of the potentially significant adverse cost consequences of an unsuccessful motion. Mr. Osborne suggested replacing the presumption of substantial indemnity costs with a rule conferring permissive authority on the court to impose such costs on any party where the court is of the opinion that a party has acted unreasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith or for the purpose of delay (at p. 37).

[26] In addition to these three suggested amendments to Rule 20, Mr. Osborne also recommended that a new summary trial mechanism be adopted, similar to Rule 18A in British Columbia’s *Supreme Court Civil Rules*, B.C. Reg. 221/90 [now Rule 9-7]. Mr.

Osborne noted, at p. 37, that such an option “may provide an effective tool for the final disposition of certain cases on affidavit and documentary evidence alone.”

[27] These recommendations are encapsulated as follows in the List of Recommendations from the Osborne Report:

13. Do not amend the test of “no genuine issue for trial” in rule 20.

14. Amend rule 20 to expressly confer on a motion judge or master the authority to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence and documents filed, including adverse inferences where a party fails to provide evidence of persons having personal knowledge of contested facts. This power, however, ought not to be exercised where the interests of justice require that the issue be determined at trial.

15. Amend rule 20 to permit the court to direct a “mini-trial” on one or more issues, with or without *viva voce* evidence, where the interests of justice require a brief trial to dispose of the summary judgment motion. The same judicial official hearing the summary judgment motion would preside at the “mini-trial.”

16. Eliminate the presumption of substantial indemnity costs against an unsuccessful moving party in a summary judgment motion in rule 20.06. Replace it with a rule conferring permissive authority on the court to impose substantial indemnity costs where it is of the opinion that any party has acted unreasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith or for the purpose of delay.

17. Adopt a new summary trial mechanism, similar to rule 18A in British Columbia.

IV. The Amendments to Rule 20

[28] The Civil Rules Committee studied Mr. Osborne's recommendations and proposed a series of amendments to the *Rules* that adopted various of his recommendations. The amendments were implemented by regulation effective January 1, 2010.

[29] For the purposes of the central issues before us, the material parts of the amended Rule 20 state:²

20.04 (2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be

² The entirety of the amended Rule 20 is included as an appendix to these reasons.

presented by one or more parties, with or without time limits on its presentation.

[30] The amendments to Rule 20 generally reflect Mr. Osborne’s recommendations, albeit with some modifications. To start with, the wording of the test “no genuine issue for trial”, although not changed to “no real prospect of success at trial”, was re-worded to “no genuine issue requiring a trial”.³

[31] As recommended by Mr. Osborne, a motion court judge was granted the power to weigh the evidence, evaluate credibility, and draw reasonable inferences from the evidence. The wording of rule 20.04(2.1), which confers these powers, indicates that they may be used for the purpose of determining whether there is a genuine issue requiring a trial. However, contrary to Recommendation 14 in the Osborne Report, only judges are given these powers and not masters.

[32] With respect to Recommendation 15, an “oral evidence” option was added in rule 20.04(2.2), but the text of this rule differs from the wording of the recommendation in several important respects. This rule does not refer to a mini-trial on “one or more issues, with or without *viva voce* evidence, where the interests of justice require a brief trial to dispose of the summary judgment motion.” Rather, the provision allows a judge (not a master) to order the presentation of oral evidence, with or without time limits, for the purpose of exercising any of the powers in rule 20.04(2.1).

³ The new wording of the test for summary judgment reflects the language from *Ungerma n v. Galanis* set out above at para. 14.

[33] Recommendation 16 in the Osborne Report was adopted in rule 20.06. The result is that costs on a failed motion are to be determined presumptively on a partial indemnity basis rather than on a substantial indemnity basis as was previously the case. The rule still provides for substantial indemnity costs but only where the factors of unreasonableness or bad faith are present:

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

[34] Finally, contrary to Recommendation 17, the amended *Rules* did not add a rule for the purpose of implementing a summary trial mechanism.

V. Analysis of the Amended Rule 20

1. Overview

[35] By the time these appeals were argued, a well-developed body of jurisprudence from the Superior Court of Justice under the new Rule 20 was already in place: see e.g., *Healey v. Lakeridge Health Corp.*, 2010 ONSC 725, 72 C.C.L.T. (3d) 261; *Cuthbert v. TD Canada Trust*, 2010 ONSC 830, 88 C.P.C. (6th) 359; *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037; *Hino Motors Canada Ltd. v. Kell*, 2010 ONSC 1329;

Lawless v. Anderson, 2010 ONSC 2723; *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, 2010 ONSC 3834; *Enbridge Gas Distribution Inc. v. Marinaccio*, 2011 ONSC 2313; and *Optech Inc. v. Sharma*, 2011 ONSC 680, with supplementary reasons at 2011 ONSC 1081. We have carefully reviewed and considered the conflicting jurisprudence from the Superior Court. However, we have chosen not to comment on the relative merits of the various interpretative approaches found in this body of case law because our decision marks a new departure and a fresh approach to the interpretation and application of the amended Rule 20.

[36] The amendments to Rule 20 are meant to introduce significant changes in the manner in which summary judgment motions are to be decided. A plain reading of the amended rule makes it clear that the *Aguonie* and *Dawson* restrictions on the analytical tools available to the motion judge are no longer applicable. The motion judge may now weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence in determining whether there is a genuine issue requiring a trial with respect to a claim or defence: see rule 20.04(2.1). Moreover, the new rule also enables the motion judge to direct the introduction of oral evidence to further assist the judge in exercising these powers: see rule 20.04(2.2).

[37] As we shall go on to explain, the amended rule permits the motion judge to decide the action⁴ where he or she is satisfied that by exercising the powers that are now available on a motion for summary judgment, there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution.

[38] However, we emphasize that the purpose of the new rule is to eliminate *unnecessary* trials, not to eliminate all trials. The guiding consideration is whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.

[39] Although both the summary judgment motion and a full trial are processes by which actions may be adjudicated in the “interest of justice”, the procedural fairness of each of these two processes depends on the nature of the issues posed and the evidence led by the parties. In some cases, it is safe to determine the matter on a motion for summary judgment because the motion record is sufficient to ensure that a just result can be achieved without the need for a full trial. In other cases, the record will not be adequate for this purpose, nor can it be made so regardless of the specific tools that are now available to the motion judge. In such cases, a just result can only be achieved through the trial process. This pivotal determination must be made on a case-by-case basis.

⁴ Rules 20.01(1) and (3) also permit motions for partial summary judgment. The following analysis is focused on motions that would dispose of the totality of the action. The same interpretative principles apply to motions for partial summary judgment.

2. The Types of Cases that are Amenable to Summary Judgment

[40] Speaking generally, and without attempting to be exhaustive, there are three types of cases that are amenable to summary judgment. The first two types of cases also existed under the former Rule 20, while the third class of case was added by the amended rule.

[41] The first type of case is where the parties agree that it is appropriate to determine an action by way of a motion for summary judgment. Rule 20.04(2)(b) permits the parties to jointly move for summary judgment where they agree “to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.” We note, however, that the latter wording – “the court is satisfied” – affirms that the court maintains its discretion to refuse summary judgment where the test for summary judgment is not met, notwithstanding the agreement of the parties.

[42] The second type of case encompasses those claims or defences that are shown to be without merit. The elimination of these cases from the civil justice system is a long-standing purpose well served by the summary judgment rule. As stated by the Supreme Court of Canada in *Canada (A.G.) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 10:

The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time

and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[43] As we shall discuss further below,⁵ the amended Rule 20 has given the motion judge additional tools to assess whether a claim or defence has no chance of success at trial.

[44] Moreover, the amended Rule 20 now permits a third type of case to be decided summarily. The rule provides for the summary disposition of cases other than by way of agreement or where there is “no chance of success”. The prior wording of Rule 20, whether there was a “genuine issue for trial”, was replaced by “genuine issue requiring a trial”. This change in language is more than mere semantics. The prior wording served mainly to winnow out plainly unmeritorious litigation. The amended wording, coupled with the enhanced powers under rules 20.04(2.1) and (2.2), now permit the motion judge to dispose of cases on the merits where the trial process is not required in the “interest of justice”.

[45] The threshold issue in understanding the application of the powers granted to the motion judge by rule 20.04(2.1) is the meaning to be attributed to the phrase “interest of

⁵ See paras. 50, 73 and 101-111.

justice”. This phrase operates as the limiting language that guides the determination whether a motion judge should exercise the powers to weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence on a motion for summary judgment, or if these powers should be exercised only at a trial. The phrase reflects that the aim of the civil justice system is to provide a just result in disputed matters through a fair process. The amended rule recognizes that while there is a role for an expanded summary judgment procedure, a trial is essential in certain circumstances if the “interest of justice” is to be served.

[46] What is it about the trial process that certain types of cases require a trial for their fair and just resolution? In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the majority decision of Iacobucci and Major JJ., at para. 14, quotes a passage from R.D. Gibbens in “Appellate Review of Findings of Fact” (1991-92), 13 *Advocates’ Q.* 445, at p. 446, which refers to the trial judge’s “expertise in assessing and weighing the facts developed at trial”. The quoted passage states: “The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence.” The passage further notes that the trial judge gains insight by living with the case for days, weeks or even months. At para. 18, Iacobucci and Major JJ. go on to observe that it is the trial judge’s “extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge’s familiarity with the case as a whole” that enables him or her to gain the level of appreciation of the issues and the evidence that is required to make dispositive findings.

[47] As these passages reflect, the trial judge is a trier of fact who participates in the dynamic of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries, and hears the evidence in the words of the witnesses. As expressed by the majority in *Housen*, at para. 25, the trial judge is in a “privileged position”. The trial judge’s role as a participant in the unfolding of the evidence at trial provides a greater assurance of fairness in the process for resolving the dispute. The nature of the process is such that it is unlikely that the judge will overlook evidence as it is adduced into the record in his or her presence.

[48] The trial dynamic also affords the parties the opportunity to present their case in the manner of their choice. Advocates acknowledge that the order in which witnesses are called, the manner in which they are examined and cross-examined, and how the introduction of documents is interspersed with and explained by the oral evidence, is of significance. This “trial narrative” may have an impact on the outcome. Indeed, entire books have been written on this topic, including the classic by Frederic John Wrottesley, *The Examination of Witnesses in Court* (London: Sweet and Maxwell, 1915). As the author instructs counsel, at p. 63:

It is, perhaps, almost an impertinence to tell you that you are by no means bound to call the witnesses in the order in which they are placed in the brief.

It will be your task, when reading and noting up your case, to marshal your witnesses in the order in which they will best

support your case, as you have determined to submit it to the [trier of fact].

[49] In contrast, a summary judgment motion is decided primarily on a written record. The deponents swear to affidavits typically drafted by counsel and do not speak in their own words. Although they are cross-examined and transcripts of these examinations are before the court, the motion judge is not present to observe the witnesses during their testimony. Rather, the motion judge is working from transcripts. The record does not take the form of a trial narrative. The parties do not review the entire record with the motion judge. Any fulsome review of the record by the motion judge takes place in chambers.

[50] We find that the passages set out above from *Housen*, at paras. 14 and 18, such as “total familiarity with the evidence”, “extensive exposure to the evidence”, and “familiarity with the case as a whole”, provide guidance as to when it is appropriate for the motion judge to exercise the powers in rule 20.04(2.1). In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

[51] We think this “full appreciation test” provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of

witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the “interest of justice” requires a trial.

[52] In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge’s direction by hearing oral evidence on discrete issues.

[53] We wish to emphasize the very important distinction between “full appreciation” in the sense we intend here, and achieving familiarity with the total body of evidence in the motion record. Simply being knowledgeable about the entire content of the motion record is not the same as *fully appreciating* the evidence and issues in a way that permits a fair and just adjudication of the dispute. The full appreciation test requires motion judges to do more than simply assess if they are capable of reading and interpreting all of the evidence that has been put before them.

[54] The point we are making is that a motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the

evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.

[55] Thus, in deciding whether to use the powers in rule 20.04(2.1), the motion judge must consider if this is a case where meeting the full appreciation test requires an opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand. Unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record – as may be supplemented by the presentation of oral evidence under rule 20.04(2.2) – the judge cannot be “satisfied” that the issues are appropriately resolved on a motion for summary judgment.

[56] By adopting the full appreciation test, we continue to recognize the established principles regarding the evidentiary obligations on a summary judgment motion. The Supreme Court of Canada addressed this point in *Lameman*, at para. 11, where the court cited Sharpe J.’s reasons in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434, in support of the proposition that “[e]ach side must ‘put its best foot forward’ with respect to the existence or non-existence of material issues to be tried.” This obligation continues to apply under

the amended Rule 20. On a motion for summary judgment, a party is not “entitled to sit back and rely on the possibility that more favourable facts may develop at trial”: *Transamerica*, at p. 434.

[57] However, we add an important *caveat* to the “best foot forward” principle in cases where a motion for summary judgment is brought early in the litigation process. It will not be in the interest of justice to exercise rule 20.04(2.1) powers in cases where the nature and complexity of the issues demand that the normal process of production of documents and oral discovery be completed before a party is required to respond to a summary judgment motion. In such a case, forcing a responding party to build a record through affidavits and cross-examinations will only anticipate and replicate what should happen in a more orderly and efficient way through the usual discovery process.

[58] Moreover, the record built through affidavits and cross-examinations at an early stage may offer a less complete picture of the case than the responding party could present at trial. As we point out below, at para. 68, counsel have an obligation to ensure that they are adopting an appropriate litigation strategy. A party faced with a premature or inappropriate summary judgment motion should have the option of moving to stay or dismiss the motion where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery. This option is available by way of a motion for directions pursuant to rules 1.04(1), (1.1), (2) and 1.05.

3. The Use of the Power to Order Oral Evidence

[59] It is necessary at this point to discuss the limits on the discretion of the motion judge to order oral evidence under rule 20.04(2.2) of the amended Rule 20. First, while the terminology of the “mini-trial” provides a convenient short form, this term should not be taken as implying that the summary judgment motion is a form of summary or hybrid trial. A summary judgment motion under the new rule does not constitute a trial. Mr. Osborne’s recommendation of adopting a summary trial mechanism was not adopted, and his recommendation relating to mini-trials was not accepted in full. Indeed, the term “mini-trial” did not find its way into the body of the rule.

[60] The discretion to order oral evidence pursuant to rule 20.04(2.2) is circumscribed and cannot be used to convert a summary judgment motion into a trial. Significantly, it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed. The distinction between the oral hearing under rule 20.04(2.2) and the narrative of an actual trial is apparent. The discretion to direct the calling of oral evidence on the motion amounts to no more than another tool to better enable the motion judge to determine whether it is safe to proceed with a summary disposition rather than requiring a trial.

[61] In appropriate cases, the motion judge is empowered to receive oral evidence on discrete issues for purposes of exercising the powers in rule 20.04(2.1). In other words, the motion judge may receive oral evidence to assist in making the determination whether

any of the issues raised in the action require a trial for their fair and just resolution. We discuss below, at paragraphs 101-103, the circumstances in which it will be appropriate to order the presentation of oral evidence. However, at this stage, we stress that the power to direct the calling of oral evidence under rule 20.04(2.2) is not intended to permit the parties to supplement the motion record. Nor can the parties anticipate the motion judge directing the calling of oral evidence on the motion.

[62] The latter point requires that we address a practice issue in the Toronto Region. As a case management matter, parties to a summary judgment motion in Toronto are required to complete a summary judgment form, which includes questions about whether the parties intend to call *viva voce* evidence on an issue in dispute, and estimating the time required for such evidence. Although no doubt well-intentioned, these questions are misplaced in that they create the misconception that a summary judgment motion is in fact a summary trial.

[63] A party who moves for summary judgment must be in a position to present a case capable of being decided on the paper record before the court. To suggest that further evidence is required amounts to an admission that the case is not appropriate, at first impression, for summary judgment. It is for the motion judge to determine whether he or she requires *viva voce* evidence under rule 20.04(2.2) “for the purpose of exercising any of the powers” conferred by the rule. This is not an enabling provision entitling a party to enhance the record it has placed before the court. It may be that, for scheduling reasons,

the oral evidentiary hearing will need to be held after the hearing of the main motion. Nonetheless, it is the purview of the motion judge, and the motion judge alone, to schedule this hearing, which is a continuation of the original motion and not a separate motion.

4. Trial Management Under Rule 20.05

[64] Rule 20.05 facilitates a greater managerial role for judges and masters in circumstances where a summary judgment motion is dismissed in whole or in part and where the court orders that the action proceed to trial expeditiously. The summary judgment court, having carefully reviewed the evidentiary record and heard the argument, is typically well-positioned to specify what issues of material fact are not in dispute and to define the issues to be tried. Rule 20.05(2) sets out a lengthy list of directions that a court may make with a view to streamlining the proceedings and empowers the court to make a variety of orders, including requiring the filing of a statement setting out what material facts are not in dispute, specifying the timing and scope of discovery, and imposing time limits on any oral examination of a witness at trial.⁶

[65] While the court may make use of the provisions in rule 20.05 to salvage the resources that went into the summary judgment motion, the court should keep in mind that the rule should not be applied so as to effectively order a trial that resembles the

⁶ The full text of rule 20.05(2) is found in the appendix.

motion that was previously dismissed. For example, while rule 20.05(2)(f) provides that “the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery”, these materials should not be treated as a substitute for the *viva voce* testimony of the witnesses in the trial judge’s presence. Any trial management order flowing from a failed summary judgment motion must facilitate the conduct of a genuine trial that will permit the full appreciation of the evidence and issues required to make dispositive findings. In other words, the trial ought not to be simply a reconfiguration of the dismissed motion.

[66] Further, litigants must not look to rule 20.05 as a reason for bringing a motion for summary judgment or as a substitute for effective case management of the trial of an action. The newly-introduced Rule 50 permits parties to obtain orders and directions that will assist in ensuring that a trial proceeds efficiently.

5. Costs in Rule 20.06

[67] As a result of the amendments to rule 20.06, the onus is now on the party seeking substantial indemnity costs to convince the court that the other side acted unreasonably or in bad faith for the purpose of delay in bringing or responding to a motion for summary judgment. This amendment removes a disincentive to litigants from using Rule 20 by eliminating the presumption that they will face substantial indemnity costs for bringing an unsuccessful motion for summary judgment. However, as the jurisprudence becomes more settled on when it is appropriate to move for summary judgment, the reasonableness

of the decision to move for summary judgment or to resist such a motion will be more closely scrutinized by the court in imposing cost orders under rule 20.06.

6. The Obligation on Members of the Bar

[68] It is important to underscore the obligation that rests on members of the bar in formulating an appropriate litigation strategy. The expenditure of resources, regardless of quantum, in the compilation of a motion record and argument of the motion is not a valid consideration in determining whether summary judgment should be granted. It is not in the interest of justice to deprive litigants of a trial simply because of the costs incurred by the parties in preparing and responding to an ill-conceived motion for summary judgment.

7. Standard of Review

[69] A final matter to address before assessing the merits of the appeals is the standard of review that applies to a decision to grant or deny a motion for summary judgment. Under the former Rule 20, courts reviewed the question whether the motion judge applied the appropriate test of a “genuine issue for trial” on a standard of correctness: see, e.g., *Whalen v. Hillier* (2001), 53 O.R. (3d) 550 (C.A.), at para. 14; *Canadian Imperial Bank of Commerce v. F-1 Holdings & Investments Inc.*, 2007 CarswellOnt 8012 (Div. Ct.), at para. 6; see also Donald J.M. Brown, Q.C., *Civil Appeals* (Toronto: Canvasback Publishing, 2011), at pp. 15-52 to 15-53 and the case law cited at footnote 348.

[70] There is no reason to depart from this standard under the new rule. The determination of whether there is a “genuine issue requiring a trial” is a legal determination. In the leading authority on the standard of review, the majority of the Supreme Court in *Housen* explained, at para. 8, that the standard of review on a question of law is correctness. Similarly, the standard of review on a question of mixed fact and law that “can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle” is also correctness: *Housen*, at para. 36. As Blair J.A. said in *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at para. 27:

Where the matter referred to is more a matter of legal principle and sits towards the error of law end of the spectrum, the standard is correctness. Where the matter is one in which the legal principle and the facts are inextricably intertwined – where the facts dominate, as it were – it falls more towards the factual end of the spectrum, and significant deference must be accorded.

[71] Where the appellate court determines that the motion judge correctly applied the legal test for determining whether to grant summary judgment, any factual determinations by the motion judge in deciding the motion will attract review on the deferential standard of palpable and overriding error.

8. Summary

[72] We have described three types of cases where summary judgment may be granted. The first is where the parties agree to submit their dispute to resolution by way of summary judgment.

[73] The second class of case is where the claim or defence has no chance of success. As will be illustrated below, at paras. 101-111, a judge may use the powers provided by rules 20.04(2.1) and (2.2) to be satisfied that a claim or defence has no chance of success. The availability of these enhanced powers to determine if a claim or defence has no chance of success will permit more actions to be weeded out through the mechanism of summary judgment. However, before the motion judge decides to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence, the motion judge must apply the full appreciation test.

[74] The amended rule also now permits the summary disposition of a third type of case, namely, those where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1). In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record – as may be supplemented by oral evidence under rule 20.04(2.2) – or if the attributes and advantages of the trial process require that these powers only be exercised at a trial.

[75] Finally, we observe that it is not necessary for a motion judge to try to categorize the type of case in question. In particular, the latter two classes of cases we described are not to be viewed as discrete compartments. For example, a statement of claim may include a cause of action that the motion judge finds has no chance of success with or without using the powers in rule 20.04(2.1). And the same claim may assert another cause of action that the motion judge is satisfied raises issues that can safely be decided using the rule 20.04(2.1) powers because the full appreciation test is met. The important element of the analysis under the amended Rule 20 is that, before using the powers in rule 20.04(2.1) to weigh evidence, evaluate credibility, and draw reasonable inferences, the motion judge must apply the full appreciation test in order to be satisfied that the interest of justice does not require that these powers be exercised only at a trial.

[76] We now turn to apply these principles to the appeals before us.

VI. Application to the Five Appeals

Combined Air Mechanical v. Flesch (C51986)

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated April 8, 2010, with reasons reported at 2010 ONSC 1729.

1. Introduction

[77] The appellants, Combined Air Mechanical Services Inc. and related companies (collectively, “Combined Air”), appeal a summary judgment dismissing Combined Air’s

action against the respondents, William Flesch, James Searle and related companies. The action included a claim for damages for alleged breaches of restrictive covenants by the respondent Flesch.

[78] The restrictive covenants were contained in an acquisition agreement pursuant to which Combined Air purchased a heating, ventilating and air conditioning (“HVAC”) business from the respondents. Following the acquisition, Flesch provided consulting services for Strategic Property Management, a property manager, and later worked for Computer Room Services Corporation (“CRSC”), a company engaged in designing, building and maintaining customized computer and information technology (“IT”) infrastructure facilities. Combined Air alleged that Strategic Property Management and CRSC were engaged in businesses similar to, and in competition with, Combined Air, and that Flesch violated the restrictive covenants.

[79] The motion judge found that Combined Air failed to adduce any evidence to support its various allegations against the respondents, including the allegations that Flesch’s employers were engaged in businesses similar to, or in competition with, Combined Air.

[80] Before reaching the conclusion concerning CRSC, the motion judge considered a document advanced by Combined Air that listed CRSC as a bidder, along with some of Combined Air’s HVAC competitors, for a project for the City of Pickering. The motion judge made an order under rule 20.04(2.2) directing the respondents to present oral

evidence from a witness – “ideally” a CRSC representative – who could explain this document. The judge limited the questions that could be asked of the witness to the bid document and refused to allow Combined Air’s counsel to cross-examine the witness on other bids or projects. Ultimately, the motion judge held that the document supported the respondents’ position that CRSC was not in competition with Combined Air.

[81] Combined Air argues that the motion judge erred in interpreting the terms “same or similar [business]” and “compete” in the acquisition agreement, that he misapplied the burden of proof on the motion, and that he erred in both directing and limiting the scope of the oral evidence under rule 20.04(2.2). For the reasons that follow, we do not accept these arguments and would dismiss the appeal.

2. Facts

[82] In 2003, Flesch and Searle formed a partnership, Combined Air Mechanical Services, to sell and service HVAC systems in the commercial and industrial market. In June 2006, they sold their partnership interests to two corporations controlled by Vicken Aharonian – Combined Air Mechanical Services Inc. and Dravo Manufacturing Inc. The parties executed an acquisition agreement containing a number of restrictive covenants. These covenants were summarized by the motion judge as follows, at para. 20:

- For the first two years after closing (June 2006 to June 2008), Flesch could not be involved in any way with any business or undertaking that is “the same or similar” to the business of Combined Air; nor could he

“deal” in any way with any supplier of Combined Air “other than for the purposes of personal consumption”;

- For the next three years (July 2008 to July 2011) Flesch could not work for any business or undertaking that “competes” with Combined Air and could not interfere with the relationship between Combined Air and any supplier;
- Competition is not specifically defined, but s. 8.18 provides that an entity shall be “deemed to compete” with Combined Air if it sells a product or service that was sold by Combined Air in the five years before closing (2001 to 2006), to anyone who was a customer of Combined Air during this same five-year period;
- The business of Combined Air is defined as “the business presently carried on by the Partnership consisting of mechanical contracting, including purchasing heating, ventilating and air conditioning equipment for resale to commercial and industrial end users, servicing and maintaining heating, ventilating and air conditioning equipment and all operations related thereto.”

[83] Flesch and Searle agreed to stay on as key employees for a defined term and signed separate employment agreements with Combined Air. The employment agreements imposed no additional restrictions. In February 2007, Flesch gave 30 days’ notice that he was terminating his employment agreement. In March 2007, Combined Air gave notice to Searle that it was terminating his employment agreement.

[84] From September to December 2007, Flesch provided intermittent consulting services to Strategic Property Management, a property manager. Prior to the acquisition,

Strategic Property had used Combined Air to service the HVAC needs in its portfolio of ten buildings.

[85] In January 2008, Flesch was hired by CRSC. CRSC is in the business of designing, building and maintaining customized computer and IT infrastructure facilities. CRSC was also a client of Combined Air prior to the acquisition and often retained Combined Air as a subcontractor for the HVAC work on its computer room projects.

[86] After Flesch began working with Strategic Property, Aharonian noticed a decrease in service calls from Strategic Property and advised Flesch via email that he was holding Flesch responsible. Aharonian's concern was magnified when Flesch joined CRSC. In November 2008, CRSC decided to go with a lower-priced HVAC subcontractor on a Hydro One project in Barrie. Shortly thereafter, Combined Air commenced this action alleging, *inter alia*, that Flesch and Searle had breached their fiduciary duties as senior employees, and had committed the torts of conversion, misrepresentation and unlawful interference.

3. Motion for Summary Judgment

[87] Flesch brought a motion for summary judgment arguing that there was no basis for any of these allegations. Searle took the same position. Following the exchange of affidavits and cross-examinations of witnesses for the summary judgment motion, Combined Air amended the statement of claim to include allegations that Flesch had

breached the restrictive covenants in the acquisition agreement by working for Strategic Property and CRSC, since those companies were in the “same or similar” business or competed with Combined Air.

[88] On the hearing of the motion, Combined Air acknowledged that it had no case against Searle for the claim of breach of the restrictive covenants and that he had been joined as a defendant because of an indemnification clause in the acquisition agreement. Combined Air conceded that if Flesch’s motion were granted, the action against Searle should also be dismissed.

[89] The motion judge granted summary judgment dismissing the action. He found that there was no evidence raising a genuine issue requiring a trial on any of the claims advanced by Combined Air. On appeal, Combined Air only challenges the motion judge’s holding that the restrictive covenant claim failed to raise a genuine issue requiring a trial.

[90] The motion judge found it was abundantly clear that neither Strategic Property nor CRSC “competes” with Combined Air. Strategic Property is a property management company. It is not a licensed HVAC contractor and does not perform HVAC contracting services for its clients. As for CRSC, it does not sell the same products as Combined Air; nor does it sell to the same customers. CRSC designs, builds and maintains controlled environments to support IT infrastructure. It is a general contractor that oversees components of the computer room project. It does not and cannot do any HVAC work.

Both Strategic Property and CRSC hired Combined Air to do HVAC work for them in the past. The motion judge concluded, at para. 34: “A company that cannot do HVAC work and has to hire a subcontractor to do this work is not in the same or similar business as the HVAC subcontractor.”

4. The Motion Judge’s Order for Oral Evidence Under Rule 20.04(2.2)

[91] In attempting to raise a genuine issue requiring a trial on the question whether Flesch was in breach of the restrictive covenants due to his work for CRSC, Combined Air relied on a document containing the “unofficial bid results” for a project for the City of Pickering. That document listed CRSC and four other bidders – three of which were known HVAC contractors who competed with Combined Air. Combined Air submitted that the presence of these three competitors implied that CRSC was also competing with Combined Air.

[92] To understand this document and assess the weight that it should be given, the motion judge directed the presentation of oral evidence under rule 20.04(2.2). He invited the defendants to call a witness, ideally from CRSC, who was familiar with the Pickering bid, and made it clear to counsel that the focus of the hearing was on the Pickering bid alone and that examination-in-chief and cross-examination were strictly limited to this specific and narrow point. He directed Combined Air’s counsel in the following terms: “[Y]ou must limit yourself to the focus of the Pickering document. It’s not a free-wheeling cross-examination of [CRSC’s] business.”

[93] Matt Eaton, the son of CRSC's owner, Greg Eaton, testified that in June 2008, CRSC was invited to submit a bid for a server room upgrade at the Pickering Civic Complex. This bid included amounts for architectural services, electrical work, mechanical (HVAC) work and equipment rentals. The HVAC component comprised just under one-third of the overall cost of the bid. CRSC's bid was for much more than just the HVAC work and the HVAC work was to be subcontracted to Combined Air. The motion judge concluded that Combined Air's only specific example of alleged competition actually supported the respondents.

5. Issues

[94] Combined Air raises the following issues:

- (1) Did the motion judge err by finding that CRSC was not a "same or similar business" to, and that it did not "compete" with, Combined Air?
- (2) Did the motion judge err in exercising his power to order the presentation of oral evidence under rule 20.04(2.2)?

6. Analysis

- (1) Did the motion judge err by finding that CRSC was not a "same or similar business" to, and that it did not "compete" with, Combined Air?**

[95] Combined Air submits that the motion judge erred by misconstruing the definition of the terms "same or similar" and "competes" in the acquisition agreement. According

to Combined Air, these terms defined the partnership business expansively to include the servicing and maintaining of HVAC equipment “and all operations related thereto.”

[96] “Compete” is not defined in the acquisition agreement. However, Combined Air relies on s. 8.18 which provides that an entity shall be “deemed to compete” with it if the entity sells a product or service that was sold by Combined Air during the five years before closing to anyone who was a customer of Combined Air during the same period. Combined Air argues that because CRSC dealt with Hydro One and Primus, which were both customers of Combined Air during the five-year period before closing, Flesch breached the non-competition covenant.

[97] Combined Air further submits that the motion judge erred by failing to draw an adverse inference under rule 20.02(1) from the respondents’ failure to lead evidence from CRSC representatives as to whether or not their business was the “same or similar” to, or competed with, Combined Air. This rule provides that “the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.”

[98] We do not accept the submission that the motion judge erred by finding that CRSC was not a “same or similar” business to, and that it did not “compete” with, Combined Air. The motion judge properly assessed the evidence that CRSC was a general contractor that oversaw multiple components of computer room projects. The respondents provided affidavits from Flesch, Searle and Shawn Thorne, who had worked

at Combined Air for approximately 15 years. These individuals deposed that they did not consider CRSC to be in a similar business to Combined Air. In particular, Thorne asserted on examination that Combined Air was not involved in projects of the same type and size as CRSC, and that CRSC typically requested HVAC services from Combined Air.

[99] Combined Air led no evidence that CRSC had sold HVAC equipment to its customers. The only possible evidence that it offered of direct competition, the Pickering bid, actually supported the respondents because Combined Air was included in that bid as the subcontractor to supply the HVAC equipment. The language of the deeming provision in s. 8.18 cannot assist Combined Air in the face of the evidence as to CRSC's business. The motion judge was entitled to conclude that the nature of CRSC's business was that of a general contractor and that there was no issue requiring a trial.

[100] The motion judge did not err by failing to draw an adverse inference against the respondents pursuant to rule 20.02(1). As the moving parties, the respondents bore the legal burden to demonstrate that there was no genuine issue requiring a trial. As the responding party, Combined Air bore an evidentiary burden to respond with evidence setting out specific facts showing there is a genuine issue requiring a trial: see *Esses v. Bank of Montreal*, 2008 ONCA 646, 241 O.A.C. 134, at para. 44. As we have explained, the respondents adduced evidence as to the nature of CRSC's business and Flesch's involvement in it to show that CRSC was not in competition with Combined Air. The

respondents were entitled to rely on that evidence and they were not obliged to lead evidence from a representative of CRSC. Combined Air failed to adduce any evidence showing that CRSC was a competitor and when the details about CRSC's Pickering bid were disclosed in the oral evidence hearing, the evidence supported the respondents rather than Combined Air.

(2) Did the motion judge err in exercising his power to order the presentation of oral evidence under rule 20.04(2.2)?

[101] Rule 20.04(2.2) provides as follows: "A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation."

[102] Generally speaking, a rule 20.04(2.2) order will be appropriate where the motion judge concludes that the exercise of the powers conferred by rule 20.04(2.1) will be facilitated by hearing the oral evidence of a limited number of witnesses on one or more specific, discrete and likely determinative issues. For ease of reference, rule 20.04(2.1) provides:

In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

[103] While we do not wish to be taken as establishing an exhaustive list of when a judge may choose to make a rule 20.04(2.2) order, such an order would be appropriate where:

- (1) Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time;
- (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and
- (3) Any such issue is narrow and discrete – *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion.

[104] In our view, the motion judge had ample grounds to make a rule 20.04(2.2) order in the circumstances of this case. The Pickering bid document relied on by Combined Air was at best ambiguous and required some explanation. The issue was narrow and discrete. The only question was whether the fact that CRSC was listed as a bidder along with other HVAC subcontractors was capable of proving that CRSC competed with Combined Air. That discrete issue could be resolved by hearing a limited number of witnesses (here, only one witness) testify for a relatively short period of time. The explanation was likely to have a significant impact on whether the summary judgment motion was granted. If, as appeared likely from the balance of the evidence, the oral

evidence did not indicate that CRSC competed with Combined Air, the summary judgment motion would succeed on the basis of the evidence led by the respondents.

[105] Combined Air argues that a motion judge may only impose a temporal restriction on the presentation of oral evidence under rule 20.04(2.2) and that a motion judge has no power to restrict the type of questions that may be asked of a witness under cross-examination. According to Combined Air, the motion judge erred by prohibiting its counsel from asking the witness questions about other instances where CRSC may have been competing with Combined Air and by strictly limiting counsel's questions to the Pickering bid document.

[106] We do not accept Combined Air's contention that the motion judge's decision to limit the oral evidence in this way amounted to a breach of procedural fairness. In our view, it is implicit in both the language and purpose of rule 20.04(2.2) that, when exercising the power to direct that oral evidence be presented by a party, the judge hearing a summary judgment motion is entitled to limit the scope of that evidence to one or more discrete issues. To allow the examination or cross-examination to enter into issues that the motion judge has determined do not require a trial would risk turning an oral evidence hearing into a trial and would defeat the whole purpose of rule 20.04(2.2).

[107] The motion judge did not deny Combined Air procedural fairness by limiting the scope of the cross-examination. Combined Air had been given full opportunity to present its evidence. Examinations of witnesses under rule 39.03 had taken place before the

motion and counsel for Combined Air conducted extensive cross-examinations on all affidavits filed by the respondents. Given the nature of the evidence and issues presented, this was a straightforward case; it was not one that had to proceed through the full discovery process before becoming ripe for summary judgment.

[108] In responding to the motion for summary judgment, Combined Air could have led evidence from a CRSC representative or from any other witness as to conduct by the respondents that violated the restrictive covenants. It was only after both parties had been given full opportunity to argue the motion and present their supporting evidence that the motion judge directed a limited examination to clarify the significance of the evidence of the Pickering bid document. The motion judge was entitled to direct an oral hearing on that discrete issue without allowing Combined Air to open new issues or re-open old issues, whether by cross-examination or otherwise.

[109] Combined Air argues that the evidence of the Pickering bid document was sufficient to give rise to an issue requiring a trial and that the motion judge erred by, in effect, allowing the respondents to use the oral evidence hearing to plug a gap in their case.

[110] We do not accept that submission. The respondents led evidence that CRSC did not compete with Combined Air. Combined Air led no evidence of actual competition and could do no better than the Pickering bid document that revealed bids from CRSC and three entities that did compete with Combined Air. The motion judge was not certain

whether this document might be some evidence of competition warranting a trial and directed the presentation of oral evidence so that he might make a finding on the point.

7. Conclusion

[111] After ordering the presentation of oral evidence under rule 20.04(2.2), the motion judge exercised the powers granted by rule 20.04(2.1) to make a finding that this evidence actually supported the respondents' position that CRSC was not in competition with Combined Air. Having made this finding, the motion judge effectively concluded that, in the end, Combined Air's action had no chance of success. The motion judge did not err in ordering oral evidence or limiting the oral evidence to a discrete and narrow issue. Moreover, after augmenting the written record with oral evidence on this issue, the motion judge did not err in granting summary judgment. Having regard to the full appreciation test, it was entirely appropriate for the motion judge to use the rule 20.04(2.1) powers to make a finding on this limited contentious factual issue.

[112] For these reasons, the appeal is dismissed. The parties may make brief written submissions on the costs of the appeal.

Mauldin v. Hryniak (C52912); Bruno Appliance and Furniture v. Hryniak (C52913)

On appeal from the order of Justice A. Duncan Grace of the Superior Court of Justice, dated October 22, 2010, with reasons reported at 2010 ONSC 5490.

1. Introduction

[113] In June 2001, the respondent, Fred Mauldin, met with the appellant, Robert Hryniak, a man named Robert Cranston, and Hryniak's lawyer, Greg Peebles, at the law offices of Cassels Brock & Blackwell, where Peebles was a senior partner. Mauldin represented a group of investors looking for investment opportunities. Following the meeting, the Mauldin group invested U.S.\$1.2 million with Hryniak. Nearly all of the group's investment was lost.⁷

[114] In February 2002, Albert Bruno, the principal of the respondent, Bruno Appliance and Furniture, Inc., met with Cranston and Peebles, but not Hryniak, at Cassels Brock. Following the meeting, Bruno wired U.S.\$1 million to Cassels Brock for investment. His entire investment was lost.

[115] The Mauldin group and Bruno started separate actions to recover their money. Each sued Hryniak in fraud, and Peebles and his law firm in fraud, conspiracy, negligence and breach of contract. Although Cranston played a prominent role in the events that gave rise to the actions, he was not sued in either action.

⁷ In February 2002, the Mauldin group received a small distribution of approximately U.S.\$9,600.

[116] Hryniak denied defrauding the respondents. He contended that the Mauldin group's funds were stolen by a third party and that he never asked Bruno to invest with him and never received Bruno's funds.

[117] In 2008, the Mauldin group and Bruno moved for summary judgment against Hryniak, Peebles and Cassels Brock. The motions were heard together. Eighteen witnesses filed affidavits on the motions. Cross-examinations took three weeks. The motion record consisted of 28 volumes of evidence. Oral argument – which took place in 2010 – took four days.

[118] Applying the amended Rule 20, the motion judge delivered a 58-page judgment. He granted summary judgment against Hryniak.⁸ He did not believe Hryniak's evidence and concluded that Hryniak had defrauded both the Mauldin group and Bruno. However, the motion judge dismissed the motions against Peebles and Cassels Brock. He concluded that a trial was required to determine whether Peebles was guilty of fraud or had been duped by Hryniak, and whether Peebles had any liability apart the claim for fraud.

[119] On this appeal, Hryniak makes three main submissions:

- (1) The motion judge erred in holding that it was in the interest of justice to grant summary judgment.
- (2) The motion judge erred by failing to hold that each action raised genuine issues requiring a trial.

⁸ The motion judge granted judgment in favour of the Mauldin group for U.S.\$1,190,401.29. That amount represents the initial U.S.\$1.2 million less the small distribution in February 2002. The motion judge also granted summary judgment in favour of Bruno for U.S.\$1 million.

- (3) The motion judge erred in his application of the rule in *Browne v. Dunn* and thus deprived Hryniak of the opportunity to respond to the allegations against him.⁹

[120] We say at the outset that we see no merit in the third ground of appeal. Hryniak knew the case against him and was aware of the allegations against him made by both the Mauldin group and Bruno. He had ample opportunity to respond to those allegations, and indeed endeavoured to do so both in his lengthy affidavits and in cross-examinations on those affidavits. The balance of these reasons, therefore, will only address the first two grounds of appeal.

2. Facts

(1) The Mauldin Group Action

(i) The investment

[121] The critical meeting that led to the Mauldin group's investment occurred on June 19, 2001. Mauldin, Hryniak, Peebles and Cranston attended.¹⁰ No party has contemporaneous notes of what was said at the meeting, and recollections vary. All parties agree, however, that during the meeting Hryniak explained that he had an investment company called Tropos Capital and that he wanted to raise at least U.S.\$10 million to invest through a joint venture called the Tropos Joint Venture.

⁹ The rule in *Browne v. Dunn* requires a party to give notice to a witness whose evidence he intends to impeach.

¹⁰ As noted earlier, Cranston was not sued in either action. Also, he did not give evidence on the motions.

[122] Hryniak then explained his trading program. He said that he used an arbitrage strategy known as “basis” trading, or “cash and carry” trading. By “basis” he meant the difference between the cost of acquiring an asset and the future value of that asset. For example, if Tropos bought a bond for less than its face value and later sold it at face value or a premium, the “basis” would be the profit or the difference between the purchase price (and associated fees and costs, called the costs of carry) and the price received on the sale.

[123] At the meeting, Mauldin said that his group was looking for an investment with a high rate of return. He was so taken with Hryniak’s presentation that ten days after the meeting he wired U.S.\$1.2 million on behalf of the group to the Cassels Brock trust account. Later he sent an additional U.S.\$50,000 to Cranston’s holding company, Rhino Holdings.

[124] The parties dispute whether the U.S.\$1.2 million was deposited at Cassels Brock with one of Hryniak’s entities or with a Panamanian company called Frontline Investments, then owned by Cranston. Hryniak said the Mauldin group invested with Cranston; the Mauldin group said that it invested directly with Hryniak. That dispute did not need to be resolved because eventually the U.S.\$1.25 million from the Mauldin group found its way to Tropos Capital – Hryniak’s company. Between June and December 2001, Tropos Capital raised U.S.\$10.2 million to be invested in the Tropos Joint Venture. This amount included the Mauldin group’s funds.

(ii) What happened to the Mauldin group's investment?

[125] Hryniak said that in September 2001, he met Ole Spaten, the owner of Aro Motors, which was in the business of importing foreign cars into the United States. According to Hryniak, Aro Motors had Deutsche Bank Finance bonds available for sale. The bonds were on deposit in a bank called the New Savings Bank in Montenegro, in the former Yugoslavia.

[126] Hryniak claimed that in December 2001, he decided to acquire the bonds as a "test trade". To do so, he set up a brokerage and bank account in the name of Tropos at the New Savings Bank. He sent all the money he had raised, including the Mauldin group investment, to this bank. The joint venture then purchased U.S.\$5 million in Deutsche Bank bonds from Aro Motors. Hryniak sold the bonds in mid-December and realized a modest profit of three per cent (U.S.\$197,000).

[127] The Tropos Joint Venture did no other trading. Aside from the less than U.S.\$10,000 distribution in February 2002, no money was ever returned to the Mauldin group.

(iii) Hryniak's explanation

[128] Hryniak claimed that the money he had deposited at the New Savings Bank was stolen by Jay Pribble, a senior vice-president with the bank. According to Hryniak,

Pribble stole the funds by closing client accounts and diverting the monies to himself. He then disappeared. The money he misappropriated was never recovered.

[129] Hryniak gave evidence that he first became aware that the funds had been taken in May 2002. However, he put forward no reliable evidence that a theft had ever occurred or that he made any serious attempts to recover the U.S.\$10.2 million. He did not file a police report, he did not ask for Peebles' help to trace the theft, and he did not make any efforts himself to recover the funds from the bank. The only two pieces of evidence he filed on the motion to support his account were a self-serving letter he sent to the Canada Revenue Agency and a perfunctory fax he sent to a person he claimed was an FBI agent in Las Vegas some 15 months after the supposed theft.

(iv) The motion judge's findings

[130] The motion judge accepted that the New Savings Bank was not a fictitious entity. However, he was skeptical of the "test trade". He questioned why Aro Motors would not have sold the bonds for a profit itself, instead of allowing Hryniak to do so.

[131] The motion judge rejected the rest of Hryniak's various explanations. He did not believe that there had been a legitimate trading program or that the loss of the Mauldin group's investment was due to Pribble's misappropriation. He noted that Hryniak made no effort to recover the money. He concluded that Hryniak accepted the Mauldin group's money fully intending to use it for his own benefit.

[132] In reaching this conclusion, the motion judge recognized that there were no contractual documents between the Mauldin group and Tropos or Hryniak, but held that it did not matter because Hryniak had orchestrated the entire scheme. He held that since Hryniak had perpetrated a fraud, he could not escape personal liability on the basis that he carried out the fraud through his company, Tropos Capital.

(2) The Bruno Action

(i) The investment

[133] Albert Bruno invested U.S.\$1 million after a short meeting with Cranston and Peebles at the offices of Cassels Brock on February 22, 2002. How the meeting came about, what was said at the meeting, and with whom Bruno invested were all very much in dispute on the motion. Like the Mauldin meeting, no contemporaneous notes of the Bruno meeting were put into evidence.

[134] Peebles testified that Hryniak asked him to attend the meeting with Cranston to meet Bruno, a potential investor in the Tropos Joint Venture. Hryniak denies this and says that by early 2002, he was not accepting any more money for investment. Nonetheless, Hryniak directed Tropos to pay Cassels Brock's fees for the meeting.

[135] Whatever was said at that meeting, Bruno was induced to invest by the prospect of a legitimate investment opportunity. On March 4, 2002, he wired U.S.\$1 million to Cassels Brock. He did so without ever having met or spoken to Hryniak.

[136] Hryniak maintained that Bruno did not invest with the Tropos Joint Venture but instead was persuaded by Cranston to invest in a joint venture of Cranston's company, Frontline. Some of the documents appear to bear this out. On March 20, 2002, Bruno received a certificate of investment from Frontline. Moreover, Hryniak said that he first spoke to Bruno in the fall of 2002, many months after the investment was made, when, in a telephone conversation, he explained basis trading.

[137] Peebles told a different story. He claimed to understand Bruno's money was always intended to be invested in the Tropos Joint Venture through Frontline. Again some evidence on the motion supports Peebles' claim. Bruno's funds were deposited in a Cassels Brock U.S. dollar trust account with a Tropos client number. Further, in late March 2002, Peebles received instructions from Hryniak to invest U.S.\$1 million for the benefit of the Tropos Joint Venture. And Hryniak continued to be actively involved in decisions relating to this investment and the disbursement of Bruno's funds.

[138] Also, although Hryniak denied that he was accepting funds for investment in early 2002, the record shows that during this period he was accepting money from other investors, including a U.S.\$2.5 million investment from an entity called Southern Equity.

(ii) What happened to Bruno's investment?

[139] Both sides agree that none of Bruno's money ended up in the New Savings Bank; however, they do not agree on where the funds did end up.

[140] Bruno said that after his U.S.\$1 million was sent to Tropos, U.S.\$550,000 was transferred back to the Cassels Brock trust account for Tropos. Most of that amount was dispersed to several entities unrelated to Bruno, while \$66,000 was used to pay a Cassels Brock invoice. The remaining U.S.\$450,000 was used by Hryniak for various corporate requirements. None of Bruno's U.S.\$1 million was ever returned to him.

(iii) Hryniak's explanation

[141] Hryniak claimed that he never made any representation to Bruno about investing in Tropos and that he never received Bruno's funds for his own benefit because they were taken by Cranston.

[142] He said that by late June 2002, Cassels Brock was holding over \$1 million in its trust account for Tropos Capital. Those funds included Bruno's money. In July 2002, Cassels Brock sent Bruno's money to Rhino Holdings. Peebles offered some support for Hryniak's contention. In a statement dated March 31, 2005, taken in front of a lawyer, Peebles said that in July 2002, he inadvertently authorized the transfer of \$1 million out of his law firm's trust account to Cranston's holding company, Rhino Holdings. In his reasons, the motion judge did not refer to Peebles' statement.

(iv) The motion judge's findings

[143] The motion judge held that although Hryniak was not at the meeting with Bruno, he knew about Bruno's investment from the time it was made. He also held that Hryniak

never intended to invest Bruno's money and did not do so. Instead, Hryniak took Bruno's money so that he could make payments to other persons. Thus, Hryniak defrauded Bruno as he had the Mauldin group.

3. Analysis

(1) Did the motion judge err in holding that it was in the interest of justice to grant summary judgment?

[144] Hryniak submits that in actions such as these, it is not in the interest of justice for the motion judge to exercise the expanded powers under rule 20.04(2.1) for the purpose of granting summary judgment. In essence, Hryniak argues that the motion judge erred in concluding that a trial was not required to determine his liability.

[145] In our discussion of the amended Rule 20, we identified three types of cases that are amenable to summary judgment. The first two types of cases existed under the former Rule 20. The third type of case recognizes that the expanded powers under rule 20.04 permit a motion judge to decide a case summarily where the interest of justice does not require a trial.

[146] We emphasized, at para. 50, that cases should not be decided summarily where the full appreciation of the evidence and issues that is required to make dispositive findings can only be achieved by way of a trial. And we went on to say, at para. 51, an example of such a case is one that calls for "multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record".

[147] As the motion judge implicitly acknowledged, neither the Mauldin group action nor the Bruno action could have been decided summarily under the former Rule 20. Nonetheless, using the expanded powers under rule 20.04(2.1), he concluded, citing *Healey v. Lakeridge*, at para. 29, that the “forensic machinery of a trial” was not needed to determine Hryniak’s liability. In the motion judge’s opinion, a very clear picture of Hryniak’s liability had emerged from the record.

[148] However, both the Mauldin group action and the Bruno action bear all the hallmarks of the type of actions in which, generally speaking, the full appreciation of the evidence and issues can only be achieved at trial:

- The motion record is voluminous – 28 volumes of evidence together with additional evidence filed on the motions themselves;
- Many witnesses gave evidence – 18 witnesses filed affidavits, and cross-examinations on those affidavits took three weeks;
- Different theories of liability were advanced against each of the defendants;
- Numerous findings of fact were required to decide these motions;
- Credibility determinations lay at the heart of these disputes, and the evidence of the major witnesses – Mauldin, Bruno, Hryniak and Peebles – conflicted on key issues; and
- Assessing credibility was made more difficult by the near absence of reliable documentary yardsticks.

[149] The partial resolution of these two actions by way of summary judgment did not promote the values underlying the amended Rule 20: better access to justice, proportionality and costs savings. In a real sense the summary disposition had the opposite effect, as the length of time taken to bring and argue the motions and the plaintiffs' bill of costs tellingly illustrate.

[150] The motions, launched in 2008, were argued over four days in May and June 2010 and finally decided in October 2010 – in short, close to three years from beginning to end. At the conclusion of the motions, the plaintiffs submitted a bill of costs for \$1.7 million. Moreover, any efficiency achieved by the summary judgments was severely attenuated by the motion judge's decision that a trial was needed to determine Peebles' liability.

[151] Peebles' involvement in the events giving rise to this litigation was very much bound up in his client Hryniak's involvement. Indeed, the respondents have sued Peebles in conspiracy. Peebles and Hryniak have cross-claimed against each other. If the action against Peebles does go to trial, inevitably many of the issues canvassed on the summary judgment motions will have to be canvassed again.

[152] We therefore conclude that, going forward, cases such as the Mauldin group action and the Bruno action require a trial. They should not be decided by summary judgment.

[153] Undoubtedly, if the motion judge had had the benefit of these reasons he would have sent both actions on to trial. But the motion judge did not have the benefit of these reasons, and especially did not have the benefit of the newly-stated full appreciation test. Instead, he decided these motions when the jurisprudence under the amended Rule 20 was unsettled, and opinions differed on the scope and purpose of the powers conferred by rule 20.04(2.1).

[154] As an appellate court, we now have to decide what to do with these two summary judgments. One obvious approach is to set aside the judgments on the simple ground that cases of this nature should not be resolved summarily. However, we do not think this is a desirable approach. It is not a desirable approach because it fails to give effect to the reality of what is before us – a decision reached after a careful scrutiny of an extensive record, written at a time when the law was unsettled. In the light of these particular circumstances, we are prepared to look beyond the characteristics of these actions that would otherwise preclude summary judgment to determine if the motion judge was nonetheless correct in granting partial summary judgment.

[155] In taking this approach, however, we wish to be clear that we are *not* creating a new type of case that is amenable to summary judgment, nor are we creating an exception to the principles we have laid out above. The court's decision to scrutinize the judgments in this case is a product of the unusual circumstances in which they arose.

[156] Having reviewed the extensive evidentiary record, we conclude that it firmly supports the motion judge's determination that Hryniak committed the tort of civil fraud against the Mauldin group. Hryniak's defence to this action simply has no credibility. However, we are not prepared to uphold the summary judgment against him in the Bruno action because, as we shall explain, the motion judge did not address an important element of the legal test for civil fraud, nor is it clear that Hryniak received the benefit of all of Bruno's funds.

(2) Did the motion judge err by failing to hold that each action raised genuine issues requiring a trial?

(i) The Mauldin group action

[157] To prove civil fraud against Hryniak, the Mauldin group had to show on a balance of probabilities that:

- Hryniak knowingly made a false statement to Fred Mauldin with the intent to deceive him;
- the false statement induced the Mauldin group to invest with Hryniak; and
- as a result of investing with Hryniak, the Mauldin group suffered a loss: see *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.); *Gregory v. Jolley* (2001), 54 O.R. (3d) 481 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 460.

[158] Unquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin at the meeting at Cassels Brock on June 19, 2001.

And unquestionably, the Mauldin group lost virtually all of its investment. Thus, the only question requiring serious consideration is whether the motion judge erred in finding that the statements Hryniak made at the meeting were knowingly false and were made with intent to deceive Fred Mauldin.

[159] We are satisfied that the extensive motion record supports the motion judge's finding on this question. At root, the question turns on whether Hryniak had a legitimate trading program that went awry when Pribble stole his money, or whether his program was a sham from the outset.

[160] At the meeting on June 19, 2001, Hryniak told Fred Mauldin that the group's investment was secure and would be used to engage in basis trading. In numerous conversations after the meeting, Hryniak assured Mauldin and his colleague, Dan Myers, that their investment was safe and secure. In other words, Hryniak portrayed to Mauldin and the Mauldin group a legitimate, credible and secure investment opportunity.

[161] The Mauldin group argued and the motion judge concluded that Hryniak's so-called trading program was a sham. The motion judge found that Hryniak's statements at the meeting were false, that he never intended to and never did legitimately invest the Mauldin group's money, that he orchestrated a "test trade" to dissuade the group from demanding the return of its investment, and that his claim that Pribble stole the money was "utter nonsense."

[162] Other than the so-called “test trade”, Hryniak never made an investment with the Mauldin group’s money. Therefore, to us, the veracity of his contention that he had a legitimate trading program turns on whether one could give any credence to his claim that Pribble stole the Mauldin group’s funds. We think the motion judge was entitled to reject Hryniak’s claim of misappropriation.

[163] It defies credulity that faced with a theft of approximately U.S.\$10 million, Hryniak would not immediately report the theft to the police, ask his lawyer for assistance, or at least make some effort to recover the funds. Yet on the record before the motion judge he did nothing other than send a self-serving letter to the Canada Revenue Agency and a very brief fax to a purported FBI agent whom he knew, some 15 months after the theft occurred. Even having done that, Hryniak took no steps to follow up with either the Canada Revenue Agency or the FBI agent about the whereabouts of the money or the supposed thief.

[164] On all the evidence presented on the motion, including the examinations of Hryniak, Hryniak’s claim that Pribble misappropriated the Mauldin group investment rings hollow. The incredulity of his evidence strongly supports the motion judge’s finding that Hryniak never had or intended to have a legitimate trading program in place and yet he falsely told Fred Mauldin that he did in order to persuade the Mauldin group to invest with him.

[165] In the light of the blatant incredulity of Hryniak's evidence, we are not persuaded that we should interfere with the summary judgment granted in favour of the Mauldin group. Accordingly, we dismiss Hryniak's appeal from that judgment.

(ii) The Bruno action

[166] We take a different view of the summary judgment in the Bruno action. The evidence against Hryniak in that action was not nearly as overwhelming and raises at least two genuine issues requiring a trial.

[167] The first and most significant issue is whether Hryniak made a false statement that induced Bruno to invest with him. Again, to prove Hryniak defrauded him, Bruno had to establish that:

- Hryniak knowingly made a false statement to Bruno with the intent to deceive him;
- the false statement induced Bruno to invest with Hryniak; and
- as a result of investing with Hryniak, Bruno suffered a loss.

[168] Despite Hryniak's protestations to the contrary, we accept for the purpose of this appeal that he knew Bruno had invested U.S.\$1 million with Tropos, that he did not invest this money, and that instead he used at least a portion of it for his own "corporate requirements." We are even prepared to accept that Hryniak knew about the meeting on

February 22, 2002 that led to Bruno's investment. And, of course, we also accept that Bruno lost his entire investment.

[169] What is not clear on the record is whether Hryniak made any statement that induced Bruno to invest with him. The motion judge did not address this important element of a cause of action in civil fraud. As we read his reasons, he concluded that because Hryniak had dishonestly converted Bruno's money to his own use, Hryniak was liable to Bruno in fraud. In other words, fraud was made out because Hryniak deprived Bruno of his money and did so in a dishonest way.

[170] The notion of deprivation underlies both the tort of conversion and civil fraud: see Philip H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011), at pp. 308-309. But proof of civil fraud requires proof of some additional elements; depriving the plaintiff of his goods is not enough. Fraud requires a false statement knowingly made that induces the victim to act to the victim's detriment. On the record before us, Bruno wired his U.S.\$1 million investment to the Cassels Brock trust account without ever having met or spoken to Hryniak. He sent his investment after a short meeting with Peebles and Cranston, and first spoke to Hryniak a month or more later.

[171] Bruno acknowledges that he invested before meeting or talking to Hryniak. He contends, however, that Peebles acted as Hryniak's agent in inducing Bruno to invest. A person may commit fraud through an agent: see G.H.L. Fridman, *Canadian Agency Law*, (Markham: LexisNexis Canada Inc., 2009), at pp. 190-93. But we have no compelling

evidence that Peebles acted as Hryniak's agent for the purpose of inducing Bruno to invest. Nor could we make that finding as the motion judge left Peebles' credibility to be determined at trial.

[172] Also, we do not know what statements persuaded Bruno to invest. He may have invested because of something Peebles said; or, he may have invested because of something Cranston said. Indeed Bruno's own affidavit filed on his motion for summary judgment strongly suggests that Cranston's representations induced him to invest. Yet Cranston, as we have said, gave no evidence on the motion. For these reasons, whether Hryniak, through Peebles, made a false statement that induced Bruno to invest is a genuine issue requiring a trial.

[173] There is a second genuine issue requiring a trial: whether part of Bruno's investment was misappropriated by Hryniak or by Cranston. Again, despite Hryniak's denials, we accept for the purpose of this appeal that he knowingly took Bruno's money and used at least U.S.\$450,000 of it for his own purposes. The Cassels Brock trust ledgers and Hryniak's own instructions to Peebles' assistant overwhelmingly show this to be so. However, the Cassels Brock trust ledgers also show that in late June 2002, Hryniak redeposited U.S.\$550,000 into the Cassels Brock trust account for Tropos, with the result that the law firm then held more than U.S.\$1 million in trust for Hryniak's company.

[174] In March 2005, Peebles signed a written statement before a lawyer in which he acknowledged that he inadvertently sent U.S.\$1 million out of the Cassels Brock trust account to Cranston's company, Rhino Holdings. The motion judge did not refer to this statement. Although Peebles appeared to retract his statement in a later affidavit, his credibility remains to be determined. Thus, whether the U.S.\$1 million sent to Cranston, included U.S.\$550,000 of Bruno's money, and whether Hryniak eventually got the benefit of that money or whether Cranston misappropriated it are questions that require a trial for their resolution.

[175] Because the Bruno action raises at least two genuine issues requiring a trial, his summary judgment against Hryniak cannot stand. We allow Hryniak's appeal from this judgment, set aside the judgment and dismiss Bruno's motion.

4. Conclusion

[176] Hryniak's appeal from the summary judgment granted in favour of the Mauldin group is dismissed. His appeal from the summary judgment in favour of Bruno is allowed, that judgment is set aside, and Bruno's motion for summary judgment is dismissed.

[177] Three remaining matters need to be addressed: a trial management order under rule 20.05 for Bruno's action against Hryniak, the letter of credit posted by Hryniak, and costs.

[178] Our trial management order will accord with the order made by the motion judge in the actions against Peebles and Cassels Brock. Under rule 20.05(1), we order that the action should proceed to trial expeditiously. In addition, under rule 20.05(2), and subject to any further order by a judge of the Superior Court of Justice, we impose the following terms:

- The affidavits of the parties and the cross-examinations on the affidavits, which were used on the motion for summary judgment, may be used at trial in the same manner as examinations for discovery. Further discovery should be limited to matters not already covered in those affidavits and the cross-examinations.
- The Bruno action against Hryniak should be heard together with the pending actions of Mauldin and Bruno against Peebles and Cassels Brock.
- As the motion judge noted, Master Glustein is ably case managing the actions against Peebles and Cassels Brock. He should also oversee the Bruno action against Hryniak.

[179] On January 24, 2011, Weiler J.A. ordered Hryniak to post an irrevocable letter of credit with the court in the amount of \$950,000 as a condition of granting Hryniak's motion to extend time to perfect his appeals. Weiler J.A. said that imposing this order "would be a just balance between Hryniak's right to an appeal and the respondents' interest in ensuring that they may enforce the motion judge's court order if Hryniak loses his appeal": see *Mauldin v. Hryniak*, 2011 ONCA 67, 274 O.A.C. 353, at para. 41. On February 11, 2011, Doherty J.A. varied the terms of Weiler J.A.'s order to facilitate

Hryniak's ability to finance the letter of credit: see *Mauldin v. Hryniak*, 2011 ONCA 126.

[180] Considering that Hryniak's appeal was dismissed in the *Mauldin* action and allowed in the *Bruno* action, we must decide how to deal with the proceeds of the letter of credit. The parties to the appeals may file brief written submissions of no more than five pages setting out their positions on the order this court should make in respect of the proceeds of the letter of credit.

[181] Finally, the parties may make written submissions on the costs of the appeals and on the costs of Bruno's motion for summary judgment.

394 Lakeshore Oakville Holdings Inc. v. Misek (C53035)

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated November 2, 2010, with reasons reported at 2010 ONSC 6007.

1. Introduction

[182] This is an appeal from an order granting summary judgment in favour of the respondent, 394 Lakeshore Oakville Holdings Inc. The motion judge declared that the property of the appellant, Carol Anne Misek, does not enjoy a prescriptive easement over the respondent's property. In so doing, the motion judge exercised the enhanced powers under rule 20.04(2.1), which allow a judge on a motion for summary judgment to weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence.

[183] The appellant contends that the motion judge erred in concluding that a trial was not required to decide the issue whether there was a prescriptive easement over the respondent's property. For the reasons that follow, we do not accept the appellant's position.

2. Facts

[184] The respondent owns 394 Lakeshore Road West in Oakville, which is a 9.5 acre parcel of land with shoreline on Lake Ontario. In December 2009, the respondent applied to the Town of Oakville to develop these lands for 23 residential condominium lots.

[185] The neighbouring property owners, including Misek and her husband, opposed the development. Misek's property is located at 394A Lakeshore Road West (the "Misek property"), which abuts the respondent's property to the northwest. The Misek property has no shoreline. Janet Purvis, who was a co-defendant in the respondent's action, owned 394A Lakeshore Road West from 1975 to 2002. She and her husband sold the property to Misek in 2002.

[186] On March 17, 2010, the respondent applied under the *Land Titles Act*, R.S.O. 1990, c. L.5, to obtain a designation of "Land Titles Absolute" for 394 Lakeshore Road West. This designation is a prerequisite for registering a condominium plan. The respondent's property has been designated as "Land Titles Conversion Qualified" since February 1996, when the lands were converted to the land titles system.

[187] Misek, as a neighbouring property owner, received notice of the respondent's land titles application. She filed a statement of objection under the *Land Titles Act* in which she asserted an easement over the respondent's property based on continuous use of the lands for more than 20 years.

[188] In addition to the statement of objection, Misek and Purvis each filed a supporting statutory declaration. In her declaration, Misek claimed "a prescriptive easement over, along and across [a] 9.83 metre strip of [the respondent's property, specifically, over Part 5 of the respondent's draft reference plan] ... for access to and from the Misek Lands to the pebble beach and water [*sic*] edge of Lake Ontario".

[189] Misek had the onus of proving that a prescriptive easement had been established over the respondent's property by no later than February 26, 1996, when both the respondent's property and the Misek property were converted from the land registry system to the land titles system. In Ontario, a prescriptive easement can only be created over lands governed by the *Registry Act*, R.S.O. 1990, c. R.20, because s. 51(1) of the *Land Titles Act* prevents the maturing of claims for adverse possession and for prescriptive easements once a property is transferred into the land titles system. Central to this case is what happened on the respondent's property in the 20-year period before February 26, 1996, the date that the respondent's property was converted to the land titles system. The relevance of the 20-year period is explained below at paras. 206-207.

[190] In Purvis' statutory declaration, she deposed that while she and her husband were the owners of 394A Lakeshore Road West from 1975 to 2002, their property enjoyed the benefit of a registered right of way over a portion of the neighbouring lands (shown as Parts 1, 2, 3 and 4 on the respondent's draft reference plan). She further deposed that their property enjoyed the benefit of a prescriptive easement over a 9.83 metre strip of the respondent's property, extending from the Misk property to the edge of Lake Ontario. She stated that during their ownership, she and her husband used and enjoyed the prescriptive easement in a manner that was "continuous, uninterrupted, open and peaceful".

[191] Misk's objection to the respondent's application was delivered to the Registrar for Land Titles in early May 2010. On May 11, 2010, without abandoning its *Land Titles Act* application, the respondent commenced an action against Misk and Purvis for \$5 million in damages for slander of title and injurious or malicious falsehood.

[192] Misk and Purvis moved under Rule 21 for an order staying or dismissing the action on the basis that: (1) the action failed to disclose a reasonable cause of action against Purvis; (2) there was another proceeding pending in Ontario between the same parties in respect of the same subject property, namely, an administrative proceeding under the *Land Titles Act*; and (3) the action was frivolous, vexatious, and an abuse of process.

[193] The respondent followed with a cross-motion for summary judgment under Rule 20 before the close of pleadings.

[194] Misek's lawyer requested permission to access the respondent's property in order to prepare a survey of the claimed easement. The respondent objected to the need for a survey. The respondent's lawyer provided a computer-aided design file (an AutoCAD file) of the existing survey of the lands for use by Misek's surveyor, George Lo.

[195] On July 6, 2010, the lawyer for the respondent wrote directly to Lo and said:

You are hereby put on notice that 394 will hold you personally responsible, in accordance with subsection 6(2) of the *Surveys Act*, and at common law, for any and all damage that results if, under these circumstances, you proceed to attend at the 394 Property and prepare, register or file a survey that is used by Ms. Misek and/or Ms. Spadafora or otherwise place stakes or markers on the 394 Property in the advancement of their assertion of the Claimed Easement.

[196] Lo prepared a survey from the drawings supplied to him. He refused to attend the property in person because he did not want to run the risk of being added as a defendant to this action. As a result, he relied on information provided by Misek and Purvis and the aforesaid drawings.

[197] Purvis swore two affidavits in which she deposed that she and her late husband regularly walked on the respondent's property, making their way down to the pebble beach at the lake. She also provided video evidence showing the two of them walking on the claimed easement lands in 1990.

[198] When Purvis was cross-examined on her affidavit, she acknowledged that the claimed easement is narrower than 9.83 metres in certain places.

[199] The respondent issued a summons to a former owner of 394 Lakeshore Road West, Russell Little. Little testified that Purvis and her family frequently walked over his lands and across the waterfront of Lake Ontario and that he would wave to them when he saw them. He also testified that he never objected to their use of the lands. He said that his understanding was that their use of the lands was derived from a right inherited from the previous owners of the Misek property and a continuation of a long-established convention that he respected. He did not know if he had an option to consent to Purvis walking on his lands but “[he] just assumed it was a right”.

[200] Before the summary judgment motion was argued, the respondent served an amended statement of claim. In the amended claim, the respondent withdrew its claim for slander of title, injurious affection and malicious falsehood. The respondent sought an order deleting the statement of objection filed by Misek, and a permanent injunction prohibiting Misek and Purvis from registering any document or plan against its title, or otherwise claiming any interest in its lands.

3. Motion for Summary Judgment

[201] The parties’ competing motions under Rules 20 and 21 were heard together. The motion judge observed that the respondent’s action was unnecessary because of the

pending proceeding under the *Land Titles Act*. However, he exercised his discretion to proceed with the motions so as not to prolong the matter. On appeal, no objection was made to this exercise of the motion judge's discretion.

[202] The motion judge held that a trial was not necessary to determine the question whether the Misek property enjoyed an easement over the respondent's property. He concluded that Purvis had only held a personal license, which was not defined with sufficient certainty to establish a prescriptive easement. He granted summary judgment in favour of the respondent and declared that the Misek property did not enjoy a prescriptive easement over the respondent's property. He also granted Purvis' Rule 21 motion and dismissed the respondent's action against her. The motion judge observed that there was no basis for naming Purvis as a defendant considering that she no longer owned the property in favour of which the prescriptive easement was claimed. Finally, he dismissed Misek's Rule 21 motion seeking to stay the respondent's action.

[203] In his reasons for these orders, the motion judge gave an exhaustive review of the law of easements in England and Canada extending back to the mid-19th century. It is unnecessary to repeat that review in detail here.

[204] The motion judge referred to the four essential characteristics of an easement as described by the Master of the Rolls in *Re Ellenborough Park*, [1956] 1 Ch. 131 (Eng. C.A.):

- (i) There must be a dominant tenement (the property that enjoys the benefit of the easement) and a servient tenement (the property that is burdened);
- (ii) The easement must accommodate, that is, better or advantage the dominant land and not merely the owner of the land. It is not enough that an advantage has been conferred to the owner of the dominant property making his or her ownership more valuable or providing a personal benefit to him or her; rather, for there to be an easement, the right conferred must serve and be reasonably necessary for the enjoyment of the dominant tenement;
- (iii) Both tenements cannot be in the hands of the same person; and
- (iv) The easement must be capable of forming the subject matter of a grant. The following conditions must be met to fulfill this requirement: the rights claimed must not be too vague; the rights claimed must not amount to a good claim to joint occupation of the property in question or substantially deprive the owner of the servient property of proprietorship or legal possession; and the rights claimed must not be ones of mere recreation and amusement. The rights in issue must be of utility and benefit.

[205] The motion judge then described the two ways that a prescriptive easement can be acquired in Ontario:

- (i) prescription by limitation period statute (the *Real Property Limitations Act*, R.S.O. 1990, c. L.15); and
- (ii) prescription by the doctrine of lost modern grant.

[206] As noted by the motion judge, the limitation period statute in Ontario, the *Real Property Limitations Act*, provides that the 20-year period for creating a prescriptive

easement is the period immediately before the commencement of the action: see ss. 31 and 32 of that Act.

[207] The doctrine of the lost modern grant was described by Blair J.A. in *Kaminskas v. Storm*, 2009 ONCA 318, 95 O.R. (3d) 387, at para. 22, as follows:

This doctrine was developed in common law jurisprudence to overcome the inconvenience of the common law rule (where the right could be defeated if it could be proven that the right claimed did not exist at any point in time within legal memory). Under the doctrine of lost modern grant, the courts will presume that there must have been a grant made sometime, but that the grant had been lost. *Uninterrupted user as of right at any point in time will create the prescriptive right under this doctrine, provided it was for at least 20 years.* [Emphasis added.]

[208] In addition to considering whether the evidence established the essential characteristics of an easement articulated in *Ellenborough Park*, the motion judge also considered the following criteria for establishing a prescriptive easement. These criteria apply whether the claim for the easement is based on a limitations statute or the doctrine of lost modern grant:

- (i) Use by permission or license is insufficient to establish a prescriptive easement;
- (ii) The easement claimant's use must be open and not secret or clandestine;
- (iii) There must be evidence that the owner of the servient tenement knew or ought to have known what was happening on his or her land;

- (iv) Use permitted by neighbourliness is insufficient to establish an easement by prescription; and
- (v) The use of the easement must be uninterrupted for the required prescription period.

[209] The motion judge next referred to his ability to weigh evidence under the amended

Rule 20 (at para. 101):

I will make this review in the context of the court's recently enhanced powers under rule 20.04(2.1) on a motion for summary judgment to weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence and on the basis that the parties have put their respective best evidentiary cases forward.

[210] In his assessment of the evidence, the motion judge observed, at para. 113, that Misek's evidence was "unhelpful in deciding the fundamental issue" of whether a prescriptive easement existed. This was because she and her family were not living on the property during the relevant 20-year period prior to the lands being registered under the *Land Titles Act*. Her evidence on the use of the lands during this period would thus be hearsay.

[211] The motion judge found that the evidence of the surveyor, Lo, was not dispositive. He observed that it was unfortunate that Lo had been "scared off" by the somewhat aggressive letter of the respondent's solicitor. However, the motion judge concluded that even if Lo had accessed the respondent's property, it would not have made a difference because he would not have discovered a demarked route for the claimed easement.

[212] The real focus of the judge's assessment was the evidence of Purvis and, to a lesser extent, that of Russell Little. The motion judge accepted Purvis' evidence that she and her husband would walk to the lake from their house along the eastern boundary of 394 Lakeshore Road West "on a meandering path over the unmarked grassy area to a sloped path that led to a slate beach." These walks took place on average two times per week during spring, summer and fall, and less frequently during the winter. No one ever tried to stop Purvis and her husband from walking on the neighbouring land. Occasionally, during their walks, Purvis and her husband would stop and chat with the neighbours.

[213] In addition, the motion judge accepted Purvis' evidence that neither she nor her husband ever asked permission to walk across the respondent's property. She regarded the walks as a "practice" that was already in place when she purchased the property. She also described the walks as a "ritual" and a "situation" that went with the property itself. However, she testified that she did not think of the practice as a right. As well, Purvis testified that she did not think her property was more valuable because of her ability to walk on her neighbour's property. Instead, she saw the ability to do so as having a personal value rather than a monetary one.

[214] In his testimony, Little confirmed that he never objected to Purvis and her husband walking across the property in issue. While he would not have made an objection, he believed that he could not do so because he understood from his groundskeeper that there

was a tradition or custom that permitted the occupants of 394A Lakeshore Road West to walk on the adjoining lands from the time that 394A was severed from 394.

[215] After the motion judge's review of the above evidence, he concluded at paras.

122-25:

I conclude from all this evidence that there is no genuine issue requiring a trial. In my opinion, the evidence establishes that Mr. and [Mrs.] Purvis had a personal licence and never acquired a prescriptive easement over property that they knew belonged to their neighbours.

The evidence shows only that the owners of 394 Lakeshore Rd. W. tacitly permitted – as neighbours might do – their neighbours to pass across their lands without being regarded as trespassers. The owners permitted the use because it was the custom to permit this personal use. The evidence is insufficient to establish acquiescence of a right to be annexed to a dominant tenement.

Further, the licence that was the pre-existing practice or custom between the owners of 394 and 394A Lakeshore Rd. W. did not have the capacity to become a prescriptive easement. The licence provided only a personal benefit that the owners of 394A would not be regarded as trespassers by the owners of 394 Lakeshore Rd. W. The licence was not reasonably necessary for the enjoyment of the dominant tenement or meant to burden the servient tenement. Further, the licence was not defined with adequate certainty, and it was not limited in scope.

A trial is not necessary in the circumstances of this case to determine whether a prescriptive easement was created. There is no genuine issue requiring a trial. The evidence shows only a licence, which does not run with the lands. It is also plain and obvious and no trial is necessary to conclude that the Plaintiff never had a claim against Mrs. Purvis.

4. Issues

[216] The appellant raises the following four issues:

- (1) Did the motion judge err in deciding whether there was a prescriptive easement on a Rule 20 motion?
- (2) Did the motion judge err in deciding that Purvis enjoyed a personal license rather than a prescriptive easement?
- (3) Did the motion judge err in deciding that the easement claim was not defined with adequate certainty or limited in scope?
- (4) Did the motion judge err in deciding that the easement claim was not reasonably necessary to enjoy the Misek property?

5. Analysis

- (1) Did the motion judge err in deciding whether there was a prescriptive easement on a Rule 20 motion?**

[217] Counsel for the appellant submits that a claim for a prescriptive easement should not be decided on a summary judgment motion. In support of this assertion, counsel relies on *Longo v. C.H. Lager Ltd.* (1998), 20 R.P.R. (3d) 128 (Gen. Div.). In *Longo*, there were cross-applications under Rule 14 of the *Rules of Civil Procedure* for determining property rights of neighbouring parties in respect of a right of way. The application judge sent the matter on for trial and, in doing so, observed that except in the clearest of cases, it would be difficult to decide issues of adverse possession on affidavit material. A fair

reading of the reasons in *Longo* indicates that the evidentiary record was not sufficient to permit the application judge to decide the case. In addition, the application judge noted that conflicts in the evidence necessitated credibility findings that required a trial.

[218] We reject the appellant's suggestion that certain categories of claims should not be decided on a motion for summary judgment. According to the appellant, a claim for a prescriptive easement requires findings of credibility concerning the use of the claimed easement lands, which should not be made on a summary judgment motion. The appellant's position ignores the fact-finding powers afforded to the motion judge by rule 20.04(2.1), including the express power to make credibility findings. As we have said, the test for exercising the powers conferred by rule 20.04(2.1) is whether the full appreciation of the evidence and issues that is required to make dispositive findings is possible on a motion for summary judgment.

[219] This case is a good example of the type of case that is amenable to summary judgment based on the application of the full appreciation test. The documentary evidence was limited and not contentious. There were a limited number of relevant witnesses. The governing legal principles were not in dispute. It was thus entirely appropriate for the motion judge to decide the action on a Rule 20 motion.

(2) Did the motion judge err in deciding that Purvis enjoyed a personal license rather than a prescriptive easement?

[220] Before addressing the appellant's specific complaints about the motion judge's findings, we begin by observing that the appellant does not take issue with the motion judge's articulation of the law on prescriptive easements. The appellant's point of departure from the motion judge concerns how the motion judge applied the law to the facts as he found them. Thus, the appellant's complaints relate to the motion judge's findings of mixed fact and law. These findings fall more towards the factual end of the spectrum, and significant deference must be accorded: *Bell Canada v. Plan Group*, at para. 27.

[221] Counsel for the appellant submits that there was no evidence to support a finding that Purvis had express or implied permission for her use of the lands. He further submits that both Purvis' and Little's evidence supports a finding that Purvis walked the claimed easement lands in a continuous, uninterrupted, open, peaceable manner, and with the knowledge of, and without objection from, the owner for 20 years.

[222] We would not interfere with the motion judge's findings on this issue. The evidence before him supported the inference that Purvis and her husband were permitted to walk on the adjoining land as a neighbourly gesture without being treated as trespassers. The motion judge was entitled to draw the inference from the evidence before

him that Purvis and her husband were simply the recipients of neighbourly goodwill. This ground of appeal is dismissed.

(3) Did the motion judge err in deciding that the easement claim was not defined with adequate certainty or limited in scope?

[223] Counsel for the appellant submits that the motion judge misapprehended the evidence concerning the boundaries of the easement and effectively held the appellant to a higher standard of certainty than the law requires. Counsel submits that the survey prepared by Lo was sufficiently particular when taken with Purvis' evidence to establish the boundaries of the easement over the respondent's lands with adequate certainty.

[224] Alternatively, counsel submits that if Lo's survey was deficient, the motion judge failed to properly consider that any deficiencies were caused by the interference of the lawyer for the respondent. Counsel argues that the motion judge erred in making a final determination on the certainty issue in the absence of a proper survey. He further argues that the actions of the respondent's lawyer hindered the appellant from being able to properly defend the Rule 20 motion.

[225] The conduct of the respondent through its solicitor was of concern to the motion judge. However, he concluded that even if Lo had been permitted unrestricted access to the respondent's property, it would not have made a difference. After referring to Purvis' evidence describing the meandering, unmarked route across grassy and treed areas that

she and her husband took on their walks, the motion judge concluded, at para. 114, that Lo “would not have discovered a demarked route.”

[226] While the appellant raises a legitimate concern about the treatment of the appellant’s surveyor, the evidence reasonably supports the motion judge’s finding that the surveyor would not have been able to show the boundaries of the claimed easement with sufficient certainty, and that the easement was not limited in scope. We would not interfere with these findings.

(4) Did the motion judge err in deciding that the easement claim was not reasonably necessary to enjoy the Misek property?

[227] Counsel for the appellant submits that the motion judge erred in determining that the claimed easement was not reasonably necessary to enjoy the Misek property. He argues that this finding fails to account for the utility that the easement claim provided to the Misek property. He cites *Ellenborough Park*, at pp. 174-75, for the proposition that an easement for recreational and leisure purposes is recognized in law.

[228] In our view, it was reasonable for the motion judge to conclude that the advantage conferred on Purvis and her husband was not reasonably necessary for the enjoyment of the Misek property, but was rather in the nature of a personal benefit. This is not a case like *Schwark Estate v. Cutting* (2008), 77 R.P.R. (4th) 219 (Ont. S.C.), rev’d 2010 ONCA 61, 316 D.L.R. (4th) 105, relied on by the appellant, in which cottagers sought a

prescriptive easement over neighbouring lands in order to access a beach on Lake Erie that was directly in front of their cottages.¹¹

[229] Unlike a cottage property, where the use of a nearby beach might well be closely connected with the use and enjoyment of the cottage, in the case at bar, the dominant tenement was not a cottage property adjacent to a beach. The video evidence indicates that there were many trees and bushes on the claimed easement lands and no clear access from the Misek property to the pebble beach along Lake Ontario. It was, therefore, reasonable for the motion judge to find that the claimed easement over 394 Lakeshore Road West was a benefit that depended on the personal interest of Purvis and her husband in taking walks in the area, rather than being reasonably necessary for the enjoyment of the Misek property.

6. Conclusion

[230] In this case, the motion judge determined that a trial was not required to decide the respondent's action. He did not err in this conclusion. He properly employed the enhanced powers accorded to him by rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw reasonable inferences in order to decide the action summarily, and we see no basis upon which to interfere with his findings of fact.

¹¹ The trial judge denied the claim for a prescriptive easement on the ground that the use of the lands in question was by permission of the owners of the lands rather than a use as of right. That finding was not appealed.

[231] For these reasons, the appeal is dismissed. The parties may make brief written submissions on the costs of the appeal.

Parker v. Casalese (C53395)

On appeal from the order of the Divisional Court (Justices Emile R. Kruzick, Katherine E. Swinton and Alison Harvison Young J.J.), dated October 21, 2010, with reasons reported at 2010 ONSC 5636.

1. Introduction

[232] This is an appeal by Marie Parker, Katherine Stiles, and Siamak Khalajabadi (“appellants”) from the Divisional Court’s decision affirming the motion judge’s order dismissing their motion for summary judgment. The appellants commenced an action against the defendant, Pino Scarfo (“respondent Scarfo” or “Scarfo”), under the simplified procedure set out in Rule 76 of the *Rules of Civil Procedure*. They alleged that the respondent Scarfo constructed two new homes in between their existing homes and damaged their properties in the process. The appellants also claimed against the owners of the new homes, the defendants Eric and Gerarda Casalese and Antonietta and Mauro Di Lauro (“respondent homeowners”), on a theory of vicarious liability.

[233] The appellants’ motion for summary judgment was heard less than two months after the amended Rule 20 came into force. The motion judge’s reason for dismissing the motion was that there were “numerous conflicts in the evidence” that could only be “justly resolved after a trial.” He did not identify these conflicts or explain why the

powers under the new rule should not be used to resolve them. Greer J. of the Divisional Court granted leave to appeal on the basis of the inadequacy of the motion judge's reasons. The Divisional Court acknowledged the insufficiency of the motion judge's reasons, but agreed with the result based on that court's review of the record.

[234] This appeal raises the novel interpretative issue of how Rule 20 should be applied in the context of an action under Rule 76.

2. Facts

[235] In their statement of claim, the appellants allege that in the fall of 2007, the respondent Scarfo demolished a semi-detached home that was in between their properties on Woburn Avenue in the City of Toronto and began construction of two new homes. They claim that their properties were damaged during the construction process in various ways. For example, they say that the respondent Scarfo failed to shore up the soil along the sides of the excavation site, which resulted in damage to their properties. They complain of sinking land, cracked foundation walls, water damage, and cracked and sloping paving. They also allege that cement was splattered on parts of their homes during the construction. In addition, the appellants claim that the new properties were not graded properly, which created a risk of drainage problems affecting their properties. They seek joint and several damages totalling almost \$90,000 against the respondent Scarfo as the builder and the respondent homeowners.

[236] In the respondent Scarfo's statement of defence, he denies that he personally performed the demolition and construction work and claims that any work was carried on by his corporation. He also denies that the appellants' properties were damaged during the construction. In their separate statement of defence, the respondent homeowners acknowledged that Scarfo demolished the existing homes and began construction of the new ones. However, they deny any losses were suffered and also deny liability for Scarfo's actions.

3. Motion for Summary Judgment

[237] The appellants moved for summary judgment. In support of the motion, they each filed affidavits describing the alleged damage done to their properties, which they attributed to the construction process carried out by the respondent Scarfo. They also filed an expert report by an engineering firm detailing the damages allegedly caused by the construction. The report explains the causes of the observed damages and estimates the cost of repairing the damage to the appellant Parker's property at \$31,000 and the cost of repairing the property owned by the appellants Stiles and Khalajabadi at \$55,000, plus an additional 20 per cent for plans, permit fees and inspections.

[238] The respondents filed affidavits in response to the motion. The respondent Scarfo claimed that his company, The Manor Arms Inc., was responsible for the construction. He deposed that Manor Arms had a verbal agreement with the respondent homeowners to demolish the existing semi-detached homes and to build the new homes. He filed, as an

exhibit, documents showing that the respondent homeowners' payments for the construction work were payable to "Greenline", which was a business name registered to Manor Arms. In addition, he filed affidavits from various sub-contractors indicating that they had been hired and paid by Greenline.

[239] In their affidavits, the respondent homeowners acknowledged that Scarfo demolished the existing homes and began construction of the new ones. They denied any negligence or damage in the construction process and said that, in any event, the appellants' recourse was only against Scarfo, not them. The respondent homeowners filed as exhibits two applications for building permits to construct the new homes, which identified the applicant for the permits as Scarfo personally. Although the form includes a section asking for the name of any corporate applicant, this section was not filled in.

[240] The respondents did not file an expert report contradicting the appellants' expert. Rather, in addition to generally denying any damages, the respondent Scarfo asserted that the appellants' estimate of the cost of repairs was excessive.

[241] When the motion was first brought, it was governed by rule 76.07. Rule 76.07 permitted a party in a simplified procedure action to move for summary judgment after the close of pleadings. Rule 76.07(3) stipulated that the test for summary judgment was not that in rule 20.04. Instead, rule 76.07(9) provided the following test:

76.07 (9) The presiding judge shall grant judgment on the motion unless,

- (a) he or she is unable to decide the issues in the action without cross-examination; or
- (b) it would be otherwise unjust to decide the issues on the motion.

[242] When the motion was heard, rule 76.07 had been revoked (by O. Reg. 438/08, s. 55) and the amended Rule 20 governing summary judgments applied.

[243] No examinations for discovery had been held when the motion was brought because under rule 76.04, as it then read, examinations for oral and written discovery were not permitted. The current rule 76.04 now prohibits written examinations for discovery under Rule 35, while oral discovery is limited to two hours of examination: see rule 76.04(2). No cross-examinations on the affidavits were held because both the former and the amended rule 76.04 prohibit cross-examination of deponents on affidavits filed on a motion.

[244] The motion judge dismissed the appellants' motion. His reasons, in their entirety, state:

The motion is dismissed. Submissions regarding costs may be exchanged and delivered to me within one month.

There are numerous conflicts in the evidence and I am satisfied that they can be justly resolved only after a trial.

[245] The appellants appealed to the Divisional Court with leave. The court made the point, at para. 10, that the motion judge's reasons were inadequate as "he made no

reference to the test for summary judgment as set out in Rule 20, and there is nothing to indicate whether he appreciated the fact that the standard is different and more flexible under the new Rules.” However, the Divisional Court found that a review of the record supported the motion judge’s conclusion that a trial was required for three reasons, at paras. 12-14. These reasons may be summarized as follows:

- (1) There is conflicting evidence as to whether the work was carried out by Scarfo personally or by his company. Scarfo’s personal liability should not be decided without a trial as most of the agreements with the sub-trades and the homeowners were verbal. These factors “appear to put a premium on *viva voce* evidence and the ability to be cross-examined”.
- (2) The new homeowners’ liability was not clearly established on the record. To establish vicarious liability, the appellants must show that the work undertaken involved “unusual and inherently dangerous risk: *Savage v. Wilby*, [1954] S.C.R. 376”. The record did not differentiate between damages from activities that might have been inherently dangerous, such as excavating, and damages from activities that might not be, such as constructing a walkway.
- (3) The expert report filed by the appellants does not break down the damage calculation into its components. Further, there is conflicting evidence as to whether there was damage that pre-existed the construction.

[246] Finally, the court observed that there was no cross-examination prior to the motion. The court concluded, at para. 15, that “despite the new rules, this is a case that is more appropriately dealt with by a trial, though perhaps one that is summary in nature.”

[247] The appellants appealed with leave to this court.

4. Issues

[248] The overarching issue raised by the appellants is whether the Divisional Court erred in the way it applied the test for summary judgment under the amended Rule 20. The appellants say that if the court had properly applied the new test, it would have recognized that there was no genuine issue requiring a trial and would have granted summary judgment on all issues. Alternatively, had the court determined that some issues could not be decided on the motion, the court ought to have granted partial summary judgment or ordered the hearing of oral evidence to resolve those issues.

[249] The appellants argue that the respondent Scarfo's personal liability can and should be decided on the existing record. They submit that the evidence of his liability is compelling. The respondent homeowners admit they hired Scarfo personally. As well, Scarfo personally signed the building permit forms and has provided no explanation for why, if his company were in fact the builder, it was not named anywhere on the application forms. According to the appellants, any conflict in the evidence on this issue cannot survive the court's new powers under rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw reasonable inferences from the evidence.

[250] As for the respondent homeowners' liability, the appellants submit that they are liable for the work carried out by their hired contractor on the legal theory that an owner

is liable for direct damages caused to an adjacent property where a property owner excavates and interferes with the right of natural support of an adjacent property. They rely on *Barber v. Leo Contracting Co. Ltd.*, [1970] 2 O.R. 197 (C.A.), for this theory of liability.

[251] On the issue of damages, the appellants emphasize that there is no evidence to contradict their expert's report, which states that the failure to take precautionary measures during the excavation resulted in damage to their properties as described in the report. The appellants also argue that the quantum of damages is not seriously challenged and the new Rule 20 does not permit the respondents to rest on bald denials.

5. Analysis

(1) How should Rule 20 be applied in the context of an action under Rule 76?

[252] As indicated, the appellants brought their motion just as significant changes to the rules related to simplified procedure and summary judgment were being implemented. Under the now-revoked rule 76.07, the motion judge had broader powers than did a judge hearing summary judgment motions under the former Rule 20. Under rule 76.07, a judge was allowed to make determinations of fact including determinations of credibility: see *Newcourt Credit Group Inc. v. Hummel Pharmacy Ltd.* (1998), 38 O.R. (3d) 82 (Div. Ct.), at p. 86. The motion judge was to grant summary judgment unless the judge was

unable to decide the issues in the action without cross-examination, or if it would be otherwise unjust to decide the issues on the motion.

[253] The test for summary judgment in simplified procedure actions is now governed by Rule 20. Resolving the liability and damages issues in the appellants' action would require the motion judge to weigh the evidence, evaluate the credibility of deponents, and draw reasonable inferences from the evidence. Under the principles we have established, the full appreciation test is the governing test. It must be asked: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

[254] We wish to emphasize a significant additional factor that must also be considered in the context of a simplified procedure action. Given that simplified procedure claims are generally for amounts of \$100,000 or less, the rule is designed to get the parties to trial with a minimum of delay and costs. Thus, one of the key objectives of the simplified procedure rule is to limit the extent of pre-trial proceedings and to bring the parties to an early trial conducted pursuant to tailored rules. That is why discovery is restricted, cross-examination on affidavits and examination of witnesses on motions are not allowed, and the procedure at a summary trial is modified to reduce the length of the trial. No doubt, in appropriate cases, a motion for summary judgment in a Rule 76 action can be a useful tool to promote the efficient disposition of cases. However, it will often be the case that

bringing a motion for summary judgment will conflict with the efficiency that can be achieved by simply following the abridged procedures in Rule 76.

[255] When a judge is faced with a contested motion for summary judgment in a simplified procedure action that requires exercising the powers in rule 20.04(2.1), the judge will not only have to apply the full appreciation test, but will also need to assess whether entertaining the motion is consistent with the efficiency rationale reflected in the simplified procedures under Rule 76. We make two general observations that will inform this assessment.

[256] First, summary judgment motions in simplified procedure actions should be discouraged where there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination, or where oral evidence is clearly needed to decide certain issues. Given that Rule 76 limits discoveries and prohibits cross-examination on affidavits and examinations of witnesses on motions, the test for granting summary judgment will generally not be met where there is significant conflicting evidence on issues confronting the motion judge. While the motion judge could order the hearing of limited oral evidence on the summary judgment motion under rule 20.04(2.2), in most cases where oral evidence is needed, the efficiency rationale reflected in the rule will indicate that the better course is to simply proceed to a speedy trial, whether an ordinary trial or a summary one: see rules 76.10(6) and 76.12.

[257] Second, we are not saying that a motion for summary judgment should never be brought in a simplified procedure action. There will be cases where such a motion is appropriate and where the claim can be resolved by using the powers set out in rule 20.04 in a way that also serves the efficiency rationale in Rule 76. For example, in a document-driven case, or in a case where there is limited contested evidence, both the full appreciation test and the efficiency rationale may be served by granting summary judgment in a simplified procedure action.

[258] As we noted above at para. 58, a responding party faced with an inappropriate motion for summary judgment may move for directions under rules 1.04 and 1.05 to request that the motion be stayed or dismissed. If a stay or dismissal is granted and if a summary trial ultimately ensues, the affidavits prepared for the summary judgment motion can serve as affidavits under rule 76.12 in order to salvage some of the resources expended on the motion for summary judgment.

[259] We now illustrate these general observations by applying them to the present case. As noted by the respondents, the motion judge was called on to resolve a number of disputed issues:

- (i) Should the respondent Scarfo be found personally liable given the conflicting evidence as to whether he or his company was responsible for the construction?
- (ii) Should the respondent homeowners be held vicariously liable for the damage caused?

- (iii) If the respondent homeowners are vicariously liable, did their liability extend to the damage that did not naturally flow from the excavation, such as damage caused by cement splatter and faulty grading?
- (iv) Was there pre-existing damage as alleged by the respondent Scarfo?
- (v) Should any weight be given to Scarfo's affidavit evidence that the cost of any repairs are significantly lower than the expert's estimates?
- (vi) If the court were to conclude there was pre-existing damage or that the respondent homeowners were not vicariously liable for all of the alleged damage, how could the court adjust the award in the absence of itemized amounts in the expert report?

[260] The appellants argue that the motion judge could have decided the matters that are clear and ordered the hearing of oral evidence under rule 20.04(2.2) to resolve any of the remaining issues. However, the full appreciation test and the efficiency rationale of Rule 76 tell against resolving this case by way of summary judgment. While the full appreciation test could arguably be met in relation to the liability issues, it could not be met in relation to the causation and quantum of damages issues. The motion judge did not have the benefit of any testing of the various assertions of the affiants or the expert.

[261] Moreover, in the context of a simplified procedure action, a summary judgment motion that requires oral evidence from key witnesses offers little or no benefit from an efficiency standpoint as compared to the parties simply proceeding to trial. Indeed, the presiding justice at triage court offered the appellants an early trial date as an alternative

to proceeding with their motion. Holding an early summary trial would clearly have been the preferred procedural route in this case.

6. Conclusion

[262] Considering the nature of the issues in dispute, the absence of any cross-examinations of the key witnesses, the lack of a detailed damages assessment in the appellants' expert report, and the absence of any appreciable efficiency gain that would be accomplished by the motion, we see no error in the Divisional Court's conclusion that a trial was required.

[263] For these reasons, we dismiss the appeal from the Divisional Court's order upholding the motion judge's order refusing summary judgment.

[264] Where summary judgment is refused, it is open to the court to exercise the case management powers found in rule 20.05. The motion judge did not make any order under rule 20.05, nor did the Divisional Court.

[265] In the interests of promoting an efficient and more cost-effective resolution of this dispute, we order under rule 20.05(1) that the matter should proceed to trial expeditiously on the issues of liability, causation and quantum of damages. In addition, we impose the following terms pursuant to rule 20.05(2), subject to further order by the Superior Court of Justice:

- The trial of this action shall proceed by way of a summary trial under rule 76.12.
- Within 60 days of the release of this judgment, the parties are to file, from among the affidavits filed on the motion for summary judgment, the affidavits they propose to use at the summary trial and, if so advised, an additional affidavit addressing the issues of causation and/or quantum of damages.

[266] Given the novelty of the issues raised in the context of the changes to Rules 20 and 76, we make no order as to costs in the *Parker v. Casalese* appeal.

RELEASED: December 5, 2011 “WKW”

“W.K. Winkler C.J.O.”

“John Laskin J.A.”

“Robert J. Sharpe J.A.”

“Robert P. Armstrong J.A.”

“Paul Rouleau J.A.”

APPENDIX: THE TEXT OF RULE 20

20.01(1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

20.02(1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

20.03(1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked: O. Reg. 394/09, s. 4.

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

- (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
- (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

20.05(1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

- (a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;
- (b) that any motions be brought within a specified time;
- (c) that a statement setting out what material facts are not in dispute be filed within a specified time;
- (d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;
- (e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;
- (f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;
- (g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;
- (h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;
- (i) that any oral examination of a witness at trial be subject to a time limit;
- (j) that the evidence of a witness be given in whole or in part by affidavit;
- (k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings

or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

- (i) there is a reasonable prospect for agreement on some or all of the issues, or
 - (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;
- (l) that each of the parties deliver a concise summary of his or her opening statement;
 - (m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;
 - (n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;
 - (o) for payment into court of all or part of the claim; and
 - (p) for security for costs.

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs.

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

- (a) the party acted unreasonably by making or responding to the motion;
or
- (b) the party acted in bad faith for the purpose of delay.

20.07 A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

20.08 Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

20.09 Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.