

SUPREME COURT OF NOVA SCOTIA

Citation: *Unisys Canada Inc. v. Pineau-Pandya*, 2025 NSSC 305

Date: 20250919

Docket: Hfx No. 473125

Registry: Halifax

Between:

Unisys Canada Inc.

Plaintiff/Respondent

v.

Andrea Pineau-Pandya, Matthew Watts, Karen Caldwell,
Shiliang Lu, Fang Goa, Quishi Li, Natasha Squires and
Meraki IT Consulting Incorporated

Defendants/Movers

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: October 29 and 30, 2024 and January 30, 2025, in Halifax, Nova Scotia

Counsel: Mark Tector and Hannah Stordy, Stewart McKelvey, for the Respondent
(Plaintiff)
Colin D. Bryson, K.C., Burchell Wickwire Bryson, LLP, for the Movers
(Defendants)

By the Court:**OVERVIEW**

[1] This is a challenging case featuring eight defendants and approximately 40 causes of action. The plaintiff is the respondent on this motion. The defendants seek to have the entirety of the plaintiff's action summarily dismissed. The action's complexity on its own does not bar it from being summarily dismissed. However, based on my review of the evidence, the presence and number of genuine issues of material fact in dispute, does. For the reasons discussed throughout, the defendants' motion fails at the first stage of the *Shannex* test. There are many material facts that involve credibility assessments which will have to be dealt with at trial. The defendants bear the onus to show that there are no genuine issues of material facts in dispute. They have failed to discharge that onus.

FACTS

[2] This action was commenced by Unisys Canada Inc. ("Unisys" or the "plaintiff") in 2018 against many of its former employees and the corporate entity Meraki IT Consulting Incorporated ("Meraki")(together "the defendants"). Meraki was created by Unisys' former employee, Andrea Pineau-Pandya. Matthew Watts, Karen Caldwell (now Karen Hildibrand), Shiliang Lu, Fang Gao, Qiushi Li, Natasha Squires (collectively the "individual defendants") were all previously employees of Unisys. They left the company and went on to work at Meraki.

[3] Andrea Pineau-Pandya was an employee at Unisys for 16 years. She headed the service delivery department. Unisys terminated her employment on October 24, 2016, for what they say was just cause. Pineau-Pandya disputed that it was just cause. Her claim settled a few months later. She incorporated Meraki in October 2017 and entered into a contract with CSDC, Systems Inc. ("CSDC").

[4] In August 2020, the defendants filed a motion for summary judgment. The motion was originally scheduled to be heard in March 2021. Both parties brought production motions in November 2020. A decision on those motions was issued on March 12, 2021. The summary judgment motion was rescheduled for February 7-8, 2022.

[5] Following a case management conference on January 20, 2022, the summary judgment hearing was adjourned and the hearing date of February 7, 2022, was to

be used to determine Unisys' claim for settlement privilege. The motion was subsequently adjourned at the Court's request and heard on July 6, 2022. The decision on the issue of settlement privilege was rendered on May 16, 2023 (*Unisys Canada Inc. v. Pineau-Pandya*, 2023 NSSC 328).

[6] The summary judgment motion was scheduled for two days and heard October 29 and 30, 2024. Dates had to be set for a continuation of the hearing. The motion continued and was completed on January 30, 2025.

[7] Unisys pleads:

That the individual defendants breached their common law and contractual ongoing obligations, in the following ways:

- Breached Employee Proprietary Information and Invention Agreements;
- Breached common law obligations to Unisys including the obligation not to misuse Unisys' confidential information, and duty of good faith; and
- Participated and benefited from Pineau-Pandea's breach of fiduciary obligations.

That Pineau-Pandea:

- Breached fiduciary duties owed to Unisys by misusing its confidential information, soliciting the individual defendants, and taking Unisys' corporate opportunities, including services with respect to the AMANDA software;
- Breached her employment agreement and common law duties by misusing confidential information;
- Induced individual defendants to breach their contractual obligations and through her actions intended to procure their respective breaches; and
- Actively and knowingly participated in and benefited from the breaches, and should therefore be liable as a constructive trustee, and liable to account to Unisys.

That Meraki:

- Induced the individual defendants to breach their contractual obligations including obligations pursuant to their respective agreements;
- Misused Unisys' confidential information;
- Actively and knowingly participated in and benefited from the breaches by the individual defendants as described above, and therefore should be liable as a constructive trustee and liable to account to Unisys.

[8] Unisys claims that by conducting themselves in the way they allege, the defendants unlawfully conspired amongst themselves with the predominant purpose of harming Unisys' economic and business interests.

[9] Pineau-Pandya and the other defendants deny the claims made by Unisys and counterclaimed. The counterclaim is not the subject of this summary judgment motion.

ISSUES

[10] Should summary judgment be granted to the defendants on all, or some, or none of the plaintiff's various causes of action?

LAW

[11] The defendants filed a motion on August 24, 2020, seeking an order pursuant to Civil Procedure Rules 13.01 and 13.04 for summary judgment, "dismissing all or some of the claims of the Plaintiff in this proceeding." Rules 13.01 and 13.04 of the Rules are as follows:

13.01 Scope of Rule 13

- (1) This Rule is for summary judgment on evidence in an action and summary judgment on pleadings in an action or an application.
- (2) This Rule is not for economical disposal of a claim or defence that may have some merit, to be determined through assessment of credibility or otherwise, which purpose may be served by any of the following:
 - (a) provisions of Rule 4 - Action for early assignment of trial dates;
 - (b) provisions of Rule 5 - Application for an application in court and Rule 6 - Choosing Between Action and Application;
 - (c) Part 4 - Alternative Resolution or Determination, except Rule 13 - Summary Judgment;
 - (d) Part 12 - Actions Under \$150,000.
- (3) This Rule is not for disposal of frivolous, vexatious, scandalous, or otherwise abusive pleadings, which purpose is served by Rule 88 - Abuse of Process.

[...]

13.04 Summary judgment on evidence in an action

- (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
 - (a) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
 - (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
- (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
- (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
- (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
- (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
- (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
 - (a) determine a question of law, if there is no genuine issue of material fact for trial;
 - (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[12] The five-part test for summary judgment on evidence in Nova Scotia was set out by the Nova Scotia Court of Appeal in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89:

[34] I interpret the amended Rule 13.04 to pose five sequential questions:

- **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]**

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.

The analysis of this question follows *Burton's* first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

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

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

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

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

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

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

- **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a):

Should the judge exercise the "discretion" to finally determine the issue of law?

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

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

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[35] **"Discretion"**: The judge's "discretion" under the amended Rule 13.04(6)(a) governs the option *whether or not to determine the full merits* - i.e. the Fourth Question. I disagree with Mr. Upham's factum that Rule 13.04(6)(a) gives the judge "unfettered" discretion to just dismiss Shannex's summary judgment motion. The Civil Procedure Rules do not authorize judges to allow or dismiss summary judgment motions on an unprincipled or arbitrary basis.

[36] **"Best foot forward"**: Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.

[37] **Conversion to an application**: Lastly, the judge and counsel "must" bear in mind Rule 13.08(1)(b):

13.08(1) A judge who dismisses a motion for summary judgment on the evidence *must*, as soon as is practical after the dismissal, schedule a hearing to do either of the following:

- (a) give directions for the conduct of the action, if it is not converted to an application;
- (b) on the motion of a party or on the court's own motion, convert the action to an application in court, set a time and date for the hearing of the application, and give further directions as called for in Rule 5 - Application.

[emphasis added]

[38] Two reasons are often cited to support the request that an action be determined by a chambers judge upon affidavits. First is that the responding party's pleading has no merit. Second is that the disputed issues may be determined more efficiently by an abbreviated procedure without a full trial.

[39] Some jurisdictions address both factors with one Civil Procedure Rule: e.g. Ontario's amended Rule 20, that was discussed in *Hryniak*. Ontario's Rules do not have a general mechanism to convert actions into hybrid applications. Nova Scotia separates the functions with two Rules. Rule 13 addresses the first scenario with summary judgment. Rule 6 permits a chambers judge to convert an action to an application that will more proportionately allocate resources. Rule 6.02 lists the governing criteria, and a body of jurisprudence under Rule 6 has developed the principles for conversion. These include factors like those discussed in *Hryniak*.

[40] It is important to distinguish the functions of Rules 13.04 and 6. That is because different tones and criteria govern the two reasoning paths. A summary judgment motion frontally, sometimes scornfully attacks merit. A conversion motion considers the more efficient process to adjudicate a plausible claim.

[41] Rules 13.08(1)(b) and 6 acknowledge that, in Nova Scotia, the two functions follow separate channels. This affects the analysis of a summary judgment motion. The mere fact that an application by affidavit may allocate resources more proportionately than a trial is not a reason to summarily dismiss a pleading as unmeritorious under Rule 13.04. Rather, the proportionality factor should trigger consideration, by the judge or counsel: (1) whether the judge should exercise the discretion to decide an isolated point of law under Rule 13.04(6)(a), as discussed earlier, and (2) whether the action should be converted to an application under Rules 13.08(1)(b) and 6. See *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, paras. 11-20.

[42] Rule 13.08(1) says that a judge who dismisses the motion for summary judgment "must" schedule a hearing to consider conversion or directions. Accordingly, a dismissed motion under Rule 13.04 triggers the supplementary question:

- **Fifth Question:** If the motion under Rule 13.04 is dismissed, **should the action be converted to an application** and, if not, what directions should govern the conduct of the action?

[bolding in original]

ANALYSIS

[13] The defendants argue that Unisys' claims are so clearly without merit that they can be dismissed on summary judgment. The defendants' counterclaim is not addressed in this summary judgment motion. The defendants say they can establish the following:

1. That Pineau-Pandya was not a fiduciary
2. That the termination of Pineau-Pandya by Unisys eliminated whatever fiduciary duty that she may have had
3. That Unisys' failure to raise its position that Pineau-Pandya was a fiduciary during or before the settlement of her wrongful dismissal claim estopped Unisys from asserting the position post-settlement
4. If Pineau-Pandya was a fiduciary, there was no wrongful solicitation because Meraki's first two contracts were initiated by the clients approaching Pineau-Pandya, and the remaining contracts were obtained through the tender process
 - That Meraki's first two contracts were not initiated by Ms. Pineau-Pandya soliciting Unisys' clients, but by the clients approaching her about making a proposal
 - That Meraki's first two contracts were work that Unisys chose not to bid for, so there is no causation for Unisys' claim for damages for the "loss" of contracts
 - That Meraki's subsequent contracts were in response to public requests for proposals, so at law were not a product of solicitation by Ms. Pineau-Pandya
5. That whatever fiduciary duty Pineau-Pandya may have had, the time frame of the restrictions imposed on her by that duty had expired prior to Meraki's first contract, or in the alternative before any contract that Pineau-Pandya or Meraki may have solicited
6. If Ms. Pineau-Pandya was a fiduciary, any restrictions on Pineau-Pandya would have long expired by June 2020
7. That there is no evidence of the other defendants breaching their non-competition/non-solicitation/confidential information agreements with Unisys, or any common law duties.

[14] Unisys says the defendants' application for summary judgment on the evidence should be dismissed in its entirety. It says the defendants focused primarily on arguments about Unisys' claim for breach of fiduciary duty against Pineau-Pandya. On this cause of action, Unisys says there are numerous material facts in dispute, as well as questions of law. For the remaining 35 causes of action, Unisys

says the defendants have failed to put their best foot forward and have not met their onus of showing on evidence that there is no dispute of material fact. Unisys says further that the defendants have failed to provide notice as to which other causes of action it may be seeking summary judgment on.

DISCUSSION

[15] The court must apply the five-part *Shannex* test in order to determine whether summary judgment on some or all of the claims is appropriate. To reiterate, the first part of the test is at para. 34 of *Shannex*:

First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)] [emphasis in original]

[16] Justice Farrar writing for the Nova Scotia Court of Appeal in *Halifax Regional Municipality v. Annapolis Group*, 2021 NSCA 3, reiterated this step:

[36] To decide whether an allegation of fact is material, a court must consider whether the allegation is essential to establish a pleaded cause of action. **The first step in the analysis, therefore, is to identify the essential elements of that cause of action. The second step is to consider whether the allegations of fact in support of those elements are the subject of genuine dispute.** [emphasis added]

[17] The *Shannex* test holds that if there are genuine issues of material fact in dispute, the motion is dismissed on the basis that the case should not be determined by summary judgment (see *Shannex, supra*, at para. 34).

[18] Justice Bourgeois of the Nova Scotia Court of Appeal wrote about discerning whether facts are material in *Arguson Projects Inc. v. Gil-Son Construction Ltd.*, 2023 NSCA 72:

[35] The first question's focus is solely whether there is a dispute of material fact. A material fact can be one that stands on its own (i.e., whether an email was sent and received) or it can be mixed with a question of law (i.e. an email was sent, but does it constitute a "decision" pursuant to the notice provisions of the contract?). **At the first stage, a judge looks only at whether the material fact - was an email sent and received - is in dispute.** It is irrelevant at this stage whether there is a question of law mixed with the material fact (i.e., the application of the contractual provisions in determining the legal significance of the email) - that consideration belongs to the second step.

[36] In *Shannex*, Justice Fichaud noted "a 'material fact' is one that would affect the result. A dispute about an incidental fact - i.e., one that would not affect the outcome - will not derail a summary judgment motion" (para. [34]). And further:

The moving party has the onus to show by evidence there is no genuine issues of material fact. But the judge's assessment is based on all evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes.

[37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.

[38] To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the evidence presented on a motion that must be considered. As noted recently by Justice Farrar in *Risley*, **bald assertions in a responding affidavit, without more in terms of evidentiary foundation, will not give rise to a dispute in material fact. It is critical to emphasize that a dispute of material fact cannot arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings of what evidence could possibly be called at the time of trial.** [bolding added].

Preliminary issue prior to the summary judgment analysis: sufficient notice provided for which claims the defendants seeks summary judgment on?

[19] The plaintiff submits "it is difficult to conceive of a case less amenable to summary judgment in Nova Scotia than this one." Unisys advanced over 40 causes of action against Pineau-Pandya, Meraki and the individual defendants. Unisys says the defendants chose to focus almost exclusively on one cause of action: its claim of breach of fiduciary duty against Pineau-Pandya. With respect to the other causes of action, Unisys argues the defendants have failed to provide it with explicit notice of the causes of action for which it seeks summary judgment. It points to a passage from the Nova Scotia Court of Appeal's decision *Sinclair v. Fierro*, 2014 NSCA 5, in which Fichaud J.A. wrote for the court:

[59] Each party to a summary judgment motion is expected to "put his best foot forward" with evidence under both branches of the test under Rule 13.04 [*Burton*, para 87(6)]. This assumes that, when the responding party gathers his evidence for the motion, he has been given notice of the cause of action for which summary judgment is sought. He isn't expected to grope blindfolded.

[20] Unisys argues that the defendants have put them in a position of groping blindfolded with respect to which causes of action to respond to on the summary judgment motion.

[21] The plaintiff also provided the Ontario Court of Appeal case *Singh v. Trump*, 2016 ONCA 747, which addressed this issue:

[148] However, a motion judge may not grant or dismiss a claim on a motion for summary judgment that is not within the scope of the motion before him or her. Doing so would deny procedural fairness and natural justice.

[149] A fair hearing requires that a party have notice of the matters that will be at issue at the hearing and how that party may be affected by the hearing's outcome...

[22] Responding to Unisys' allegation of insufficient notice, the defendants argue that the court should reject it. They say the plaintiff has been aware of their position since the initial version of the defendants' brief was provided to the plaintiff in December 2021. There was an August 2024 brief filed in this matter, but the defendants say it is virtually the same brief, minus the removal of portions that breached settlement privilege, and the addition of caselaw. The defendants argue that both briefs provided clear notice of the claims that they seek to have struck by summary judgment:

The Defendants agree that their brief identified the remaining causes of action in a shorthanded fashion, rather than list them individually. This does not mean the 35 causes of action were not clearly identified, or at least identifiable. This is demonstrated by the fact that the Plaintiff has listed them in its brief. Accordingly, the Plaintiff is far from groping in the dark.

[23] The defendants' notice of motion, dated August 24, 2020, states that they are moving "for an order pursuant to Civil Procedure Rules 13.01 and 13.04 for Summary Judgment, dismissing all or some of the claims of the Plaintiff in this proceeding."

[24] In the defendants' brief in support of their application for summary judgment, filed August 14, 2024, counsel notes: "The Defendants submit that Unisys' claims are so clearly without merit that they can be dismissed on summary judgment..." In their brief, the defendants focus predominantly on the plaintiff's causes of action relating to Pineau-Pandya's alleged breach of fiduciary duty. The defendants summarize their argument on the summary judgment motion as follows:

- (a) Pineau was not a fiduciary,

- (b) If Pineau was a fiduciary, the termination of Pineau by Unisys eliminated whatever fiduciary duty that Pineau may have had,
- (c) If Pineau was a fiduciary, Unisys' failure to raise the fiduciary issue in the settlement of Pineau's wrongful dismissal claim estopped Unisys from asserting the position post-settlement;
- (d) If Pineau was a fiduciary, there was no wrongful solicitation because Meraki's first two contracts were initiated by the clients approaching Pineau and Meraki's remaining contracts were obtained through the tender process,
- (e) If Pineau was a fiduciary, Meraki's first two contracts were for work that Unisys chose not to bid for, so there is no causation between Unisys' alleged loss of business and a breach by Pineau or Meraki,
- (f) If Pineau was a fiduciary, the time frame for any restrictions imposed on her by that duty would be for much less than a year, well short of Meraki's first contract,
- (g) If Pineau was a fiduciary, and given that there was no wrongful solicitation occurred to June 2020, three years and eight months after Pineau's termination, any restrictions imposed on Pineau would have long expired by June 2020.
- (h) There is no evidence of the individual Defendants breaching their non-competition/non-solicitation/confidential information agreements with Unisys, or common law duties, and if there were any breaches, no damages resulted from those breaches.

[direct quote; emphasis added]

[25] I interpret that the final bullet point as the defendants' way of addressing the causes of action other than the fiduciary-related ones. The other bullet points are each addressed in a subsection. The last subsection in the body of the brief before the above summary refers to: "Unisys' remaining claims that the Defendants breached their non-competition / non-solicitation / confidential information agreements with Unisys, and similar common law duties" [emphasis added]. Under the sub-heading the only argument that the remaining claims should be dismissed is "that there is no evidence whatsoever that the alleged breaches occurred. For that reason, Unisys' claims of such breached [sic] have no real chance of success".

[26] In the defendants' reply brief, they assert that the plaintiff has put forward no evidence supporting the 35 causes of action they have identified. The defendants say this supports their position that there is no evidence supporting those claims. I do not agree. The defendants are the movers on the motion and it is their obligation to positively show there are no genuine material facts in dispute. The plaintiff does not bear this burden. In my view, the defendants/movers are confusing the burden. The plaintiff highlights that the defendants' brief is completely silent on whether there

are material facts in dispute in relation to the remaining 35 causes of action, and whether any of them require the determination of any questions of law.

CONCLUSION ON THE ISSUE OF NOTICE

[27] The defendants broadly state that they want some or all the claims dismissed on summary judgment. The defendants focus almost entirely on the issues with respect to whether Pineau-Pandya was a fiduciary, and if so, if she breached her fiduciary duties.

[28] It would not be appropriate for the court to summarily dismiss the causes of action that are not explicitly focused on by the defendants, other than the vague catch-all listed at para. 173(h), replicated above. That would constitute a denial of procedural fairness and natural justice as noted by the Ontario Court of Appeal in *Singh* (para. 148). I reiterate a portion of Justice Fichaud's decision in *Shannex* at para. 38, where he emphasized on behalf of the Nova Scotia Court of Appeal:

To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the evidence presented on a motion that must be considered...It is critical to emphasize that a dispute of material fact cannot arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings of what evidence could possibly be called at the time of trial.

[29] This makes it clear that the absence of a dispute of material fact cannot arise from counsel submissions rather than evidence.

[30] In any event, the defendants have certainly failed to show on the evidence that there is no genuine issue of material fact in dispute on the remaining 35 claims by solely advancing this vague and broad statement with no supporting positive evidence to corroborate it. Consequently, my analysis on Stage One on the *Shannex* test will focus solely on the fiduciary-type issues that were focused on by the defendants and responded to by the plaintiff.

IS THERE A GENUINE ISSUE OF MATERIAL FACT?

[31] There are several facts in dispute in the case at bar. The question for this court to grapple with and resolve is whether some or all those facts in dispute are genuine issues of material fact. For the reasons noted above with respect to notice, my analysis will only focus on material facts in dispute with respect to the causes of action that involve fiduciary issues.

[32] Following the Nova Scotia Court of Appeal's direction in *Annapolis*, the court must first consider the essential elements of the causes of action sought to be summarily dismissed. As noted above, I am only considering the fiduciary-related causes of action.

The Essential Elements of the Cause of Action

[33] The plaintiff in its brief noted there are generally four characteristics necessary for a fiduciary relationship to be created, summarizing *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at paras. 27-36:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power;
4. The fiduciary has given an undertaking of responsibility to act in the best interests of the beneficiary

[34] The plaintiff highlighted the case of *John A. Ford & Associates Inc. v. Keegan*, 2014 ONSC 4989, for its commentary on fiduciary relationships in the employer-employee context:

[170] In determining whether an individual is a fiduciary, the court must look at the nature of the relationship between the parties, the job function and the responsibilities being performed, as being more determinate of the issue, than the title held by the employee. The varying degrees of trust, confidence and reliance given to the employee and the corresponding vulnerability or dependency of the employer to competition when the person leaves, are the most pertinent factors in determining whether a fiduciary duty exists.

[35] The plaintiff also provided *GasTOPS Ltd. v. Forsyth*, 2009 O.J. 3969 at para. 83, in which the Ontario Superior Court of Justice set out indicia for determining whether an employee is a key employee, such that they owed a fiduciary duty to their former employer:

[83] ...

- i. What were the employee's job duties with the former employer?
- ii. What was the extent or frequency of the contact between the employee and the former employer's customers and/or suppliers?

- iii. Was the employee the primary contact with the customers and (or) suppliers?
- iv. To what extent was the employee responsible for sales or revenue?
- v. To what extent did the employee have access to and make use of, or otherwise have knowledge of, the former employer's customers, their accounts, the former employer's pricing practices, and the pricing of products and services?
- vi. To what extent was the former employee's information as regards customers, suppliers, pricing, etc., confidential?

Additionally, courts have considered the following:

- a) Whether the employee has scope for the exercise of some discretion or power, can unilaterally exercise that power or discretion so as to effect the beneficiary's legal or practical interest;
- b) Whether the employer is vulnerable to or at the mercy of the employee holding a discretion or power; the employee's knowledge or customer contact information; needs and preferences, and therefore, an ability to influence customers;
- c) Whether the employee has "encyclopedic knowledge" of his/her employer's customers, unrestricted access to all customer lists and information concerning customers, and knowledge of policy issues and personal contact with, and responsibility for, a large portion of the customers;
- d) The employee's knowledge of the business and market opportunity of the employer or playing a role in the employer's strategic market development;
- e) Whether or not the employee's functions are essential to the employer's business, therefore rendering the employer vulnerable to the employee's departure.

Any one of these factors, or a combination of them may result in a finding that an individual owes a fiduciary obligation to his former employer. [emphasis added in plaintiff's brief].

[36] The plaintiff Unisys says the court must consider these indicia to determine whether Pineau-Pandya at the relevant time was a key employee who owed a fiduciary duty to the plaintiff. It says there are disputes in material facts which are part of the court's analysis of whether she was a fiduciary or not.

Whether the allegations of fact in support of those elements are subject of genuine dispute:

[37] The plaintiff Unisys argues that there are material facts in dispute relating to the breach of fiduciary claims, specifically in relation to the following issues:

- (a) Whether Pineau-Pandya is a key employee;
- (b) Whether Unisys was vulnerable following Pineau-Pandya's departure;
- (c) Whether Pineau-Pandya solicited Watts and Caldwell, and/or whether Pineau/Lu solicited Li; and,
- (d) Whether Pineau-Pandya was terminated for just cause.

[38] Accordingly, it argues that the defendants fail on the first prong of the summary judgment test. The plaintiff emphasizes that the onus is on the defendant to show that there are no genuine material facts in dispute. They argue that based on the defendant's evidence on this motion, there are many material facts in dispute. If the court finds that there are genuine material facts in dispute, the summary judgment analysis does not continue.

Whether Pineau-Pandya was a key employee:

[39] It is undisputed that Pineau-Pandya was a Director at Unisys and that Meraki and Unisys are competitors. However, whether Pineau-Pandya was a key employee with fiduciary duties owing to Unisys is hotly disputed. The court's determination of whether she was a fiduciary is a question of fact. Unisys highlighted some of the GASTOPS indicia in which it says there are genuine disputes of material fact in the case at bar. For example, on (a) the employee's jobs and duties with the former employer, Unisys argues that Pineau-Pandya is downplaying her role at Unisys. She argues that she was a "first-time manager with five or more levels of management above her" but Mr. Oliver argues this is not accurate that "she would [be] one level removed from Unisys' Canada's executive management" and "two levels removed from Unisys [Corporation]". Pineau-Pandya stated in her affidavit:

I was not involved in the sale of Unisys' services to customers. My direct contact with Unisys' customers and clients related solely to Unisys' performance of its contracts with those customers and clients.

[40] Oliver, who replaced Pineau-Pandya at Unisys, countered this in his affidavit by saying that Pineau-Pandya was in fact involved in various "pitches" to prospective clients and customers of the AMANDA software. For context, the plaintiff provided a brief description of the software in its brief:

AMANDA software is a specialized type of software owned by Unisys' partner and client, CSDC Systems Inc. ("CSDC"), which is used for issuing and managing permit, license, inspection, and compliance information for governments. CSDC is now owned by a company called Granicus.

[41] Unisys argues the defendants have tried to minimize Pineau-Pandya's duties. They argue that there are genuine material facts in dispute in relation to Pineau-Pandya's job functions, the nature of her duties, and the nature of the trust given by Unisys. Her functions and the circumstances of her departure from the company are at issue. Unisys also says that whether there was a fiduciary duty or not is a highly contextual analysis, and the resolution of facts in dispute is required to determine whether Pineau-Pandya had a fiduciary duty or not.

[42] The defendants argue that Pineau-Pandya was not a fiduciary. They say that the issue of whether she was a fiduciary depends on her job responsibilities, and the power and discretion (or lack thereof) that she had over the interests of Unisys that would make it vulnerable to competition from her. They say the material facts in relation to this issue are Pineau-Pandya's job responsibilities and discretion, in respect of which the defendants say there is no genuine issue. The defendants say:

A review of the other case law demonstrates that the...requirements of discretion and power, and resultant vulnerability, are at the heart of a finding that an employee is a fiduciary. Those facts simply do not exist in this case, and it is not close. Unisys' claim that Pineau was a fiduciary does not have a real chance of success. [emphasis added]

[43] The defendants' focus on arguing why Pineau-Pandya is not a fiduciary. With respect, that is not the question on summary judgment. The question is whether there are genuine material facts in dispute that inform the fiduciary analysis. In its closing submissions, counsel for the defendants argued that for each issue, material facts are not in dispute. On whether Pineau-Pandya was a fiduciary, the defendants state that none of the relevant facts are in dispute. They argue that the evidence has shown that Pineau-Pandya had no authority beyond managing the delivery of the work. They argue that her lack of authority is an undisputed material fact.

[44] The defendants say that Oliver's affidavit is replete with opinion and hearsay which should not be relied upon by the court. They say his evidence does not raise a dispute of material fact. They say the court should not accept his opinion that Pineau-Pandya was a "key employee". They say that, at best, Oliver's affidavit raises some minor differences about her job duties but in the context of the rest of the

evidence it is immaterial. This is essentially the extent of the defendant's argument as to why there are no material facts in dispute.

[45] There are several indicia for determining whether an employee owed their employer a fiduciary duty. The factual considerations underpinning the analysis of whether Pineau-Pandya is a fiduciary are material facts - they have an impact on the determination of the case. They are not peripheral facts. In the case at bar, there are many factual disputes with respect to whether Pineau-Pandya was a fiduciary. Among the factual disputes are genuine disputes of material facts. Referencing the GASTOPS criteria, the parties disagree on Pineau-Pandya's job duties, including her extent/frequency of contact with customers, amongst other factors. Determining whether she is a fiduciary will require the court to assess credibility and make factual findings on what her duties were, and what authority she had and did not have, and parse through the discrepancies between the defendants' and plaintiff's evidence on these points. This cannot be done at the summary judgment stage and must be reserved for trial.

Whether Unisys was vulnerable following Pineau-Pandya's departure:

[46] The plaintiff argues that Unisys was vulnerable following Pineau-Pandya's departure and there are material facts in dispute on this issue. The defendants disagree that Unisys was made vulnerable and disputes that there are key facts in dispute on this issue.

[47] The court in GASTOPS noted that "a key employee is one whose position and responsibilities are essential to the employer's business, making the employer particularly vulnerable to competition upon that employee's departure" (para. 82).

[48] In his affidavit, Oliver says that Pineau-Pandya held the second most senior position to Tim Feick, who was the general manager for Unisys and ran its Halifax office. Pineau-Pandya in her cross-examination disagreed with this, and said no one would say she was second to Mr. Feick. She explained that when Unisys aligned to the United States, she had another line of bosses in the U.S. She testified that Tim Feick was one of her bosses, but she was not second to him. She did not fill in for him when he was gone.

[49] Oliver also deposed in his affidavit that she was the leader of the AMANDA software globally and was the only person at Unisys that had the ability to bid on AMANDA-related opportunities. Pineau-Pandya disagreed on cross-examination and said her direct leader was Lynn Geller, Director of Application Services.

[50] The defendants argue that Unisys was not vulnerable upon her departure because Pineau-Pandya did not have the power or authority to affect Unisys' legal or practical interests. They argue that that Unisys' lack of vulnerability to competition from Pineau-Pandya is demonstrated by its conduct upon her termination; for example it did not assert that Pineau-Pandya was a fiduciary and therefore restricted in the work she could look for post-termination. The defendants further argue that Unisys' lack of vulnerability is demonstrated by the fact that Pineau-Pandya's job responsibilities were temporarily covered by others at the company without client complaints and there were no problems once Oliver assumed the responsibilities in May 2017.

[51] Unisys disputes this characterization and says that the fact that Pineau-Pandya's job responsibilities were temporarily covered by others does not equate to a lack of Unisys' vulnerability. It says the opposite was true: "Pineau-Pandya's role was essential to the effective functioning of the AMANDA team in Halifax and Unisys had no one who could immediately step in and perform all of [her] responsibilities."

[52] In my view, there are genuine disputes of material fact underlying the court's assessment of whether Unisys was made vulnerable by Pineau-Pandya's actions. This is for the same reasons as outlined in section (a): following the caselaw describing the essential elements of whether a fiduciary relationship existed in an employee-employer context, the alleged vulnerability of the employer is a relevant determination. The factual disputes with respect to Unisys' vulnerability are material to the court's determination of whether Pineau-Pandya was a fiduciary or not.

Whether Pineau-Pandya solicited Watts and Caldwell and/or whether Pineau/Lu solicited Li:

[53] The plaintiff Unisys alleges that Pineau-Pandya breached her fiduciary duties by (1) misusing Unisys' confidential information; (2) soliciting its employees; and (3) taking Unisys' corporate opportunities. In its brief, the plaintiff states at para. 145:

For the purpose of this motion, it is only necessary to focus on the second alleged breach - Pineau's solicitation of employees, and specifically here Watts and Hildebrand - to demonstrate that there are material facts in dispute which should result in the dismissal of the summary judgment motion with respect to a breach of fiduciary duty.

[54] Unisys argues there are material facts in dispute regarding the circumstances of Caldwell's (now known as Hildebrand) and Watts' departure from Unisys and material facts in dispute mixed with a question of law as to whether this amounted to "solicitation" at law.

[55] Unisys argues the following on the material facts in dispute in its brief:

The Defendants failed (whether intentionally or not) to document their business arrangements with formal agreements, and have failed to preserve and/or disclose records of their communications during this period, so the evidentiary record is incomplete as to who contacted whom, when, and what was discussed. Given the lack of documentation of these arrangements (caused by the Defendants), credibility will be a key consideration for the trial judge when determining whether Pineau solicited Watts and Hildebrand as well as the role of Shiliang Lu in the formation of Meraki. These significant credibility issues cannot be determined on a summary judgment motion. [emphasis added].

[56] The plaintiff argues that Pineau-Pandya solicited employees of Unisys, while the defendants deny that solicitation occurred. The plaintiff says there is a contextual analysis required for the court to determine whether there was a breach of an obligation not to solicit employees. They say the assessment of the timelines and occurrences of alleged solicitations should be properly dealt with at trial and involve disputes of material fact. Unisys alleges that Pineau-Pandya encouraged several Unisys employees to leave the company by offering them employment while they were still employed at Unisys.

[57] Pineau-Pandya denies that she solicited Watts and Caldwell. She says she did not reach out to any of the Unisys employees to offer them work. The defendants say that the evidence of the individual defendants (other than Pineau and Squires) was that they each approached Pineau or Lu about working for Meraki. Pineau-Pandya said Caldwell and Watts had reached out to her to keep in touch. Watts would send her job postings and told her to let her know where she ended up, and that he would love to work with her again. They kept in touch and became friends. Pineau-Pandya was invited to a family barbecue, where Caldwell and Watts asked her if she had found work. She told them about the CDSC proposal, and they both expressed interest in joining her. When Pineau-Pandya subsequently informed them that the tender was successful, Watts and Caldwell agreed to join her as sub-contractors of Meraki.

[58] The court's determination of whether Pineau-Pandya solicited the other individual defendants depends on whether her evidence is accepted in whole or in

part. Whether Pineau-Pandya is believed necessitates a credibility assessment which cannot be done at the summary judgment stage. Justice Keith in *Aiken v. Nova Scotia (Attorney General)*, [2021] N.S.J. No. 81, commented on the inability of the motions judge to assess credibility at the summary judgment stage:

[54] To be clear, I neither accept nor reject Mr. Aiken's version of events. The problem is that the Attorney General asks that I reject Mr. Aiken's testimony as entirely implausible. Respectfully, this would involve an assessment of credibility which is an impermissible exercise of my discretion in a motion for summary judgment.

[59] The court needs to make factual findings on whether Pineau-Pandya approached the individual defendants with job offers or whether they approached her about an interest in being employed with Meraki. Whether solicitation occurred depends on the resolution of this material fact in dispute. On the causes of action relating to solicitation, the defendants have not discharged their onus of showing there are no genuine material facts in dispute.

Whether Pineau-Pandya was terminated for just cause:

[60] The plaintiff says another disputed issue is whether Pineau-Pandya's employment with Unisys was terminated for "just cause." She says she was terminated without just cause, which the plaintiff disputes. Unisys says there are material facts in dispute respecting the circumstances of her termination, including the following:

1. Comments made by Pineau-Pandya to Unisys staff members at CSDC conference in Niagara Falls in October 2016;
2. Pineau-Pandya's conduct towards Service Nova Scotia;
3. Pineau-Pandya's job performance.

[61] On the first issue, Pineau-Pandya sent an e-mail to her manager Lynn Geller, and the H.R. manager, Mary Collins, following her termination regarding the allegations of her making inappropriate comments at the conference:

I do want to let you know that I never spoke ill of Unisys to the team. There was a conversation at CTAC about us starting our own AMANDA consulting shop but it was just fun and there wasn't any of our clients present.

[62] Mary Collins' rejects Pineau-Pandya's denials:

I did not then - and do not now - believe Andrea's denials during her termination or in her email that the comments she made to her team at the conference were "just in fun."

[63] This is a dispute of material fact. The court must assess credibility and make factual findings about what was said at the conference and in what tone it was said and what the implications of that are.

[64] On the second issue, Unisys says that Pineau-Pandya reached out to a manager of Service Nova Scotia, Chad MacDonald, to "blast him" while he was on holiday about feedback that he provided to Unisys about Pineau-Pandya. Ms. Lidstone, another Service Nova Scotia manager, reported the text message to Joyce Burns of Unisys in the following way:

Hi Joyce, How are things at the office? Chad told me that Andrea texted him to blast him about the feedback we provided Lynn. I hope you're not being affected by the fallout.

[65] Pineau-Pandya acknowledges that she reached out to Chad MacDonald while he was in Hawaii, but that he told her to feel free to reach out to him and that he would be working while he was there. The text message allegedly sent by Pineau-Pandya to Mr. MacDonald is not before the court. The defendants say the only evidence of this conversation is hearsay based on what Ms. Collins was told.

[66] I have not analyzed the third example of alleged dispute of material fact that the plaintiff raised because in my view, issues one and two clearly raise disputes in material fact and it is not necessary to continue. Credibility assessments and factual findings by the trial judge are required: *Aiken* at para. 54.

[67] The same applies for most issues raised by the plaintiff in which credibility assessments by the trial judge are necessary to resolve the material factual disputes.

CONCLUSION

[68] In my view, the defendants have not discharged their onus on this motion to show that there are no genuine issues of material fact as required by the *Shannex* test at step one. The plaintiff has raised countless disputes of fact, and I am satisfied that many of them are material facts. That is to say, there are many facts at issue that would affect the result (i.e. not incidental facts: *Shannex* at para. 34; *Arguson Projects Inc.* at para. 36). Many of the factual disputes in issue require resolution

through credibility assessments which is impermissible at the summary judgment stage.

[69] For these reasons, the defendants' motion for summary judgment is dismissed. I will leave it to counsel for the parties to try to agree on costs, failing which, I am willing to receive their written submissions within 30 calendar days of the date of release of this decision.

[70] I will be in contact with counsel in due course to schedule a hearing to deal with the requirements of Civil Procedure Rule 13.08.

Glen G. McDougall, J.