NOVA SCOTIA COURT OF APPEAL

Citation: Lienaux v. 2301072 Nova Scotia Ltd., 2005 NSCA 97

Date: 20050621
Docket: CA 214597
Registry: Halifax

Between:

Charles D. Lienaux and Karen L Turner-Lienaux

Appellants

v.

2301072 Nova Scotia Limited, Marven C. Block, Q.C., The Toronto Dominion Bank

Respondents

v.

Wesley G. Campbell and Grant MacNutt

Third Parties

Judges: Roscoe, Freeman and Saunders, JJ.A.

Appeal Heard: May 16, 2005, in Halifax, Nova Scotia

Held: Appeal allowed in part, per reasons of Roscoe, J.A., concurred in by Freeman and Saunders, JJ.A.; and Saunders, J.A. concurring by separate reasons, concurred in by Freeman, J.A.

Counsel: Charles D. Lienaux and Karen L. Turner-Lienaux, on their own behalf
Gavin Giles, Q.C. for respondents 2301072 Nova Scotia Limited, Toronto-Dominion Bank and Third Party Wesley G. Campbell
Marjorie A. Hickey, Q.C. for Marvin C. Block, Q.C.
no one appearing on behalf of Mr. MacNutt

Reasons for judgment:

[1] This is an appeal from a decision of Chief Justice Kennedy whereby he denied the application of Charles Lienaux and Karen Turner-Lienaux to amend their defences and counterclaims and allowed the application of Wesley Campbell, 2301072 Nova Scotia Limited and the Toronto-Dominion Bank to strike out portions of the defences. The decision under appeal is reported as 2004 NSSC 19; [2004] N.S.J. No. 18 (Q.L.).

[2] Where it is necessary to distinguish between the individual and corporate respondents and third parties on the appeal, I will refer to them by name, otherwise I will refer to them collectively as respondents, since their positions in responding to the appeal do not differ in substance.

[3] The defences in issue are in response to two foreclosure actions commenced by the Toronto-Dominion Bank against the appellants in 1993 to enforce two mortgages, one in the principal amount of $100,000 and the other in the principal amount of $233,000. The background facts and the relationship between the parties on the appeal are succinctly set out in the decision under appeal as follows:

> [11] The subject matter of the claims of 2301072 Nova Scotia Limited are promissory notes, personal guarantees and mortgages collateral thereto, in respect of the sums of $100,000 and $233,000, which were executed by Lienaux and Turner-Lienaux in favour of Central Guarantee Trust Company (CGT) in 1989. 2301072 Nova Scotia Limited claims the benefit of those notes, guarantees and mortgages, pursuant to their assignment to it by the Toronto-Dominion Bank. The Toronto-Dominion Bank had claimed the benefit of the notes, guarantees and mortgages by virtue of their assignment to it by CGT.
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> [12] Lienaux and Turner-Lienaux argue that the notes, guarantees and mortgages are void and unenforceable against them. Lienaux argues that they have been discharged as against him as a result of his second assignment into bankruptcy. Turner-Lienaux argues that her guarantees were coerced by undue influence exercised on her by Lienaux and that neither her guarantee, nor the mortgages collateral thereto, were preceded by independent legal advice, to which she says she was entitled.
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> [13] Another party to the action represented by counsel before me is Marven C. Block, Q.C. He is involved in the litigation because he was the lawyer retained by CGT to prepare the documentation that is central to the matter.

> [14] In addition, Lienaux and Turner-Lienaux both raise defences which relate to their participation with Campbell in the development of The Berkeley Senior Citizens Residence in Halifax in 1989. It is these latter pleadings that are the subject of these applications.

[4] As well, the facts underlying the protracted litigation between Mr. Lienaux and Mr. Campbell and related parties arising from their involvement in the Berkeley senior citizen's residence project are set out in detail in the decision of Justice Suzanne Hood (2001 NSSC 44; [2001] N.S.J. No. 230 (Q.L.)) and the decision of this court on the appeal from Justice Hood (2002 NSCA 104; [2002] N.S.J. No. 369 (Q.L.)). An application for leave to appeal to the Supreme Court of Canada was dismissed with costs by that court on March 20, 2003: [2002] S.C.C.A. No. 425 (Q.L.). The Quicklaw headnote of this court's decision dismissing the appeal from Justice Hood (one of the 24 grounds of appeal, not relevant to this proceeding, was allowed) provides sufficient context for the matters now in issue:

> Appeal by Smith's Field Manor Development from the dismissal of its action against Campbell for damages for fraud, dishonesty and breach of fiduciary duty. Smith's Field alleged that Campbell breached a fiduciary duty by failing to disclose the nature of the initial investment in a retirement home project made by his team. Campbell and his two associates each contributed $50,000 in equity. The remaining $200,000 contribution came in the form of a loan from their company, Stonehedge. Smith's Field stated that the long-term equity contribution should have come from the investor's personal resources, and that failure to inform it that the investment was in the form of a loan from Stonehedge was a material non-disclosure amounting to fraud and a breach of a fiduciary duty. It also alleged that Stonehedge was not at liberty to commit $200,000 to the project, as there were creditors who had claims against those funds that could be asserted against Smith's Field. Smith's Field claimed that if it had known the true situation, it would not have participated with Campbell and his associates, and it sought restitution. The trial judge had found that the evidence did not support the allegations of fraud or breach of fiduciary duty. Her findings generally supported the facts alleged by Stonehedge and did not support the facts alleged by Smith's Field.
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> HELD: Appeal dismissed. The trial judge did not err in her findings of fact. A significant body of evidence supported her findings. There was no merit to the allegations involving the source of the funds.

[5] In the foreclosure action Chief Justice Kennedy granted the respondents' application and struck out 107 new paragraphs proposed to be added to the

three defences filed by the appellants on the basis that the issues raised by them were *res judicata*. The appellants' application to amend the defences was dismissed in respect of those 107 specific paragraphs. Several other uncontested amendments were allowed. The Chief Justice awarded solicitor client costs to the corporate respondents and Mr. Campbell, and costs in the cause to Mr. Block.

[6] On appeal, Mr. Lienaux and Ms. Turner-Lienaux raise the following issues:

1. Did Chief Justice Kennedy err in law and deny the appellants procedural fairness and fundamental justice when he failed to render his reasons for judgment within a reasonable time after issues were submitted to him in writing and within a reasonable time after issues were argued before him?

2. Did Chief Justice Kennedy err in law when he ruled that events which have occurred since the appellants applied for leave to amend their pleadings do not give rise to the appearance of bias?

3. Did Chief Justice Kennedy base his decision on wrong fact when he ruled that the appellants had an opportunity to raise defences - - sought to be included in the amendments applied for - - in proceedings tried before Justice Suzanne Hood and this Court?

4. Did Chief Justice Kennedy err in law and deny the appellants procedural fairness and fundamental justice when he ruled that defences pleaded by the appellants - - which are substantively identical to defences pleaded by the defendant Marven Block - - are *res judicata*.

5. Does refusal by the learned Chief Justice to allow the amendments sought result in patent injustice?

[7] The standard of review on an appeal from a refusal to allow an application to amend pleadings is as stated by Glube, C.J. in **Lamey v. Wentworth Valley Developments Ltd.** (1999) 175 N.S.R. (2d) 356; N.S.J. No. 122 (Q.L.)(C.A.):

> [10] It is well-established law in Nova Scotia that there are only limited circumstances under which an interlocutory appeal will succeed. The Court of Appeal will not interfere unless wrong principles of law have been applied or a patent or manifest injustice has resulted. (See: **Exco Corporation. v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331(N.S.S.C.A.D.); **Minkoff v.**

Poole and Lambert (1991), 101 N.S.R. (2d) 143 (N.S.S.C.A.D.); and **Global Petroleum Corp. et al. v. CBI Industries Inc. et al.** (1997), 158 N.S.R. (2d) 201 (N.S.C.A.).)

. . .

[12] The trial court has a wide discretion on an application to amend pleadings. It is usual to allow amendments where the applicant is acting in good faith and where there would be no injustice or serious prejudice by the amendment that could not be compensated by costs. The test to be applied in Nova Scotia for granting an amendment to a pleading is set out in **Stacey v. Electrolux Canada** (1986), 76 N.S.R. (2d) 182, where Chief Justice Clarke states at page 183:

> [5] A review of the case law leads us to conclude that the amendment should have been granted unless it was shown to the judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated by costs. One of the earliest statements of this proposition is by Bramwell, L.J., in **Tildesley v. Harper** (1878), 10 Ch.D. 393. In considering whether to grant leave to amend the statement of defence, he stated at pp. 396-397:
>
> > . . . My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.
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> [6] The opinion expressed by Bramwell, L.J., has been followed in numerous judgments of courts since 1878, including this court in **Baumbour v. Williams** (1977), 22 N.S.R. (2d) 564; 31 A.P.R. 564. In **Baumbour**, at the commencement of the trial, the defendant sought to amend his defence to allege fraud. After reviewing the authorities, including **Tildesley**, Coffin, J.A., said at p. 567:
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> > . . . there is a very important issue to be tried and the respondents have not shown that they would be unduly prejudiced by the amendment. The respondents should be adequately compensated for any inconvenience by costs.

[8] The Court will not interfere with the decision under appeal unless wrong principles of law were applied or a patent injustice resulted from the order.

1. timeliness of the decision under appeal

[9] The application was heard by the Chief Justice on July 10, 2003. The decision was released on January 22, 2004, more than six months later, contrary to the provisions of s. 34(d) of the **Judicature Act** R.S.N.S. 1989, c. 240, as amended. The appellants submit that the delay has resulted in procedural unfairness, that justice delayed is justice denied, and the proper remedy in the circumstances would be to set aside the decision and allow the application for the amendments.

[10] One of the difficulties with the appellants' argument is that the delay in resolution of the applications has presumably been just as detrimental to the other parties, and to fashion a remedy that benefits only one side when the delay is adverse to all sides would be more unfair than the delay. The appellants have not established that they suffered any specific prejudice as a result of the additional 12 days in excess of six months. Furthermore, as noted in **Langille v. Midway Motors Ltd.**, 2002 NSCA 39, at ¶ 8, a failure to deliver a decision within six months does not result in an automatic loss of jurisdiction and:

> ... The time limit should not be considered to be mandatory but rather strongly directory.

[11] The first ground of appeal should therefore be dismissed.

2. bias

[12] The appellants submit that the delay in deciding the application, coupled with alleged procedural errors made by the Chief Justice, creates the appearance of bias against them. As confirmed by the Supreme Court of Canada in **R. v. S. (R.D.)**, [1997] 3 S.C.R. 484, the party alleging bias bears the onus of proof to the following standard:

> 111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in **Committee for Justice and Liberty v. National Energy Board** , [1978] 1 S.C.R. 369, at p. 394:
>
> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question

> and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. . . ."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.[citations omitted] Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold":...

[13] One instance of unfairness the appellants allege is that the respondent Mr. Block was allowed to plead defences that the appellants were not, for example, that in relation to recovery by the Bank through the Canada Deposit Insurance Corporation. The simple answer to that allegation is that no party applied to have Mr. Block's defence struck out. Surely an informed person, viewing the matter realistically and practically and having thought the matter through, would not conclude that failure to deal with a matter not raised before him was indicative of any bias.

[14] Another accusation of the appellants is that the Chief Justice exhibited bias by striking out paragraph 68 of their defence which alleged that Mr. Campbell "deceived" Justice Hood about the source of the $200,000 that was invested in the Berkeley project. The argument is that at this stage of the proceedings the allegation of deception is deemed to be true, and if Mr. Campbell has deceived the court, the integrity of the administration of justice will be damaged if the deception is not remedied. The appellants cite **Re Pinochet** (1998), 237 N.R. 201 (HL) in support of their submission that the paramountcy of the integrity of the administration of justice "outranks the rule of *res judicata*". They submit:

> 34. If Campbell deceived the Court in the proceedings decided by Justice Hood then it is in the best interests of the administration of justice that that deception be remedied. If the Court does not require the deception to be remedied then it appears that there is a bias which is influencing the Court not to enforce the law against Campbell.
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> 35. If a reasonable person was informed of the foregoing matters he or she would conclude that it appears that Chief Justice [Kennedy] was not being impartial in this matter. According to **Pinochet** *supra* that appearance provides a

sufficient basis for striking out the Chief Justice's decision refusing leave to allow the appellants to amend their defence.

[15] More will be said about the applicability of the doctrine of *res judicata* to the amendments sought by the appellants in the following section of this decision. However, once more, in my view, a reasonably informed person would not suspect a judge of partiality on the basis of his application of an established legal doctrine, such as *res judicata* which has been referred to as "a cornerstone of the justice system" to the facts of this case. (see: *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, 2000, page 4) Here there is nothing remotely similar to the facts giving rise to the finding of bias in the **Pinochet** case. Whether the legal principle was properly applied is an arguable issue to raise on appeal, but it does not give rise to a reasonable apprehension of bias. This ground of appeal should be dismissed.

3. errors of fact

[16] In the third ground of appeal, the appellants submit that the chambers judge erred in finding that some of their new defences were *res judicata* on the basis that they could and should have been raised in the action tried by Justice Hood. Among them are those alleging that since Mr. Campbell and the numbered company only paid $2,000 for the assignment of the T-D Bank mortgages, they should not be entitled to recover more than that on the foreclosure. In fact, the appellants had unsuccessfully sought to amend their pleadings in the case before Justice Hood to raise the issue of the assignment of the mortgages from the T-D Bank to Mr. Campbell. To that limited extent, I would agree that the chambers judge was mistaken. I will deal with this further in the next section of these reasons.

[17] Under this ground of appeal the appellants also submit that the chambers judge erred in fact in determining that they could or should have raised the allegations that Mr. Campbell "embezzled" the $200,000 invested in the Berkeley project in the earlier proceeding. Again they submit that they tried to raise this allegation in this court on the appeal of the Hood, J. decision and were unsuccessful in that attempt. While it is true that this court denied the appellants application to amend their statement of claim and submit fresh evidence after the hearing of the appeal, concerning the source of the $200,000, it was on the basis that it was not relevant and it was not "new", in the sense that the information upon which the application was based was available before the trial. Justice Freeman said:

> [17]... I would deny the application for leave to adduce fresh evidence and to amend the statement of claim. In my view, even if the allegations respecting the Rosebridge investors were proven, they are irrelevant to the outcome of this appeal. Whatever rights the bank or the investors may have had against Stonehedge Investments or its principals, Justice Hood's findings make it clear that Berkeley Developments was immune to their claims until the equity notes fell due. Furthermore, while the appellants submit the "Rosebridge Offering" should have been disclosed, it was a matter of public record in the files of the Nova Scotia Securities Commission which, with due diligence, could have been brought forward by the appellants at the trial.
>
> [18] The appellants do not seek to allege the funds came unlawfully into possession of Stonehedge. It must therefore be assumed that control over funds lawfully in the possession of Stonehedge Investments had been entrusted to Campbell, Logie and MacNutt, the only shareholders, directors and officers of that company. If the Rosebridge investors or the Canadian Imperial Bank of Commerce had an objection to the way the funds were put to use, their recourse lay against Stonehedge Investments through those shareholders, directors and officers, not The Berkeley Developments Limited. The three-year terms of the promissory notes securing the shareholders' investments in Berkeley Developments matured September 28, 1992, more than a year before the foreclosure, and the earnings from which they were to be repaid never materialized. The source of the Stonehedge group's equity investments played no role in the foreclosure that sealed the fate of The Berkeley Developments Limited.
>
> [19] In my view there is no merit in any of the appellants' allegations involving the source of the Stonehedge funds. ...

[18] I agree that the chambers judge appears to have misunderstood the facts relating to earlier attempts to amend their pleadings in the initial action. Since both errors are matters that will be dealt with in more detail as necessary in the analysis of the fourth ground of appeal, it is not necessary to make further comment here.

4. *res judicata*

[19] The central legal issue raised on the appeal is whether the Chief Justice erred in finding that all 107 proposed amendments were *res judicata*. In coming to this conclusion the chambers judge relied on **Hoque v. Montreal Trust Co. et al.** (1997), 162 N.S.R. (2d) 321 where Cromwell, J.A. set out the relevant principles beginning at ¶ 19:

[19] This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. Distilled to its simplest form, the issue in this appeal is how these two important principles should be applied to the particular facts of this case.

[20] *Res judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in **Angle v. M.N.R.** (1974), 47 D.L.R. (3d) 544 at 555:

> ....The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ..... The second species of estoppel per rem judicatam is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in **Hoysted et al. v. Federal Commissioner of Taxation** (1921), 29 C.L.R. 537 at pp. 560-1:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue- estoppel").

[21] *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed." : see Sopinka, Lederman and Bryant, **The Law of Evidence in Canada** (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "...prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

[22] It is the second aspect which is relied on by the appellants. Their principal submission is that all matters which could have been raised by way of set-off, defence or counterclaim in the foreclosure action cannot now be litigated in Dr. Hoque's present action.

...

[37] Although many of these authorities cite with approval the broad language of **Henderson v. Henderson**, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[20] In **Angle v. M.N.R.** , *supra* referred to by Justice Cromwell, Justice Dickson defined the requirements of issue estoppel as:

... (1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[21] In this case the Chief Justice determined that the proposed amendments by the appellants violate the principles upheld in **Hoque**. He described the earlier proceeding tried by Justice Hood as follows:

[33] The litigation which culminated in Justice Hood's decision [and the appeal to the Court of Appeal] covered the full range of complaints by Lienaux and Turner-Lienaux with respect to the conduct of Campbell in the course of the Berkeley Project. Justice Hood rejected all the claims of assorted misconduct, negligence, perjury, breach of fiduciary duty, misrepresentation, and fraud. The allegations considered by Justice Hood and rejected, related to the period including the 1989 financing of the Berkeley Project, and the 1989 loans from CGT. The Lienauxs pleadings in the first action were as extensive as their

> defences and counter-claims in this action. Virtually every conceivable avenue of alleged misconduct by Campbell was raised by Lienaux and Turner-Lienaux, considered and rejected by Justice Hood.

[22] The Chief Justice concluded that each of the proposed amendments contained an allegation that was previously examined and rejected by Hood, J. or could and should have been brought forward during that trial. He described the proposed amendments as mirroring the allegations considered by Justice Hood and continuing the theme of the previous litigation which was criticized and dismissed with solicitor-client costs and therefore subject to the principals of *res judicata*. He concluded:

> [41] It is made definitive in Justice Hood's decision that the inability of Lienaux and Turner-Lienaux to repay those loans cannot be linked to any improper dealings by Campbell.
>
> [42] The allegations have been found to be of no merit. That conclusion was tested on appeal and upheld. The campaign of baseless accusation carried by Lienaux and Turner-Lienaux against Campbell is over.
>
> [43] It would be an abuse of the process of this Court to allow those allegations, dressed up in different clothing, to be restated and revisited.

[23] The appellants submit that the chambers judge erred in the application of the law of *res judicata* to the facts of this case for four reasons:

> (i) the appellants are not pursuing a second litigation against Campbell - - the appellants' pleadings are in response to claims being made against them by a corporation which was not a party to the proceedings before Justice Hood;
>
> (ii) the parties in the present proceeding are not the same parties as in the Hood case;
>
> (iii) the issues raised are not the same issues that were tried in the Hood case;
>
> (iv) Justice Hood expressly ruled that matters raised in the proposed amendments should be tried in this proceeding and refused to consider them in the proceeding tried before her.

[24] None of the responding parties addressed these points in oral or written argument, but in my view these arguments have little merit, and with respect to almost all of the proposed amendments, it was correct to bar them on the

basis of the proper application of the principles of issue estoppel, or cause of action estoppel. There are two minor exceptions with which I will deal separately after dealing with the points raised by the appellants generally.

[25] It would be helpful to begin the *res judicata* analysis by briefly revisiting Justice Hood's decision. It is beyond doubt that the major issues in that proceeding were: what was the source of the $200,000 contributed by the Stonehedge Group, whether the source or manner of payment of the $200,000 had any causal connection to the financial failure of the Berkeley project, and whether Mr. Campbell's actions were unlawful, negligent or fraudulent. Peripheral questions included whether there was a joint venture, whether Mr. Campbell was in a fiduciary position and if so, whether he breached his fiduciary duties, and what caused the financial collapse of the project. These issues have been finally determined and are not subject to collateral attack in the present foreclosure proceeding. All proposed amendments that raise the same issues are *res judicata*.

[26] It is the substance of the previous pleadings and findings of the court that must be examined, not the minute details, or slight differentiation in the characterization of the claims. The statements of Chief Justice Scott for the court in **Hughes Land Co. v. Manitoba** (1998), 167 D.L.R. (4th) 652 (M.C.A.), at page 667 are applicable:

> 37 The application of issue estoppel does not require an exact duplication. The key issue as we have seen is simply whether the question to be decided in the second action was fundamental to the earlier decision. If so, the never- ending ingenuity of counsel to create new formulations and characterizations cannot displace the application of the doctrine of *res judicata*. An argument based on fairness will not be accepted by the Court in a second go-round simply because the matter has been dressed up as "a new approach": **Favor and Favor v. Winnipeg (City)** (1989), 57 Man. R. (2d) 228 (C.A.). Simply "re- engineering" the claim is not good enough: **Corbin v. Winnipeg (City)** (1997), 116 Man. R. (2d) 107 (Q.B.) at p. 110.

[27] Here for example, the appellants now use the word "embezzled" to describe the method by which they claim Mr. Campbell acquired the $200,000, whereas in the earlier pleadings they claimed he "without lawful authorization and for personal financial gain removed" the funds from the accounts of the Stonehedge investors (¶ 47 amended counterclaim S.H. No. 93-5567) and at other places claimed the funds were "unlawfully taken" by Mr. Campbell (¶ 65). "Embezzlement" is defined as "fraudulent

appropriation of property entrusted to one" (*The Shorter Oxford English Dictionary*, 1988). The new claim is obviously the same in essence as the old claim.

[28] The proposed amendments are replete with issues that were raised and specifically dealt with by Justice Hood and/or this court on appeal. Numerous paragraphs repeat the allegations of fraud and breach of fiduciary duties, the existence of a joint venture, and the cause of the project's financial failure. Other claims are not specific duplicates of those in the earlier action but are subtle variations on the same theme, that is, that Mr. Campbell wrongly caused the appellants to lose their investment in the Berkeley project. For example, it is now claimed that Mr. Campbell "conspired" to cause the appellants' losses, that he perjured himself with respect to the source of the funding, and that the funds from Stonehedge were "proceeds of crime". In the earlier proceeding, it was claimed that Mr. Campbell dishonestly caused deprivation and committed criminal fraud. (¶ 92) The issue of the source of the $200,000 and everything related to it including the type of funding, the accounting of it, and the authorization for it, was fully canvassed in the first action and is now precluded by issue estoppel. The question has been clearly decided.

[29] Before turning to the appellants' arguments on *res judicata*, it should be noted that, although the Chief Justice referred only to the decision of Justice Hood and the appeal from it as the decisions which render the proposed amendments subject to estoppel, the respondents also rely on other interlocutory decisions made by other judges in the course of the foreclosure action. For example, there is a decision of Associate Chief Justice Kennedy, as he then was, on a production of documents application made in 1997. He decided that the documents sought by the appellants were not relevant because what transpired between the Bank and the assignee and the Bank and its insurer "had no conceivable relevance". There was no appeal from that order.

[30] On another interlocutory application, Justice Goodfellow determined that it was not an abuse of the court's process for Mr. Campbell to have attempted to settle both the foreclosure action and the Berkeley action by offering a release of the mortgages in exchange for a release of the claims against Mr. Campbell arising out of the Berkeley project. Despite the claim by the Lienauxs that this was some form of extortion, Justice Goodfellow determined that it was not an abuse of process and Mr. Campbell was not

barred from proceeding to foreclosure. That decision was upheld on appeal to this court. (See: 159 N.S.R.(2d) 305)

[31] As noted above, the Supreme Court in **Angle**, affirmed that one of the elements necessary for issue estoppel was that the earlier decision creating the estoppel was final. The question then becomes, were these two interlocutory decisions final? The authors of the English text, *The Doctrine of Res Judicata*, 2nd. ed., Spencer Bower and Turner, Butterworths, London, 1969, state at page 132:

> A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent recission, review, or modification by the tribunal which pronounced it. This definition involves the existence of two distinct types of non-finality, which it is proposed to examine separately: one, in which the judicial decision on the face of it is imperfect, provisional, conditional, indefinite, or ambiguous, and the other in which the judicial decision, though *ex facie*, purporting to be final, is by the English, or (as the case may be) the foreign, law applicable, liable to be afterwards rescinded, re-opened, or varied by the originally adjudicating tribunal.

[32] Finality is discussed by Lange, *supra*, at page 77:

> The decision must be a final decision. A final decision for the purposes of issue estoppel is a decision which conclusively determines the question between the parties. ...
>
> The test for finality for issue estoppel, therefore, is that a decision is final when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind the finding.

[33] In my view the decision on the application for the production of documents may be final on the point of whether the documents were to be produced prior to trial, but it cannot be used to set up an estoppel preventing the application to amend. The documents may not have been relevant prior to the amendment, but that should not prevent the appellant's from amending the pleadings to allege that the mortgagee should be denied recovery on the debt because it has been reimbursed by insurance. That argument may face some other legal impediment, but it should not be prevented on the basis of an application for production of documents.

[34] As for the decision that the attempt to settle the cases was not an abuse of process, in my view that was a final decision and should not be revisited.

That decision conclusively determined the question. This court, on appeal from Justice Goodfellow, confirmed that there was no abuse of process, there was no agreement between Mr. Campbell and the Bank to extort an advantage from the appellants, and the negotiations were a perfectly legitimate attempt to settle all the outstanding actions between the parties. (See: 159 N.S.R. (2d) 305 at ¶ 23 -24.)

[35] I will now turn to the appellants' specific arguments on this issue. The appellants submit that *res judicata* is inapplicable because they are not pursuing a second action against Mr. Campbell but are responding to an action against them. No authority is cited in support of the argument.

[36] In my view it does not matter that the appellants are defendants in the current case and in the earlier proceedings they were plaintiffs. To start with, they are also plaintiffs by counterclaim in the current action and many of the proposed amendments are in their counterclaim. Secondly, they were also defendants in the original action when it was first started by Mr. Campbell. Mr. Campbell subsequently abandoned the action but Mr. Lienaux and Ms. Turner-Lienaux carried on as plaintiffs by counterclaim. Thirdly, one of the components necessary to prove issue estoppel is merely that the parties be the same, that is, the same people or entities or their privies were before the court in the earlier proceeding. It is not required that a plaintiff in the first action be a plaintiff in the second action, or that a party be a defendant in both actions. It is only required that they be before the court in a capacity where they are able to present their evidence relevant to the specific issue. See, for example **Reddy v. Oshawa Flying Club,** [1992] O.J. No. 1337, (O.C.J.) where defendants in an earlier action were barred from bringing an action as plaintiffs concerning the same issues as resolved by consent order in the first action. Spencer Bower and Turner, supra, cite several older authorities in answering this question more definitively: [page208]

> It makes no difference, where identity of parties is established, that in the proceedings resulting in the decision set up as *res judicata*, the party was a plaintiff, claimant, or petitioner, and, in the subsequent proceedings, is attempting to controvert the decision by way of cross-bill, counterclaim, set-off, "responsive allegation" (in divorce suits), or any other form of cross-claim or affirmative defence, or vice versa.

[37] The second reason the appellants say *res judicata* is inapplicable is that the parties in the present action are not the same as in the previous action. They

say that there are several parties in the foreclosure case who were not parties in the earlier action including, 2301072 Nova Scotia Limited, (the numbered company) Mr. Lienaux, the T-D Bank, and Mr. Block and therefore the requirement that the parties be the same has not been met.

[38] The requirement for issue estoppel is "that the parties .. or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies" (**Angle**, *supra*, at ¶ 18 herein). Spencer Bower and Turner, *supra*, provide an overview of the authorities on privity for the purpose of *res judicata* at page 209:

> Estoppel *per rem judicatam* operates for, or against, not only the parties, but also those who are privy to them in blood, title, or interest.
>
> ...Privies include any person who succeeds to the rights or liabilities of the party upon his death, or insolvency or who is otherwise identified with his or her estate or interest; but it is essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or its subject matter... [footnoted citations omitted]

[39] More specific to the Canadian approach to the issue of who is a privy to a party is the discussion in the Lange text, *supra*, at page 71:

> For the purpose of issue estoppel, a privy of a party has been variously defined. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. Privity can be one of blood, or title, or interest. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. To determine whether a person has a participatory interest in the outcome of the proceeding, is to determine whether the outcome could affect the liability of that person. A non-party in an earlier proceeding is a privy on the basis of being involved in the first proceeding by being present and by giving evidence. The term "parties" includes those who are named in the proceeding and those who have an opportunity to attend the proceeding.
>
> When there is a finding that a privy of a party is estopped by issue estoppel, the doctrine of estoppel by conduct or representation has, on occasion, also been applied to that person. Factors which have been considered in applying estoppel by conduct or representation are similar to factors which have been considered to establish a privy of a party, namely, having knowledge of the previous proceeding, a clear interest in the proceeding, the ability to intervene as a

participant but choosing to stand-by and watch, active participation in the previous proceedings by giving evidence, and being part of the litigation team.

. . .

The courts of Canada have made many findings of where a non-party is a privy of a party, and where a non-party is not a privy of a party for the purpose of issue estoppel. The following list comprises situations where a non-party is a privy of the party:

- a director and officer of a company and the company (*Ontario v. National Hard Chrome Plating Co.* (1995), 60 A.C.W.S. (3d) 289 (Ont. Gen. Div.) at 11.)

. . .

- the individuals who own or control a company and the company (*420093 B.C. Ltd. v. Bank of Montreal* (1995), 34 Alta. L.R. (3d) 269 (C.A.) at 277-79; *Stelmaschuk v. Dean*, [1995] 9 W.W.R. 131 (N.W.T.S.C.) at 143; *Veroli Investment Ltd. v. Liaukus* (1998), 80 A.C.W.S. (3d) 338 (Ont. Gen. Div.) at 8.)

- a lawyer who is a director, officer, and solicitor for a company and the company (*Guay v. Dennehy*, [1994] 5 W.W.R. 738 (Man. Q.B.) at 747.)

- a bank's solicitor and the bank (*Beaulieu v. McLaughlin*, (1986), 68 N.B.R. (2d)(C.A.) at 446-47.)

. . .

- a wife and a husband (*Quiamco v. Gaspar* (1985), 33 A.C.W.S. (2d) 442 (B.C.C.A.) at 15-16)

. . .

- an assignee of a mortgage and the mortgagee (*Income Trust Co. v. Thatcher* (1991), 27 A.C.W.S. (3d) 882 (Ont. Gen. Div.) at 16. ... reversed on appeal, (1994), 48 A.C.W.S. (3d) 1012) on the ground that the previous decision was not final...)

...

- a person conducting a defence on behalf of a defendant and the defendant (*DeChamplain v. Maryland Casualty Co.* (1982)., 35 O.R. (2d) 428 aff'd (1982), 40 O.R. (2d) 480 (C.A.)

[40] Although Mr. Lienaux was the secretary of Smith's Field Manor Development Limited, and the apparent spokesperson for it and his wife throughout the proceedings, he was not a party in the original case at the time of trial. The plaintiffs by counterclaim were Ms. Turner-Lienaux and Smith's Field. Ms. Turner-Lienaux was the sole shareholder of Smith's Field. As is clear from the record, Mr. Lienaux made an assignment into bankruptcy subsequent to the commencement of the proceedings involving The Berkeley. The Trustee in bankruptcy, Paul Goodman, F.C.A., transferred and assigned all of Mr. Lienaux's rights of action to Mr. Campbell on February 28, 1996. As noted by Justice Hood, although Mr. Lienaux was not a party in the litigation at time of trial, he was intricately involved in the project, the dealings with Mr. Campbell, and the ensuing lawsuit:

> [63] I therefore conclude that in 1989 and 1990, Karen Turner-Lienaux had no direct role in the negotiations Lienaux had with MacNutt, then with Logie and MacNutt, then with Logie alone. She also had no role in any discussions with Campbell about the project in general or its financing in particular during that time.
>
> [64] Although Karen Turner-Lienaux testified that she authorized Lienaux to act on her behalf, I conclude that no one else knew that Lienaux personally was to have no financial interest in the project. He testified that he did not tell the Stonehedge Group about his prior bankruptcy or that he held no assets in his own name. He did not disclose to any of the Stonehedge Group that, although he signed as a subscriber for the BDL shares, he had executed a Declaration of Trust in favour of his wife.
>
> [65] I conclude that Lienaux led the Stonehedge Group to believe that he was the shareholder in BDL. During the critical negotiations to get the Stonehedge Group involved in the project, Lienaux was at all times the one with whom they were negotiating. Not only did he conduct all the negotiations himself, he personally wrote the cheque for $175,000.00 which was the Lienaux Group's contribution to the "Permanent Cash Equity", although it was on the joint account of Turner-Lienaux and himself. His letter to Logie enclosing the cheque (Exhibit 1A, Tab 36) said "I am enclosing my personal cheque....". He noted on the cheque itself (Exhibit 1A, Tab 37, p. 4) "Shareholder's loan, CD Lienaux."

...

[372] This action began when Campbell sought to have a receiver appointed to manage the assets of Smith's Field and BDL. He commenced action against Lienaux, Turner-Lienaux, BDL and Smith's Field. A counter-claim was filed by Lienaux, Turner-Lienaux and Smith's Field.

[373] After filing a defence to the counter-claim, Campbell added BAI as a third party in March 1997. Campbell later discontinued his claim but the counter-claim continued. Upon the bankruptcy of Lienaux, only Turner-Lienaux and Smith's Field remained as plaintiffs ....

[492] Lienaux himself is acting, not as a lawyer, in this proceeding, but as the Secretary of Smith's Field. He is also the husband of Turner-Lienaux, who although representing herself, left the case almost entirely to be put forward by Lienaux. She testified, but asked no questions of any witnesses. She gave a brief closing argument of approximately 13 minutes, during which she referred to Campbell as having "orchestrated" the receivership of The Berkeley. She said that he should have been "honest and up-front". The pre-trial brief was signed by Lienaux and was said to be the pre-trial submissions of Smith's Field and Turner-Lienaux. There were a number of days on which Turner-Lienaux did not attend for trial. When she attended, she made notes and Lienaux did consult with her and she with him. Campbell, on the other hand, had to have his counsel present throughout the trial and, of course, bear the associated costs for attendance and preparation.

[493] Lienaux was clearly, and I so find, the driving force behind the litigation.
...

[41] Although Mr. Lienaux was not a party in the first case by the time of trial, there is no doubt that he is a privy to a party in the first case under numerous heads. Not only was he the “driving force” behind the litigation, he was a director of and the solicitor for Smith’s Field which was a party, he was a witness, a spouse of a party and the person who conducted the case on behalf of the plaintiffs by counterclaim. (See **Quiamco v. Gaspar**, [1985] B.C.J. No. 1661 (B.C.C.A.) re privity as between husband and wife)

[42] With respect to the numbered company which was not a party in the action tried by Justice Hood, it too is privy to another party. The numbered company is the assignee of the mortgages being foreclosed. The mortgages were assigned first from Central Guaranty Trust to the Toronto Dominion

Bank in 1992 and then later to the numbered company, in February 1996. The numbered company was found by Chief Justice Kennedy to be "associated with" Mr. Campbell and it is clear from the record that Mr. Campbell or his wife is in control of it. Therefore the numbered company is a privy for the purposes of issue estoppel.

[43] As for Mr. Block, none of the proposed amendments addressed his conduct, so it is immaterial that he was not a privy to the earlier proceedings.

[44] The T-D Bank was not a party to the first action. Although its relationship with Mr. Campbell might be sufficient for it to be designated as a privy to the matter before Justice Hood, because it assigned the mortgages under foreclosure to him, I do not think it is necessary to do so. The vast majority of the amendments that were struck out on the basis of issue estoppel and cause of action estoppel were claims alleging misconduct by Mr. Campbell and the numbered company. There are very few that relate to the actions of the Bank. Most of them are *res judicata* as a result of the decision of Justice Goodfellow referred to in ¶ 30 and 34 herein. Other allegations against the Bank, that would not be included within the issues finalized in that decision, are so interwoven with the claims against Mr. Campbell, that have been dismissed by Justice Hood, that they are meaningless and have no substance when the facts as alleged against Mr. Campbell are severed.

[45] The third and fourth points raised by the appellants on the *res judicata* issue have some merit in part. They submit that there are some issues raised in the foreclosure case that were not raised in the earlier proceeding and in fact Justice Hood specifically declined to deal with them. These points raise the same matters as in the bias argument with respect to errors of fact by the Chief Justice, to which I referred in ¶ 16.

[46] The appellants say issue estoppel does not apply to those matters which were not decided by Justice Hood. I agree. There were two defences pleaded in the proposed amendments by the appellants that should not have been found to be *res judicata*: that Mr. Campbell only paid $2,000 for the assignment from the T-D Bank and therefore should not be able to collect more than that from the appellants and that the T-D Bank recovered its losses on the mortgages from CDIC. Those amendments that deal only with these issues should not have been struck out. Justice Hood specifically declined to delve into these issues. Furthermore, the decision of A.C.J. Kennedy on the production of documents application was not a final decision. Therefore these two issues are still alive and able to be set up as

defences on the foreclosure. However, in many instances in the pleadings the appellants associate one of these points with another issue that is *res judicata*, such as whether there was a fraud committed by Mr. Campbell in relation to the Berkeley project, whether there was a joint venture, or whether it is an abuse of process to enforce the mortgages. Only those paragraphs which raise the CDIC and the consideration issues as stand-alone pleas, without combining or intertwining with a previously determined issue, are permitted to stand. I am making no comment on the merits of these defences. I am only saying that they are not subject to *res judicata*. A review of the pleadings indicates that the paragraphs that meet these criteria are as follows:

1. In the defence and counterclaim attached as Schedule "A" to the order of Chief Justice Kennedy: paragraphs 25, 26, 38

2. In the defence and counterclaim attached as Schedule "C" to the order of Chief Justice Kennedy: paragraphs 19, 20, 71, 73 and 75.

[47] The appeal should be allowed in part to allow only these specific proposed amendments.

5. patent injustice

[48] The fifth ground of appeal is that the decision under appeal results in a patent injustice because it is based on the decision of Justice Hood and the decision of this court on appeal from that decision, which the appellants allege are "both bad on their face". The appellants contend that Justice Hood and the panel who heard the appeal, "intentionally did not enforce the law against Campbell" because of his social standing in Halifax which "raises an unavoidable appearance that the Court's process has been corrupted." It is also alleged that this court aided Mr. Campbell in the commission of a crime, that is, a fraud upon the appellants and the Stonehedge investors.

[49] The allegations of the appellants against Justice Hood and the panel who heard the appeal from Justice Hood's decision are scandalous and offensive, and not one iota of evidence is offered to support the implications of corruption. Particulars of the accusations are provided in the concurring reasons of Justice Saunders.

[50] The appellants submit that since this court cannot be the judge of whether its own process has been corrupted, the matter should be submitted to the Supreme Court of Canada for determination of whether the decisions in the Berkeley matter bring the administration of justice into disrepute. Section 37 of the **Supreme Court Act**, R.S.C. 1985 c. S-26, is cited as authority:

> Appeals with leave of provincial court
>
> 37. Subject to sections 39 and 42, an appeal to the Supreme Court lies with leave of the highest court of final resort in a province from a final judgment of that court where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision.

[51] The appellants have not cited any case where a provincial appellate court has referred one of its decisions to the Supreme Court for further review after that Court has already denied leave to appeal the impugned decision.

[52] The appellants repeat several of the arguments made previously both to Justice Hood and to this court in an attempt to reopen issues respecting the Berkeley project that are definitely *res judicata*. They offer no evidence to support their submissions that the impugned decisions were tainted by bias or corruption.

[53] In my view this ground of appeal is of absolutely no merit. In the absence of any evidence to support their allegations, and in the absence of any authority to submit the matter to the Supreme Court of Canada in circumstances such as these, I would dismiss this ground of appeal.

Notices of Contention

[54] Both Mr. Campbell and Mr. Block filed notices of contention submitting that the decision of Chief Justice Kennedy that the amendments should not be permitted could be supported by other reasons. Other than the submission that the order should be upheld on the basis of the interlocutory decision made on the production of documents application, referred to herein at ¶ 29 - 33, the issues raised by the notices of contention need not be considered since the decision under appeal should be dismissed for the reasons given by the Chief Justice. With respect to the argument that the CDIC amendment should be struck out on the basis that the matter was determined in the earlier decision, I do not agree with the respondents' position. The

earlier order on the production of documents application was not final and therefore is not sufficient to set up the estoppel, for the reasons stated above.

Costs of the appeal

[55] The respondents Mr. Campbell, the numbered company and the T-D Bank were awarded costs taxed on a solicitor client basis by the Chief Justice on the application to strike the proposed amendments. They seek costs on the appeal on the same basis. Mr. Block seeks party and party costs on an increased scale due to the complexity of the matter. The appellants seek the reversal of the costs order made by the chambers judge and party and party costs on the appeal.

[56] While I may have been inclined to accede to the request for solicitor client costs for Mr. Campbell given the unremitting attempts by the appellants to rehash the same issues, and the repeated allegations of fraud and the commission of crimes, against him, I would decline for two reasons. First and most importantly, the appeal is being allowed on two minor points. Secondly, counsel for Mr. Campbell did not respond to the legal arguments made by the appellants in the fourth ground of appeal. That ground raised issues of parties, privity and finality which required some legal analysis and for which it would have been helpful to have submissions from the respondents.

[57] However, since most of the issues argued by the appellants should be dismissed as having little merit, I would order the appellants to pay the costs of the respondents taxed in the amount of $6,000 plus disbursements to Mr. Campbell, the numbered company and the T-D Bank, forthwith, and $4,000 plus disbursements to Mr. Block, also payable forthwith.

[58] In conclusion, I would allow the appeal with respect to the eight proposed amendments as set out in ¶ 46 herein, and dismiss all other grounds of appeal with costs to the respondents as specified above.

Roscoe, J.A.

Concurring:

Freeman, J.A.

Saunders, J.A.

Saunders, J.A.: (separate, concurring reasons)

[1] I agree with the reasons written by my colleague Justice Roscoe, but feel compelled to add my own, given the seriousness of the allegations made by the appellants.

[2] I consider the appellants' arguments to be such an affront against the administration of justice in this province as to warrant quick and unreserved denunciation.

[3] In his written submissions as well as his oral submissions at the hearing, Mr. Lienaux, on his own behalf and on behalf of his wife, Ms. Karen Turner-Lienaux, cast aspersions against senior members of the Bar as well as the Nova Scotia judiciary. By times, these latter attacks seemed to be directed at certain individual judges; at other times the target appeared to be an entire court, whether the Supreme Court, or the Court of Appeal, or both.

[4] The thrust of the appellants' attack on the judiciary is that the judges who sit on the trial and appeal benches, who have rendered decisions in these proceedings that have "gone against" Mr. & Mrs. Lienaux, comprise - in spite of the gender of many of my colleagues - an "Old Boys' Club" that has effectively conspired with certain parties, in particular Mr. Wesley G. Campbell, the result of all of which has been to "favour" Mr. Campbell's interests in most if not all judicial outcomes.

[5] These aspersions cast by the appellants are expressed in language said to impugn "an appearance of bias" or general unfairness towards the appellants. An apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is:

> what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude . . .

(per de Grandpré, J. in his dissenting reasons in **Committee for Justice and Liberty v. National Energy Board**, [1978] 1 S.C.R. 369, at p. 394, applied by the Court in **R. v. R.D.S.**, [1997] 3 S.C.R. 484, at ¶ 111). The onus of demonstrating bias lies with the party who alleges its existence. The threshold for a finding of real or perceived bias is high. Whether a reasonable apprehension of bias arises depends entirely on the facts of the case. See, for example, **R.D.S.**, *supra*, at ¶ 115 and 158; and **Arsenault-Cameron v. Prince Edward Island** [1999] 3 S.C.R. 851. The test for apprehension of bias takes into account the presumption of

impartiality. A real likelihood or probability of bias must be demonstrated. **R. v. R.D.S.** at ¶ 112-113; **Arsenault-Cameron**, *supra*, at ¶ 2.

[6] Upon my review of the record I consider the appellants' submissions to be based on not a shred of evidence, and which ought to be seen as preposterous, offensive and absolutely devoid of merit.

[7] Until I stopped him short, Mr. Lienaux also attacked the character and ethical conduct of past and present counsel for the respondents 2301072 Nova Scotia Limited, The Toronto-Dominion Bank, and Mr. Wesley G. Campbell. Mr. Lienaux's bold assertion at the hearing was to accuse these counsel of conduct which I would and did characterize as tampering with Mr. Lienaux's work product by pawing through his personal papers at a time when he and Ms. Turner-Lienaux were not in the courtroom, at some point during the course of the 38 day trial before Hood, J. in 2001. The accusation was vigorously denied by respondents' counsel who, when invited to reply, explained that the "incident" referred to by Mr. Lienaux never involved his co-counsel (who was not present at the hearing to respond personally) but that in any event had never occurred, never was the subject of complaint or disposition before Justice Hood, and in fact had never been mentioned in any judicial proceeding until the accusation was made by Mr. Lienaux for the first time before our panel at this hearing. It is not our task, at this time, to probe the circumstances surrounding the "episode" (if any) about which Mr. Lienaux complains and which respondents' counsel categorically denies. I simply raise it here as another example of allegations put forward by the appellants without a shred of evidence to back them up and which are, in any event, irrelevant to this appeal.

[8] Mr. Lienaux also attempted - until my rebuke - to refer to a recent decision filed by Scanlan, J. in an entirely different proceeding having nothing to do with this case, in which, so Mr. Lienaux suggested, the trial judge was highly critical of the conduct of one of respondents' counsel. I reminded Mr. Lienaux, as I do here, that the observations of a trial judge, in a decision which has nothing whatever to do with these proceedings, are entirely irrelevant to this appeal.

[9] When impugning the conduct of judges, or the full court, or senior members of the Bar, Mr. Lienaux went to great lengths to express his "discomfort" in voicing his complaints which he acknowledged were very serious and "could not be sugarcoated."

[10] At times Mr. Lienaux insisted that he was not casting any aspersions against any particular judge's personal integrity, but rather protesting the appearance that (in his mind at least) we were all part of a conspiracy, complicit in an "Old Boys' Club." He opined that if he "were ever to put this case before a jury" he would "most certainly win."

[11] The tone and thrust of Mr. Lienaux's accusations may be gleaned from these passages selected at random from the appellants' factum:

> 75. The review below of the findings of fact and legal rulings made by Hood, J. and this Court show on their face that they intentionally did not enforce the law against Campbell. This makes it appear that the Courts are applying a law in such a way as to allow persons in favor with the court to derive financial benefits from the commission of criminal acts while the Courts prosecute and incarcerate persons who are not in favour with the Court for committing the same actions. This raises an unavoidable appearance that the Court's process has been corrupted.
>
> 76. The Impugned Decisions make it appear that because of his social standing in the Halifax community Campbell received special consideration from the Courts which is not afforded to members of the general public.
>
> . . .
>
> 77. The evidence set out hereinafter establishes reasonable grounds for any knowledgeable person to conclude that judges of both levels of the court intentionally did not enforce the law thereby allowing Campbell to evade liability for a number of criminal activities. This has caused the integrity of the administration of justice in Nova Scotia to be doubted by knowledgeable members of the public at large.
>
> . . .
>
> 81. Before articulating why the Impugned Decisions are bad on their face the appellants wish it to be noted for the record that they object to this Court making any decision on this issue because it raises the question of the propriety of actions by judges of this Court.
>
> . . .
>
> 82. This Court cannot be the judge of whether or not its process may be seen to have been corrupted.

> 83. In the event that this appeal is not allowed on any other ground the appellants submit that the sole issue of whether the Impugned Decisions are bad on their face to the extent that they bring the integrity of the administration of justice into question must be submitted to the Supreme Court of Canada for determination.
>
> . . .
>
> 95. Justice Hood intentionally disregarded the law . . .
>
> 96. **Thirdly**, Justice Hood knowingly condoned Campbell's substitution of debt financing for a permanent cash equity investment in circumstances where other persons who have done the same thing have been convicted of fraud and incarcerated.
>
> . . .
>
> 118. The foregoing review makes it clear on the face of the Impugned Decisions that both levels of our Court have treated Campbell differently from members of the general public who have been prosecuted and convicted for committing acts similar to his actions.
>
> . . .
>
> 149. This Court should not commit acts indirectly which would constitute criminal offences if they were done directly. By ruling that Campbell could use proceeds of crime as a lawful equity investment in the Berkeley this Court indirectly aided him in the commission of one or more crimes against the appellants. Such conduct creates the unavoidable appearance that the Court's process was corrupted.

[12] Were there any substance to the appellants' assertions, one would expect counsel to put them forward, despite any natural discomfort in hearing them. Such is the honourable, but sometimes unpleasant duty, of a free and independent Bar, one of the fundamental cornerstones of this country's constitutional democracy. See, for example, Erskine's defence of Thomas Paine, indicted in 1792 for publishing the *Rights of Man* as reported in 22 State Tr. at 411; or the famous exchange between the great English barrister F. E. Smith, (later Lord Birkenhead) and the trial judge as recounted in John Train (ed.), Wit: The Best Things Ever Said (New York: Harpercollins,

1991), pp.17-18; or ***The Ethics of Advocacy***, a chapter contributed by Earl E. Cherniak, Q.C. to the book ***Advocacy in Court: A Tribute to Arthur Maloney, Q.C.*** ((1986) Canada Law Book Inc., Toronto, edited by Moskoff, Franklin R.); or **Professionalism: A Century of Perspectives** (published by the Law Society of Upper Canada, 2002); or ***Legal Ethics and Professional Conduct*** (published by the Nova Scotia Barristers' Society, 1990) in particular, chapters 10, 13, 14 and 21.

[13] I see none of that in this case. To my mind there is nothing bold or praiseworthy in making veiled charges of corruption or submissions maligning the administration of justice in this province, that are based on nothing more than the appellants' own imaginings.

[14] The appellants protest that their relentless pursuit of this litigation ought not to have been characterized in previous judgments as if the appellants were bent on a vendetta. Given this record, I cannot imagine that any reasonable and properly informed observer could come to any other conclusion.

[15] It is really quite extraordinary to count the multiplicity of proceedings that this bitter litigation has engendered. At every stage, Mr. Lienaux's attention is especially focussed on Mr. Wesley G. Campbell, who would seem to stand in the eyes of the appellants as a nemesis.

[16] The appellants say that Justice Hood was "deceived" and that we ought to set things right. I reject the appellants' assertions. In my opinion this appeal is nothing more than a trumped-up attempt to have us re-try the case heard by Justice Hood more than four years ago and substitute different findings for hers. That is not our function.

[17] In his most recent attempts to "plead" or colour Mr. Campbell's conduct as amounting to "fraud" or "embezzlement" or involving the "proceeds of crime" Mr. Lienaux seems blind to the fact that in her decision (upheld on appeal in all respects material to this appeal) Justice Hood was satisfied that Mr. Campbell had done everything he was obliged to do, and that nothing he had done or omitted to do was in any way the cause of the losses for which the appellants continue to complain.

[18] Among the countless issues that arose in the 38 day trial over which she presided, Hood, J. found in Mr. Campbell's favour on virtually every point. To illustrate the clarity of her findings - which to my mind and evidently in the opinion of Kennedy, C.J.S.C. as well - serve to put an end to Mr. Lienaux's renewed attack upon Mr. Campbell, I need only refer to a sampling of Justice Hood's specific findings, first from that portion of her

judgment dealing with the merits, and then from the latter parts of her judgment where she deals with costs. I have underlined certain findings, for added emphasis.

[260] Lienaux has alleged various acts of fraud, acquiescence in fraud or equitable fraud against Campbell. These are set out above and relate to breaches of fiduciary duty. Although I have concluded above that there was no fiduciary duty and therefore no breach of it, I will deal with the allegations of fraud.

. . .

[264] I conclude, based upon the facts viewed objectively, there was no prohibited act, in the nature of an act of deceit, a falsehood or "other fraudulent means." I conclude that there was no dishonest act by Campbell.

. . .

[267] Since I have concluded there was no prohibited act, I do not need to consider mens rea. However, in light of the allegations made against Campbell, I will do so.

[269] I conclude that Campbell had no intent to perform a prohibited act nor was he reckless about such an act. He had no intent to do anything other than invest in and participate in a seniors residence project in an honest and fair manner. Although the project did not turn out as anticipated, Campbell's commitment to honest dealings and fairness did not change.

[270] If Campbell did not take the care one might hope for in attending to detail and carefully scrutinizing documents, he cannot be faulted for the way in which he lived up to all his financial obligations. He trusted his fellow directors to act honestly and fairly, but his trust in Lienaux was misplaced. As I have said above, Lienaux acted in his own and the Lienaux group's interests, including those of Smith's Field and Turner-Lienaux, in a way which no reasonable person would expect. (underlining mine)

[271] Lienaux also alleges equitable fraud. This allegation arises from the breach of a fiduciary duty. I have concluded above that no fiduciary duty existed. Therefore, the claim of equitable fraud must fail as well.

[272] In summary, I conclude there was no financing scheme. I also conclude that there is no merit to the arguments that one existed.

. . .

[309] I therefore reject the submission that Campbell's words in his evidence to the court on his receivership application were "injurious falsehoods" as Lienaux alleges.

. . .

[364] In this case, Lienaux says there was a breach of contract. However, even if there was, I conclude hereinafter that neither Smith's Field nor Turner-Lienaux was a party to any contract with Campbell.

[365] In any event, any breach of contract did not cause the losses alleged. The receivership and foreclosure were not the foreseeable result of any breach of contract. They were caused by Lienaux's actions and those of Smith's Field and Turner-Lienaux.

[366] Lienaux also alleges that breach of fiduciary duty by Campbell caused the losses alleged. I have concluded above that there was no breach of fiduciary duty; therefore, there can be no losses flowing from its breach.

. . .

[370] Mr. Lienaux also alleges misrepresentation by Campbell. I have concluded there was none and, similarly, I cannot conclude that any losses flowed from it.

. . .

[390] On the basis of these factual findings, I conclude that Campbell had no contractual relationship with Turner-Lienaux. Because he did not deal with her or even know of any involvement she had in the project, I also conclude that Campbell owed Turner-Lienaux no duty in tort and made no representations to her with respect to financing of The Berkeley project.

[391] It is also claimed that Campbell owed a fiduciary duty to Turner-Lienaux and that he breached that duty.

. . .

[435] I find as a fact that there was no financial benefit to Campbell that forms the basis of a claim by Smith's Field or Turner-Lienaux.

. . .

[476] In my findings on credibility, I accepted the evidence of Campbell and Logie over that of Lienaux. On every factual issue raised, I found in favour of Campbell.

[477] This case could have been decided solely on the issue of causation or the proper parties. Either would have disposed of the claims made by Smith's Field and Turner-Lienaux.

[478] Money was invested as agreed into the Berkeley project. Mortgage money and other money was borrowed for the project. The project had cost over-runs. The Berkeley residence did not attract tenants and therefore did not earn revenues as projected. There was never enough money to pay all The Berkeley's expenses. The mortgage and property taxes were continuously in arrears. The mortgage lender was more than patient. When matters came to a head in October 1993, its patience was at an end. It did what mortgage lenders do in such circumstances. It acted to protect itself. The disputed $200,000.00 was not a factor in any of this. Had it been paid personally by Campbell, Logie and MacNutt in three equal shares, events would still have unfolded as they did. Such is the short version of the story of The Berkeley between 1989 until 1993.

. . .

[485] In this case, there were allegations of criminal and equitable fraud and acquiescence in fraud; perjury; breach of fiduciary duty; and dishonesty. All were unfounded. Complaints were made to Campbell's professional governing bodies by Lienaux, who before his bankruptcy was a party to this proceeding. The police conducted an investigation of Campbell at the instigation of Lienaux.

. . .

[488] The history of this action as it unfolded during the trial and as is evidenced in the voluminous court file, coupled with the unfounded allegations referred to above and the public nature of those allegations, combine to make this one of those "rare and exceptional cases" in which I conclude, in my discretion, that it is appropriate to award solicitor-client costs against Smith's Field and Turner-Lienaux. Turner-Lienaux's and Smith's Field's conduct in pursuing unfounded allegations of fraud and dishonesty against Campbell is the sort of reprehensible

conduct that I feel must be rebuked through an award of solicitor-client costs. Although such a costs award is not limited to such cases, the courts can use an award of solicitor-client costs to show disapproval of "oppressive or continuous" conduct. I do so in this case.

. . .

[493] Lienaux was clearly, and I so find, the driving force behind the litigation. Had Lienaux acted as a lawyer, I would feel compelled to give serious consideration to awarding costs against him as such. His appearance at trial in the role of layperson prevents me from undertaking this consideration.

[500] The BAI brief concludes with a third alternative argument that echoes that of Smith's Field and Turner-Lienaux:

> In the alternative, BAI argues that receivership [sic] was based upon untrue, inaccurate and misleading information submitted by Campbell to the Court. BAI relies upon the brief submitted by Smith's Field with respect to the application of this principle.

. . .

[505] BAI says that Campbell was fraudulent. In the alternative, BAI says he was reckless in his statements to Byrne. I have concluded that, to the contrary, he made no such statement.

[506] Making a distinction between "stealing" and "unlawfully removing" funds is a distinction without a difference. Saying it in one way rather than another is still saying it.

. . .

[509] All claims of the plaintiffs are dismissed. Wesley G. Campbell is to have his costs and disbursements. Costs are awarded to Wesley G. Campbell on a solicitor-client basis against Smith's Field Manor Development Limited and Karen Turner-Lienaux. Lump sum costs are awarded to Wesley G. Campbell against Byrne Architects Inc. in the amount of $10,000.00.

[19] The appellants speak of fairness, and the search for truth, and respect for the administration of justice. I had occasion to reflect on the meaning of those words in **Frame v. Nova Scotia (Commission of Inquiry into the Westray Mine Disaster)** [1997] N.S.J. No. 62, which I would repeat here:

> [21] In my view the notion "administration of justice" goes beyond the interests of a party or accused or witness or victim depending whether the context is civil or criminal or whether the proceeding is taken before a court or some inferior body or decision maker. While undoubtedly the administration of justice is presumed to recognize and protect such rights and responsibilities in the resolution of a particular dispute it is not restricted to those concerns. Instead the administration of justice is much broader conceptually and would seem to me to include a multi-faceted public interest founded on reasons of public policy and fairness. One which would address such legitimate concerns as: finality; the search for truth; openness in the way truth is pursued; protections to ensure that proceedings are and are seen to be characterized by fairness; and finally in a fashion which would instill confidence and respect for the system of justice and the people who comprise it.
>
> [22] Thus while I need not attempt this afternoon to establish any exhaustive definition of the words "administration of justice" the phrase to me, in this case, speaks of that system of values and procedures by which the community has decided that the rights and responsibilities of its citizens will be protected and enforced. Naturally, in a free and democratic society such as exists in this country, those values and procedures would recognize certain fundamental freedoms, would seek accuracy and openness and fairness and finality in the determination of disputes or inquiries as between the State and/or its citizens and would admit that in striving to achieve such objectives there must often be a weighing, a balance struck between competing interests. To me these are the values and principles that go to the very root of what we refer to as the administration of justice. They should not be miscast as lofty precepts but rather provide the framework within which practical day to day decisions such as this one ought be measured or tested. These then will be the meanings I attribute to the words that I have had to consider in this analysis.

[20] There is nothing in this case that would engage any consideration of the values and principles I articulated in **Frame**.

[21] Our responsibility is to review for error. I find practically none. Kennedy, C.J.S.C., summed up things quite nicely when he said:

> [41] It is made definitive in Justice Hood's decision that the inability of Lienaux and Turner-Lienaux to repay those loans cannot be linked to any improper dealings by Campbell.
>
> [42] The allegations have been found to be of no merit. That conclusion was tested on appeal and upheld. The campaign of baseless accusation carried by Lienaux and Turner-Lienaux against Campbell is over.

> [43] It would be an abuse of the process of this Court to allow those allegations, dressed up in different clothing, to be restated and revisited.
>
> [44] I do not intend to allow that to happen.

[22] We have varied Chief Justice Kennedy's order, as amended, only slightly, so as to permit those specific and limited defences already described by Roscoe, J.A. in her reasons.

[23] But for that slight variation and the appellants' submissions related thereto, I consider the arguments advanced by Mr. Lienaux, both in writing and in our presence, to be unfounded and scandalous, and deserving of censure that is swift, direct and unambiguous.

Saunders, J.A.

Concurring:

Freeman, J.A.