NOVA SCOTIA COURT OF APPEAL

Citation: Turner-Lienaux v. Campbell, 2004 NSCA 41

Date: 20040317
Docket: CA206700
Registry: Halifax

Between:

Karen Turner-Lienaux and Smith's Field Manor Development Limited
Appellants
Respondents by Cross Appeal

v.

Wesley G. Campbell
Respondent
Appellant by Cross Appeal

Revised judgment:	The text of the decision has been corrected according to the erratum released March 17, 2004.
Judges:	Roscoe, Freeman, and Cromwell, JJ.A.
Appeal Heard:	January 22, 2004, in Halifax, Nova Scotia
Held:	Appeal and cross appeal are dismissed per reasons for judgment of Roscoe, J.A.; Freeman and Cromwell, JJ.A. concurring.
Counsel:	Charles Lienaux as agent for the corporate appellant Karen Turner-Lienaux on her own behalf Alan V. Parish Q.C. and Gavin Giles, for the respondent

Reasons for judgment:

[1] This is an appeal and a cross-appeal from decisions of Justice Walter Goodfellow allowing the appellants' appeal from the taxation of solicitor-client costs by Small Claims Court adjudicator W. Augustus Richardson.

[2] It is not necessary to review the extensive background facts since they are contained in numerous reported decisions, including the decision of this court [(2002) 208 N.S.R.(2d) 277] dismissing the appeal from the trial decision of Justice Suzanne Hood [(2001) 195 N.S.R.(2d) 220]. As well, the two decisions of adjudicator Richardson are reported as [2001] N.S.J. No. 531(QL) and [2002] N.S.J. No. 60 (QL) and the decisions of Justice Goodfellow are found at [2002] N.S.J. No. 492(QL) and [2003] N.S.J. No. 254(QL).

[3] In her decision following the 38 day trial, Justice Hood reviewed the relevant authorities respecting costs on a solicitor-client basis and concluded:

> 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.
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> 489 Campbell should not, in the circumstances of this case, be put to any expense for his costs in defending the outrageous and scandalous allegations against him. He has been completely vindicated. Furthermore, I conclude that this action was pursued almost as a vendetta against Campbell. Little else can explain the course of this action since early 1996. Orkin refers to "harassment" and "fruitless litigation". These words are apt for this action and its result. This is exemplified by Mr. Lienaux's unresponsiveness in his closing submissions to the fundamental and, as it turns out, fatal problems with the action: causation and parties. Both issues were argued by Mr. Parish in his closing. However, Mr. Lienaux dealt with these issues in his closing only after prompting by the court and then in a cursory fashion.

> 490 The action continued in the face of the decision of Bateman, J. (as she then was) in 1993 soon after the action started. In her decision (November 12, 1993 - unreported), she said at p. 9:
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> > I am further satisfied that Mr. Lienaux acted unilaterally and without authority on a number of occasions. The evidence persuades me that he has taken improper advantage of his legal training and acted in a high-handed and deceptively manipulative way toward Mr. Campbell and the other directors and shareholders.
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> She continued on p. 10:
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> > Mr. Lienaux, throughout his evidence, revealed a blind conviction in the righteousness of his position.
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> 491 This indictment of Mr. Lienaux should have been a warning to him, and to Smith's Field and Turner-Lienaux, to re-evaluate their position. After 38 days of trial, including eight days of Lienaux's own testimony, I conclude that he did not. To the contrary, the trial evidence disclosed to me more evidence of high-handed and unilateral actions by Lienaux. It also disclosed, as did the statement of claim, the brief and closing submissions, that he redoubled his efforts to blame and discredit Campbell. At the time of Justice Bateman's decision, there were no allegations of fraud, perjury or other dishonesty. As each avenue he pursued closed, he found another; hence the myriad amendments to the pleadings. All this was done because of a failure to recognize the harsh reality that the project had failed and that the investment of time, effort and money he and his wife and their company had put into it was gone. He continued on in sublime ignorance (or willful blindness) that it was his own attitude and conduct that had pushed the mortgage lender to the brink and then to act. On October 20, 1993, Adelaide was willing to offer a mortgage for The Berkeley. This was in spite of the fact that three years after completion it still did not have full occupancy and, as Lienaux said in his fatal letter to them, it was still only "close" to the point when revenues would meet expenses.

[4] On appeal of that decision to this Court, it was determined that “... there is no basis for this Court to interfere with the exercise of Justice Hood's discretion in awarding solicitor-and-client costs against the appellants.”

[5] The solicitors for Mr. Campbell initially presented an account for taxation to the adjudicator in the amount of $805,118.70 including disbursements and GST and HST. The account was described by Mr. Richardson:

> [2] ....The solicitors also filed copies of all their accounts, and their time dockets in respect of these accounts. There were more than 55 accounts over the period October 1993 through to April 2001. These accounts, when taken together with the time dockets, totalled almost 1,000 pages, contained in three bound volumes of material.

[6] The adjudicator instructed counsel for Mr. Campbell to remove from the accounts all amounts that were billed for work on other related litigation between the parties, that had not been heard and determined by Justice Hood. As a result, of that reduction and other adjustments made by counsel for Mr. Campbell, the account presented on the second hearing in the Small Claims Court was $706,721.12. The adjudicator taxed the account at $656,721.12 including disbursements of $39,085 and GST and HST.

[7] On appeal by Ms. Turner-Lienaux and Smith's Field, Justice Goodfellow reduced the account to $475,621.23. The most significant reduction he made was as a result of disallowing the "topping-up" of amounts previously taxed on a party and party basis on several interlocutory applications and appeals.

[8] The adjudicator outlined the submissions before him on the topping-up point as follows:

> 47 As I have already noted, I was advised by counsel that the main action saw a large number of interlocutory applications, many of which were appealed. It is my understanding that on many (if not all) of these applications the solicitors for Mr. Campbell asked for solicitor and client costs. Costs were awarded in these applications, against the defendants, but only on a party and party basis. The costs were fixed in various amounts and were payable by the defendants to Mr. Campbell.
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> 48 The question then becomes whether there is anything left for me to tax in respect of the services surrounding such applications; or whether the costs orders have predetermined what can and cannot be allowed in respect of those applications.
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> 49 Mr. Lienaux says that the fact that the orders were made on a party and party basis precludes any further award in respect of those applications. The matter is res judicata.
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> 50 The solicitors for Mr. Campbell acknowledged that they could not ignore these awards. They say that a credit equal to the total of these cost awards will or

should be granted. However, they say that the fact that awards were made on a party and party basis does not prevent them from asking for full indemnity in respect of those applications (subject to that credit).

51 Following argument, and on the understanding that all the awards had been made against the defendants on a party and party basis; and without the benefit of any authorities from counsel on either side; I ruled that a party and party award against the defendants did not preclude a subsequent taxation, on a solicitor and client basis, of awards in respect of those applications.

52 I also indicated that the fact that the fees and services in respect of such applications were to be considered by me should not be taken as an indication that their reasonableness could not be challenged. Rather, it was simply to say that I was prepared to review them and to assess their reasonableness.

53 I hope to make myself clear with the following example. Legal fees of $10,000 were incurred by the plaintiff in respect of a particular application. Party and party costs were ordered against the defendants, fixed in the amount of $3,000. Following taxation on a solicitor and client basis, the "reasonable" fees are set at $7,500. In my view, that assessment is binding on the parties (subject to their right of appeal). However, the question of whether the defendants are liable to pay that $7,500 (subject to a credit of $3,000); or whether the earlier order of party and party costs relieves them of such liability (whether on the grounds of res judicata or otherwise) is outside the scope of my jurisdiction. It is a matter to be determined by a justice of the Supreme Court.

54 Having said this, I should also note that I have some concern about whether or not my assessment can be binding without a ruling from the Court as to whether there is a binding liability or obligation on the part of the defendants to pay solicitor and client costs associated with the services rendered on such applications, where they have already received the benefit of a costs order.

55 I note in this regard the decision in Simone v. Toronto Sun Publishing Ltd [1979] O.J. No. 3141 (Ont SC, Taxing Officer). This was an action for libel arising out of an article published by the defendant. On an unopposed motion for judgment an order for solicitor and client costs had been made against the defendant. Taxing Officer Sedgwick assessed those costs, and was of the view that he had to exclude from the solicitor and client bill of costs "all of the items and matters concerned with those interlocutory motions, and appeals therefrom, wherein the costs of the motions and appeals were either awarded to the defendants or where no costs were awarded:" see para 4.

> 56 In coming to this conclusion Sedgwick, TO relied on the early decisions of McDonald v. Crites (1906) 7 OWR 795 and Dickerson v. Radcliffe (1900) 19 PR 223.
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> 57 From these decisions it would appear that a party who has been awarded solicitor and client costs at trial may not be able to obtain costs in respect of interlocutory applications which resulted in either in costs orders against him or her; or (which amount to the same thing) express orders of "no costs." This principle may not apply to a situation (as I understand the case to be here) where a party obtains a party and party award of costs on an application, and then obtains a solicitor and client award at the conclusion of the action.
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> 58 A decision on this point is beyond my jurisdiction. I can assess whether the solicitor and client costs claimed in respect of those interlocutory applications are "reasonable;" but whether the defendants here are in fact liable to pay those "reasonable" costs is for a judge of the Supreme Court.

[9] Justice Goodfellow determined that the appellants should not be liable to pay the difference between the party and party costs and the solicitor-client costs of each of the 19 interlocutory matters. His reasons are as follows:

> 19 With respect to the orders of the Court of Appeal relating to the costs issue, there is no authority or jurisdiction in the trial judge to alter or vary a costs discretion exercised by the Court of Appeal unless there is a specific direction from the Court of Appeal giving such jurisdiction to this court by way of referral. In my view, it is an error in law for the Small Claims adjudicator to have included in the taxation of the bill of costs on a solicitor and client basis, as directed by Justice Hood, any professional services directly related to the applications for which the Court of Appeal gave orders as to costs and this necessitates a review and deletion of any such items of professional services that were included.
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> 20 The listing of the orders in this decision is taken directly from the appellants' brief, however, it should be noted that items (x) and (xi) are actually decisions of Saunders, J. which resulted in the order of Saunders, J. in (xii).
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> 21 The *Civil Procedure Rules* with respect to costs on interlocutory applications is clear. CPR 63.05(1) indicates that such costs on interlocutory applications are costs in the cause and shall be included in the general cost of the proceeding **unless the court otherwise orders**. In all of the orders where the Supreme Court has on interlocutory applications exercised its discretion and

addressed the issue of costs, the determination is subject to appeal or leave to appeal and becomes a final determination not subject to appeal, review or amendment by the trial judge. I note, for example, that on occasions in the interlocutory applications, solicitor and client costs were sought and declined by the chambers judge. On one of the applications, Justice Jamie W. S. Saunders (as he then was) filed a decision June 25th, 1997 reviewing the issue of costs and concluding the proper exercise of his discretion was to deny solicitor and client costs on that particular application before him and in a supplementary decision, taxed the party and party costs of the application to Mr. Campbell at $12,000.00 plus disbursements of $817.49 and the decision was finalized by order the 10th of September, 1997. The order went on to appeal and the Court of Appeal declined overruling the exercise of discretion by Justice Saunders and confirmed the denial of solicitor and client costs for that interlocutory application.

22 On interlocutory applications the justice presiding has discretion with respect to costs and can choose to deal with them by "costs in the cause" which defers the issue of recovery and quantum to the trial justice and follows the determination of costs made by the trial judge. If on an interlocutory application the issue of costs is not addressed, then CPR 63.05(1) applies and the costs of that application are costs in the cause and subject to determination by the trial justice. It appears from the orders as recited in the appellants' brief that there were no orders silent as to costs that would therefore invoke CPR 63.05 and only the one order of then Bateman, J. November the 12th, 1993 directed that costs of that application be costs in the cause. In all other applications, it appears that costs were addressed.

23 It is clear that costs already addressed could not be retaxed on a solicitor and client basis was not brought to the attention of the trial justice and understandably so because this is an unique case insofar as one can ascertain in that this issue being determined on appeal never arose before in Nova Scotia. The only way a trial justice might be able to provide a higher level of compensation and indemnification to a party, in a case such as this is where the trial justice is able to conclude the full force and impact of the appellants' unjustified litigation, justifies an order of solicitor and client costs covering all matters that have not been the subject of costs determinations and adding a gross sum, in addition to the taxed costs. CPR 63.02(1)(a). The adding of a gross sum would not be any interference, appeal or review of the determination made by a chambers judge on an interlocutory application.

24 A chambers judge may give costs to a named party in the cause which means that if the party in whose favour the order is made is later awarded costs of the action, that party will also be entitled to the costs of that interlocutory proceeding. The quantum of costs would in such circumstance be determined by

> the trial justice which would include the jurisdiction to order solicitor and client costs. If the other party is successful and obtains an order for costs at trial, the party who obtained costs as a named party in the cause makes no recovery, as such an award is conditional upon being successful in costs at trial.
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> 25 The interlocutory application could result in "costs to a party in any event of the cause" which would permit that party in the order to an entitlement to costs regardless of the outcome of the trial. This simply establishes an entitlement to costs but the recovery is postponed.
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> 26 There are no limitations on the terms and terminology that a justice can utilize in the proper judicial exercise of discretion with respect to costs on interlocutory proceedings.
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> 27 In each and every case where the trial justice has exercised his or her discretion and costs are not left to be in the cause, then the determination is subject to appeal or leave to appeal and if not appealed successfully, represents a final determination on the issue of costs in that interlocutory proceeding. It follows therefore that the adjudicator is in error to have taxed on a solicitor and client basis services for interlocutory applications where the cost determination had already been addressed.

[10] In addition to the reduction of $151,794 as a result of this direction, Justice Goodfellow subtracted an additional $29,305.67 representing the amount of fees billed for representing Mr. Campbell on his action against the Lienauxs which had been discontinued without costs in 1996.

[11] The appellants list five grounds of appeal that can be summarized as arguments that Justice Goodfellow erred in finding that the respondent had filed sufficiently detailed accounts, in finding that all amounts directed to be removed from the accounts were in fact deducted, and in approving accounts that were unreasonable and irrelevant to the proceeding. The appellants suggest that the allowable costs are in the range of $260,000 and ask that the taxation be remitted for re-taxation. Mr. Campbell, hereinafter called the respondent for ease of reference, has cross-appealed submitting that Justice Goodfellow erred by not allowing solicitor-client costs for all of the interlocutory applications and appeals and that the order of the adjudicator be restored.

[12] In addition to these issues, the Court asked counsel to make submissions on the issues of whether there was a right of appeal to this Court on a taxation of a bill of costs. That is the first issue.

Jurisdiction

[13] The procedure for taxation of bills of costs has changed recently and it appears that this is the first case to make its way to this Court under the new process. Effective April, 2001, the **Taxing Masters Act**, R.S.N.S. 1989, c. 459 was repealed and the **Small Claims Act,** R.S.N.S. 1989, c.430 was amended to transfer the duties of Taxing Master to the Small Claims Court Adjudicators. Section 9A now provides:

> **9A (1)** An adjudicator has all the powers that were exercised by taxing masters appointed pursuant to the *Taxing Masters Act* immediately before the repeal of that Act, and may carry out any taxations of fees, costs, charges or disbursements that a taxing master had jurisdiction to perform pursuant to any enactment or rule.
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> **(2)** The monetary limits on the jurisdiction of the Court over claims made pursuant to Section 9 and on orders made pursuant to Section 29 do not apply to taxations.

[14] The jurisdiction of this Court is brought into question because of s. 32(6):

> **32 (1)** A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
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> (a) jurisdictional error;
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> (b) error of law; or
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> (c) failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.
>
> **Notice of appeal**
>
> **(2)** A notice of appeal filed pursuant to subsection (1) shall be in the prescribed form and set out

(a) the ground of appeal; and

(b) the particulars of the error or failure forming the ground of appeal.

Transmission of notice

(3) Upon the filing of a notice of appeal in accordance with this Section, the prothonotary shall transmit a copy thereof to

(a) the adjudicator; and

(b) where the prothonotary is not the clerk of the Court, to the clerk.

Transmission of report

(4) Upon receipt of a copy of the notice of appeal, the adjudicator shall, within thirty days, transmit to the prothonotary a summary report of the findings of law and fact made in the case on appeal, including the basis of any findings raised in the notice of appeal and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision.

Transmission of file

(5) Upon receipt of a copy of the notice of appeal, the clerk of the Court, where the prothonotary is not the clerk, shall transmit the file for the case to the prothonotary.

Decision is final

(6) A decision of the Supreme Court pursuant to this Section is final and not subject to appeal. 1992, c. 16, s. 124; 1996, c. 23, s. 39.

[15] The relevant Civil Procedure Rules provide:

Part V. Appeals from Taxation

Application of Part V

63.37A

(1) No appeal lies pursuant to this Part from a determination of costs by the court pursuant to rule 63.04.

(2) For greater certainty, nothing in paragraph (1) precludes an appeal to the Nova Scotia Court of Appeal from a determination of costs by the court, including a determination pursuant to this Part of costs by a judge in chambers. [Amend. 20/6/94]

Time and contents of appeal

63.38.

(1) A person pecuniarily interested in the result of a taxation may, not later than ten (10) days after he has received notice of a certification on taxation, appeal the taxation as herein provided.

(2) The appellant shall commence the appeal by filing with the prothonotary a notice of appeal as prescribed by the Small Claims Court Taxation of Costs Regulations and immediately serving a copy of the notice upon all other parties to the taxation and upon the taxing officer. [Amend. 05/02/03]

(3) A notice of appeal shall specify any item objected to, the grounds of the objection, and the date of the hearing of the appeal.

(4) A notice of appeal shall be,

(a) returnable within fifteen (15) days from filing it with the prothonotary; and

(b) served on all parties directly affected by the appeal not less than three (3) days before the date set for the hearing of the appeal. [E. 62/33/35]

(5) Notwithstanding anything contained in this Part, an appeal from a taxing officer's determination of a party's entitlement to disbursements in a proceeding in which the costs between the parties were determined by a court shall be to the same judge who determined the costs between the parties, unless the court otherwise orders.

Appeal confined to items specified

63.39.

(1) Unless the court otherwise orders, an appeal from a taxation shall be confined to the items and grounds specified and shall be heard on the evidence before the taxing officer.

(2) The decision of the taxing officer shall be final and conclusive on all matters which have not been appealed from.

Powers of judge on appeal

63.40.

On an appeal from a taxation, the court may

(a) exercise all the powers of a taxing officer;

(b) review any discretion exercised by the taxing officer as fully as if the taxation were made by the court in the first instance; and

(c) grant such order on the application, including the costs of appeal and taxation, as is just.

[16] In their submissions on the jurisdictional issue, both counsel indicated that their appeal from Justice Goodfellow was properly before this Court but that the other party's appeal was not. Mr. Lienaux's argument was to the effect that their appeal to Justice Goodfellow was made both pursuant to the **Small Claims Act** and pursuant to Rule 63.38(1) and therefore there was a further appeal to this Court, as contemplated by s. 38(1) of the **Judicature Act**. Counsel for the respondent submitted that the issue raised on the cross appeal, that of the topping-up issue, was first determined by Justice Goodfellow since the adjudicator did not actually rule on liability on that part of the taxation. Therefore the proscription of s. 32(6) of the **Small Claims Court Act** does not effect the cross-appeal.

[17] It would not be practical for some taxations to have a right of appeal to this Court and not others, depending on whether a new issue was raised in the Supreme Court, or whether the party who appealed from the adjudicator noted **Rule** 63.38 in the notice of appeal, or whether the parties raised issues of liability for payment as opposed to reasonableness of the amounts. Prior to the repeal of the **Taxing Masters Act** there was an appeal from taxation to the Supreme Court pursuant to **Rule** 63 and then a further appeal to this Court pursuant to the **Judicature Act**.

Although the **Small Claims Court Act** does limit appeals of small claims matters to one level, pursuant to s. 32(6), which is in keeping with the purpose of the **Act**, that is, to simplify matters involving small claims, it is not clear that there was any intention to limit the number of appeals from taxations undertaken by adjudicators. This matter is obviously not a small claim, having started out as a matter involving in excess of $800,000. Furthermore, the taxation of a bill of costs is not a "proceeding before" the Small Claims Court**.** The proceeding is in the Supreme Court. The adjudicator, acting as taxing master, is in effect acting on a reference from the Supreme Court in furtherance of the original order where a party was ordered to pay taxed costs.

[18] For these reasons, I would determine the jurisdictional matter by finding that s.32(6) of the **Small Claims Court Act** does not apply to taxations of bills of costs by adjudicators pursuant to the authority vested by s. 9A of that **Act**.

Standard of Review

[19] The standard of review by this Court on both the appeal and the cross appeal from Justice Goodfellow's decision is as noted by Bateman, J.A., in **Founders Square Ltd. v. Coopers & Lybrand**, 1999 NSCA 13:

> [46] Costs are within the discretion of the trial judge. As with any discretionary order, appellate courts are reluctant to interfere. In **Conrad v. Snair** (1996), 150 N.S.R. (2d) 214 (at p. 216), Flinn, J.A. said:
>
> > Since orders as to costs are always in the discretion of the trial judge, this appeal is subject to a clearly defined standard of review. This court has repeatedly stated that it will not interfere in a trial judge's exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice. (See **Exco Corp. v. Nova Scotia Savings & Loan Co. et al** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331 (C.A.); **Turner - Lienaux v. Nova Scotia (Attorney General) et al** (1993), 122 N.S.R. (2d) 119; 338 A.P.R. 119 (C.A.); and **Hawker - Siddeley Canada Inc. v. Superintendent of Pensions (N.S.) et al** (1994), 129 N. S.R. (2d) 1940; 362 A.P.R. 194 (C.A.)); See also **Elsom v. Elsom** (1989), 96 N.R. 165 (S.C.C.))."

[20] In my view, there is no reason to depart from this standard on the basis that Justice Goodfellow was not the trial judge. An adjudicator and a judge of the trial court, both very experienced in matters of costs in the Supreme Court, have

reviewed the accounts in question in excruciating detail and it is not our function to conduct that level of scrutiny for a third time. We will review only for errors in principle or those that give rise to a patent injustice.

The issues on appeal

[21] The appellants state the issues on appeal as follows:

> 1. Did the learned Chambers Judge err in law when he ruled that the Respondent's solicitors had provided sufficient information to the Appellants to determine whether the solicitor and client costs charged to them were relevant and reasonably necessary to the Respondent's defence of the proceedings?
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> 2. Did the learned Chambers Judge err in law when he ruled that the Small Claims Court adjudicator judicially determined whether all charges directed by the adjudicator to be removed from the Respondent's bill of costs had been so removed?
>
> 3. Did the learned Chambers Judge err in law when he ruled that the Small Claims Court adjudicator judicially determined whether the solicitor and client costs charged to the appellants were relevant and reasonably necessary to the Respondent's defence of the proceedings?
>
> 4. Did the learned Chambers Judge err in law when he allowed solicitor and client costs to be charged to the Appellants for services which were not relevant or reasonably necessary to the Respondent's defence of the proceedings?
>
> 5. Did the learned Chambers Judge err in law when he ruled that the Respondent's counsel had removed all costs and charges which he directed to be removed from the Respondent's bill of costs?

[22] As noted above, the issues are more conveniently categorized as complaints: (1) that the respondent had not filed sufficiently detailed accounts, (2) that all amounts directed by the adjudicator and Justice Goodfellow to be removed from the accounts were not in fact deducted, and (3) that accounts were approved that were unreasonable and irrelevant to the proceeding.

[23] The appellants submit simply that they were not able to discern from the accounts submitted exactly what legal services were included. I would agree that

the method of accounting, while perhaps suitable for the usual account to a client for an ordinary matter, was not a satisfactory method of presenting an account for a contested taxation. This was not an ordinary situation - the solicitors for the respondent were presenting accounts for more than ten years of work on at least six separate legal proceedings arising out of related facts. The accounts and accompanying documents did indicate the specific lawyers who worked on the file, the dates of the work, a general description of the services provided, the length of time billed for each item of service and the hourly rate of each lawyer. The problem was that the accounts for each distinct matter or court proceeding were not kept separate, and they were obviously not prepared with a view that they would be taxed several years later on a solicitor-client basis. It would have been better practice to keep the accounts for each court proceeding separately and to describe the work performed with more precision, so that it would be easier to ascertain which matters were properly for the account of the opposite party ordered to pay the costs.

[24] However, in my view, the unsystematic accounting has been remedied. In his first decision, the adjudicator responded to each of 27 objections that Mr. Lienaux advanced, determined that many were valid points and directed that several matters be removed from the accounts. As a result of directions from the adjudicator, counsel for the respondent went through the 1000 pages of bills and marked with highlighters all the services that related to other proceedings. The adjudicator then reduced the bill by a total of $98,816.73 representing fees for matters not included in the action tried by Justice Hood, by another $29,457.41 representing costs that had been paid as party and party costs pursuant to interlocutory orders, and by $10,000 representing the amount paid as costs to the respondent by Byrne Architects, another party in the proceeding. In considering whether all the amounts that ought to have been deducted had been identified, the adjudicator noted at ¶ 67 of his second decision:

> ... that Mr. Lienaux refused to provide me with any specific objections to the charges listed in the revised accounts. Since he acted throughout the proceedings as counsel for the respondents, he would have been in the best position to determine whether any particular charge or group of charges was reasonable. This he refused to do, even though Mr. Parish advised him that he would take the position that his failure to do so would be taken by him as a waiver of his right to object. His refusal also supports an inference that he did not think that the fees themselves were unreasonable. (I acknowledge, in saying this, that Mr. Lienaux

> clearly did not agree that the respondents were liable to pay the fees - but that is a different issue from whether they are reasonable in amount.)

[25] Justice Goodfellow also dealt with this argument by the appellants and agreed with them that it was necessary to further review the accounts to ensure that nothing relating to one of the other actions was included and that all items that had already been taxed in interlocutory proceedings were excised.

[26] This leads into the second prong of the appellants' argument which is that the account still includes matters that should have been deducted. Extensive and more organized material was filed by respondent's counsel as a result of Justice Goodfellow's directions. The bills by then had been correlated into categories for trial preparation, preparation for discoveries, attendance at discoveries and trial work. As a result, an additional $151,794 was deducted mainly on the basis of disallowing topped up amounts, which is the subject of the cross appeal. Another $29,305 was deducted to represent an amount that Justice Goodfellow said was related to the claim by the respondent against the appellants which had been discontinued early in the proceeding on a without costs basis. Justice Goodfellow was then satisfied that the accounts did not include any items for work on other files or for previously taxed interlocutory matters.

[27] Another point made by the appellants is that they were not able to "make any reasonably precise calculation of the dollar value of the costs of the services", included in each of the accounts. This is because the respondent's law firm discounted each bill. For example, on the pre-bill for the very first account to Mr. Campbell dated January 11, 1994, the total fees for the five lawyers who billed for 175 hours were calculated to be $32,532, but that amount was discounted to $26,000 when the bill was sent to Mr. Campbell. Since the discount was applied globally at the end of the pre-bill, Mr. Lienaux is not able to figure out how much the individual items on that bill, that are now the responsibility of the appellants, actually cost the respondent. The discounts on most of the other bills are not proportionately as large as for the first bill, and in some cases are very small. However, at the end of the day, the amounts included in the bills to be paid by the appellants as ordered by Justice Goodfellow are the discounted amounts, not the pre-discount bills, so since they are receiving the benefit of the decreases, it seems to be a meaningless point.

[28] As indicated above, it is not the role of this Court to re-tax the accounts or to examine them as if in the first instance. Rather we are to ascertain whether there has been an error in principle or application of the law. The points made by the appellants in the first two categories of argument have already resulted in a massive reduction of the account and I am not persuaded that any issue of law or principle remains to be determined in that respect.

[29] The third prong of the appellants' argument is that they should not be responsible for paying the fees for services rendered as a result of presenting arguments of law that were either not accepted by Justice Hood or were accepted by her, but not endorsed by this Court on the appeal. They submit that further deductions should be made for "services which were charged for to prepare and argue matters that were wrong in law or irrelevant to the matters in issue". They say that the discoveries and trial were much longer than required because of the extraneous arguments put forth by the respondent in defence of the claim against him. Examples include the submission that the parties were not joint venturers, that the appellants were not the proper parties to bring the action, and that causation of the failure of the venture was relevant to the appellants' claim for restitution.

[30] In my view the answer to this issue is that these arguments made by the respondent were all known to this Court when the order for solicitor client costs was affirmed. This issue is *res judicata,* or has been merged in the original appeal decision. If there was conduct of the respondent or his counsel that unnecessarily prolonged the trial or needlessly complicated the legal issues raised, that was a matter for consideration by the trial judge in the original costs order or on the appeal of the original solicitor and client costs order. Presumably, if that were the case, the trial judge would not have ordered solicitor client costs, or the Appeal Court would either have not confirmed the costs order, or would have ordered some sort of reduction.

[31] A defendant is entitled to raise alternative lines of defence and if successful, at the end of the day is normally entitled to costs even if only one of the arguments was compelling. This was not a case of mixed results. All of the appellants' claims against the respondent were dismissed.

[32] I am unable to find that Justice Goodfellow applied wrong principles of law, or that the decisions are so clearly wrong as to amount to a manifest injustice. I would, therefore, not interfere with the amounts taxed and would dismiss the

appeal. I will deal with the question of costs of the appeal after consideration of the cross appeal.

The Cross Appeal

[33] Mr. Campbell (who I will now refer to as the appellant) cross appeals from the decision of Justice Goodfellow to disallow costs on a solicitor-client basis for those interlocutory matters and appeals that had been previously taxed on a party and party basis, or fixed by the court. In the notice of cross appeal, the issue is stated as:

> The Learned Justice erred at law when he found that the respondent was not entitled to his solicitor/client costs with respect to interlocutory applications and appeals in which party/party costs had been ordered in proceedings in the Supreme Court of Nova Scotia under file therein S. H. Number 93-5567 (101803);

[34] The reasons rendered by Justice Goodfellow on the topping up issue are set out in paragraph 9 herein.

[35] The appellant submits that since Justice Hood ruled that he should not "be put to any expense for his cost in defending the outrageous and scandalous allegations against him", and since she was aware of the numerous interlocutory applications and appeals, that implicit in her ruling is that she intended that the party and party costs should be increased to solicitor-client costs.

[36] The cases relied upon in support of this argument include three Ontario cases and one from the Federal Court: **Polish National Union of Canada Inc. - Mutual Benefit Society v. Palais Royale Ltd.** (1998), 163 D.L.R. (4th) 56; **131843 Canada Inc. v. Double "R" (Toronto) Ltd.**, [1992] O.J. No. 3872; **Benner & Associates Ltd. v. Northern Lights Distributing Inc**., [1996] O.J. No. 3525 and **Maison des Pates Pasta Bella Inc. v. Olivieri Foods Ltd.** [1999] F.C.J. No. 213.

[37] The principle that emerges from these cases is generally that at the time of an interlocutory proceeding the Chambers judge in fixing or determining costs is acting in a procedural vacuum, isolated from the big picture. An award of solicitor-client costs is almost unheard of at that stage. The eventual outcome of the

proceeding is very uncertain and the Chambers judge has little insight as to the impact of the interlocutory order on the final determination. But after the trial, the trial judge has the entire context of the litigation, knows then which party has prevailed, whether the proceeding has been unduly prolonged, or whether there were unfounded scurrilous accusations by the unsuccessful party to such an extent that solicitor-client costs for the whole matter should be awarded. It is only then that the decision to fully indemnify the successful party can be made.

[38] In the **Polish National** case, Morden, A.C.J.O. indicated in *obiter* that the top-up practice was acceptable where party-party costs had been ordered on an interlocutory matter, but not when the motions judge had ordered that there be no costs, or that the party ultimately successful after trial was not entitled to costs of the application. He said:

> 15 It was not open to the judge to award costs of a segment of the proceeding with respect to which there was an existing order providing, in effect, that the plaintiff was not entitled to those costs. This principle would not deprive a party who had been awarded costs of a motion on a party and party basis from having the costs provision "topped up" in an order at the end of the proceeding fixing costs of the proceeding on a solicitor and client basis.

[39] In the **Double R** case, Blair, J., as he then was, endorsed the topping up practice, holding:

> 29. Costs were awarded to the defendants in certain interlocutory proceedings prior to trial and were presumably granted on a party-and-party basis. The plaintiff submits that the defendants should not now be entitled to recover costs on a different and higher scale.
>
> 30. I do not agree. I see nothing to prevent the court from "topping up" a party's recovery in respect of the costs of such proceedings if, at the end of the trial, the judge is of the opinion - as I was - that the party is entitled to be reimbursed on the solicitor-and-client scale throughout. It is not a question of sitting on appeal from the interlocutory decision; it is simply a question of providing to the successful party the full indemnity that such an award envisions.

[40] The cases relied on by Ms. Turner-Lienaux and Smith's Field, the respondents on the cross appeal, include **Dickerson v. Radcliffe** (1900), 19 P.R. 223; **MacDonald v. Crites** (1906), 7 O.W.R 795; **Simone v. Toronto Sun Publishing Limited** (1979), 11 C.P.C. 340; **Van Bork v. Van Bork** (1994), 30

C.P.C. (3d) 116 and, **Kabutey v. New-Form Manufacturing Co.** [2000] O.J. No. 546. These cases generally stand for the proposition that the level of costs on interlocutory motions where a costs order has been made is *res judicata* and cannot be revisited by the trial judge or a judge subsequently presiding over a taxation. For example, in the **Simone** matter, Master Sedgwick stated:

> ¶ 5 The orders referred to above either awarded costs to the defendants in the cause - those orders of Master McBride dated January 17, 1977, of Master Davidson dated October 31, 1977, and of Mr. Justice Rutherford dated November 21, 1977; or awarded no costs - the order of Mr. Justice Steele dated February 2, 1977. In support of the defendants' objections, counsel submits that where the costs of an interlocutory motion had been disposed of the trial Judge has no power to alter the disposition of those costs. In support of this contention I have been referred to the following cases which I have read and considered: McDonald v. Crites (1906), 7 O.W.R. 795 and Dickerson v. Radcliffe (1900), 19 P.R. 223. The principle I take from these cases is that there is no power in the trial Judge to deal with the cost of an interlocutory motion if those costs have been awarded to one party or the other or if no order as to costs has been made. Mr. Justice Meredith said the following in the Dickerson v. Radcliffe case, at page 224: "It may be taken for granted that, if the order disposed of the costs one way or the other, there was no intention and no power, to alter such disposition of them. That is to say, the trial Judge could not deal with them as if hearing an appeal against the order. He could not, for instance, award costs to either party if the order provided that neither party should have the costs of it". The McDonald v. Crites case and the Dickerson v. Radcliffe case dealt with costs on a party and party scale. However, it does not seem to me that the above principle should be different notwithstanding that the costs are being taxed on a solicitor and client scale.

[41] Here, the appellant is asking for top up of roughly $150,000 representing the difference between party-party costs and solicitor-client costs on the following interlocutory matters, (as listed by Justice Goodfellow at ¶ 14 of his first decision):

> 14 The orders in question are as follows:
>
> (i) order of Bateman, J. dated November 12, 1993 inter alia appointing a receiver to take possession of the assets of Smith's Field Manor Development from Mrs. Turner-Lienaux; The order provided that costs of this application would be costs in the cause.

(ii) order of Boudreau, J. dated April 17, 1996 allowing Mrs. Turner-Lienaux to amend pleadings; The order fixed party and party costs at $500.00 in addition to any other costs in the proceeding, plus GST. ...

(iii) order of Saunders, J. dated April 17, 1996 allowing Mr. Campbell to discontinue his action; The order provided that the Campbell action would be discontinued without costs up to April 17, 1996.

(iv) order of Hood, J. dated May 27, 1996 fixing party and party costs of an application to remove Green Parish as counsel at $1,200; These costs have been paid to Mr. Campbell.

(v) order of Nova Scotia Court of Appeal dated October 8, 1996 fixing costs of an appeal from the decision of Hood, J. at $2,000; These costs have been paid to Mr. Campbell.

(vi) order of Nova Scotia Court of Appeal dated October 15, 1996 fixing costs of an appeal from the decision of Justice Saunders allowing Mr. Campbell to discontinue his action at $1,000; These costs have been paid to Mr. Campbell.

(vii) order of Nathanson, J. dated February 3, 1997 fixing costs of an application to order Mr. Campbell to produce documents for discovery at $500 plus GST; ...

(viii) order of Nathanson, J. dated February 3, 1997 fixing costs of an application to order Adelaide Capital Corporation and Toronto-Dominion Bank to produce documents for discovery at $500 plus GST; ...

(ix) order of Tidman, J. dated March 6, 1997 allowing amendments to the pleadings of Smith's Field Manor Development Limited and Mrs. Turner-Lienaux; This order provided that there were not costs to any party.

(x) decision on costs of Saunders, J. dated June 2, 1997 refusing to award solicitor and client costs on application for summary judgment against Mr. Campbell;

(xi) supplementary decision on costs of Saunders, J. dated July 24, 1997 fixing party and party costs of $12,000 plus disbursements of $817.49;

(xii) order of Saunders, J. dated September 10, 1997 dismissing an application for summary judgment against Mr. Campbell and fixing party and party costs, disbursements and HST applicable thereto at $12,907.41; These costs have been paid to Mr. Campbell.

(xiii) order of Bateman, J.A. dated November 3, 1997 dismissing an application to stay Saunders' J.'s order for costs; The order provided that costs of the application would be costs in the appeal.

(xiv) order of Nova Scotia Court of Appeal dated April 8, 1998 fixing party and party costs of an appeal from the decision of Justice Saunders dismissing an application for summary judgment against Mr. Campbell at $4,800; These costs have been paid to Mr. Campbell.

(xv) order of Nova Scotia Court of Appeal dated April 23, 1998 fixing party and party costs of stay application before Bateman, J.A. at $500 inclusive of disbursements; These costs have been paid to Mr. Campbell.

(xvi) order of MacAdam, J. dated September 13, 1999 fixing costs of an application to order Mr. Campbell to produce documents for discovery at $1,000 in addition to any other costs in the proceeding;

(xvii) order of Gruchy, J. dated March 8, 2000 dismissing claims against Mr. Campbell for professional negligence and consequential damage; This order provides that all claims dealt with in the order are dismissed without costs to any party.

(xviii) decision of Bateman, J.A. dated August 24, 2000 dismissing application to allow new evidence and reconsider appeal; This decision fixed party and party costs of this application at $1,500. These costs have been paid to Mr. Campbell.

(xix) draft order of Scanlan, J. dated in or about November, 2000, dismissing an application for abuse of process and allowing an application for increased security for costs and fixing party and party costs at $5,000; These costs have been paid to Mr. Campbell.

[42] As noted by Justice Goodfellow, items (x) and (xi) were two decisions of Justice Saunders arising from the same application which resulted in the order shown as item (xii). It appears that the main reason Justice Goodfellow declined the request for the top up is that the question of costs on all these applications where costs were awarded was *res judicata*. Furthermore, the Supreme Court did not have jurisdiction to change an award of costs either fixed by the Court of Appeal on an appeal, or affirmed by this Court on appeal. He was of the view however, that the trial judge, if she had been asked before she determined the costs

order, could have added a gross up or lump sum to the award of solicitor-client costs.

[43] This Court has not dealt with the issue of topping up before. It would appear to be an exceptional case where it would become an issue, since awarding solicitor-client costs after trial is such an infrequent occurrence. In many of those cases, the number of interlocutory motions would not be so great so as to make it worthwhile to argue about the top-up question.

[44] There appear to be sound principles underlying both lines of cases. I agree with Justice Goodfellow to the extent that any topping up, whether by way of a lump sum award or otherwise, is a matter for the trial judge not another judge hearing an appeal from a taxation. I would also agree that topping up should only occur as described by Morden, A.C.J.O. in the **Polish Union** case. I would also agree with those cases that indicate that it would be inappropriate for a trial judge to change an award of costs made previously so that the first order is reversed. For example, if a defendant was awarded party and party costs on his motion to strike out a part of the statement of claim, and after trial the plaintiff was successful, the trial judge should not attempt to overrule the earlier order. Nor would it be appropriate for a trial judge to vary a costs order made by the Appeal Court. Presumably if the Appeal Court panel thought the appeal was a complete waste of time or was frivolous or vexatious, it would order solicitor-client costs on the interlocutory appeal.

[45] After careful consideration of the cases to which counsel have referred, and deliberation on all the circumstances of this case, I have come to the conclusion that the cross appeal should be dismissed. While the arguments of Mr. Campbell's counsel were cogent, especially in light of the criticism leveled against the respondents on the cross appeal by Justice Hood, in my view, Justice Goodfellow did not err in law in determining that he should not order a top up in this case. While not ruling out the possibility of top ups by a trial judge generally, or in another case, it was in my opinion, not wrong for him to refuse to top up in this case.

[46] In this case the appellant requested solicitor-client costs on many, if not all, of the motions. Those requests were specifically denied by the various Chambers judges. For example, Saunders, J., as he then was, in June 1997 dismissed the application by the Lienaux group for summary judgment, received further written

submissions from the parties on the question of costs and wrote a detailed decision allowing significant costs fixed in the amount of $12,000. That decision was then appealed, and this Court dismissed the appeal and fixed costs of $4,800 plus $500 for the stay application. Surely the costs arising from that application and appeal should not be revisited at his point. Another factor is that in some of the interlocutory matters the respondents on the cross appeal were successful, for example, on an application for production of documents before Nathanson J., in February 1997, who allowed the application without costs, and the application by the Lienaux group to amend their defence before Tidman J., who also declined to order any costs to either party. Although Justice Hood was of the view at the end of the trial that the respondents' conduct was reprehensible and their allegations against Mr. Campbell were outrageous, some of the interlocutory motions may have been completely reasonable at the time, or even perhaps necessitated by a refusal of the appellant to consent to a legitimate request. It would be extremely difficult to turn the clock back now to discover whether in every instance the actions of the respondents on specific motions was of such an oppressive nature to warrant the burden of a solicitor-client costs order against them. These are matters that should be addressed by a trial judge who orders solicitor and client costs after trial, before the trial judge becomes functus by signing the order.

[47] On a few of the pre-trial motions the costs were determined to be in the cause and it appears that Justice Goodfellow properly allowed the costs of those applications to be included in the final taxed bill of costs.

[48] For these reasons, I would dismiss the cross appeal.

Costs

[49] Since success was equally divided, I would order that each party bear their own costs on the appeal and the cross appeal.

Roscoe, J.A.

Concurring:

Freeman, J.A.

Cromwell, J.A.