Date: 19980609 Docket: C.A. 143955

NOVA SCOTIA COURT OF APPEAL
Cite as: Granview Farms Ltd. v. CBCL Ltd., 1998 NSCA 115

Roscoe, Hart and Flinn, JJ.A.

BETWEEN:

GRANVIEW FARMS LIMITED, a body corporate Michael J. Wood and	)	
Appellant	)	Stuart Gilby for the Appellant
- and -	)	
	)	T. Arthur Barry for the Respondent
CBCL LIMITED, a body corporate	)	
Respondent	)	Appeal Heard: April 9, 1998
	)	Judgment Delivered: June 9, 1998

THE COURT: Appeal allowed per reasons for judgment of Flinn, J.A.; Hart and Roscoe, JJ.A. concurring.

FLINN, J.A.:

Introduction

The appellant, Granview, commenced an action, in the Supreme Court, against the respondent, CBCL, a firm of consulting engineers.

Granview alleges :

(i) that the City of Dartmouth retained CBCL to investigate a particular site for the proposed development of a recreational park and soccer fields, and to prepare tender documents for that proposed development;

(ii) that, CBCL, in the course of its investigation, became aware of site conditions which would make the site unsuitable for the proposed development without extensive additional work;

(iii) that CBCL did not disclose these unusual site conditions in the tender documents which they prepared.

(iv) that Granview used the tender documents to bid (under an arrangement with another contractor, TAG Developments Ltd.) on the proposed development; that it was successful, and that it incurred substantial additional costs, and other damages, as a result of not being informed of the unusual site conditions.

Granview claims damages against CBCL, alleging that CBCL was negligent in not advising Granview of the unusual site conditions, in the tender

documents, or otherwise.

CBCL made an application in Supreme Court Chambers to strike out Granview's statement of claim. Granview also made an application to strike out certain portions of CBCL's defence. Both applications were heard together. Justice Boudreau dismissed Granview's application and the dismissal of that application is not at issue in this appeal. With respect to CBCL's application, Justice Boudreau struck out Granview's statement of claim in its entirety, and dismissed Granview's action against CBCL with costs. He decided that Granview was relitigating a matter which had already been adjudicated upon; and that to permit Granview to proceed would offend the principles of *res judicata*, and be an abuse of the process of the court.

The prior proceeding, to which Justice Boudreau was making reference, was a mechanics' lien action which Granview had commenced against the City of Dartmouth. Granview was unsuccessful in that action.

Granview appeals, for intervention by this Court, to set aside the decision of the Chambers judge. Granview claims that the Chambers judge made errors of law in reaching his decision. Further, Granview submits, it is patently unjust to dismiss this proceeding on a pretrial motion, without the opportunity of having the matter heard and determined on its merits.

Facts

It is necessary to review, in some detail, the prior proceedings in order to properly assess the application, by the Chambers judge, of the principles of *res judicata* and abuse of process. Before doing so, two additional facts should be noted here:

(i) Granview is the successor corporate entity of Turf Masters Landscaping Limited (Turf Masters) by virtue of an amalgamation of Turf Masters and other corporate entities in December, 1990; (I will use both names, Turf Masters and Granview, interchangeably throughout these reasons) and

(ii) Granview's predecessor corporation (Turf Masters) had no contractual relationship with the City of Dartmouth. The work which it performed at the site was part of a contract entered into between the City of Dartmouth, as owner, and Turf Master's joint venture partner, TAG Developments Limited.

Turf Masters began work on the site in October of 1989 and, within weeks, it became apparent that there would be cost overruns as a result of unknown soil conditions. Turf Masters encountered significant problems in completing the landscaping portion of the work which entailed extra costs resulting from additional labour and materials as well as different methods of executing the work which had to be utilized. Turf Masters sought payment for

the extra costs from the City of Dartmouth but received no payment. Work stopped on the project, for the winter, around November 1989.

In December 1989 Turf Masters filed a lien against the City of Dartmouth and TAG, claiming increased costs as a result of the earth compacting, sodding in ditches being washed away and the ditch banks being steeper than anticipated. A statement of claim was filed on December 21, 1989.

Turf Masters resumed the work in the late spring or early summer of 1990; and in July 1990 it filed a further lien claim.

Turf Masters continued to work on the project, pursuant to the contract, during the time that the mechanics' lien action was proceeding. In 1991, in the course of discovery examinations, the City of Dartmouth produced geo-technical reports which had been prepared by Jacques Whitford & Associates (a firm of consulting engineers retained by CBCL), with respect to sub-surface conditions at the project site. It is conceded that Turf Masters had never previously seen these reports, and they contained information about the sub-surface conditions which would have identified the nature and extent of the problems which Turf Masters ultimately encountered. Turf Masters claimed that had this information been provided as part of the tendering process, the Turf Masters tender would have been much higher and the method of work employed would have been different.

In an affidavit filed in this proceeding, and deposed to by Alan Streatch, the President and CEO of the appellant, deposed as follows:

> 10. THAT by June of 1992, Granview Farms was experiencing significant financial problems due to the losses being incurred on the Project as well as the ongoing litigation costs related to the Mechanics' Lien action. In June 1992, as a result of these financial problems, Turf Masters changed its solicitors from McInnes Cooper & Robertson to Charles Lienaux.

Also in an affidavit filed in this proceeding, the appellant's new counsel, Mr. Lienaux, deposed as follows:

> 4. THAT at the time I took over conduct of the Mechanics Lien action, I was aware of the existence of soils reports prepared by Jacques Whitford and Associates Limited which had not been provided to Turf Masters Landscaping Limited prior to commencement of work on the project. I was of the view that there was well-established case authority that any claim against CBCL Limited based upon this non-disclosure would arise in tort and could not be made in the Mechanics' Lien action.
>
> 5. THAT during the course of my representation of Turf Masters Landscaping Limited in the Mechanics' Lien action, I was advised by Mr. Alan Streatch that the City of Dartmouth was refusing to award Granview Farms any work so long as the litigation was outstanding. He also advised me of other business opportunities that Granview Farms was unable to pursue because of its financial circumstances.
>
> 6. THAT in my view, the losses suffered by Granview Farms Limited arising out of the project were not limited to the cost of labour and materials supplied but included loss of economic opportunity, as well as the costs incurred in pursuing the Mechanics' Lien action. These latter items could not be recovered in the Mechanics' Lien action but rather would have to be pursued in a separate action for negligent misrepresentation arising out of the failure of CBCL Limited to disclose the Jacques Whitford soils reports.

> 7. THAT since the losses of Granview Farms were continuing to accrue I felt that the tort claim against CBCL Limited would not be perfected until the Mechanics Lien action was concluded. At that time, it was the intention of myself and my client that the action against CBCL Limited for negligent misrepresentation would be pursued for those damages not recovered in the Mechanics' Lien action.

In August 1992 an order was granted permitting Turf Masters to amend its statement of claim in the mechanics' lien action. As a result of the amendments, the mechanics' lien action was recast as a claim by Turf Masters directly against the City of Dartmouth and based on *quantum meruit*. The amended statement of claim pleads the non-disclosure of the soils reports as the basis for two alternative claims:

1. If Dartmouth acted in good faith in failing to make the disclosure, then it should compensate Turf Masters for the cost of all "extra" work which was required; and
2. If Dartmouth acted in bad faith in not disclosing the reports, then this constituted misrepresentation which would render the contract voidable and give rise to a claim based upon *quantum meruit*.

In September, 1992, the City of Dartmouth joined CBCL as a third party seeking indemnity for the claim of Turf Masters with respect to failure to disclose the soils reports to tenderers.

It should be noted here that in September of 1992, the County Courts in Nova Scotia had not yet merged with the Supreme Court of Nova Scotia. Merger did not take place until January 30, 1993, and until that time the County Court had jurisdiction over mechanics' liens actions.

On the application of Turf Masters, to a County Court judge in Chambers, the City of Dartmouth's third party proceeding against CBCL was struck out. On appeal, this Court reinstated the third party claim.

Following the joinder of CBCL, counsel for Turf Masters sought and obtained the agreement of counsel for Dartmouth, as well as CBCL, that the *quantum meruit* claim being advanced against Dartmouth should proceed to trial under the provisions of the **Mechanics' Lien Act**. Counsel also requested a pretrial conference with the late Chief Judge Palmeter which took place on January 21, 1993. Chief Judge Palmeter's memo to file of the conference (which was attended by counsel for Turf Masters, counsel for the City of Dartmouth and counsel for CBCL) confirms that the matter would continue as a Mechanics' Lien action, as indicated by the following passage, from that Memo:

> The question of jurisdiction of this Court to continue to hear the matter was raised and I indicated that it was my opinion that the Court still had jurisdiction under s. 46 of the *Mechanics' Lien Act*, notwithstanding that many of the Mechanics' Lien matters had been settled between the parties. So long as the action was properly commenced under the Act, the Court had the jurisdiction to continue to hear matters derived therefrom and to issue a personal judgment. I advised that merger would take place on

> January 30, 1993 and the matter would be continued in the new Supreme Court of Nova Scotia.
>
> Counsel for all parties agreed with my interpretation and accepted the jurisdiction of the Court to continue to hear the matter.

Turf Masters had retained the engineering firm of Mac Williams Engineering Limited to give an expert opinion with respect to the problems experienced by Turf Master with respect to this project. In a report dated February 1993 Mac Williams Engineering Limited reported to Turf Master's counsel as follows:

> Turf Masters requested the firm of Mac Williams Engineering Limited to review this matter and to give its opinion of the cause of the problems experienced by Turf Masters and to determine whether the extra labour and materials expense claimed by Turf Masters is reasonable in the circumstances.

And further:

> There was a substantial loss of topsoil for which CBCL did not make any allowance for payment, which CBCL knew would be experienced because of subsurface conditions at the site.

The calculation of loss by Mac Williams Engineering Limited, and the references to the soils reports and other issues, in essence, set out the nature of the claims which were pursued by Turf Masters, <u>against the City of Dartmouth</u>, at the trial.

On March 3, 1993, Turf Master's counsel wrote to counsel for the City of Dartmouth, with a copy to counsel for CBCL enclosing a copy of the Mac Williams Engineering report and noting that he would be filing an amended statement of claim in relation to the amounts being claimed. He stated at p. 2 of his letter:

> I also note that I no longer see any sense in pursuing a claim under the contract between TAG and Turf Masters. The claims which I shall be pursuing shall be based on either *quantum meruit* or alternatively upon negligent misrepresentations.

And:

> According to Mr. Williams' findings CBCL knew at the time it issued the tender call for the work that it would be necessary for Turf Masters to do extensive work at this site because of subsurface soils conditions described in two reports in CBCL's possession. However, CBCL did not disclose this information.

The trial of the mechanics' lien action commenced in June of 1993 and was held over 18 days between June of 1993 and January of 1994. The decision of the trial judge is reported in (1994), 135 N.S.R. (2d) 105. It is relevant to set out the issues, as the trial judge saw them, in the course of writing his decision. The trial judge said the following at pp.109-110):

> .....Turf Masters is not claiming breach of contract on the part of the City. Turf Masters has admitted that it had no contract with the City of Dartmouth. Their contract was with T.A.G., who had the contract with the City, but that agreement is only relevant here insofar as it indicates the intentions of the parties. What the plaintiff is seeking is recovery on the basis of a **quantum meruit**. They claim that the work they performed was so materially different from that

> tendered for and contemplated in their contract with T.A.G., that they should be entitled to a reasonable claim for labour and materials that were necessary as a result of nondisclosure by the City of certain information.
>
> The parties have set out a number of issues they feel comprise the essence of this case, both in argument and in the various memoranda. However, certain positions have been abandoned, or, at least, the focus has shifted during the course of these proceedings. Although all the arguments have been considered, it is better to set out the main issues, as I see them now, on which it is necessary to come to a decision.
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> (1) Does the plaintiff have a basis for a claim in **quantum meruit?**
> (2) Has the plaintiff proven damages?
> (3) Is the plaintiff's claim barred by the **Mechanics' Lien Act**?
> (4) Liability of CBCL, the third party.
> (5) Prejudgment interest.

The trial judge ordered the City of Dartmouth to pay to Turf Masters the sum of $180,936.40 together with pre-judgment interest and costs. The trial judge also stated in his judgment and order that CBCL was jointly and severally liable with the City for the damages; however, the order made no express provision for contribution by CBCL.

The City of Dartmouth appealed the trial judge's decision and order to this Court. CBCL appealed from the finding that it is jointly and severally liable along with the City of Dartmouth to Turf Masters and as well challenged the liability of the City of Dartmouth to Turf Masters.

The decision of this Court on that appeal is reported in (1995), 143 N.S.R. (2d) 275. Writing on behalf of the Court, Justice Chipman said the following at p. 282 (the reference in the following quotation to the "City" means the City of Dartmouth):

> The City and CBCL have raised a number of issues. It is not necessary to deal with all of them. I accept the findings that the failure to disclose the soils reports was material and that there was instability in the site which made the work of Turf Masters more difficult than it had anticipated. In my opinion, the only issue which must be resolved is whether the trial judge erred in holding that Turf Masters could recover against the City in quantum meruit.
>
> (Emphasis added)

And at p. 284:

> At no time did Turf Masters elect to treat its contract with T.A.G. as at an end. Nor did it establish that prior to the completion of the work the contract was fundamentally breached, frustrated or otherwise terminated between the parties.

And at p. 285:

> Where the contractor does not repudiate the contract as frustrated or breached but continues to act under it, a claim for quantum meruit cannot be sustained.

And at p. 290:

> In my opinion, Turf Masters has no claim against the City in quantum meruit.

The appeal of the City of Dartmouth was allowed, and the cross-appeal

of CBCL was dismissed. As a result, Turf Masters' claim against the City of Dartmouth, in *quantum meruit*, (for the additional costs which it incurred as a result of not knowing about the soils reports) was dismissed.

Turf Masters' application for leave to appeal to the Supreme Court of Canada was dismissed on March 21st, 1996.

Five months later, on the 13th of August, 1996, the appellant, the successor by amalgamation of Turf Masters, commenced the action, which is the subject of this appeal, against CBCL claiming damages for negligence.

The Decision of the Chambers Judge

In his decision, the Chambers judge identified the issues before him as follows:

1. Should Granview's statement of claim be struck out on the basis of *res judicata*/cause of action estoppel?
2. Should Granview's action be stayed or dismissed as an abuse of process of the Court?

The Chambers judge answered both questions in the affirmative, struck out Granview's statement of claim and dismissed its action.

The Chambers judge, firstly, decided that whether Granview's present

claim (an action in negligence against CBCL) could have been pleaded in the first action under the **Mechanics' Lien Act** was not a determinative issue. Further, with respect to the requirement, in the application of the principle of *res judicata*, that the previous court decision be final and between the same parties or their privies he said the following:

> There can be no question that the first decision is final, leave having been denied by the Supreme Court of Canada. While CBCL was not originally named as a defendant in the first action it became a full third party litigant by being joined for indemnity by the City.

He decided that the present cause of action (by Granview against CBCL in negligence) "is the very same one litigated in the first action, simply under a different legal concept."

After referring to the decision of this Court in **Hoque v. Montreal Trust Co. et al** (1997), 162 N.S.R. (2d) 321, the Chambers judge said:

> I am satisfied that Granview/Turf Masters should have raised the point now asserted in the second action [a claim in negligence by Granview against CBCL] at the very latest in early 1993 and well before the trial. ..... In my opinion it was possible to have the entire allegations heard at one trial, or at the very least it should have been attempted.

On the issue of abuse of process, the Chambers judge said:

> I am satisfied that to allow Granview to now basically relitigate the same action on the same factual basis on a different legal concept which it considered but did not

proceed with would be an abuse of process of the court.

Standard of Review

The proceeding which is the subject of this appeal is an interlocutory proceeding involving a discretionary order. However, since the order of the trial judge is a final order, which dismisses Granview's action, the decision of the Chambers judge is not given the same deference usually afforded by this Court when dealing with interlocutory matters involving the exercise of discretion. As Justice Roscoe said in **Frank v. Purdy Estate** (1995), 142 N.S.R. (2d) 50 (N.S.C.A.) at p. 54:

> In this case, as in **MacCulloch [MacCulloch v. McInnes Cooper & Robertson** (1995), 140 N.S.R. (2d) 220], the order appealed from had a terminating effect and plainly disposes of the rights of the parties. Therefore the usual test applied to discretionary orders of an interlocutory nature does not apply. Rather the issue is whether there was an error of law resulting in an injustice.

Disposition

I will refer, firstly, to the decision of this Court in **Hoque , (supra)**, which was relied upon by the Chambers judge, in applying the principles of *res judicata*, or issue estoppel, to dismiss Granview's action. In my opinion, the Chambers judge erred in his interpretation, and application, of **Hoque**, and my reasons for that opinion follow.

The case of **Hoque** has no application here. The first proceedings in

Hoque were actions by a mortgagee, against Dr. Hoque and companies controlled by him, claiming foreclosure and sale of certain mortgages. The actions were not defended. The orders for foreclosure and sale were granted and the properties were sold. Subsequently, in the second action, Dr. Hoque sued the mortgagee, and one of its officers, claiming damages for breach of contract, tortious interference with business relations, trespass and conversion. These allegations related to dealings between Dr. Hoque and the mortgagee with respect to the mortgages which had been foreclosed in the first action.

In the course of deciding that certain of Dr. Hoque's claims against the mortgagee were barred by the principles of *res judicata*, or issue estoppel, Justice Cromwell, writing for the Court, said the following at p. 330 (N.S.R.):

> *Res judicata* requires that the previous court decision be final and between the same parties and their privies. Both of these requirements are met here.

And at p. 339 (N.S.R.):

> In my respectful view, Dr. Hoque cannot be permitted to allege in his action anything which is inconsistent with the final orders of foreclosure. In other words, all of the matters essential to the granting of the final orders of foreclosure are not now open to be relitigated in these proceedings. This is not a mere technical rule but an application of a fundamental principle of justice: once a matter has been finally decided, it is not open to reconsideration other than by appeal or other proceedings challenging the initial finding.

The Chambers judge referred to the following statements by Justice

Cromwell in his reasons in **Hoque**. Firstly, at p. 331 (N.S.R.):

> The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matters not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.

> And at p. 333 (N.S.R.):

> 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.

> And at p. 338 (N.S.R.):

> My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier

> case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.

Applying Justice Cromwell's comments, the Chambers judge concluded that Granview could have, and should have, ensured that Granview's claim against CBCL (for damages in negligence) was determined along with the mechanics' lien action, all in the one proceeding. The Chambers judge said:

> In my opinion it was possible to have the entire allegations heard at one trial, or at the very least, it should have been attempted.

With respect, what Granview could have done in this regard bears no resemblance whatsoever to the situation in which Dr. Hoque found himself in the **Hoque** case. Firstly, the law is clear that Granview could not have joined CBCL as a defendant in the mechanics' lien action, and claimed damages in negligence against CBCL. Justice Chipman, of this Court, noted that point in his decision on the appeal of the mechanics' lien action. He said at p. 289 (143 N.S.R. (2d):

> Turf Masters had suggested to the trial judge that such nondisclosure was akin to negligent misrepresentation. The point was argued before us. The cases cited as authority for the proposition that an owner or its consultant can be liable in tort for a misrepresentation in the tender documents are of no assistance here. A claim in tort is not enforceable under the Mechanics' Lien Act. See Western Caissons (Man.) Ltd. v. Trident Construction Co. (1975), 54 D.L.R.(3d) 289 (Man. Co. Ct.).
>
> (Emphasis added)

(See also **P.P.G. Industries v. J.W. Lindsay Enterprises** (1982), 52 N.S.R. (2d) 267 (N.S.C.A.)).

I will say more about what Granview could have done, and should have done, (prior to the trial of the mechanics' lien action) when I deal with the issue of abuse of process.

In **Hoque**, the defendants' argument, in essence, was that the allegations later raised by Dr. Hoque could have been raised in the earlier litigation between the same parties. The court held that *res judicata* did not necessarily bar all claims that could have been raised, but only those that, having regard to a number of considerations, should have been raised. The underlying basis of this Court's decision in **Hoque** is that Dr. Hoque was not permitted, in the second action, to allege anything which is inconsistent with the final order for foreclosure (the finding in the first action). He decided that the allegations, which Dr. Hoque was barred from raising, were inconsistent with the validity and enforcability of the mortgages. Their validity, and enforcability, result from Dr. Hoque's trustee in bankruptcy not having defended the foreclosure action.

In this proceeding, Granview is claiming damages, in negligence, against CBCL. No allegation in this action - nor any finding which a trial judge

would have to make in this action - would be inconsistent with that which has already been decided in the mechanics' lien action. The only issue that was decided in the mechanics' lien action was that Granview did not have a claim in *quantum meruit* against the City of Dartmouth. In neither the trial, nor the appeal, of the mechanics' lien action, was the subject of CBCL's liability to Granview in negligence, or otherwise, dealt with. Granview took no proceeding against CBCL in the mechanics' lien action. The fundamental requirement that the earlier litigation be between the same parties or their privies was, therefore, lacking.

The principles of *res judicata*, or issue estoppel, simply do not apply here. The Chambers judge erred in law in applying those principles to these circumstances.

With respect to the issue of abuse of process, the Chambers judge said the following:

> .....In my opinion it was possible to have the entire allegations heard at one trial, or at the very least it should have been attempted. I am satisfied that to allow Granview to now basically relitigate the same action on the same factual basis on a different legal concept which it considered but did not proceed with would be an abuse of process of the court.

Whether Granview could have ensured that both its claim against the City of Dartmouth, under the **Mechanics' Lien Act**, and its claim, against CBCL

in negligence, could have been dealt with in one trial involves some analysis. There was no such analysis in the Chambers judge's decision. He simply says that it could have been done and should have been "attempted".

Firstly, as I have already pointed out, Granview could not have added CBCL as a defendant in the mechanics' lien action and claimed damages against CBCL in negligence. It is not clear why the Chambers judge decided that he did not have to deal with this issue (or why it was not determinative) while at the same time deciding that Granview had abused the process of the court by commencing this action, not having had it joined with the prior proceeding.

Secondly, there was an alternative open to Granview, as counsel for CBCL submits. After the merger of the County Court with the Supreme Court (January 30th, 1993), the Supreme Court acquired jurisdiction over the mechanics' lien action. At that time Granview recognized that it had a separate cause of action against CBCL in negligence. As counsel for CBCL submits, Granview should have, at that time, commenced a separate action in the Supreme Court against CBCL claiming damages for negligence. This action could, then, have been consolidated with the mechanics' lien action, and everything could have been heard together.

That, in my view, is more easily said that done.

At the time of the merger of the two courts, (January 30th, 1993) the mechanics' lien action was, for the most part, ready for trial. The trial actually commenced in June, 1993. Discoveries had been held. A pre-trial conference had been conducted by Chief Judge Palmeter, just before merger, on January 21st, 1993. Counsel for Granview, the City of Dartmouth and CBCL were all present. The note of the pre-trial conference indicates that, with the exception that "some short discoveries might be undertaken by the parties in April or May" there were no other issues to be resolved. Chief Judge Palmeter set the matter down to be heard in June, 1993. The note of the pre-trial conference also indicates that:

> It is anticipated that there will be no further interlocutory applications made prior to trial**.**

In this context, what, if any, assumptions can be made as to the ability of Granview, assuming that it commenced a separate action in the Supreme Court against CBCL for damages in negligence, to consolidate such an action with the mechanics' lien action, so that all issues could be heard in one trial? I certainly cannot assume that the City of Dartmouth and CBCL would not have opposed such an application. Nor can I assume that the court, in its discretion, would have granted the consolidation.

The mechanics' lien action was, for all intents and purposes, ready for trial. To introduce a separate and distinct cause of action "into the mix" at that stage may very well have been met with opposition. It would involve further

pleadings. It would, in all probability, have necessitated additional discoveries, because there would now be a new cause of action involving different rights and obligations of two of the parties. The trial date for the mechanics' lien action, which had been set, would, undoubtedly, have to be changed. I also note that there is no evidence that at the pre-trial conference on January 21st, 1993, (or for that matter, at any other time) CBCL were insisting that there be one trial to determine all of the issues between all of the parties. Indeed, there is no evidence that CBCL even made a suggestion to that effect at that time.

There is no doubt that with the co-operation of all of the parties and their counsel, and with the indulgence of the Court, such a consolidation could have been accomplished; and, as a result, all of the issues between all of the parties could have been dealt with at one trial. It does not follow, however, given the circumstances which existed at the time, and which I have described above, that simply because Granview's counsel did not "attempt" the consolidation, Granview is now abusing the process of the Court by bringing this present proceeding against CBCL.

CBCL's application to dismiss Granview's action, here, was made pursuant to **Civil Procedure Rule** 14.25. In **Hurley v. Co-operator's General Insurance Co.** (CA. No. 144304 dated May 12, 1998) this Court said the following concerning abuse of process in the context of **Civil Procedure Rule** 14.25:

> ..... the phrase, [abuse of process] in the context of **Rule 14.25**, contemplates that, in commencing, or maintaining, a

> legal proceeding, the process of the court is being misused, or is being used for an improper purpose; as opposed to an action being brought, or maintained, for the assertion of legitimate rights.

It would have been more efficient, and certainly less costly for all concerned, if all of these matters had been dealt with in one trial. It cannot be said, however, that Granview is misusing the process of the Court - or using it for an improper purpose - by bringing the present action, not having "attempted" to have it consolidated with the mechanics' lien action in 1993.

In summary, and in conclusion, the Chambers judge erred in law in his interpretation and application of the principles of *res judicata* and abuse of process in dismissing Granview's action. Further, on the basis of all of the circumstances which I have set forth in these reasons, it would result in a patent injustice, to Granview, if Granview was prevented from having the issue of CBCL's liability, in negligence, determined following a trial.

I would, therefore, allow this appeal. I would set aside paragraph 1 of the order of the Chambers judge, dated December 11th, 1997, which provides as follows:

> **THAT** the Application of the Defendant CBCL Ltd. is hereby granted, and the Statement of Claim is hereby struck out in its entirety, and the within action is dismissed with costs payable to the Defendant CBCL Ltd. in the amount of $2,500 plus disbursements to be taxed;

I would order that CBCL pay to Granview, forthwith, its costs both here

and in the Court below. I would fix those costs as follows. I would fix the total fees at $3,500.00. In addition to the $3,500.00 Granview should be entitled to its disbursements both on this appeal and on the application in the Court below.

Flinn, J.A.

Concurred in:

Hart, J.A.

Roscoe, J.A.

C.A. No. 143955

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

GRANVIEW FARMS LIMITED

Appellant

- and -

CBCL LIMITED, a body corporate

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.