Date: 19980512 Docket: C.A. 144304

NOVA SCOTIA COURT OF APPEAL

Cite as: Hurley v. Co-operators General Insurance Company, 1998 NSCA 127

Clarke, C.J.N.S.; Hart and Flinn, JJ.A.

BETWEEN:

FRANCIS J. HURLEY	)	William P. Burchell
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Robert K. Dickson
	)	for the Respondent
CO-OPERATORS GENERAL INSURANCE COMPANY	)	
Respondent	)	Appeal Heard: April 3rd, 1998
	)	Judgment Delivered: May 12, 1998

THE COURT: Appeal allowed per reasons for judgment of Flinn, J.A.; Clarke, C.J.N.S. and Hart, J.A. concurring.

FLINN, J.A.:

Following the hearing of an application, in Supreme Court Chambers, Justice Edwards, pursuant to the provisions of **Civil Procedure Rule 28.13**, dismissed the appellant's action against the respondent for want of prosecution.

While acknowledging that there has been delay in the prosecution of this action, counsel for the appellant submits that the delay has not been inordinate; and, in any event, that the defence of the action has not been prejudiced by that delay. He submits that the Chambers judge was, therefore, wrong to have dismissed the appellant's action for want of prosecution.

This proceeding is a claim under a fire insurance policy. In November, 1993, the appellant's home, in New Waterford, Nova Scotia, was damaged by fire. The respondent (insurer) had issued a policy of insurance, for the period in question, covering the appellant's premises, and contents, for loss or damage by fire. The insurer had indemnified the appellant for the damage to the premises, as well as some cleaning costs. ($41,331.06) This action by the appellant is for indemnification, under the policy, for the value of contents of the premises.

The action was commenced on November 30th, 1994. The insurer's defence is, essentially, that if the appellant suffered a loss of contents, his claim for those contents is untrue, excessive and exaggerated. Alternatively, the

insurer claims that the appellant's proof of loss contained fraudulent and wilfully false statements with respect to the identity, value and existence of the specific contents claimed, thereby vitiating the appellant's claim.

The insurer filed a counterclaim against the appellant, claiming indemnification for the $41,331.06 paid by the insurer to the appellant for the cost of repairs and cleaning on the basis that the alleged fraudulent and willfully false statements in the proof of loss vitiated the insurance policy.

On December 16th, 1997, three years after this proceeding was commenced, the insurer made an application in the Supreme Court of Nova Scotia requesting an order to dismiss the appellant's claim. It is this application which gives rise to this appeal. The application was based on three alternative grounds:

(a) under **Civil Procedure Rule 21.03** for summary judgment dismissing the appellant's claim based on admissions of fact which the appellant made on discovery examination;

(b) under **Civil Procedure Rule 18.11** for an order dismissing the appellant's action for failure to comply with undertakings given on discovery;

(c) under **Civil Procedure Rule 28.13** for an order dismissing the appellant's action for want of prosecution.

Following the hearing of the application, the Chambers judge rendered an oral decision dismissing the appellant's action and issued an order to that effect.

The insurer's counterclaim is still alive.

In his decision, the Chambers judge made no reference to the alternative claims of the insurer under **Civil Procedure Rule 21.03** or under **Civil Procedure Rule 18.11**; nor has the insurer, by notice of contention, or otherwise, raised those issues on this appeal. The order dismissing the action refers to the insurer's application under **Civil Procedure Rule 28.13** which provides as follows:

> **28.13** Where a plaintiff does not set a proceeding down for trial, the defendant may set it down for trial, or apply to the court to dismiss the proceeding for want of prosecution and the court may order the proceeding to be dismissed or make such order as is just.

One of the problems, with respect to this appeal, is the lack of detailed reasons by the Chambers judge for dismissing the appellant's action.

The following is from the decision of the Chambers judge:

> Rule 14.25(1) says:
>
> > "The court may at any stage of proceeding order any pleading, affidavit or statement of facts, or anything therein, be struck out ... on the ground that,

> (d) it is otherwise an abuse of the process of the court; and may order the proceeding to be stayed or dismissed or judgement to be entered accordingly."
>
> By any reasonable measure, this case has not been prosecuted in an appropriate manner. Quite simply, the patience of the Court has run out. The Defendant has had to come back here several times in a "teeth pulling exercise" in order to get the case to proceed. The other infractions are set out by Mr. Dickson in his affidavit and are not seriously disputed. Counsel for the Plaintiff says simply that there has not been an inordinate delay. I disagree. This is a fairly simple matter. The fire was more than four years ago. The conduct of the Plaintiff amounts to an abuse of the process of the Court. I am also satisfied that the conduct of the Defence has been prejudiced by the Plaintiff's inaction. Therefore, I am granting the application to dismiss for want of prosecution.

These reasons raise the following problems:

1. there is no indication, in the reasons of the Chambers judge, as to why he referred to **Civil Procedure Rule 14.25(1)**. It has no relevance to this matter. The insurer's application, to have the appellant's action dismissed, was not based on **Civil Procedure Rule 14.25(1)**; nor was there any application, or submission, that "any pleading, affidavit or statement of facts or anything contained therein be struck out."

2. the Chambers judge refers to "the other infractions" which are

set out by Mr. Dickson in his affidavit. The affidavit to which the Chambers judge makes reference is a six page affidavit, with eleven exhibits attached. The document comprises over 225 pages. It is by no means clear what the Chambers judge means when he refers to "other infractions".

3. the Chambers judge states that the conduct of the appellant "amounts to an abuse of the process of the court". The Chambers judge does not make reference to any specific conduct, nor does he indicate how that conduct amounts to an abuse of the process of the court.

4. the Chambers judge also states that the conduct of the defence (by the insurer) has been prejudiced by the appellant's inaction. There is no indication, by the Chambers judge, as to how the insurer's defence of the action is prejudiced; nor did counsel for the insurer, in his affidavit in support of the application, identify any specific prejudice which was caused by delay.

It is trite law that a pre-trial order dismissing a plaintiff's action is not to be lightly made. Since the underlying bases for the Chambers judge's ultimate conclusion - to dismiss the appellant's action for want of prosecution - are not clear, it is necessary to review the circumstances which led to the insurer's application, prior to considering whether the Chambers judge's decision is subject to appellate review.

Without understating the position of the insurer, there were, essentially, three main concerns which led to the application to dismiss the appellant's action:

1. the circumstances surrounding the delivery, by the appellant, of a proper proof of loss and schedules;
2. the submission by the insurer that the appellant had not complied with undertakings given at discovery; and
3. the failure of the appellant, after giving a notice of trial, to file a confirmation within ten (10) days so that a date assignment conference - set for October 24th, 1997 - could be held.

For approximately 12 years prior to the fire, the appellant had been living, in a common law relationship, with one Donna King. Ms. King left the appellant a day or two before the fire, but later returned for a period of four to five months and then left again.

In February 1994 (approximately 3 months after the fire), a schedule of the replacement cost of the contents said to have been lost in the fire was delivered to the insurer's Sydney office. This schedule was not accompanied by a proper proof of loss. The appellant testified, on discovery, that Ms. King prepared this schedule. The insurer returned the schedule to the appellant requesting that the appellant sign the schedule and return it, with copies of invoices, for the items alleged to have been lost or damaged in the fire. The

schedule (still not accompanied by a proper proof of loss), was initialled by the appellant and returned to the insurer. The replacement cost value of the items claimed on the schedule was in excess of $60,000.00. The appellant testified, on discovery, that he initialled the schedule but never looked at it. He acknowledged, on discovery, that the schedule was not accurate, and that he had no discussion with Ms. King about preparing the document.

The insurer initiated an investigation into the appellant's claim for contents through the Insurance Crime Prevention Bureau.

For the next two years the appellant took no steps to advance his claim. The insurer's counsel wrote numerous letters to the appellant's counsel requesting a proper proof of loss and schedules, following which there would be discovery examinations. None of this correspondence was answered.

On April 3rd, 1996, following an application to a judge in Chambers by the insurer, the appellant was ordered to file a proper proof of loss and list of documents before April 30th, 1996, and requiring that discovery examinations be completed before May 30th, 1996. The order also provided that the appellant be served with a copy of the order by registered mail because the appellant's solicitor advised the Chambers judge that he was having difficulty obtaining instructions and maintaining contact with the appellant.

On April 30th counsel for the appellant faxed to counsel for the respondent a list of documents (containing three documents) and a proof of loss sworn April 30th, 1996, claiming $34,985.71 for household contents. No schedule of items was attached to the proof of loss.

In a further application, on May 23rd, 1996, the Chambers judge decided that the appellant had made only a "token effort" to comply with his April 3rd Order. The appellant was granted a further ten days to comply. Discoveries were postponed until July, and the appellant was ordered to pay, forthwith, $1,000.00 in costs with respect to these applications.

On September 26th, 1996, the insurer's counsel conducted discovery examination of the appellant. Counsel for the insurer alleges that the appellant gave undertakings at that discovery to obtain further documentation concerning proof of purchase, and value, of certain items claimed on the proof of loss; and to use his best efforts to determine the current whereabouts, and address, of Donna King. Following further correspondence from the insurer's counsel to the appellant's counsel, the appellant's counsel advised that the undertakings in question would be difficult or impossible to obtain.

The insurer's counsel is, certainly, now aware that the appellant does not have, and cannot obtain, any further documents with respect to his claim. Further, the appellant does not know the whereabouts of Ms. King.

On October 6th, 1997, the appellant's counsel filed a notice of trial. Counsel for the respondent objected to the filing of the notice of trial because of the appellant's alleged failure to comply with undertakings given at discovery.

A Date Assignment Conference Notice, dated October 24th, 1997, was issued setting a conference time and date of November 26th, 1997, and requiring the appellant to file a confirmation within ten (10) days. None was filed. Counsel for the appellant assumes responsibility for this. While it is hardly an excuse, he indicated that he was busy with another matter and, quite simply, forgot about it. On December 12th, 1997, Justice Simon MacDonald cancelled the Notice of Trial.

Counsel for the insurer then made the application which is the subject of this appeal.

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 the appellant'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.

Principles of Law

The principles of law with respect to the dismissal of a plaintiff's action for want of prosecution, pursuant to **Civil Procedure Rule** 28.13, were recently reviewed by this Court in **Savoie v. Fagan** (1998, N.S.J. No. 27 (N.S.C.A.)). Justice Bateman confirmed that the principles which govern the exercise of a judge's discretion, in deciding whether to grant an application to dismiss an action for want of prosecution, are those set out in **Martell v. Robert McAlpine Ltd.** (1978), 25 N.S.R. (2d) 540 (N.S.C.A.).

In **Martell**, Justice Cooper set out a two-fold test:

1. There must, first, have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and
2. That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause, or to have caused, serious prejudice to the defendants.

These principles are set out in helpful detail by Lord Justice Salmon. in **Allen v. Sir Alfred McAlpine & Sons Ltd. et al**, [1968] 1 All E.R. 543, at p. 561, and cited with approved by Justice Hallett in **Moir v. Landry** (1991), 104 N.S.R. (2d) 281 (N.S.C.A.) at p. 282:

> A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the **Rules of the Supreme Court** or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show: (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the time.
>
> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault. If, however, the delay is entirely due to the negligence of the plaintiff's solicitor and the plaintiff himself is blameless, it might be unjust to deprive

> him of the chance of recovering the damages to which he could otherwise be entitled.

Analysis

The appellant's action against the insurer was commenced in November 1994. Therefore, at the time the Chambers judge dismissed the action, for want of prosecution, three years had passed. Unless a proceeding is lying dormant, a period of three years, on its face, is not, in my view, an inordinate period of time in which to bring a matter to trial. The cases which the insurer's counsel has referred to the Court - where a proceeding has been dismissed for want of prosecution because of inordinate delay - were all cases where the period of delay was considerably in excess of three years. In **Savoie v. Fagan (supra)**, the circumstances of that case and the resulting ten (10) year delay, was found to have been inordinate. In **Martell v. Robert McAlpine Ltd. (supra)**, there was found to be inordinate delay because, in the words of Justice Cooper, "the action was allowed to sleep for seven years and no explanation for this delay was forthcoming except that it was lost sight of". In **Allen v. Sir Alfred McAlpine & Sons, (supra)**, the Court reviewed and decided three separate appeals simultaneously. The first appeal involved an action where there had been a delay in excess of six years. The second appeal involved a claim which was precipitated by an injury suffered in the course of the plaintiff's employment. Nine years passed and little was done to advance the action. The third appeal involved delays amounting to three and a half years with little done to forward the

claims and fourteen years passing since the time the cause of action arose. The first and third appeals were dismissed upholding the lower Court's decision to dismiss the claims. The second appeal was allowed even in light of the delays because the Court did not accept that the defendants had been prejudiced by the delays.

There is no question that there has been delay in this proceeding; and, to a great extent, that delay has been inexcusable. There has been delay caused by the appellant in not communicating with his counsel, and delay caused by the appellant's counsel not communicating with the insurer's counsel, and in seeing that matters required to be attended to were done. I would not be prepared to say, however, that, considering the fact that at the time of the application only three years had passed from the commencement of the action, that the delay was inordinate.

Even if the delay was inordinate and inexcusable, in order for the application to succeed, it is necessary that the insurer show that the delay caused prejudice to its defence of the action.

In the affidavit which counsel for the insurer filed in support of this application before the Chambers judge, no evidence was offered - nor submission made - that the delay in this particular case caused any specific prejudice to the conduct of the insurer's defence. The fact that documentation

is not available to support the appellant's claim; and the fact that a witness (Ms. King), who would, no doubt, be a material witness, is not available, seems to me to be factors which would cause concern as to the merits of the appellant's claim, rather than factors which cause prejudice to the insurer's defence.

The law is clear that in cases of extreme delay, a defendant will not be required to prove prejudice. It will be presumed. That is what this Court did in **Savoie (supra)**; and, in doing so, referred to the decision of Justice Hallett in **Moir**, at p. 284 (N.S.R.):

> A plaintiff has a right to a day in court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.

Justice Hallett's decision in **Moir** was also referred to by this Court in **Sauliner v. Dartmouth Fuels Ltd** (1991), 106 N.S.R. (2d) 425. In **Sauliner** it was admitted that the passage of four years, when absolutely no action was taken on the case, was inordinate and inexcusable, Justice Chipman, however, writing for a unanimous Court, refused to presume prejudice to the defendant, and decided that a patent injustice would be suffered by the plaintiff if the lower court's decision to dismiss his action was upheld.

I have concluded that the Chambers judge erred in law in not properly articulating, or applying, the test for dismissing an action for want of prosecution.

There was no objective analysis of the evidence as against the test for dismissing an action for want of prosecution. While the Chambers judge's decision was rendered prior to the decision of this Court in **Savoie**, the two-fold test set out by Justice Cooper, in 1978, in **Martell**, has been applied on many occasions since that time. Had the Chambers judge properly articulated and applied that test, and considered the cases such as **Moir** and **Saulnier**, he would, in all probability, have concluded that any delay, on the part of the appellant, although inexcusable, was not inordinate. Even if he had concluded that it was inordinate, there was no evidence upon which he could reasonably conclude that the insurer was prejudiced by that delay. This is not one of those cases of extreme delay (like **Moir** and **Savoie**) where prejudice is presumed.

Abuse of Process

Counsel for the insurer advanced an alternative argument on the hearing of this appeal. He submits that in view of the findings of the Chambers judge that the appellant had abused the process of the court, the insurer can apply to have the action dismissed quite apart from having to satisfy the two-fold test (inordinate and inexcusable delay and prejudice) set out in **Martell** and **Savoie**.

Counsel refers to the recent decision of the House of Lords in the case of **Grovit et al v. Doctor et al**, [1997] 2 All E.R. 417. At p. 424 Lord Wolfe says:

> The courts exist to enable parties to have their disputes resolved. To commence and continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v. James ([1978] A.C. 297)

The reference to "either of the limbs identified by Lord Diplock" is to what is essentially the two-fold test enunciated by Justice Cooper, in **Martell (supra)**.

I have two observations to make with respect to **Grovit**:

(1) The lower courts in **Grovit** had concluded, on the evidence, that the abuse of process in that case was "in maintaining proceedings where there was no intention of carrying the case to trial". In this case, the Chambers judge made no finding, nor was there any evidence upon which he could reasonably conclude that the appellant was maintaining this

proceeding with no intention of carrying the case to trial.

(2) The case of **Grovit** does not advance any new principle, heretofore unknown in Nova Scotia. If a plaintiff started an action in Nova Scotia, and it was determined that he had no intention of carrying the case to trial, an application could be made to strike out his statement of claim under **Civil Procedure Rule 14.25(1)** which provides, in full, as follows:

> **14.25.** (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
>
> (d) it is otherwise an abuse of process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

As I have indicated previously, the Chambers judge made no reference to anything specific which amounted to an abuse of process; nor is there any indication of the context in which he was referring to abuse of process.

However, it is a reasonable inference, since he quoted from **Civil Procedure Rule 14.25**, that he must have been referring to abuse of process in the context of that **Rule**.

On that point, I note the following:

1. The insurer's application was not made for an order that "any pleading, affidavit, or statement of fact, or anything therein, be struck out". The insurer requested that the proceeding be dismissed for want of prosecution under **Civil Procedure Rule 23.18** and that is what the Chambers judge did.

2. There is no definition of "an abuse of the process of the Court" as those words appear in **Civil Procedure Rule 14.25(1)(d)**, nor have I been able to find any Nova Scotia cases which purport to define, or limit, those words.

   In **Re: MacCulloch (Bankrupt)** (1992), 115 N.S.R. (2d) 131, Chief Justice Glube, in dealing with an application under **Civil Procedure Rule 14.25**, made reference to the case of **Re: Lang Michener et al. and Fabian et al.** (1987), 59 O.R. (2d) 353. In **Lang Michener**, Henry, J., extracted, from various decisions on the subject-matter, a list of principles which would lead to the conclusion that an action is "frivolous or vexatious or an abuse of the process of the court", under an Ontario Rule similar to

Civil Procedure Rule 14.25. Those principles are listed as follows:

(a) The bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person

> instituting the proceedings to pay the cost of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
>
> (g) the respondent's conduct is persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

The Court of Appeal of England has, recently, explored the concept of abuse of process. In **House of Spring Gardens Ltd. v. Waite**, [1990] 3 W.L.R. 347 (C.A.), Lord Justice Stuart-Smith said the following:

> [The judge] did not find it necessary to deal with the question of abuse of process. In my opinion the same result can equally well be reached by this route, which is untrammelled by the technicalities of estoppel. The categories of abuse of process are not closed: see *Hunter v. Chief Constable of West Midlands* . . . [1982] A.C. 529 at 536, where Lord Diplock said:
>
> > 'My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds

> of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

> That was the case where the court would not permit a collateral attack on the decision of a court of competent jurisdiction. The principle has recently been applied in this court to analogous cases, where issues of fact have been litigated exhaustively in sample cases; it is an abuse of process for a litigant, who was not one of the sample cases, to relitigate again all the issues of fact on the same, or substantially the same evidence: see *Ashmore v. British Coal Corp.*, [1990] 2 W.L.R. 1437.

> The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court. it having been tried and determined by Egan J. in Ireland. In my judgment it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to relitigate matters which have twice been extensively investigated and decided in their favour in the natural forum, but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. . . . Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause.

In a recent decision, the Ontario Court of Appeal agreed with Lord Justice Stuart-Smith in **Ashmore**, that what constitutes abuse of process depends on the circumstances of each case. (See **Alta Surety Co. v. Toronto-Dominion Bank**, [1996] O.J. No. 4152)

For the purpose of this appeal, it is neither necessary, nor desirable, to define, or to limit, the phrase "abuse of the process of the Court", as that

phrase is used in **Civil Procedure Rule 14.25**. It is sufficient to note, only, that the phrase, 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.

Quite apart from the fact that the insurer's application was not made under **Civil Procedure Rule 14.25**, there was no evidence upon which the Chambers judge could reasonably conclude that the appellant was using the court's process for any purpose other than to litigate a cause of action under a fire insurance policy. Whether that cause of action has any merit, is for the trial judge.

There is little question that the lack of co-operation by the appellant, and his counsel, in seeing to it that the appellant's claim was advanced expeditiously, leaves a lot to be desired. However, under the circumstances of this case, that does not amount to an abuse of the process of the Court; and, for the reasons I have given, it is patently unjust to deprive the appellant of his day in court, and to dismiss his action, for want of prosecution or for abuse of process.

As counsel for the appellant submits, once the cancelled notice of trial

is either reinstated or refiled, this case is only “a scheduling conference away” from having a date fixed for trial.

I would, therefore, allow this appeal. I would set aside the order of the

Chambers judge. Further, I would order the respondent to pay the appellant his costs, both here and in the court below. I would fix those total costs at $2,500.00 inclusive of disbursements.

Flinn, J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.

C.A. No. 144304

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

FRANCIS J. HURLEY	)	
Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
CO-OPERATORS GENERAL	)	
INSURANCE COMPANY	)	FLINN, J.A.
	)	
Respondent	)	
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