Date: 19971027 Docket: C.A. 137284

NOVA SCOTIA COURT OF APPEAL
Cite as: Montreal Trust Company of Canada v. Hoque, 1997 NSCA 153

Freeman, Roscoe and Cromwell, JJ.A.

BETWEEN:

MONTREAL TRUST COMPANY OF CANADA and GARY GRAHAM Appellants	Alan V. Parish, Q.C. and Peter Doig for the Appellant
- and -	
KHANDKER SHAMSUL HOQUE Respondent	Raymond F. Wagner for the Respondent
	Appeal Heard: October 2, 1997
	Judgment Delivered: October 27, 1997

THE COURT: Appeal allowed in part per reasons for judgment of Cromwell, J.A.; Freeman and Roscoe, JJ.A. concurring.

CROMWELL, J.A.:

I. Overview:

Dr. Hoque and companies controlled by him granted mortgages and entered into related agreements with Montreal Trust. After Dr. Hoque made an assignment in bankruptcy, Montreal Trust commenced action on the mortgages. These actions were not defended and final orders of foreclosure were issued by the Supreme Court.

After his discharge from bankruptcy, Dr. Hoque commenced the present action against Montreal Trust and its employee Gary Graham (hereafter referred to collectively as "Montreal Trust") for breach of fiduciary duty, breach of contract, tortious interference with business relations, trespass and conversion. The allegations in this action concern Montreal Trust's dealings with Dr. Hoque in relation to the mortgages and related agreements. In response, Montreal Trust brought an application to dismiss Dr. Hoque's action on the basis that the issues raised in it could have been dealt with in the foreclosure actions. Saunders, J. refused to dismiss Dr. Hoque's action.

Montreal Trust now applies for leave to appeal from that

decision and, if leave is granted, seeks on appeal an order dismissing Dr. Hoque's action as *res judicata*. The issue in the appeal is whether the final orders of foreclosure bar Dr. Hoque's action.

II. The Facts:

The main argument by Montreal Trust is that all of the issues raised in Dr. Hoque's action could have been determined in the foreclosure actions. It is therefore necessary to review the facts and allegations in detail.

Throughout the 1980's, Montreal Trust had various mortgage loans outstanding with Dr. Hoque and companies controlled by him including Nelson's Landing Developments Limited. In 1992, Dr. Hoque experienced difficulties in servicing the mortgages. An agreement was reached to capitalize outstanding arrears, reduce the interest rate under the mortgages and otherwise to vary the previous legal obligations of the parties. This amending agreement, (hereafter "the agreement") was executed on August 4, 1992. Dr. Hoque was represented in the negotiations leading up to this amending agreement

by a major Toronto law firm.

The terms of this agreement are significant for the legal issues raised on appeal. The most relevant terms may be summarized as follows:

> a. The agreement recites a number of mortgages between Montreal Trust and Dr. Hoque or his companies, assignments of leases and rents as collateral security and personal guarantees by Dr. Hoque of the corporate mortgages. It further recites that the parties (including Dr. Hoque and Montreal Trust) have agreed to restructure the loans extended by the Mortgages and to amend the security held by the Montreal Trust.
>
> b. With respect to the several mortgages, the agreement provides for the capitalization of arrears and amendment of the interest rate, maturity date and amortization period.
>
> c. The agreement provides for 6 payments of $150,000 on a series of dates beginning October 1, 1992 to be applied to outstanding loans.
>
> d. The agreement provides that “the properties subject to the mortgages shall continue to be maintained, leased and managed in a manner which in the sole opinion of the Mortgagee is consistent with good sound and proper maintenance and management standards...”
>
> e. Montreal Trust agrees to provide partial releases of the Nelson’s Landing Mortgages on certain conditions, one of which is that 50% of the units were presold.

Clauses 31 and 32 provide as follows:

> **31.** This Agreement may be cancelled by the Mortgagee without liability to the Mortgagee. This Agreement shall not be interpreted or construed in any manner so as to prejudice any of the rights, powers or remedies of the Mortgagee pursuant to the Mortgages and the Mortgagee reserves the right to cancel this Agreement without liability to the Mortgagee if at any time, in the sole discretion of the Mortgagee, there is any material change with respect to Hoque, Nelsons Landing, Properties, Hoque Management or any of the properties which are subject to the Mortgages, or in the event that any of the conditions set forth in this Agreement or the Commitment Letter have not been satisfied or adhered to or in the event of any default on the part of Hoque or Nelsons Landing under the Mortgages amended hereby.
>
> **32.** The parties hereto specifically acknowledge and agree that if Hoque and/or Nelsons Landing default in the observance or performance of any of the covenants, terms, provisos or conditions contained in any of the Mortgages, then the full amount of the principal and interest secured by each of the Mortgages herein, with the exception of the Herring Cove Mortgage, shall, at the option of the Mortgagee, forthwith become due and payable and all of the powers of the Mortgagee under each and every one of the Mortgages in the event of default may be exercised.
>
> (Emphasis added)

In January 1993, Montreal Trust alleged default under this agreement. Dr. Hoque's then counsel responded at length on his behalf. Certain passages of his letter (dated January 12, 1993) are

particularly pertinent:

> .....Your letter indicates that there has been a default under the Amending Agreement, without providing particulars as to the nature of the default. Based upon our review of the matter with Dr.. Hoque, we think it unlikely that MT could establish a default entitling it to move under its security. .....
>
> Boiling the overall situation down to basics, the issue is really in MT's court. Is MT prepared to allow the fracturing of the mortgage at twenty to twenty-five units sold, so that Dr. Hoque can achieve a paydown of MT and so that the issues with Imperial Oil can be resolved, or not? In the alternative, is MT prepared to waive the extraordinary principal repayment requirements? Obviously, our client requires a clear answer from MT.

There was further correspondence later in January and in February, with Montreal Trust specifying the alleged defaults, including failure to make the $150,000 payment due under the amending agreement on October 1, 1992. Dr. Hoque's then counsel acknowledged at one point that "there may have been technical default" with respect to the October payment but asserted that there were "collateral agreements as to the fracturing of the mortgage on Nelson's Landing and that ... Montreal Trust was intending to forebear with respect to this amount..." In a subsequent letter, Dr. Hoque's then counsel stated that there had been no default and that Montreal Trust's "interference with [Dr. Hoque's] business...has already and is continuing to cause very substantial damage not only

to his reputation as a landlord and as a businessman but also to his ability to recover on his investments."

On February 11, 1993, Montreal Trust demanded payment of all outstanding amounts (roughly $20,000,000) by March 15. In early March, Dr. Hoque made a voluntary assignment under s. 49 of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3 and Coopers & Lybrand Limited was appointed trustee.

Montreal Trust commenced foreclosure proceedings in April, 1993. The following is an excerpt from one of the Statements of Claim (that relating to the Oak Street Mortgage) which is typical of the others:

> (j) The Mortgagor, Dr. Khandker Shamsul Hoque, Nelson's Landing Developments Limited, the Mortgagee, Montreal Trust Company of Canada, and Nina Naseema Hoque executed an Amending Agreement dated August 4, 1992 and registered at the Registry on August 4, 1992 in Book 4270 at Page 1198 and re-registered at the Registry on September 3, 1992 in Book 5289 at Page 99 (hereinafter referred to as the "Amending Agreement"), under the terms of which the parties thereto agreed inter alia, as follows:
>
> 1. To pay to the Mortgagee a

minimum of $150,000.00 no later than on each of the following dates:

October 1, 1992
February 1, 1993
June 1, 1993
October 1, 1993
February 1, 1994
June 5, 1994

which payments would be applied by the Mortgagee against outstanding loans to the Mortgagor and Nelson's Landing Developments Limited;

2. That the principal amount outstanding on the Mortgage be increased to $5,865,815.34, that the maturity date of the Mortgage be extended to June 5, 1994, that the interest rate be changed to 9.5% per annum calculated half-yearly not in advance, and that the mortgage loan be repaid by blended monthly payments of principal and interest in the sum of $48,523.00 each commencing July 5, 1992;

3. That if the Mortgagor or Nelson's Landing Developments Limited defaulted in the observance or performance of any of the covenants, terms, provisos or conditions contained in any of the following Mortgages:

(a) a Mortgage from Dr. Khandker Shamsul Hoque in favour of the

Plaintiff dated February 24, 1987 and registered at the Registry on February 25, 1987 in Book 4336 at Page 752 (the "Sylvia Avenue Mortgage"); .....

5. Default has been made in the payment of amounts due under the Mortgage .....

7. Default has also been made in the payments due under the terms of the Amending Agreement in that the payments of $150,000.00 each due on October 1, 1992 and February 1, 1993 were not made when due and remain in arrears as of March 19, 1993.

8. Under the terms of the Mortgage payments being in arrears the whole principal and interest due under the Mortgage has become due and payable. Also, under the terms of the Amending Agreement, default having been made under the Regent Drive Mortgage, Sylvia Avenue Mortgage, 91 Nelson's Mortgage, 61 Nelson's Mortgage and Nelson's Landing Second Mortgage and default having been made in the payments required under the terms of the Amending Agreement the whole principal and interest due under the Mortgage has become due

and payable. .....

10. The Plaintiff claims payment of the sum of $5,914,975.43 with interest at the rate of 9.5% on the sum of $5,914,975.43 together with interest on arrears at the said rate, from March 19, 1993, until payment together with costs to be taxed, or in default, foreclosure and sale and possession. The Plaintiff also claims all reasonable costs it has incurred or may incur in repairing, maintaining, managing, protecting, securing, appraising, inspecting, leasing and/or insuring the said property subject to the Mortgage from time to time up to and including the date of payment, or foreclosure and sale and possession.

11. The Plaintiff further claims the right to prove its claim in the bankruptcy of Dr. Khandker Shamsul Hoque and to claim against the Defendant, Nelson's Landing Developments Limited under the covenants contained in the Mortgage and in the Amending Agreement for the deficiency in case the sum realized at the sale pursuant to a foreclosure order herein be not sufficient to satisfy the amount due and for such further and other relief as the nature of the case may require and also taxes and taxes costs herein.

The trustee was served with notice of these foreclosure

actions but did not defend. On May 19, 1993, Goodfellow, J. granted an order for foreclosure, sale and possession in favour of Montreal Trust in each of the foreclosure actions. It is worth noting that Dr. Hoque's possible causes of action against Montreal Trust are not referred to in his statement of affairs as assets of the estate and that, so far as the record discloses, there was no detailed consideration given to them until after the final orders of foreclosure had issued.

The matter was discussed by creditors after the foreclosure orders were made. Advice was obtained to the effect that the estate could move to stay the sale under foreclosure or alternatively sue Montreal Trust independently. Advice was also given to the effect that the rights of parties to pursue actions independently continued to exist notwithstanding that an order of foreclosure had already been granted.

Subsequent to his discharge, Dr. Hoque sought and received from the inspectors an agreement to assign to Dr. Hoque the estate's rights to all causes of action against secured creditors, including the

claim against Montreal Trust. Montreal Trust objected to this agreement and brought an application pursuant to s. 37 of the **Bankruptcy and Insolvency Act** for a declaration that there had been no valid assignment. MacDonald, J. dismissed the application, holding that there was a binding agreement to transfer the causes of action. His decision was upheld on appeal to this Court: (1996), 148 N.S.R.(2d) 142 (C.A.).

In September of 1994, Dr. Hoque commenced action against Montreal Trust. His Statement of Claim was substantially amended in February of 1996 and that is the Statement of Claim before us. It alleges that :

> a. "Montreal Trust and Gary Graham commenced in a malicious and calculating manner, a course of action designed to destroy Dr. Hoque and his business empire." (Para 6)
>
> b. the refinancing arrangements set out in the amending agreement were unconscionable and they "radically altered the relationship between Montreal trust and Dr. Hoque from Mortgagee/Mortgagor or Lender/Borrower to a relationship that by its nature created a host of fiduciary relationships." (Paragraph 18) Alternatively, it is alleged that "Montreal Trust became a business partner with Dr. Hoque which raised similar fiduciary duties imposed upon Montreal Trust as a business owner." (Paragraph 18)

c. There were collateral agreements concerning the $150,000 payments and the partial releases provided for under the Amending Agreement and that these collateral agreements were relied on by Dr. Hoque "such as to create a default when no default in law existed." (Paragraph 22 - 25)

d. The January 25, 1993 demand was "unconscionable" (paragraph 29 - 33) and that Montreal Trust's attornment of rent was "unlawful and unconscionable" and "for no lawful purpose or right": paragraph (34 - 35)

e. Montreal Trust improperly disclosed confidential information to third party lenders "which was calculated to cause and did cause others to act precipitously (paragraph 36 and 39(j)

f. Montreal Trust acted in an abusive and disrespectful manner causing financial loss, embarrassment and mental distress. (Paragraphs 39(c) and 44)

g. Montreal Trust acted "in a calculating and conspicuous manner...so as to intentionally and tortiously interfere with the economic and business relations of Dr. Hoque."(paragraph 42)

h. Montreal Trust's illegal acts caused Dr. Hoque's bankruptcy and loss of everything he had owned apart from a few personal effects (Paragraph 37) and further caused Dr. Hoque to suffer from depression and mental distress (paragraph 38)

i. Montreal Trust committed acts of trespass and conversion in relation to Dr. Hoque's property. (Paragraph 45)

Montreal Trust filed a defence and then brought an application before the Chambers judge pursuant to **Civil Procedure Rules 14.25(1)(b)** and **(d)** and **25.01** for an order dismissing the action on the grounds that it is barred by cause of action estoppel or, in the alternative , issue estoppel. The matter was heard over 3 days. The Chambers judge, in a reserved decision of 31 pages, dismissed Montreal Trust's application. Montreal Trust now seeks to appeal to this Court.

III. The Decision of the Chambers Judge:

The Chambers judge had to resolve a number of procedural and evidentiary matters which are no longer in issue. On the question of whether Dr. Hoque's action is barred by *res judicata*, the Chambers judge held that the matters now raised by Dr. Hoque's action constitute defences or a basis for set-off and counterclaim against Montreal Trust in the foreclosure actions and could have been raised therein. However, the learned judge was of the view that the application of *res judicata* is grounded on principles of fairness and public policy and that in the circumstances of the present action,

it would be unfair for Dr. Hoque to be denied the opportunity to have his allegations determined on their merits. The Chambers judge put it this way:

> The carriage and control of the law suit in the hands of Dr. Hoque was interrupted by the bankruptcy. Mr. Parish emphasizes that the Trustee was very familiar with the matters now raised by Dr. Hoque in his present litigation. But this cuts both ways. Dr. Hoque fulfilled his obligation to be candid with the Trustee. He declared the intended action against his secured creditor(s). The minutes confirm that the Montreal Trust "situation" was reviewed at some length by the Trustee and inspectors. The estate's solicitor Mr. Victor Goldberg was engaged to search the law and prepare an opinion. Based on his assessment Mr. Goldberg opined that any cause of action against Montreal Trust would survive the foreclosure proceeding. .....
>
> Whether Mr. Goldberg was right or wrong in arriving at that conclusion is not for me to decide. The fact is that such an opinion was sought, received and considered. Ultimately the Trustee determined, likely on the basis of simple economics, that it did not wish to become embroiled in litigation between Dr. Hoque and Montreal Trust and chose not to defend the foreclosure actions. However, I conclude that Dr. Hoque always intended to proceed against Montreal Trust insofar as the law and his circumstances would permit. He says that his impecuniosity prevented him from doing anything about the defendants' actions until bringing his own litigation in September, 1994. ..... A real question - which can only be decided after a full trial on the merits - is whether the conduct and actions attributed to Montreal Trust led to or aggravated Dr. Hoque's precarious financial situation which then in turn prevented or hampered his mounting a full defence of the applicants' suit against him. .....
>
> It would seem to me to be grossly unfair and unjust if Dr. Hoque were barred from seeking to prove his allegations against Montreal Trust because - as it turned out - he did not have sufficient resources to fully defend the foreclosure actions launched against him, all of that a consequence of

> the conduct of the same financial institution whose actions he now seeks to challenge.

IV. Issue:

There is one fundamental issue on this appeal: whether the Chambers judge erred in law in refusing to dismiss Dr. Hoque's action as *res judicata*.

V. Analysis:

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

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

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

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

Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

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

Res judicata requires that the previous court decision be final and between the same parties or their privies. Both of these requirements are met here. The final orders of foreclosure were not appealed or otherwise challenged. As to privity, it is not argued that there was no privity as between Dr. Hoque and his trustee in bankruptcy who was the named defendant in the foreclosure actions. It is not disputed that all of the claims now asserted by Dr. Hoque vested in his trustee at the time of his assignment in bankruptcy.

There are some very wide statements about the scope of

cause of action of estoppel. For example, in the seminal case of **Henderson v. Henderson** (1843 - 60) All E. R. 373, Vice-Chancellor Wigram stated that the plea of *res judicata* ... "applies...not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation and which the parties exercising reasonable diligence might have brought forward at the time." (at 381-2), (emphasis added). Similarly in **Fenerty v. Halifax** (1920), 50 D.L.R. 435 (N.S.S.C. en banco) Ritchie, J. for the Court said that the plea applies "...not only as to the matter dealt with, but also as to questions which the parties had an opportunity of raising." (at 437), (emphasis added) There are several similarly broad statements in **420093 B.C. Ltd. v. Bank of Montreal** (1995), 128 D.L.R. (4th) 488 (Alta C.A.) especially at 499 - 502.

The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible

application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.

I note, for example, that the very broad language of Vice-Chancellor Wigram in **Henderson, supra**, was considered by Lord Devlin in **Connelly v. D.P.P.**, [1964] 2 All E.R. 401 (H.L.) At 445:

> Res judicata imposes a rigid bar and Wigram, V-C's, principle a flexible one. I prefer the modern development of this principle which justifies it by the power to stop vexatious process. This in my mind is the true principle ... and the one that I think should be applied in the criminal law as it is in the civil. (Emphasis added)

The relatively recent decision of the House of Lords in **Arnold v. National Westminister Bank**, [1991] 3 All E.R. 41 (H.L.) supports a more flexible approach. In that case, Lord Keith noted that the often quoted passage from **Henderson v. Henderson, supra**, specifically referred to exceptional "special circumstances" noting that this passage "...appears to have opened the door towards the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or

non-existence of a cause of action" (at p. 46). The learned Law Lord also cited, with approval, the following passage from the speech of Lord Kilbrandon in **Yat Tung Investment Company Limited v. Dao Heng Bank Limited**, [1975] A.C. 581 at p. 590:

> The shutting out of a "subject of litigation" - a power which no Court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.

Moreover, Lord Keith indicated that cause of action estoppel and issue estoppel are both essentially concerned with preventing abuse of process: at 51-52.

I also note that the approach to cause of action estoppel referred to in **Arnold** was cited with apparent approval by this Court in **Brown v. Marwieh** (1995), 145 N.S.R. (2d) 220 per Bateman J.A. at p. 222.

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.

Some of the cases involve attempts to rely on new evidence to support a claim previously litigated. In such cases, the courts are concerned whether the new evidence could have been available in the first action with reasonable diligence. A leading example is **Town of Grandview v. Doering**, [1976] 2 S.C.R. 621. The plaintiff sued unsuccessfully for damages resulting from flooding of his land and crops in the years 1967 and 1968. He then commenced a new action relating to the years 1969 - 72, alleging that the defendant town had acted to cause the water behind a dam to rise to such high levels that it saturated the plaintiff's land. The differences between the first unsuccessful action and the second were the years complained of and that the second action alleged saturation as a result of water entering an aquifer as opposed to the surface flooding alleged in the first action.

Ritchie, J., for 5 members of the Court, held that the second action was barred by the principle of cause of action estoppel. He said : “Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory.” (At 638) He went on:

> It is obvious here that the question of whether or not the water entered the aquifer and thus saturated the respondent’s soil was not determined in the 1969 action because it was not raised and it would therefore not be strictly accurate to classify the present case as one of issue estoppel, but I am of the view that it is certainly a case within the principle established in *Henderson v. Henderson, supra*, and the *Phosphate Sewage Co.* case, and it is to be noted that the respondent has not alleged either in his pleadings or his affidavit that he could not by reasonable diligence, have put himself in a position to advance the theory of soil saturation through the aquifer at the time of the first action, nor can it be said that his failure to raise that particular point did not arise “through negligence, inadvertence or even accident.” (emphasis added)

Some of the cases are concerned with whether the second action alleges a cause of action which is distinct from that asserted in the first action. For example, in **Grandview, supra**, Ritchie J appears to have accepted the general proposition that the principle of cause of action estoppel applies only to matters that arise within one cause of action, but holds that the two actions before him did not give rise to causes of action that were separate and distinct.

Another group of cases holds that cause of action estoppel applies where the second action alleges a new legal basis for claims arising out of facts and relationships that have been the subject of the earlier litigation. This is the approach taken by the British Columbia Court of Appeal in **Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.** (1972), 27 D.L.R. (3d) 249 in which the Court found that the dismissal on consent of the first action for damages for breach of contract barred the subsequent action pleaded in breach of fiduciary duty arising out of the same relationship. Davey, CJBC for the Court said:

> ...it seems to me that the second action involves nothing more than a claim for the same sum of money and arising out of the same relationship and for the same services, but based upon a different legal conception of the relationship between the parties." (at 251) (emphasis added)

There are other cases which turn on that principle that all of the matters necessary to the making of a final order may not be challenged except by appeal or other direct review.

This principle was stated in **420093 B.C. Ltd. v. Bank of**

Montreal, supra at p. 503:

> A valid and subsisting order made by a competent court cannot be attacked collaterally. This well-established principle was restated by McIntyre J. In *R. v. Wilson* (1983), 4 D.L.R. (4th) 577, 9 C.C.C. (3d) 97, [1983] 2 S.C.R. 594. After reviewing a number of authorities, he said at p. 597:
>
> > It has long been a fundamental rule that a court order made by a court having jurisdiction to make it stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the high court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence. (emphasis added)
>
> In the same case, Dickson, J.,(as he then was) said at p. 584:
>
> > I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs.

Other cases turn on abuse of process, which Lord Keith in **Arnold** thought to be the true basis of the rule. These decisions are founded on the conclusion, in light of all the circumstances, that the subsequent litigation is an attempt to use the Court's process "to delay and frustrate the course of justice": **Bank of Montreal v. Prescott**

(1994), 1 B.C.L.R. (3d) 304 (C.A.).

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.

In the present case, the foreclosure proceedings resulted in a default judgment. It is that default judgment which Montreal Trust

submits bars Dr. Hoque's action. There is authority for the view that *res judicata* should be applied in a more limited way when the judgment giving rise to the plea was obtained on default.

As Cross and Tapper, **Evidence** (8th, 1995) put it:

> Obviously it is desirable to protect defendants from plaintiffs who unnecessarily split up their claims against them; but a rigid application of the words of Wigram V-C [in **Henderson**] could work great hardship on defendants who let judgment go against them by default, and the statement has been held to have no application to those judgments, rules of cause of action estoppel being very narrowly applied in such cases. (At p. 84)

For example, in **New Brunswick Railway v. British and French Trust Corp**, [1939] A.C. 1 (H.L.), The Lord Chancellor said:

> In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the res judicata in the accurate sense. (emphasis added)

Although Mr. Parish submitted that this principle applies only to issue estoppel, I do not, with respect, think that it is limited in that

way.

The appellants rely on several authorities which must be analyzed in detail. In my view, they do not support the broad statement in **Henderson, supra**. Neither do they require an inflexible approach to issues that could have been but were not raised.

In **Bayhold Financial Corporation Limited. v. Clarkson Company Limited and Scouler** (1990), 99 N.S.R. (2d) 91, Bayhold brought a foreclosure action which was not defended by the receiver. Bayhold then brought an action against the receiver for, among other things, breach of fiduciary duty and negligent management, to the detriment of Bayhold's security. The receiver defended the second action, in part, by alleging that Bayhold's security was invalid. Kelly, J. held that the receiver was prevented by the default judgment from raising the issue of the validity of Bayhold's security. He noted at p. 121 that the receiver had been aware that it had a possible defence to the foreclosure action based on the validity of the security and made a deliberate decision not to raise it at that time.

This case deals with issue estoppel rather than the broad application of cause of action estoppel and, in any event, it is not inconsistent with the principle stated in the **New Brunswick Railway Company** case.

The default judgment obtained by Bayhold necessarily and with complete precision decided the issue of the validity of its security. It is also consistent with the principle barring collateral attack, given that the validity of the security was an essential element of the default judgment.

In **Malik v. Principal Savings & Trust Co.** (1985), 63 A.R. 109 (Q.B.), the mortgagee obtained an order of foreclosure by default. After sale of the property, the mortgagor commenced a new action alleging that the mortgagee, prior to the granting of the mortgage, had breached its fiduciary duty to the mortgagor causing the mortgagor's financial ruin. The Alberta Court of Queen's Bench struck out the mortgagor's action. In the course of her careful reasons, McFadyen, J. (as she then was), cites some of the broad

statements as to the scope of cause of action estoppel which have been referred to earlier, including **Henderson v. Henderson, supra**. and **Fenerty v. Halifax**, **supra**. However, the learned judge also cited, with approval, a statement of Ford C.J.A. in **Hall v. Hall** (1958), 15 D.L.R. (2d) 636 as follows:

> This doctrine [res judicata] has not so wide an application as the broadness of the language might lead one to infer. It is limited to such matters as arise within one cause of action. It is, I think, clear that if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct. (emphasis added)

McFadyen, J. then held that the final order for sale, vesting order and the final deficiency judgment in the foreclosure action could only have been granted upon a judicial determination that the mortgage and the guarantee were valid. She further held that the only issues raised by the mortgagor in the second action were inextricably related to the granting and execution of the mortgage and the guarantee and that they did not constitute a separate cause of action. The learned judge also noted that while the judgment was, in form, a default judgment, the mortgagor had fully participated in the

foreclosure proceedings and did not, at any time, seek to raise the issues now raised in the action. There was, in the view of the learned judge, a decision not to raise those issues.

I conclude that while the broad statements of **Henderson** and **Fenerty** were cited with approval, the case in fact turns on the finding that the second action was a collateral attack on the earlier judgment and that it did not allege a new cause of action.

In **Ranch de Prairie Limitee (Prairie Ranch Limited) et al. v. Bank of Montreal**, February 3, 1987, unreported (Man. Q.B.), (affirmed (1988), 69 C.B.R. 180 (Man. C.A.), the issue was whether consent orders relating to the actions of a receiver/manager and a default judgment against guarantors barred an action by the debtors against the lender and the receiver. The second action was brought by shareholders of the bankrupt company, three of whom were guarantors and by the company itself. The action challenged the conduct of the receiver and lender throughout. The Court of Appeal held that to allow the action to proceed constituted an abuse of

process. Huband J.A., with whom Monnin C.J.M. concurred, stated as follows:

> .....It is contended that the issues are not res judicata, because the claim of the Bank of Montreal against the members of the Denis family was a claim for a sum certain, while their claim against the bank and the receiver is for unliquidated damages. Moreover, one of the plaintiffs, Marie-Claude Denis, was not involved in the litigation initiated by the Bank of Montreal.
>
> But res judicata is not the only basis which can be raised to strike out the claims of the members of the Denis family against the Bank of Montreal and the receiver. The claims which they advance are of a kind which should have been raised on a timely basis when the receiver was appointed, when the sale of assets was approved, and when default judgment under the personal guarantees was obtained.
>
> As against the receiver, MacGillivray and Co. Ltd., the plaintiffs claim damages for negligence in disposing of the assets in a manner contrary to professional advice and below market value. Damages are also claimed for breach of an alleged undertaking by the receiver to dispose of the assets as a going concern. While technically these matters might not fall within the category of res judicata, it is obvious that it was open to the members of the Denis family to raise these complaints at the time court approval was being sought for the disposition of assets. Instead of raising complaint, the court was led to believe that there was assent. The trustee in bankruptcy of the company consented to the various orders disposing of the company assets. The same solicitor who was representing the bankrupt company was representing the members of the Denis family, but no complaint was raised on their behalf. In my view it would be an abuse of process to allow the claim by members of the Denis family as against the receiver at this stage.

This case turns on the finding that the action constituted an abuse of process.

The appellants also cite **Adams-Mood v. The Toronto-Dominion Bank**, unreported, December 12, 1996, S.H. 126043 (N.S.S.C.). In that case, the Bank commenced a foreclosure action and Ms. Adams-Mood and her husband filed a defence admitting indebtedness but seeking a delay in the foreclosure to enable them to pursue their accountant, whom they blamed for their financial troubles. An order for foreclosure and sale was made and Ms. Adams-Mood filed an assignment in bankruptcy. She then commenced an action in negligence against the Bank for not advising her to seek independent legal advice and other alleged breaches of duty. Goodfellow J. granted the Bank's application to strike the statement of claim. He held that the negligence alleged by the plaintiff directly attacked the validity of the mortgage which had been finally determined in the foreclosure action. While Justice Goodfellow repeats the wide language of Justice Ritchie in **Fenerty**, **supra**, the basis of his decision is that the negligence action brought by the

plaintiff necessarily involves a challenge to the validity of the mortgage which was finally determined in the foreclosure proceedings; in other words, the principle barring collateral attack.

Also cited is the decision of MacDonald C.J.T.D. of the Prince Edward Island Supreme Court in **Miscouche Sales and Services Limited, et al. v. Massey Ferguson Industries Limited, et al.** (1992), 105 Nfld. & P.E.I.R. 91. Miscouche defaulted on a debt to its supplier. Its assets were seized and sold and an action was brought by the finance corporation against Miscouche, its directors and shareholders in relation to certain guarantees and agreements that they had signed. Default judgments were obtained with the exception of one shareholder who defended. With respect to him, summary judgment was granted.

The shareholders then brought an action against the supplier, the finance corporation and the receiver for damages arising out of the allegedly improper disposition of Miscouche's assets. MacDonald C.J.T.D. struck out the statement of claim. While quoting with approval some of the wide statements of the principle of *res*

judicata, he appears to have rested his judgment on the **Malik, supra,** case and, in particular, its holding that the final order for sale finally determined the issue of the validity of the mortgage and that the second action did not raise a distinct cause of action. He stated:

> The same can be said for the actions taken by the respondents. Insofar as Miscouche is concerned, the basis of its claim against Barclays is as a result of Barclays action in allegedly improvidently selling the assets of Miscouche without proper notice. This was a matter that should have been raised by Miscouche in the action taken against it by Barclays rather than permit default judgment to be taken. Everything is tied in together, the guarantee, the seizure, the notice, the sale and the deficiency. As to the individual respondents, it is much more difficult to see what areas their claims against Barclays might lie. However, assuming there might be liability, they are in no better position than Miscouche. Their claims also arise from the giving of the guarantees and what subsequently occurred.
>
> . . . . .
>
> The respondents are correct when they say a litigant can raise a separate and distinct cause of action in a later action. But a separate and distinct cause of action is one which can stand on its own set of acts and can be brought at any time without reference to the issues raised in the earlier action: **Greymac Properties Inc. v. Feldman** (1991), 46 C.P.C. (2d) 125; 1 O.R. (3d) 686 (Gen. Div.). Without reference to the action taken by Barclays on the guarantees, the respondents would have no cause of action.

In **Bank of British Columbia v. Singh** (1987), 17 B.C.L.R. (2d) 256 (B.C.S.C.); reversed on other grounds (1990), 51 B.C.L.R. (2d) 273 (C.A.), foreclosure orders had been obtained and the

mortgagee sought approval of sale. The mortgagors opposed the application but the Court approved the sale over their objections. Subsequently, the property was resold at a higher price and the mortgagors defended the mortgagee's action against them on their personal covenant on the basis that the mortgagee and its agents had been negligent and in breach of fiduciary duty in submitting the first sale to the court for approval. The mortgagor also brought action against the mortgagee, one of its employers and the appraiser whose report had been relied upon in seeking court approval.

Hardinge L.J.S.C. granted the mortgagee's application to strike out the relevant parts of the mortgagor's statement of defence and dismissed the mortgagor's action, both on the grounds of *res judicata* and abuse of process. In essence the judge decided that the new cause of action could not be used to attack a final judgment that was fully argued, not appealed and never set aside. While relying on a number of the broader statements relating to cause of action estoppel, the learned judge based his decision on the proposition that the mortgagors were attacking the validity of the order for sale which

had not been contested at the time, and which had never been set aside; in short, the mortgagors' action was a collateral attack on the earlier orders.

Then comes **420093 B.C. Limited v. Bank of Montreal** (1995), 128 D.L.R. (4th) 488 (Alta. C.A.). In the first action, the Bank sued its debtor First Canadian and Mr. and Mrs. Prescott as guarantors. Judgment was recovered against the Prescotts but not against First Canadian. The appellant obtained an assignment from the trustee in bankruptcy of First Canadian of any claim which First Canadian might have against the Bank. The appellant then commenced the second action. The Bank moved to strike out the action on the ground that the claims were *res judicata* or an abuse of process or constituted a collateral attack on valid and subsisting orders of the Court.

In the first action, First Canadian and the Prescotts were represented by the same solicitor. The Prescotts pleaded that the guarantees were invalid for technical reasons, that they were

executed as a result of economic duress and that the Bank had represented to them that they would not be pursued on the guarantees except for the purpose of recovering any deficiency remaining after realization of the mortgage security. The Bank moved successfully for summary judgment based on the holding that the Prescotts had failed to establish that there was a triable issue.

In the second action, the plaintiff alleged that the Bank was in breach of its obligations to First Canadian by failing to make advances as required, by breaching a fiduciary duty owed to First Canadian, that it had induced First Canadian to enter into the loan agreement by fraudulent misrepresentations and, finally, that it had wrongfully enforced its security. Every sale or disposition of the Bank's mortgage security had been made pursuant to court order.

The Alberta Court of Appeal struck the action in its entirety on the basis of cause of action estoppel. In the Court's view, the matters raised in the second action were matters of equitable set-off which could have been raised in defence by First Canadian in the first

action. As the court put it (at p. 502):

> ... the principle of issue estoppel bars the appellant from relitigating the issue of whether the bank was in breach of the loan agreement. That issue is addressed directly in the debt action and decided contrary to the position now taken by the appellant.
>
> Similarly, cause of action estoppel precludes the appellant from asserting in this action that the bank was in breach of a fiduciary duty owed to First Canadian and that the bank made fraudulent misrepresentations to First Canadian. Both of those claims could have been set up by the Prescotts in defence of the bank's claim against them in the debt action.

In conclusion, the Court found that the claims based on the Bank's alleged breach of the loan agreement, breach of fiduciary duty and fraudulent misrepresentations were barred by *res judicata* and that the remaining complaints involved an indirect attack on valid orders made in a debt action and, therefore, constituted an improper collateral attack on those orders. Finally, the Court held that the action in total was an abuse of process and was justifiably dismissed on that basis.

To the extent that this decision deals with cause of action estoppel, it proceeds on the grounds that the alleged breach of fiduciary duty and fraudulent misrepresentations relate to the formation and nature of the agreement and to performance of it by

the Bank. As the Court stated at p. 501, these claims

> ...were directly related to the very substance of the bank's claim against First Canadian under the loan agreement. Had they been raised in defence in the same form as the appellant has pleaded them in this action, they would have gone to the root of the bank's claim and put in issue the full amount alleged to be owed.

Putting aside the aspects of this decision which turned on issue estoppel and abuse of process, the holding with respect to cause of action estoppel is consistent with the narrower view of *res judicata* set out above, i.e., that the allegations in the second action were inconsistent with and, therefore, constituted a collateral attack on the decision reached in the first action.

The appellants in this appeal rely principally on the broad formulation of cause of action estoppel. There is, of course, no suggestion that the issues of breach of fiduciary duty, breach of collateral contract, tortious interference with business relations or trespass and conversion were actually raised and adjudicated in the final orders of foreclosure which were issued by default. The appellants' submission is that all of these matters could have been

raised by the trustee in bankruptcy and were not. Therefore, according to the appellants, Dr. Hoque is foreclosed from raising them in this action.

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.

In light of this understanding of the principle of cause of action estoppel, did the Chambers judge err in law in deciding that Dr. Hoque's action was not barred?

In my respectful view, the Chambers judge did err in law in this regard. However, I base my conclusion on a narrower ground than that argued by the appellants.

Finality of court orders is an important value. As Fleming James, Hazard and Leubsdorf put it:

> ...the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy. It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money or buying property) and thus be protected from repetitive litigation, but also so that the moral force of court judgments will not be undermined.
>
> Fleming James, Jr., Geoffrey C. Hayward, Jr. and John Leubsdorf, **Civil Procedure** (4th, 1992) at 581.

At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them. This is seen in the cases concerned with collateral

attack, **supra**, and is reflected in the restrictive approach to *res judicata* founded on default judgments.

In my respectful view, Dr. Hoque cannot be permitted to allege in this 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.

Dr. Hoque's action makes several claims that are inconsistent with the findings essential to the validity of the foreclosure orders.

Dr. Hoque alleges in his statement of claim (paragraph 18) that the refinancing arrangements in the amending agreement were unconscionable. However, the amending agreement was specifically

pleaded in the foreclosure actions and the final orders of foreclosure were predicated on its validity and enforceability. Therefore, the allegation of unconscionability in Dr. Hoque's action is inconsistent with the final orders of foreclosure.

Dr. Hoque alleges that there were collateral agreements, in essence waiving or delaying Montreal Trust's right to the $150,000 payments provided for in the amending agreement. In addition, there are alleged to be collateral agreements relating to the partial discharge provisions in the amending agreement to the effect that something less than the presale of 50% of the units would be sufficient (paragraphs 22-25). These allegations are inconsistent with the enforceability of the amending agreement. However, its enforceability is an essential basis of the final orders of foreclosure.

Dr. Hoque's statement of claim further alleges that the course of dealing by Montreal Trust in entering into the amending agreement and enforcing it according to its terms was "a course of action designed to destroy Dr. Hoque", and was conduct designed to

"intentionally and tortiously interfere with [his] economic and business relations". Once again, these allegations go to the root of the legality and enforceability of the amending agreement and the mortgages.

Although the pleading is not specific with respect to the acts of trespass and conversion relied on, it appears that these allegations relate to the exercise by Montreal Trust of its remedies as mortgagee and under related agreements. They are, therefore, inconsistent with the validity and enforceability of the mortgages and the amending agreement.

I conclude, therefore, that Dr. Hoque is precluded from asserting any of these claims in this action and that the learned Chambers judge erred in law in failing to strike them out.

I would not go so far as to hold that the application of *res judicata* in a case like this one is completely inflexible. There may be, to use the words of Vice-Chancellor Wigram, special circumstances in which some flexibility may be required to prevent a serious

injustice. To the extent that the learned Chambers judge relied on this flexibility in this case, I think, with great respect, that he erred in principle by failing to give sufficient weight to two considerations which, in this case, are of fundamental and overriding importance.

First, there is the strong policy in favour of the finality of court orders. As set out above, this is important not only for the certainty of transactions between the parties, but to the integrity of the judicial process. This consideration is fundamental to the administration of justice and I think, with respect, that it was not given sufficient weight by the Chambers judge.

Second, there are the underlying objectives of the **Bankruptcy and Insolvency Act**. These include the provision of a scheme for the orderly and fair distribution of the property of the bankrupt among his or her creditors while permitting the debtor to obtain a discharge from his or her debts on reasonable conditions: see L.W. Houlden and C.H. Morawetz, **Bankruptcy and Insolvency Law of Canada** (3d, revised) at 1-3. To permit Dr. Hoque, after his

discharge and after the entry of final orders of foreclosure to assert that the mortgages and amending agreement were invalid or unenforceable seems to me to undercut these objectives very considerably. In short, having been discharged from unpaid personal debts arising from these transactions, Dr. Hoque now claims damages for alleged illegal conduct in relation to those very transactions. In considering what the interests of justice required in this case, I am respectfully of the view that the learned Chambers judge gave insufficient weight to the underlying scheme and objectives of the **Bankruptcy and Insolvency Act**.

Dr. Hoque relies on Hallett, J.A.'s decision in **Re: ABN Bank Canada v. NsC Diesel Power Incorporated** (1992), 112 N.S.R. (2d) 289 (C.A. Chambers) in support of his position. In that proceeding a trial judge had set aside a foreclosure order granted by Goodfellow, J. The Bank appealed; this Court allowed the appeal and reinstated Goodfellow, J.'s order.

Subsequent to both the Sheriff's sale of the property and the

confirmation of the sale by the Supreme Court, the Bank applied to a member of the panel that heard the appeal for an order:

> "specifying that the order of This Honourable Court dated March 12th, 1991, reinstating the foreclosure order granted by Goodfellow, J., dated October 23, 1990, issued upon the respondent's default in the filing of a defence sets aside any defences, counterclaims and amendments thereto which may be filed by the respondent subsequent to October 23, 1990, together with the costs of this application. (emphasis added)

Hallett, J.A. refused to grant the order on the ground that there were no errors or omission in the order of the Court dated March 12th, 1991. Nor did the order fail to express the intent of the Court. Therefore, there was no basis under **Rule 62.26(2)** to grant the order.

Hallett, J.A. went on to state that the order did not prevent NsC Diesel from making a claim against the Bank, but that it could not be asserted in the foreclosure proceedings. The issue of *res judicata* was not raised in the Bank's application and there certainly is no holding in that decision in relation to the *res judicata* issues argued in this case.

There is one, and possibly two elements, in Dr. Hoque's statement of claim which are not inconsistent with the final orders of foreclosure. These are, first, the allegation that Montreal Trust improperly disclosed confidential information to third party lenders in a way that was "calculated to cause and did cause others to act precipitously" and second, that Montreal Trust acted "in an abusive and disrespectful manner". This second allegation is not pleaded with particularity so it is difficult to assess it. If this refers to a cause of action separate from and not inconsistent with the validity and enforceability of the mortgages and the amending agreement, it is not barred by *res judicata*.

Neither of these allegations is inconsistent with the validity of the mortgages or amending agreement. Nor do they fall into any of the categories of claims that should have been advanced. They are not simply an attempt to put a new legal conception upon settled facts or to raise facts which, with reasonable diligence, ought to have been placed before the court in the foreclosure actions. They are separate and distinct causes of action. It is not argued that asserting

them now, in all of the circumstances, constitutes an abuse of process.

It was conceded by the appellants in argument that the allegations relating to breach of duty to maintain confidential information was not barred by issue estoppel. I am also of the view, for the reasons which I have given, that it is not barred by cause of action estoppel. Although there was no concession by the appellants in respect of the allegation relating to abusive and disrespectful treatment, this was clearly not a matter covered by issue estoppel and, for the reasons I have given above, I am of the view that it is not barred by cause of action estoppel.

In summary, I am of the view that all of the allegations in Dr. Hoque's statement of claim are barred by the principle of cause of action estoppel with the exception of the claim relating to the breach of duty to keep information confidential and the allegation that Montreal Trust acted in an abusive and disrespectful manner. The Chambers judge, with great respect, erred in law in failing to so decide. To the extent that there may exist some measure of judicial

discretion to apply *res judicata* with some flexibility, I think, with respect, that the learned Chambers judge erred in principle in exercising it in this case.

I would, therefore, grant leave to appeal, allow the appeal, set aside the order of the learned Chambers judge and strike out Dr. Hoque's statement of claim. However, in light of my finding that two aspects of the statement of claim are not barred by *res judicata* or issue estoppel, I would not dismiss the action, but grant leave to Dr. Hoque to amend his statement of claim, if so advised, in accordance with these reasons. This is an order which was open to the Chambers judge to make under **Rule 14.25(1)** and is, therefore, open to the Court of Appeal pursuant to **Rule 62.23(1)(b)**. The amended allegations, if any, must not be inconsistent with the validity or enforceability of the mortgages or the amending agreement. Given that this action is now more than three years old and relates to events considerably older than that, I would also order that any amended pleading must be filed within 30 days of the release of these reasons and in default thereof Dr. Hoque's action will stand dismissed.

Montreal Trust has been substantially successful and should

receive its costs here and before the Chambers judge. Costs before the Chambers judge were fixed at $1,500.00. I would, therefore, order Dr. Hoque to pay the appellants' costs both here and below, fixed at $1,500.00 before the Chambers judge and at $1,000.00 in this Court.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.

C.A. No. 137284

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

MONTREAL TRUST COMPANY OF CANADA and GARY GRAHAM

Appellants

- and -

KHANDKER SHAMSUL HOQUE

Respondent

REASONS FOR JUDGMENT BY:

CROMWELL, J.A.