C.A. No. 135146

NOVA SCOTIA COURT OF APPEAL
Cite as: Lienaux v. Campbell, 1997 NSCA 80

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

BETWEEN:

CHARLES D. LIENAUX and KAREN L. TURNER-LIENAUX	)	Charles D. Lienaux for the Appellants
Appellants	)	
- and -	)	
	)	Alan V. Parish, Q.C. for the Respondent
WESLEY G. CAMPBELL and THE TORONTO-DOMINION BANK	)	Wesley G. Campbell
	)	Dufferin Harper and
Respondents	)	
Robert J. Aske	)	for the Respondent Toronto-Dominion Bank
	)	Appeal Heard: April 17, 1997
	)	Judgment Delivered: May 12, 1997

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

HALLETT, J.A.:

This is an appeal from a decision of Justice Goodfellow dismissing an application by the appellants for an order barring the respondent Campbell and 2301072 Nova Scotia Limited, an assignee of two mortgages on the appellant Ms. Turner-Lienaux's home, from enforcing the mortgages on the grounds that the respondents are abusing the process of the Court in so doing.

The appellants have filed an application to adduce fresh evidence before this Court. The evidence consists of two lengthy affidavits of the appellant Charles D. Lienaux, a solicitor and the husband of the appellant Karen L. Turner-Lienaux. 2301072 Nova Scotia Limited is apparently controlled by Campbell's wife.

We have reviewed the affidavits and have concluded that there is nothing in the affidavits that is relevant to the issue of abuse of process as alleged by the appellants. The source of funds used by the respondent Campbell and others who invested (along with the appellants) in the development of a senior citizens residence known as The Berkeley is totally irrelevant to the issue of whether or not the respondents, in enforcing the mortgages, are abusing the process of the Court. The test for the admission of fresh evidence on appeals as set out in **Thies v. Thies** (1992), 110 N.S.R. (2d) 177 (C.A.) is not met. The application is, therefore, dismissed.

We have reviewed the decision of Justice Goodfellow and have considered the submissions of the parties to this appeal. We are of the unanimous opinion that Justice Goodfellow did not err in dismissing the abuse of process motion.

The law respecting the tort of abuse of process was reviewed by this

Court in **Coughlan et al v. Westminer Canada Ltd. et al.** (1994), 127 N.S.R. (2d) 241. At paragraph 93 this Court stated:

> " The tort of abuse of process is described in Fleming, The Law of Torts (1987), p. 592, as follows:
>
> > 'Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful launching of criminal proceedings, but in the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to serve.'"

This statement in **Fleming** mirrors the law on abuse of process as described in the cases referred to by this Court in paragraph 89 of the **Westminer** decision and mirrors the basis of liability for abuse of process as set out in the **American Second Restatement of the Law of Contract, 1977**.

The essence of the appellants' assertion against the respondents, as set out in the appellants' factum and dealt with by the respondents in their facta, is that the respondents attempted to negotiate a settlement with the appellants of not only the two actions to enforce the mortgages but also settle another action in which Mrs. Lienaux and Smith's Field claim against Campbell in fraud with respect to the Berkeley project. Smith's Field is a company in which one or both of the appellants are officers, directors and apparently the directing force. Smith's Field was involved in the Berkeley project. In the actions the Bank has commenced to enforce the repayment of the two mortgages, the appellants defend and counterclaim against the Bank asserting that the mortgages are void because of breaches of trust and negligent misrepresentation by the original mortgagee Central Guaranty Trust Company. The appellants claim a set-off of their damages against the amounts owing on the two mortgages. The Bank had

acquired the mortgages in question when it purchased certain assets of Central Guaranty Trust following its insolvency. In short, the appellants have an action against the Bank as well as a separate action against Campbell in fraud.

In oral argument Mr. Lienaux advised the Court that the appellants were asserting more than the foregoing as a rationale behind the abuse of process application. He advanced two further basis upon which he urged this Court to find that Justice Goodfellow erred in refusing to make a finding of abuse of process. First, Mr. Lienaux asserts that the Bank and Campbell made an agreement evidenced by an exchange of letters in January of 1996 which shows they were abusing the process of the Court.

On January 23rd, 1996, the Bank's counsel wrote Campbell's counsel as follows:

> "Further to your attendance at The Toronto-Dominion Bank together with your client, Wes Campbell, and your attendance at our offices earlier today, I would like to advise that The Toronto-Dominion Bank ("Bank") will consent to the following course of action:
>
> It will make a settlement offer to Mr. and Mrs. Lienaux agreeing to provide Mr. and Mrs. Lienaux with note and mortgage discharges for both notes and mortgages held by the Bank in return for full and final releases from Mr. and Mrs. Lienaux, Smith Fields Manor, The Berkeley and any other related Companies, assignees and trustees, of any and all outstanding issues they may have against the Bank, Mr. Wes Campbell, Adelaide Capital Corporation and Mr. Grant MacNutt. The settlement offer would also involve each party bearing their own costs.
>
> In the event that the above is not satisfactory to Mr. and Mrs. Lienaux, the Bank will assign the notes and the second and third mortgages to Wes Campbell or his nominees in return for a $2,000.00 payment and an indemnity to cover any "Costs" incurred by the Bank together with security acceptable to the Bank in the amount of $60,000.00 as contribution toward that indemnity from which the Bank may immediately offset any Costs as they are incurred.

> The bank is aware that many of its employees may be required to give evidence in this matter. As such, the anticipated Costs as noted above that may be incurred by the Bank would include legal fees and disbursements incurred by counsel for the Bank for attendance at discoveries and at the trial during the questioning of witnesses on behalf of the Bank, which counsel would be retained by the Bank at its sole discretion for purposes of providing separate and independent legal representation from counsel other than counsel for Mr. Wes Campbell. The Bank is prepared to have counsel for Wes Campbell (acceptable to the Bank) represent the interests of the Bank's witnesses in the first instance, the costs for which the Bank is not responsible, in order to minimize the impact of legal fees and disbursements on the Costs noted above.
>
> The Costs noted above would also encompass legal fees and disbursements associated with the drafting and reviewing of the assignment and associated documentation to effect this Agreement. They would also encompass payment of any monies by the Bank to the Trustee in Bankruptcy of the assets of Charles Lienaux to obtain title to all actions involving the Bank and Mr. Lienaux in his personal capacity. Furthermore, the Costs would encompass the legal fees and disbursements incurred by the Bank in defending any other action brought against them by Mr. and Mrs. Lienaux or related corporate entities or any award or Order which Mr. and Mrs. Lienaux or their related corporate entities might receive if the actions as noted herein, or any part thereof, were unsuccessful and Mr. and Mrs. Lienaux initiated a new action for indemnity or costs against the Bank.
>
> The above-noted $2000 payment and indemnity together with the placement of security acceptable to the Bank must be in place within three days after a negative response is received from Mr. Lienaux.
>
> Please confirm your acceptance of the above terms and conditions in writing to myself by return correspondence."

On January 24th, 1996, counsel for Mr. Campbell responded to the Bank's counsel as follows:

> "I acknowledge receipt of your letter of January 23, 1996, which enclosed a draft of a letter to Mr. Lienaux dated January 24, 1996.

> Mr. Campbell and I have reviewed the letter to Mr. Lienaux and we are satisfied with its form. Please forward it to Mr. Lienaux and advise us of the response.
>
> Mr. Campbell wished to be assured that Mrs. Lienaux would in fact obtain a copy of the offer. I explained to him that since Mr. Lienaux was acting as her lawyer, there were certain difficulties in that regard. However, I do draw that to your attention and would ask that you perhaps keep this in mind when you forward the letter.
>
> With respect to the letter to me of January 23, 1996 which sets out the agreement between the Toronto-Dominion Bank and Mr. Wesley Campbell, we hereby accept, on behalf of Mr. Campbell, the terms and conditions in that letter.
>
> Please be advised that we do have $2,000.00 in our trust account which can be forwarded to you or to an officer of the TD Bank to satisfy that requirement of the agreement. With respect to the $60,000.00 security required, Mr. Campbell will be making those arrangements himself. Would you please let me know whether he should contact you or deal with some officer of the bank directly."

The Bank's offer to the appellants of January 23rd, 1996, was not accepted. On February 2nd, 1996, Mr. Lienaux wrote the Bank's counsel offering to settle the mortgage actions and the fraud action. He proposed that the appellants would release all claims provided the Bank assign the two mortgages to one of the Lienaux companies and pay to Mrs. Lienaux the sum of $398,253.

Mr. Lienaux asserts that the agreement between the Bank and Campbell, pursuant to which the mortgages would be assigned to Campbell if the Bank's offer to the appellants was not accepted by them, was a tortious course of conduct amounting to an abuse of process.

Secondly, he asserts that after the two mortgages were assigned by the Bank to Campbell, the following exchange of letters between Mr. Lienaux

and Campbell's counsel evidenced a threat by Campbell to enforce the mortgages if the appellants will not discontinue the fraud action against Campbell: (i) a letter from Mr. Lienaux to Campbell's solicitor dated February 22nd, 1996, the contents of which are as follows:

> "I am writing in connection with your request that we meet to discuss settlement of this matter. I advised that I am amenable to exploring settlement and this correspondence is written in that vein.
>
> In order for such a meeting to be productive it is important that we approach it from the standpoint that the purpose of settlement must be to restore the financial position of the interests to that which we would have enjoyed but for involvement with Mr. Campbell and his associates. I also wish it to be clear that I am not seeking to make a windfall here or seek any sort of retribution.
>
> The following amounts were invested by the Lienaux interests in the Berkeley project:
>
> $175,000 cash investment;
> $100,000 owed for share purchase;
> $133,000 borrowed from Central Guaranty Trust;
> $116,000 borrowed from Bank of Nova Scotia;
> $100,000 approximately in debt service costs on the residence mortgages over three years until they were allowed to go into default.
>
> The foregoing amounts total $624,000.
>
> I acknowledge that the $133,000 borrowed from CGT and the $116,000 borrowed from Bank of N.S. were not repaid, although CGT received about 100,000 in debt service costs over three years or so. These amounts would have been claimed over against Wes [Campbell] if I had not gone through bankruptcy and the mortgages could be enforced by the Bank.
>
> It is our position relative to the debt claimed by Toronto-Dominion Bank that its mortgages are void. The debt owed to Bank of Nova Scotia is barred because I went through bankruptcy.
>
> Therefore, in the end result, of the total investment in the Berkeley we seek only to recover the original $175,000 cash and $100,000 owed for my wife's shares. On that total

> sum of $275,000, some rate of interest must be paid from the time the sums were committed which was September 7, 1989.
>
> I would suggest that you, and I request hereby that you communicate this proposition to Wes, that it would be a more productive course of action to forego taking an Assignment of the Mortgages which may be unenforceable and instead attempt to strike a mutually acceptable settlement of the foregoing cash investment.
>
> I leave this with you for consideration.
>
> Pending resolution of the matter I shall be proceeding forward diligently with the litigation.
>
> In that regard I shall be filing the revised amendment which I faxed to you with the Court tomorrow at noon unless I hear from you in the interim that you are prepared to consent to some form of amendment which does not compromise the issues proposed."

(ii) The response of Campbell's solicitor to Mr. Lienaux's proposal is contained in his letter of February 26th as follows:

> "I am writing to acknowledge receipt of your letter of February 22, 1996, which was forwarded to me in contemplation of settlement.
>
> I wish to make it clear that the assignment of the second and third mortgages on your property from the Toronto-Dominion Bank to a nominee company of Mr. Campbell, has been completed. I appreciate that you take the view that the notes and the mortgages are void. However, we do not concur with that view and, in fact, feel that judgment pursuant to the notes and foreclosure pursuant to the mortgages is the likely result after trial.
>
> Although we consider Ms. Turner-Lienaux's claims groundless, Mr. Campbell is prepared to consider settlement along the lines of an exchange of the second mortgage in exchange for a release from Ms. Turner-Lienaux and all other interested parties. Furthermore, Mr. Campbell is prepared to consider a renewal or extension of the third mortgage on favourable terms.
>
> Please let me know if Ms. Turner-Lienaux is interested in pursuing settlement along such lines."

(iii) There were further negotiations between counsel which did not bear fruit.

Negotiations culminated with the following exchange of letters. Mr. Lienaux's letter to Mr. Parish of April 18th, 1996:

> "This is to advise that I discussed with my wife Mr. Campbell's offer to settle all matters between the Campbell and Lienaux interests in consideration for:
>
> (a) an Assignment to Mrs. Turner-Lienaux's corporate nominee of the two Mortgages on 332 Purcell's Cove Road now in possession of Mrs. Campbell's numbered company; and
>
> (b) $20,000 in cash.
>
> This is to advise that my wife declines this offer.
>
> It occurs to me that we may have achieved a point in these negotiations where we may make some progress. Accordingly I request that you propose the following to your client, namely:
>
> > That the subject Mortgages be assigned to Mrs. Turner-Lienaux's corporate nominee in consideration for the dismissal of all actions between the parties Lienaux, Turner-Lienaux, T-D Bank, Adelaide, Campbell, MacNutt, without costs to any party. This would be without prejudice to the rights of any parties in action 93-5567. [This is the fraud claim the appellants are making against Campbell arising out of The Berkeley project.]
>
> This would clean up the files 93-5807 and 93-5909 <u>together</u> and avoid the time and expense which both parties will incur after April 30 when amended pleadings are filed. [93 5807 and 93 5909 are the actions to enforce the two mortgages on Mrs. Lienauxs home.]
>
> It is our view that any settlement <u>must</u> involve the assignment of the mortgages and a cash component. We appear to be at the point where Mr. Campbell is prepared to assign the mortgages <u>and include a cash component</u> as a part of the settlement. All that we disagree upon now is the amount of the payment required.
>
> You suggested to me yesterday that you do not

> believe that we have a cause of action against Mr. Campbell in matter 93-5567. At this point I perceive this as mere posturing because you have not seen the documents or our expert's report and there has been no opportunity to examine Mr. Logie or Mr. Campbell.
>
> However, more to the point of attempting to resolve these matters as expeditiously and inexpensively as possible I suggest that once we are past April 30 a Settlement Conference should be considered after production of documents and Discovery Examination so that both sides may assess their chances for success in a Trial.
>
> If we can settle the T-D matters upon the above basis this would preclude any further steps in those proceedings therefore the T-D might want to discuss this offer with you. As you are aware we are in Court next Tuesday. That hearing would be unnecessary if we could settle this part of the dispute. Therefore it would be appreciated if you could advise at your earliest convenience."

Mr. Parish's response to Mr. Lienaux is set forth in his letter of April 19th, 1996; he stated:

> "Further to your letter of April 18, 1996, the proposal which you put forward is not acceptable, mainly because it would not result in the termination of litigation.
>
> If you have a proposal to put forward which would conclude all litigation, I would be pleased to hear from you."

Mr. Lienaux interpreted the letter of April 19th, 1996, as a threat pressuring him to settle the fraud action against Mr. Campbell or Campbell will cause 2301072 Nova Scotia Limited to enforce the mortgages. Mr. Lienaux asserts that Campbell cannot abuse his position as a creditor of the appellants to achieve a collateral benefit external to the actions to enforce the mortgages. Mr. Lienaux asserts that this is an abuse of process and that Justice Goodfellow did not deal with these two arguments as raised on the hearing of the appeal.

The evidence shows that there were extensive settlement negotiations

between counsel for the Bank, Mr. Lienaux, and counsel for Campbell from January 1996 into April 1996 with the object of settling all these actions and put an end to the litigation. There were offers and counter offers to this end. The appellants freely participated in these negotiations but the parties could not reach a settlement.

The negotiations concluded with the final exchange of letters between Mr. Lienaux and counsel for Mr. Campbell on April 18th and 19th, 1996. By this time earlier negotiations had failed and the Bank had assigned the two mortgages to 2301072 Nova Scotia Limited for valuable and substantial consideration.

During the lengthy period of negotiations Mr. Lienaux never complained that he was being pressured because the respondents wished to settle all litigation. In fact, on February 2nd, 1996, Mr. Lienaux offered to settle all litigation if the Bank would assign the two mortgages to the appellants and pay Mrs. Lienaux $398,253. It is also apparent that Campbell was prepared to settle all matters for an assignment of the mortgages to the appellants and a payment by Campbell of $20,000 in cash. This offer was declined on April 18th by Mr. Lienaux.

In that letter he made it clear that he was not prepared to settle the fraud action.

The trial judge's decision

Justice Goodfellow correctly identified the issue before him when he stated:

> "The major issue before me is the application seeking to bar the third party, Wesley G. Campbell, or any personal or corporate nominee of his from further enforcing the

mortgages in issue in this action."

Justice Goodfellow succinctly stated the position being taken by the appellants as follows:

> "Mr. Lienaux takes the position that the conduct of Wesley G. Campbell by acquiring the assignment of the two mortgages of Mrs. Lienaux's home, where she is either a mortgagor or a guarantor, constitutes extortion or oppression. It is Mr. Lienaux's view that the existence of the assignment and inclusion in the settlement process amounts to what he describes as "legal blackmail". He takes the view that the acquisition of the mortgages were for the purpose of extorting from the defendants a favourable settlement in a totally unrelated dispute."

After reviewing the facts and the law respecting abuse of process the trial judge stated:

> "The understandable desire to clear all litigation that is reasonably connected is most understandable. Neither the bank in seeking such an end nor more specifically, and I find, did Wesley G. Campbell commit any abuse of process. There is no element of a purpose external to these actions, but to the contrary a legitimate desire to close the book on all litigation relating to these various business matters.
>
> . . . . .
>
> The evidence does not disclose that the process of the Court is being used for an improper purpose nor that there is any threat or form of extortion established. In the result, the application of the defendants, based on an abuse of process is dismissed."

Disposition

Mr. Justice Goodfellow's finding is clearly supported by the evidence. *Prima facie* settlement negotiations of litigation do not constitute abuse of process but, on the contrary, are in the public interest. In this case the evidence shows that the negotiations were perfectly legitimate with the aim of settling all the actions between the parties.

There was no agreement between the respondents to extort an advantage from the appellants by the Bank assigning the two mortgages to Campbell if all claims of the appellants could not be settled. The only evidence of the Bank's intent in assigning the mortgages to 2301072 Nova Scotia Limited is contained in the answers to interrogatories served by the appellants on the Bank wherein the Bank had been questioned as to what was the purpose of assigning the mortgages to Campbell. The Bank stated that the purpose of the assignment was to receive financial gain. The answers show that the Bank was satisfied to receive an immediate cash payment of $2,000 for the assignment together with an indemnity for further costs that would be incurred by the Bank in the litigation with respect to the actions to enforce the two mortgages as these actions are defended by the appellants who claim a set-off arising out of the alleged improper conduct of Central Guaranty Trust surrounding the mortgaging of Mrs. Lienaux's property to that company. The answers to the interrogatories disclose that the Bank concluded that after evaluating the history of the actions and noting the legal fees incurred together with the likelihood of substantially more legal fees being incurred before the action could be successfully completed, and noting the value of the property after the payment of the first mortgage, the Bank felt that the mortgage security was of little or no commercial value and, consequently, obtaining from Campbell $2,000 for the security plus the indemnity against costs of the litigation was considered worthwhile.

The agreement between the Bank and Mr. Campbell with respect to the assignment to Campbell or his nominee of the two mortgages and the Bank's rights against Campbell following the assignment, are spelled out in the correspondence of January 23 and January 24, 1996, between counsel for the

Bank and counsel for Campbell. The Bank, in making this agreement with Campbell, was not using the Court process, if it can be said that the court process was involved in the assignment, for any purpose other than to protect its financial interest. The Bank was simply making the best deal it could to indemnify itself from the legal costs likely to be incurred in defending a complex claim being brought against the Bank by the appellants. In short, the Bank wanted to get out of this expensive and complex litigation. By assigning the two mortgages and obtaining the indemnity from Campbell, the Bank was not acting in an oppressive manner towards the appellants; it was protecting its own interests as it was entitled to do. The Bank did not abuse the process of the Court.

Mr. Lienaux's assertion that Campbell abused the process of the Court by threatening to proceed through 2301072 Nova Scotia Limited to enforce the mortgages is not sustainable. Mr. Parish's letter of April 19th, 1996, does not contain a threat; it is simply a statement that Mr. Lienaux's proposal of April 18th, 1996, was not acceptable because it left outstanding the fraud action against Mr. Campbell. It was perfectly reasonable for Campbell to want to settle all matters outstanding between himself and the appellants. There was nothing improper in this. It would seem to me that applying Mr. Lienaux's reasoning Campbell could assert that he was being threatened and pressured to release the two mortgages held on Mrs. Lienaux's home as, if he did not do so, as requested by Mr. Lienaux, the appellants would go ahead with the fraud action against him; an action which Campbell asserts is without merit.

We are advised by counsel that the appellants are proceeding to trial with the fraud action and 2301072 Nova Scotia Limited is proceeding with the

action to enforce the mortgages. The appellants are defending and counterclaiming in the mortgage actions.

In summary, the test for establishing that the process of the Court has been abused in these circumstances has not been met. Legitimate settlement negotiations having failed, the Bank was justified in assigning the two mortgages to 2301072 Nova Scotia Limited for valuable consideration. The Bank wanted to remove itself from this expensive litigation. 2301072 Nova Scotia Limited, as assignee of the two mortgages in question, was entitled to continue the actions to enforce the mortgages and entitled, as Justice Goodfellow found, to be substituted as plaintiff for the Bank, the mortgagee at the time the actions were commenced. Justice Goodfellow did not err in fact or in law in so finding. It follows that he did not err in refusing the appellants' motion to strike out the statement of claim as an abuse of process. The appeal ought to be dismissed.

Costs

Counsel for Campbell seeks solicitor and client costs of the appeal.

In a separate decision on costs Justice Goodfellow rejected a similar request. However, he stated that "the overall situation here falls just short of solicitor and client costs". Justice Goodfellow concluded that he could award reasonable costs to Campbell by the application of Tariff "A", Schedule 4 of the **Costs and Fees Act**, R.S.N.S. 1989, c. 104. He fixed costs payable to Campbell at $2,700 by the application of this Tariff. He fixed the Bank's costs at $1,000 without resort to the Tariff. He ordered that both awards plus disbursements were to be paid forthwith. The cost awards have not been appealed.

In the course of rendering his decision on the costs issue Justice

Goodfellow made the following additional relevant comments:

> "This matter was vastly different than a one-hour variety chambers application. There was a considerable volume of correspondence, pre-chambers conference, briefing and attendances.....
>
> .....This litigation will not come to an end by virtue of disposing of these chambers applications although subject to appeal, the issue of alleged abuse of process by Wesley G. Campbell should be burried.....
>
> .....I agree with Mr. Lienaux that the request for costs by Mr. Campbell's counsel of $14,500 is excessive, but I do not agree with Mr. Lienaux that we are dealing with a two and a half hour chambers application. I am convinced that the time involved, including our pre-chambers conference and the volumes of material prior to and post the actual hearing clearly warrants the treatment I have accorded this matter as being equivalent to a one-day trial.....
>
> .....the defendants took a strikingly similar application before Justice Nathanson and received some sound direction which they chose not to follow and instead adamantly pressed this matter, coupled with its importance, particularly as to the consequences that would have flowed had the application been successful, warrant at least using scale 4, the amount of $2,700.....
>
> the inappropriate attack upon Mr. Campbell was one of the considerations in moving to scale 4.....
>
> . . . . .
>
> In this case, the determination of the abuse of process, subject to the Court of Appeal's view, brings to an end the issue of abuse. Additionally, Mr. Lienaux had some pretty good guidance from Justice Nathanson. I concluded that the issue adamantly advanced by Mr. Lienaux which the court addressed could have remained for trial. In the end result, the Lienaux's have put the other parties to substantial costs by way of legal fees for which I have determined a proper judicial exercise is to provide some measure of relief by way of party and party costs which will still fall short of the solicitor and client costs incurred by the other parties.....
>
> .....Given the fact that I have concluded the application ought not to have been taken, this alone should warrant payment of costs forthwith. There are also the added features that Mr. and Mrs. Lienaux are represented effectively by Mr.

> Lienaux, and according to Mr. Lienaux, the amounts involved are of such magnitude, that any award of costs payable forthwith in this application are not likely to be a substantive stumbling block to Mr. and Mrs. Lienaux. In my view, this is a particularly strong case for an award of costs being payable forthwith."

The Law

Pursuant to **Civil Procedure Rule** 62.23(1)(c) the Court of Appeal may "make such order as to the costs of the trial or appeal as it deems fit".

Costs are clearly in the discretion of the court. The discretion must be exercised judicially.

A party's conduct both before and during the litigation process as well as the degree of success achieved are relevant to the exercise of the court's discretion as to costs (**The Law of Costs**, Orkin, 2nd edition 2-4, November 1996)

In **Foulis v. Robinson: Gore Mutual Ins. Co., Third Party** (1978), 92 D.L.R. (3d) 134 (Ont. C.A.) the Court stated at p. 139:

> "Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser. There are, of course, cases in which justice can only be done by a complete indemnification for costs."

In **The Law of Costs**, Orkin, 2nd edition, the following statement appears at p. 2-122:

> "An award of costs on the solicitor-and-client scale, it has been said is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:

> [S]olicitor and client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. Solicitor-and-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.....
>
> At the same time, it has been said that an award of solicitor-and-client costs is not reserved for cases where the court wishes to show its disapproval of oppressive or contumelious conduct.
>
> There is, as well, a factor frequently underlying such an award,, although not necessarily expressed, namely, that the circumstances of the case may be such that the successful party ought not to be put to any expense for costs. As has been said, an award of costs on the solicitor-and-client scale is an important device that the courts may use to discourage harassment of another party by the pursuit of fruitless litigation."

In **Young v. Young**, [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193 the Supreme Court of Canada stated at p. 134:

> "The trial judge ordered solicitor-client costs against the respondent. This award was made on the basis that the custody claim had "little merit", that the respondent attempted to mislead the court, that the respondent was recalcitrant on matters of custody and maintenance and, finally, on the basis that unnecessary proceedings had resulted. The trial judge also referred to the fact that someone else was promoting and paying for the legal action and that repetitive and irrelevant evidence was tendered.
>
> The Court of Appeal, *per* Cumming J.A., upheld the imposition of solicitor-client costs for four days of the trial and for four days of the interlocutory proceedings concerned with financial issues, on the basis of the husband's non-disclosure of financial information. Otherwise, costs against the respondent were reduced to party-and-party costs.
>
> The Court of Appeal's order was based on the following principles, with which I agree. Solicitor-client costs are generally awarded only where there has been

> reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs; nor is the fact that part of the cost of the litigation may have been paid for by others. The Court of Appeal meticulously considered all the proceedings in the light of these principles to arrive at its conclusion that only partial solicitor-client costs were justified.
>
> Finding no error in the reasoning or conclusion of the Court on Appeal on this question, I conclude that its order for costs should remain, save to the extent different conclusions on the merits in this Court require that an adjustment be made."

In **Young v. Young** the Supreme Court of Canada stated the general rule. However, there are many decisions of Canadian courts which have awarded solicitor and client costs where the claim or the defence was without merit (See cases in Orkin, 2nd edition at p. 2-131, November 1996). These decisions would appear to be inconsistent with the statement of the Supreme Court of Canada in **Young v. Young** (supra).

In **Leung v. Leung** (1993), 15 C.P.C. (3d) 42, 77 B.C.L.R. (2d) 314 (S.C. the court stated that "reprehensible" is a word of wide meaning. It can include conduct which is scandalous or outrageous misbehaviour but it also includes milder forms of misconduct as "reprehensible" simply means deserving of reproof or rebuke. This meaning of "reprehensible" is in accord with the meaning of that word as stated in **Random House Dictionary of the English Language**, 2nd edition, unabridged, and in **The New Shorter Oxford English Dictionary** (Lesley Brown)).

Disposition on the Costs Issue

Despite the direction apparently given to Mr. Lienaux by Justice

Nathanson that the abuse of process issue ought to be left to the trial of the action and despite the very strong statement made by Justice Goodfellow that the application ought not to have been brought, the appellants, having failed on the application, pursued an appeal to this Court. The appeal is without merit. Campbell has been put to the expense of paying counsel as he could not afford to stand back and not be represented on the appeal. The fact that an appeal is without merit is not a sound basis for making an award of solicitor and client costs. The appellants' conduct in bringing the application for abuse of process and appealing Justice Goodfellow's decision to this Court cannot be categorized as reprehensible, scandalous or outrageous. Therefore an award of solicitor and client costs is not warranted (**Young v. Young** (supra)).

Costs on an appeal are in the discretion of the court. Considering all the circumstances I would award party and party costs of $2,000 plus disbursements to Campbell and $1,000 plus disbursements to the Bank, both cost awards to be payable forthwith. Such awards will provide substantial but not full indemnification towards the costs necessarily incurred by Campbell and the Bank in responding to the appeal.

Hallett, J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.

C.A. No.135146

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CHARLES D. LIENAUX and
KAREN L. TURNER-LIENAUX

Appellants

- and -

WESLEY G. CAMPBELL and
THE TORONTO-DOMINION BANK

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.