C.A. No. 127433

NOVA SCOTIA COURT OF APPEAL

Cite as: Turner-Lienaux v. Campbell, 1996 NSCA 183

Freeman, Hart and Roscoe, JJ.A.

BETWEEN:

Karen Turner-Lienaux and **Smith's Field Manor Development Limited**	)	Charles Lienaux, Esq. for the Appellants
Appellants	)	
- and -	)	
	)	Alan Parish, Esq. for the Respondent
Wesley Campbell	)	
Respondent	)	
	)	Appeal Heard: September 25, 1996
	)	Judgment Delivered: October 17, 1996

THE COURT: The appeal is dismissed with costs of $1,000, plus disbursements per reasons of Freeman, J.A.; Hart and Roscoe, JJ.A. concurring.

Freeman, J.A.:

The issue in this appeal is whether a chambers judge in the Supreme Court of Nova Scotia should have permitted the respondent plaintiff to discontinue an action for damages from the appellant defendants.

The respondent, Wesley Campbell, had brought the action against Charles Lienaux, his wife Karen Turner-Lienaux, The Berkeley Developments Limited and Smith's Field Manor Development Limited in 1993 after problems developed in their business relationship. At the hearing Mr. Lienaux appeared for the appellants as secretary of Smith's Field and not in his capacity as barrister.

Mr. Campbell and two other investors, Grant MacNutt and Ian Logie, agreed with Mr. Lienaux in 1989 to incorporate Berkeley Developments Limited and build a residential retirement home known as "The Berkeley" on lands in Halifax owned by the Lienauxes' company, Smith's Field Manor Development Limited.

The budgeted cost of $4,625,000 was to be met by a $4,100,000 loan secured by a debenture including a first mortgage guaranteed by the shareholders and a scheme of shareholders' loans. The lender was Central Guaranty Trust Company, which later became Adelaide Capital Corporation. The building was completed in 1990 but, because Berkeley Developments had not fully paid for the property, the land remained in Smith's Field and the Lienauxes were involved in the administration of the home.

Not all commitments were honoured by the shareholders and acrimonious relations soon developed. Mr. Lienaux alleges that Mr. MacNutt has been insolvent since 1993,

that Mr. Logie filed for bankruptcy in 1993, and that Berkeley Developments has not been an active company since 1990.

Mr. Campbell brought his action in 1993 claiming repayment of $42,000 of Berkeley funds disbursed by the Lienauxes to themselves and $18,000 to him, an accounting by Berkeley Developments and Smith's Field of monies received in the operation of the residence, and damages for his increased exposures on guarantees as a result of unauthorized disbursement of funds by the Lienauxes. He also claimed for the appointment of a receiver under ss. 5(2) and 5(3) of the Third Schedule of the Nova Scotia **Companies Act**.

A receiver was appointed to preserve the assets. Subsequently, on the application of Adelaide Capital, another receiver was appointed and given powers of sale. The summary judgment so empowering the second receiver was confirmed on appeal to this court. The Berkeley was subsequently sold because mortgage payments were in arrears and there was no agreement as to refinancing. Mr. Lienaux alleges the property is now owned by a company controlled by Mr. Campbell. Mr. Lienaux filed for bankruptcy in the wake of the sale by the receiver and has since been discharged. The remaining defendants to Mr. Campbell's action are Ms. Turner-Lienaux and Smith's Field.

A detailed defence and counter-claim was filed on behalf of Ms. Turner-Lienaux claiming damages totalling $408,000 plus punitive damages from Mr. Campbell for alleged breaches of contractual duties, directors' duties of honesty and care and directors' fiduciary duties. The counter-claim subsists despite the discontinuance of Mr. Campbell's action.

At his application for the order, which provides "that the action by the plaintiff against the defendants is hereby discontinued without costs," Mr. Campbell's lawyer cited and argued **Civil Procedure Rule** 40.01.

> 40.01. At any time before a proceeding is entered for trial or its hearing is commenced in chambers,

> (a) a plaintiff may discontinue the proceeding or withdraw any cause of action therein against any defendant;
>
> (b) a defendant may withdraw his defence or any part thereof against any plaintiff;
>
> by filing and serving a notice of discontinuance or withdrawal on any party concerned.

Mr. Lienaux says he was taken by surprise by the application for discontinuance, which was added to a chambers' hearing dealing with several other matters. Mr. Lienaux did not request an adjournment of the chambers application and the notice period is not included as a ground of appeal. He argues that the chambers judge was led to believe he had no authority to impose conditions on a discontinuance by Mr. Campbell's lawyer, and in any event did not have the law properly before him so could not have exercised his discretion judicially.

The chambers judge must be presumed to be familiar with the **Rules of Civil Procedure. Rule** 40.02 provides:

> 40.02. At any time after a proceeding is entered for trial or its hearing is commenced in chambers,
>
> (a) a plaintiff may discontinue the proceeding or withdraw any cause of action therein, against any defendant;
>
> (b) a defendant may withdraw his defence or any part thereof against any plaintiff;
>
> with the leave of the court, and the order may contain such terms as to costs, the bringing of any subsequent proceeding, or otherwise, as are just.

Mr. Lienaux referred to the English practice set out in **The Supreme Court Practice**, 1988, London, Sweet & Maxwell Ltd. Stevens & Sons Ltd., Vol. 1, Part 1 at p. 370, in which **Castanho v. Brown & Root (U.K.) Ltd.**, [1981] A.C. 557 is cited as authority for the following statement:

> Although the plaintiff has the unqualified right under r. 2(1) to discontinue his action without the leave of the court before the service of

> the defence on him and indeed within 14 days after such service, yet if he abuses such right by serving a notice of discontinuance after obtaining substantial advantages in the action to the prejudice of the defendant, e.g. by securing substantial interim payments and an admission of liability or otherwise, he will be guilty of an abuse of the process of the court, and the court will then have power to set aside his notice of discontinuance, but nevertheless, the court in its discretion may grant him leave to discontinue on terms and will not grant an injunction against him to restrain him from bringing or continuing an action based on the same cause of action in a foreign court.

The appellant also cited the judgment of Cooper J.A. in **McCarthy v. Acadia University** (1977), 18 N.S.R. (2d) 364 at p. 366-7:

> The provisions of Rule 40.02 are a recognition of the fact that once an action has been entered for trial the plaintiff is no longer the sole master of the litigation. As it was put by Chitty, L.J., in **Fox v. Star Newspaper Company**, [1898] 1 Q.B. 636 at p. 639 (Court of Appeal) "after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms."

The appellants assert the action "has progressed to the point where the respondent is no longer *dominus litis* and the appellants are entitled to their day in court to have the matters put in issue by the Respondent determined."

Mr. Lienaux acknowledges that the sale of assets by the receiver is "water under the bridge" whether or not the discontinuance is allowed to stand, but asserts that Mr. Campbell's action left him in a precarious financial position and that Mr. Campbell should not be permitted to "escape by a side door and avoid the contest." He says the discontinuance is an abuse of process and the appellants have suffered injustice as a result of having been denied procedural fairness because of short notice and the right to have the matter determined according to law.

However, the chambers judge did not refuse a request for an adjournment, and must be presumed to know the law. His order must be seen as a finding that he did not consider the process abused, and, not being persuaded that substantial abuse has occurred, I would defer to that finding.

The respondent's position is not similar to that of the seaman plaintiffs in **Castanho v. Brown & Root** who accepted interim or interlocutory payments from the defendant. The receiver who sold the property was appointed on behalf of the debenture holder, and both receivers were under the supervision of the court. Their activities are not and were not in issue between the parties, whether on the main action or by counter-claim. The action that was discontinued merely sought damages from the defendants and an accounting by the two companies, one no longer active and the other without assets.

The concern of this court must be whether allowance of the discontinuance will cause any substantial prejudice to the appellants. The respondent argues it will not do so because the appellants' right to proceed with their counterclaim is not affected. I agree. I have not been satisfied that the appellants' position has been worsened in any substantial way by the discontinuance, nor that it could have been strengthened by any conditions that the chambers judge might reasonably have imposed upon the respondent plaintiff.

This court has repeatedly stated the principle that it will not interfere with a discretionary interlocutory order by a chambers judge if he or she did not proceed on erroneous principles and no patent injustice would result**:** See, *inter alia*, **Exco Corporation v. Nova Scotia Savings and Loan** (1983), 59 N.S.R. (2d) 331 and **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 (C.A.).

It has not been made clear that the chambers judge proceeded on erroneous principles nor that patent injustice results. The counterclaim, which survives, appears to bring the appellants' concerns before the court. If it does not address all substantial issues, the appellants are entitled to seek leave to amend it.

The appeal is dismissed with costs which I would fix at $1,000 plus disbursements.

Freeman, J.A.

Concurred in:

Hart, J.A.

Roscoe, J.A.

C.A. No. 127433

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

Karen Turner-Lienaux and Smith's Field Manor Development Limited		
	Appellants	
- and -		REASONS FOR JUDGMENT BY:
		Freeman, J.A.
Wesley Campbell	Respondent	