NOVA SCOTIA COURT OF APPEAL

Citation: ***Lienaux v. Norbridge Management Ltd.***, 2012 NSCA 3

Date: 20130102
Docket: CA 408479
Registry: Halifax

Between:

Charles D. Lienaux, Barrister, of the City and County of Halifax

Appellant

v.

Norbridge Management Limited

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Motion Heard:	December 20, 2012, in Halifax, Nova Scotia, in Chambers
Held:	Motion by the respondent for security for costs against the appellant is granted.
Counsel:	Appellant, in person Alan V. Parish, Q.C. and Jason Cooke, for the respondent Karen L. Turner-Lienaux, notified but not participating

Decision:

[1] Norbridge Management Limited brings a motion for security for costs against Charles D. Lienaux. Mr. Lienaux has appealed the decision of the Honourable Justice Cindy A. Bourgeois, granting a writ of possession to Norbridge with respect to Mr. Lienaux's home at 332 Purcell's Cove Road, Halifax (2012 NSSC 318). Karen Turner-Lienaux is Mr. Lienaux's wife and is currently an undischarged bankrupt. She did not participate in the case under appeal, nor is she participating on the appeal.

Introduction:

[2] Before hearing submissions from counsel, Mr. Lienaux was cross-examined briefly on his affidavit. Mr. Lienaux also requested cross-examination of Norbridge's counsel, Mr. Parish, on some of the statements and submissions in the brief filed on behalf of Norbridge. Mr. Lienaux claimed that *Toronto-Dominion Bank v. Lienaux* (1995), 140 N.S.R. (2d) 156, (N.S.C.A.) authorized him to question Mr. Parish. The TD Bank case is not on point. It was an appeal of a successful summary judgment motion by the Bank in which Mr. Lienaux and his wife, Karen L. Turner-Lienaux, were denied the opportunity to amend their pleadings or lead evidence about whether or not Ms. Turner-Lienaux received independent legal advice. The Court of Appeal found that procedural fairness was compromised when Mr. Lienaux was not permitted to lead evidence addressing the Bank's motion for summary judgment. But in this motion Mr. Lienaux could not provide any authority for the proposition that he had any right to cross-examine opposing counsel. Mr. Parish is not a party in these proceedings. He has filed no affidavit. Whether facts in his brief are accurate can be argued on the record before the Court. Norbridge's legal submissions can also be challenged by Mr. Lienaux in argument. No procedural fairness issues arise.

[3] The materials filed with the court are voluminous. Norbridge has filed an affidavit comprised of two volumes and approximately 400 pages. For his part, Mr. Lienaux has filed a two-volume affidavit attaching 66 exhibits. In addition to lengthy written submissions and books of authorities, the matter occupied a couple of hours in Chambers.

[4] Norbridge is a company owned and/or controlled by Wesley G. Campbell. Mr. Lienaux and his wife have been engaged in litigation with Mr. Campbell and/or companies owned or controlled by him for 20 years. Some sense of this background is available from the decision of Justice Jamie W.S. Saunders of this Court in a security for costs application brought last year. In particular, Appendix A to that decision contains an extensive history of previous dealings between these parties in their various personae (2011 NSCA 94).

[5] Material facts for the purpose of this motion are:

(a) By Warranty Deed dated April 27, 1992 Mr. Lienaux and Karen Turner-Lienaux conveyed 332 Purcell's Cove Road, Halifax, to Karen Turner-Lienaux alone. The Deed was recorded in the Registry of Deeds in Halifax in April 27, 1992, (the "Property");

(b) By "Marriage Agreement" of April 27, 1992, Ms. Turner-Lienaux agreed, amongst other things, that she would hold an undivided one-half interest in the Property in trust for Mr. Lienaux. That Agreement was not recorded, ("1992 Marriage Agreement");

(c) On January 25, 1995, Mr. Lienaux made an assignment in bankruptcy;

(d) On March 7, 2002, Mr. Wesley Campbell obtained a judgment against Karen Turner-Lienaux and Smith's Field Manor Development Limited in the amount of $360,532.62. A certificate judgment was recorded at the Registry of Deeds on August 7, 2004;

(e) By Warranty Deed dated February 15, 2010, Karen Turner-Lienaux conveyed the Property to herself and Mr. Lienaux as joint tenants. On February 18, 2010, the Property was migrated and the Warranty Deed duly registered pursuant to the *Land Registration Act*, S.N.S. 2001, c. 6;

(f) On February 24, 2010 an Execution Order was issued by the Prothonotary with respect to the 2002 Campbell judgment (item (d)

above). This order was issued preparatory to selling the Property by Sheriff's sale to satisfy the Campbell judgment;

(g) On April 18, 2012, a stay of sale proceeding was granted by Justice Kevin Coady, which expired on October 12, 2012;

(h) On October 8, 2010, Karen Turner-Lienaux made an assignment in bankruptcy;

(i) On June 7, 2011, Mr. Lienaux and others applied to Justice Gregory Warner for various relief including cancellation of the Sheriff's sale. Justice Warner dismissed the application. Mr. Lienaux appealed, but that appeal was dismissed because Mr. Lienaux could not post security for costs (Justice Saunders' decision above - 2011 NSCA 94);

(j) On June 15, 2011, the Property was sold to Norbridge which received a Sheriff's Deed.

(k) Mr. Lienaux then brought an application, amongst other things, to have the Sheriff's Deed declared void;

(l) On January 12, 2012, the sheriff moved before Justice Peter Rosinski to have the Lienaux application stayed or dismissed. Justice Rosinski dismissed Mr. Lienaux's application finding that it was *res judicata* and an abuse of process, (2012 NSSC 38). Mr. Lienaux's appeal was dismissed, (2012 NSCA 104);

(m) Mr. Lienaux would not vacate the Property and Norbridge brought a motion for possession. That motion was granted by Justice Cindy Bourgeois, (2012 NSSC 318). It is this decision that is under appeal.

Decision under appeal:

[6] Before Justice Bourgeois, Mr. Lienaux maintained that he still held an undivided one-half interest in the Property created by virtue of his 1992 Marriage Agreement. He then argued that the decisions of Warner J. and Rosinski J. found

that the joint tenancy deed conveyed to him Ms. Turner-Lienaux's interest, encumbered by the judgment, but not the interest held by her for him in trust pursuant to the Marriage Agreement.

[7] Mr. Lienaux went on to accuse Mr. Parish and his firm of fraud for registering the Sheriff's Deed because it purported to convey his entire interest in the Property although, he argued, it did not capture the beneficial interest originally held in trust for him by his wife under the 1992 Marriage Agreement.

[8] Mr. Lienaux's position before Justice Bourgeois was characterized by her in this way:

> [39] Mr. Lienaux has risen to that challenge, and despite the extensive arguments made before the Court, his position is quite simple. He asserts he still owns an undivided one-half interest in the property which was never subject to the Campbell judgment, and could not therefore, be properly subject to the Sheriff's sale. In my view, if Mr. Lienaux is correct in his assertion that he retains an interest in the property, such would be an effective bar against the writ of possession sought by Norbridge.
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> [40] Mr. Lienaux argues the decision of Justice Warner establishes that he retains this interest by virtue of the 1992 Marriage Contract, and that the February 2010 deed did not convey his original interest back to him, but rather conveyed his wife's one-half interest. It is asserted that Justice Rosinski confirmed this decision and outcome.

[9] Justice Bourgeois was invited by Norbridge to deal with the matter as a question of *res judicata* or abuse of process. Instead she preferred to deal with the matter "on its merits". (Justice Bourgeois did not then have the benefit of the Court of Appeal's decision, upholding Justice Rosinski's "abuse of process" decision – 2012 NSCA 104.) After extensive review of the file and the decisions of Warner J. and Rosinski J., she concluded:

> [44] Mr. Lienaux asserts that the above view is not consistent with the findings of Justices Warner and Rosinski. I have reviewed the transcript of the representations made before both justices, the Warner oral decision, and the written decision of Justice Rosinski. I cannot accept that Justice Warner's decision, and that of Justice Rosinski, based upon the context of what was being argued before the court, stand for the proposition put forward by Mr. Lienaux. Specifically, I reject that Justice Warner determined that the February 2010 deed

> served to convey to Mr. Lienaux as a joint tenant, only his wife's half interest in the property.
>
> [45] Such an interpretation is simply not reasonable, and is contrary to the documentary evidence before the Court. No evidence was presented on behalf of Ms. Turner-Lienaux to speak to her intention in terms of the February 2010 conveyance, or her belief as to what she was conveying at that time. What is before the court is her Assignment in Bankruptcy and Statement of Affairs, signed by her in October 2010. There, she asserts that she owns a one-half interest in the property. There is no mention that Mr. Lienaux is entitled to half of this half by virtue of the February deed, or that she holds another half of the property in trust for him by virtue of a marriage contract.

[10] Justice Bourgeois was very critical of Mr. Lienaux for his allegations of fraud against Mr. Parish and, as a result, in a separate decision, awarded generous lump sum costs against Mr. Lienaux of $30,000, (2012 NSSC 411).

[11] Mr. Lienaux has appealed Justice Bourgeois' decision arguing that:

1. Justice Bourgeois misconstrued the decisions of Justice Warner and Rosinski which "previously determined matters in issue before her and were therefore binding upon her pursuant to the doctrine of *stare decisis*";

2. Justice Bourgeois erred in finding that the Campbell Judgment bound his beneficial and/or matrimonial property interest in the property;

3. Justice Bourgeois erred in failing to draw a negative inference that Norbridge obtained the property by fraud because the lawyer who certified title through Halifax County Land Registry was not called as a witness;

4. Justice Bourgeois erred in failing to find that Norbridge's acquisition of Mr. Lienaux's interests were acquired by fraud.

[12] Norbridge has filed a Notice of Contention that Justice Bourgeois should have disposed of the matter as *res judicata* and/or an abuse of process.

Motion for Security for Costs:

[13] Norbridge brings a motion for security for costs arguing that:

(a) Mr. Lienaux has habitually failed to pay orders for costs and has behaved in an insolvent manner towards Norbridge;

(b) Mr. Lienaux has not established impecuniosity;

(c) Alternatively, impecuniosity is not a bar to the granting of an order for security for costs;

(d) Mr. Lienaux's appeal is not meritorious.

[14] Norbridge seeks an order for security for costs in the amount of $10,000 plus a further $30,000 representing the lump sum award granted by Justice Bourgeois, for a total of $40,000.

[15] In response, Mr. Lienaux argues:

(a) That he is impecunious;

(b) That Mr. Campbell (Norbridge) is the cause of his impecuniosity;

(c) Security for costs is being used to prevent his access to justice;

(d) That his appeal has merit;

(e) That granting an order for security for costs would prevent a meritorious appeal from being heard.

[16] Security for costs in the Court of Appeal is authorized by *Civil Procedure Rule* 90.42:

> **90.42 (1)** A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.

> **(2)** A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[17] Notwithstanding the 2009 reform of the *Civil Procedure Rules*, the same interpretive principles apply to new Rule 90.42 (former Rule 62.13), see: *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40, para. 2. A successful applicant must establish that there are "special circumstances" justifying security for costs. The concern which the *Rule* addresses is that the respondent will be unable to collect his costs of the appeal if the appellant is unsuccessful. Generally speaking, this means that the respondent/applicant must show that the appellant has behaved in an insolvent manner so as to justify concern about the costs risk which the respondent undergoes. It is not enough that there is a risk that the appellant will not be able to pay: *Smith v. Michelin North America (Canada) Ltd.*, 2008 NSCA 52, at para. 33. This onus can be met by establishing that the appellant has failed to pay orders for costs in the past or has outstanding judgments to satisfy (*Williams Lake Conservation Co. v. Kimberly-Lloyd Developments Ltd.*, 2005 NSCA 44, at para. 11).

[18] Norbridge submits that there is extensive evidence that Mr. Lienaux has behaved in an insolvent manner and, in particular, has failed to pay costs in related proceedings (2007 NSCA 28; 2001 NSCA 122; 2011 NSCA 94). In addition to other unpaid obligations, Mr. Lienaux has not paid four costs awards exceeding $40,000 in total. Chief Justice MacDonald's observation in 2007, remains apposite:

> [12] In conclusion, there are in this appeal special circumstances justifying a security for costs order. In fact, given the appellants' horrendous record when it comes to honouring costs obligations, it is hard to imagine a more appropriate circumstance for such relief. In short, I am not prepared allow the appellants to again take the respondent through yet another appeal without providing security. [2007 NSCA 28]

[19] Norbridge has established "special circumstances". Indeed, Mr. Lienaux concedes that he has not paid previous costs awards. His submission that he cannot post security is a tacit admission that he could not pay costs if he loses the appeal. His focus is on other considerations which suggest that the court should not exercise its discretion in favour of Norbridge.

Impecuniosity:

[20] Norbridge argues that Mr. Lienaux hasn't really given the court adequate evidence to determine that he is impecunious. It says that he has not filed a statement of affairs and that he has not provided original evidence with respect to such things as bank accounts. Mr. Lienaux counters that he has provided evidence of his income, his debts, his assets and liabilities. He has no ability to raise security. Moreover, he insists that if an order for security for costs is granted, he will not be able to post security and therefore will lose his opportunity to appeal. Certainly, his failure to post security in response to Justice Saunders' decision (2011 NSCA 94) supports Mr. Lienaux's submission here.

[21] While I agree that Mr. Lienaux has not provided compelling exhibit evidence to support his pleas of impecuniosity, I am prepared to assume for the purposes of this motion that he is an impecunious appellant. That does not dispose of the matter.

Is impecuniosity a bar?

[22] Mr. Lienaux says that he should not be denied access to the courts due to impecuniosity. This is especially so where an appeal is "likely" to succeed. It will be preferable to address the prospects of success on the merits as a discrete category, later in this decision. However, Mr. Lienaux is correct that the court is reluctant to stifle an appeal owing to an impecuniosity, assuming there are no other circumstances warranting security for costs.

[23] Mr. Lienaux cites *Disabled Consumer Society of Colchester v. Burris*, 2009 NSCA 21, in support of his "access to the court" argument:

> [14] Balanced with that principle is a concern that the security for costs not deny access to justice. In *Smith v. Michelin North America (Canada) Inc*, 2008 NSCA 52, Justice Cromwell said:
>
> > In exercising the discretion to make an order for security, the court proceeds with caution because of the risk that the order may effectively stifle the appeal.

> Where security would prevent the prosecution of an arguable appeal, and no other circumstances justified security, this court has denied security for appeal costs: *Crandall v. Atlantic School of Theology* (1993), 122 NSR (2d) 359 (CA), at ¶ 3 per Jones JA; *Ryan v. Ryan* 2000 NSCA 10, at ¶ 38-41 per Pugsley, J.A.

[24] In response, Norbridge cites *Munroe v. Morgan Industrial Contracting*, 2004 NSCA 49, where Oland J.A. said:

> [8] Even if I were to assume that he is self-represented and has not paid any portion of the trial costs because he is impecunious, that financial situation of itself does not preclude an order for security for costs. In regard to the previous *Rule* on such security, MacKeigan, C.J.N.S. stated in *L.E. Powell & Co. Ltd. v. Canadian National Railway Co. et al. (No. 2)* (1975), 11 N.S.R. (2d) 532 (N.S.C.A.), as follows:
>
> > By Rule 62.30, supra, this Court or a judge thereof, like the English courts, may now order security for costs on appeal in "special circumstances". The basic principle applied by the English courts in cases like the present has been set forth by Bowen, L.J., in Cowell v. Taylor (1885), 31 C.D. 34 (C.A.) at p.38:
> >
> > > ***The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another.*** There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow. [Emphasis added]

The following comments by Bateman, J. in *Smith's Field Development Ltd. v. Campbell*, supra, are also worth noting:

> [40] The appellants are able to pursue this appeal, as they have the litigation before the trial court, principally without concern for legal fees. Should the appeal fail, the only risk to the appellants, apart from their own disbursements, is an order for costs, which will inevitably go unanswered. As Pugsley J.A. said in Arnold in Construction, supra:

> [9] ...
>
> > (1) ... [the respondent] is entitled to a substantial sum for its taxed costs of successfully defending a trial. To permit the company to have a "free ride" without posting security, renders an[d] injustice to Alta. Alta's rights must also be considered... .

[25] Norbridge also argues that even if impecuniosity prevents a hearing of the appeal, security can still be ordered. It says that this case is very much like two previous cases involving Mr. Lienaux. In 2011, Justice Saunders said:

> [21] Had I reached the conclusion that the appellant was impecunious, or that compelling him to post security would likely terminate the appeal, I would nonetheless have ordered security for costs in favour of the respondents, so as to do justice between the parties in the face of this chronicle of discord which I would characterize as extraordinary and unparalleled. (2011 NSCA 94)

And in 2001, Justice Bateman commented in *Campbell v. Turner-Lienaux*, (2001 NSCA 122):

> [35] I am confident that, as they have in the past, the appellants will find the resources to advance the appeal in the face of a security for costs order, if they continue to believe in the merits of their cause. I add, however, that, in these circumstances, a consideration of the interests of not only the appellants but also the respondent leads me to conclude that an order for security is appropriate even should the result be termination of the litigation. In other words, even had I been satisfied that the appellants are impecunious I would have ordered security.

[26] This jurisprudence shows that litigants will not be denied access to the courts – even to the Court of Appeal – simply because they cannot post security for costs. However, the authorities do suggest that the "access to courts" argument is weaker in appeal settings because the appellant has already been heard at trial. Nevertheless, security for costs has been refused where an impecunious appellant risks losing his day in the Court of Appeal. But the loss of one's day in court is not usually determinative. The Court's exercise of discretion is not so one-dimensionally constrained. All the circumstances should be taken into account, including the interests of the respondent on appeal, (2001 NSCA 122, at 35). I would not dismiss the motion simply because it may prevent Mr. Lienaux from pursuing his appeal. I elaborate on this further under "conclusion".

The cause of impecuniosity:

[27] Mr. Lienaux argues that Mr. Campbell is the cause of his impecuniosity, so security for costs should be denied: *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316 and *1149426 Ontario Ltd. v. Forgione*, [2005] O.J. No. 2483, and cases cited therein.

[28] These authorities are all trial decisions where the propriety of the defendant's conduct was a live issue and arguably caused the plaintiff's impecuniosity. They have no application here, where Mr. Lienaux and/or his wife or company has largely been unsuccessful in previous litigation. An impecunious litigant's lack of success – particularly against the same party – is precisely why there is a rule allowing security for costs. That impecuniosity is caused by such losses is a price paid for failure – it is not a reason to deny security for costs.

Security as abuse:

[29] Then Mr. Lienaux submits that the security for costs motion is an attempt by Norbridge to improperly block access to the Court of Appeal: *Ellph.com*, at para. 3. He argues that Mr. Campbell has previously employed this device: *Lienaux v. 2301072 Nova Scotia Ltd.*, 2007 NSCA 66 (security for costs order upheld). But it can hardly be a persuasive argument that Mr. Campbell should not be successful in the current motion simply because he has been successful in the past. To the contrary, this supports Norbridge's assertion that Mr. Lienaux is (yet again) wasting everyone's time and Norbridge's money.

Merits of the appeal:

[30] Both sides agree that the motion should not be decided on its merits. On the other hand, an extensive record has been tendered and lengthy arguments have been made with respect to the merits. While the merits of an appeal should not be disposed of in an interlocutory setting, they should not be ignored. In the rare clear case, the merits can be decisive: *Campbell v. Turner-Lienaux*, 2001 NSCA 122 at para 17; *Munroe, supra*, at paras. 8 and 9.

[31] One must be cautious about weighing the merits at this stage. Nevertheless, the Court of Appeal enjoys certain advantages over the trial court with regard to the merits. First, there usually has been a lower court decision on the merits against which grounds of appeal are more easily tested than unproven allegations in pleadings or affidavits without the benefit of a full hearing – all of which a trial court faces. Occasionally a Chambers judge in the Court of Appeal may have a transcript. In this case, as indicated, the parties have filed extensive evidence and briefs. In addition to the decision appealed from, there are two other first instance decisions that have considered the sale of the Property (those of Justices Warner and Rosinski), as well as numerous other decisions between the parties which provide some context.

[32] The specific grounds raised by Lienaux are set out in para. 11 above. However, when weighing the merits, one must also consider Norbridge's Notice of Contention that Justice Bourgeois should have disposed of Mr. Lienaux's arguments as *res judicata* and/or an abuse of process.

[33] Although there are four grounds of appeal, they all depend on Mr. Lienaux's argument that he retained a 50% interest in the property arising out of the 1992 Marriage Agreement. That argument sustains his attack on Justice Bourgeois' decision and on Mr. Parish's alleged fraud in drawing and registering a Sheriff's Deed that conveyed all of Mr. Lienaux's interest in the Property to Norbridge.

[34] One of the crucial arguments made by Mr. Lienaux to Justice Warner was that his 1992 Marriage Agreement gave him an undivided 50% equitable interest in the Property and therefore the 2002 Campbell judgment did not attach to his 50% interest, even though his wife was then the sole registered legal owner. Under the former *Registry Act*, it was a correct proposition of law that a judgment could only attach to the property interest of a judgment debtor, (*Sissiboo Pulp Co. v. Carrier Lane Co.* (1905), 40 N.S.R. 546; *Leighton v. Muir et al.* (1961), 31 D.L.R. (2d) 383 (NSSC); *Pat King Limited v. Moore et al* (1970), 1 N.S.R. (2d) 837; *Lawrence v. Halifax Herald Limited et al* (1985), 68 N.S.R. (2d) 24; *Clem & Comeau v. Hants-Kings Business Development Centre*, 2004 NSSC 114). Since these decisions, the *Registry Act* has been replaced by the *Land Registration Act*. Section 66(1) of that *Act* describes the effect of a judgment:

> A judgment is a charge as effectually and to the same extent as a recorded mortgage upon the interest of the judgment debtor in the amount of the judgment.

The *Act* defines "interest" as any "...estate or right in, over or under land recognized under law..." (s. 3 (1)(g)). This language would capture equitable interests.

[35] Mr. Lienaux argues that s. 66(1) does not change the law, but leaves it undisturbed. He may be right, but it is not necessary to decide that. Mr. Lienaux argued the effect of the 1992 Marriage Agreement before Justices Warner and Rosinski. He argued the *Pat King* case to Justice Warner in a post hearing submission which Justice Warner declined to entertain. But he had made the argument in oral submissions. These excerpts come from Exhibit 'K' to Norbridge's affidavit:

> **MR. LIENAUX:** Okay. The point that I wanted to make, My Lord, with respect to that is I think the law is well settled and I think both counsel here agree that the judgment against one debtor does not affect a judgment or the interest of another owner in a property. That's been the **Registry Act** law . . .
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> **MR. LIENAUX:** So the point that I want to make, My Lord, is that if I took a one-half interest, if my wife was holding a one-half interest in trust for me, as of 1992 . . .
>
> **MR. LIENAUX:** Okay. I just want to complete the thought, if I may, My. Lord. If she was holding a one-half interest for me in trust in 1992, then when the judgment attached in 2003 or 2004 it attached to her interest. She owned half the property and was holding half of it in trust for me.

[36] So Justice Warner heard that argument but dismissed Mr. Lienaux's motion to stop the Sheriff's sale of the Property. Mr. Lienaux appealed. One of his grounds of appeal was:

> 6. That the learned Chamber Judge erred in law when he allowed the Halifax County Sheriff to auction an interest in the Lienaux matrimonial home without an execution order ***and to recover a judgment which is not binding upon the interest auctioned by the Sheriff***. [Emphasis added]

As earlier indicated, this appeal was dismissed for failure to post security for costs.

[37] Mr. Lienaux returned to this argument before Justice Rosinski, asserting that either Justice Warner had made no adverse ruling on this point, or had been wrong. Justice Rosinski disagreed, saying:

> [59] To now make, in substance, the same legal arguments in a new proceeding is relitigation of the same issues. To the extent that the issues are nuanced differently by Mr. Lienaux in his Chambers application, they are either the same issues or they are approaches to those same issues that in essence were raised, or could, and should have been, raised before Justice Warner or on appeal of his decision - see Beveridge, JA.'s citation of *Phipson on Evidence* at para. 15 in *Kameka* supra.

[38] Justice Rosinski dismissed Mr. Lienaux's application for a declaration that the Sheriff's Deed was void, on the basis of *res judicata* and abuse of process. Mr. Lienaux appealed, reiterating his arguments about the effect of the 1992 Marriage Agreement. His appeal was dismissed.

[39] Mr. Lienaux was undeterred. He repeated the same arguments to Justice Bourgeois in the case under appeal (para. 8 above).

[40] None of the previous decisions address or explain how Mr. Lienaux's 1992 "equitable interest" in the Property survived his 1995 bankruptcy. In his Affidavit, Mr. Lienaux affirmed that:

> 16. In or about 1995 I was advised by Goodman [the Trustee in Bankruptcy], and verily believed, that whereas my wife had expended approximately $600,000 to acquire and renovate the Property it was determined that I did not own any financial equity investment in the Property before or during my bankruptcy and at the time I was discharged from bankruptcy.

[41] This statement confuses the existence of an equitable interest in property with the value of that interest. On its face, it is not consistent with the creation of an equitable interest in 1992. In any event, it is clear that three courts (and the Court of Appeal) have now heard this argument.

[42] Mr. Lienaux also argued that he had an "undivided right of possession" equal to his wife's, citing the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, and *Trask v. Trask* (1997), 166 N.S.R. (2d) 344. Whether *Trask* was correctly decided on this point need not concern me. But it appears inconsistent with the

interplay between matrimonial property and general property rights (*Gill v. Hurst*, 2011 NSCA 100, paras. 50, 51). And it is clear that the statutory grant of a right of possession rests on the personal status of "spouse", not a proprietary interest *per se*. But this argument about *Trask* was also previously made to Justices Warner and Rosinski and the Court of Appeal. It does not improve with a fourth repetition.

[43] A stay of Justice Bourgeois' decision was granted and agreed on terms. So one can assume that there is an arguable issue on appeal. But in my view, Norbridge has a reasonable prospect of success on its abuse of process argument. That argument was successful on the appeal of Justice Rosinski's decision where the effect of the 1992 Marriage Contract and the alleged "right of possession" under the *Matrimonial Property Act* and *Trask* were key to all Mr. Lienaux's arguments, (2012 NSCA 104). It is reasonable to conclude that Norbridge's abuse of process argument may yet again prevail. A tentative consideration of the merits does not favour Mr. Lienaux or preclude security for costs.

Conclusion:

[44] Security for costs should be awarded. Special circumstances have been demonstrated by Norbridge. None of Mr. Lienaux's arguments against the court's exercise of discretion are persuasive. In concluding that security for costs should be granted, I must take into account all "the relevant circumstances". I have considered:

(a) the alleged impecuniosity of Mr. Lienaux;

(b) the cause of that impecuniosity;

(c) the various unsatisfied judgments and costs awards against Mr. Lienaux;

(d) the opportunities Mr. Lienaux has already enjoyed to advance the arguments he is making;

(e) the interests of Norbridge in having to litigate similar issues yet again with a virtual certainty that no costs will be recoverable if Norbridge is successful;

(f) a tentative assessment of the merits of the appeal and Notice of Contention.

These considerations indicate an exercise of discretion in favour of Norbridge's motion to have security for costs.

[45] Before Justice Bourgeois, Mr. Lienaux made allegations of fraud against Mr. Parish and his firm. Justice Bourgeois was clearly disturbed by what she considered to be an unjustified calumny. Mr. Lienaux repeats those allegations in his grounds of appeal. Accordingly, Norbridge seeks $40,000 as security for costs; $10,000 for the appeal and $30,000 for the motion before Justice Bourgeois.

[46] In less compelling circumstances, Justice Saunders awarded security for costs against Mr. Lienaux of $10,000. In this case, Mr. Lienaux persists in his allegations of fraud – allegations unnecessary to his success if he had been able to show an ongoing interest in the Property arising out of the 1992 Marriage Agreement. Mr. Lienaux raised numerous arguments during this motion which will no doubt reappear in his submissions on the appeal (although, as indicated above, they all depend on his retaining an interest in the Property by virtue of the 1992 Marriage Agreement and/or under the *Matrimonial Property Act*, unencumbered by the Campbell judgment). The appeal is set for a full day. I consider $15,000 an appropriate sum.

[47] Like Justice Saunders, I will issue an order that Mr. Lienaux pay security of $15,000 to be posted on or before 4:00 p.m. AST, Friday, January 18, 2013, failing which Norbridge shall be at liberty to move for a dismissal without further notice to Mr. Lienaux.

Bryson, J.A.