NOVA SCOTIA COURT OF APPEAL
Citation: ***Ross v. Bank of Montreal***, 2013 NSCA 70

Date: 20130618
Docket: CA 397039
Registry: Halifax

Between:

Jack Raymond Ross, Shelly Ann Ross
and Sportsclick Inc.

Appellants

v.

Bank of Montreal

Respondent

Judges:	MacDonald, C.J.N.S., Hamilton and Fichaud, JJ.A.
Appeal Heard:	April 17, 2013 in Halifax, Nova Scotia
Held:	Appeals allowed with costs payable forthwith by the respondent to the appellants in the total amount of $1,500 including disbursements, per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.
Counsel:	Christopher I. Robinson and Eric K. Slone, for the appellants Alexander S. Beveridge, Q.C. and Benjamin R. Durnford, for the respondent

Reasons for judgment:

[1] This is an appeal by Jack Raymond Ross and Shelly Ann Ross, and by Sportsclick Inc., from the March 20, 2012 order of Justice Arthur J. LeBlanc. The order struck the defence of Mr. and Mrs. Ross, guarantors of the indebtedness of Sportsclick to the respondent Bank of Montreal ("Bank"), to the Bank's action against them on their guarantees. It also struck numerous paragraphs in Sportsclick's defence to the Bank's debt action against it and in Sportsclick's counterclaim against the Bank for damages. The parties were represented by counsel before the motions judge and before us.

[2] The record before us contains limited material in addition to the notice of appeal and the Bank's notice of contention: (1) the pleadings in the Ross action and in the Sportsclick action; (2) the Bank's February 18, 2011 notice of motion that commenced the proceeding that gave rise to the order under appeal, which named only the Rosses, not Sportsclick, as respondents and sought summary judgment under **Civil Procedure Rules** 13.03 and 13.04; (3) the February 17, 2011 affidavit of Robert Patten in support of the Bank's motion; (4) the Bank's April 20, 2011 pre-hearing brief; (5) the April 26, 2011 response affidavit of Mr. Ross; (6) the Rosses' April 26, 2011 pre-hearing brief; (7) the Bank's April 29, 2011 amended notice of motion adding a reference to **Civil Procedure Rule** 88, the abuse of process rule; (8) the transcript of the May 4, 2011 hearing; (9) the judge's reasons (2011 NSSC 359) and (10) his order.

[3] The judge's reasons and the transcript indicate that shortly before the hearing, the Rosses sought an order consolidating the Bank's action against them with the Bank's action against Sportsclick, without details of the form the consolidated action would take. No materials relating to the consolidation request were included in the record.

[4] The judge's reasons set out the following as the facts:

> [3] The plaintiff, Bank of Montreal ("BMO"), extended an operating credit facility to Sportsclick Inc. ("Sportsclick"). ... The defendant, Jack Raymond Ross, is the President, CEO and Director of Sportsclick.

[4] Sportsclick became indebted to BMO for approximately $800,000 plus interest. This debt is secured by a security agreement under the *Personal Property Security Act*, S.N.S. 1995-96, c. 13, and by security pursuant to s. 427 of the *Bank Act*, S.C. 1991, c. 46.

[5] BMO also obtained personal guarantees from the defendants,..., who were involved in a predecessor business of Sportsclick. The defendants' personal guarantees exceeded $1,300,000.

[6] On July 20, 2009, BMO filed a Notice of Action for Debt and Statement of Claim against Sportsclick (Hfx No. 314220, "Sportsclick Action"). On July [16], 2010, BMO filed the same against the defendants (Hfx No. 332478, "Ross Action"), ...).

...

[8] The motions that are before me concern the Sportsclick Action and the Ross Action. The [Rosses] seek to withdraw an admission and to amend their statement of defence. The defendants also seek to consolidate the Sportsclick Action and the Ross Action. BMO seeks summary judgment and a dismissal of the defendants' statement of defence.

[9] In order to appreciate the parties' arguments on these motions, it is helpful to have a chronology of the events that led up to BMO initiating the Sportsclick and Ross Actions:

> October 27, 2006: Jack Ross provides BMO with a personal guarantee, on behalf of Sportsclick's predecessor, limited to $200,000 plus interest and costs.
>
> March 7, 2007: Jack Ross provides BMO with a personal guarantee, on behalf of Sportsclick's predecessor, limited to $1,117,000 plus interest and costs.
>
> March 13, 2007: Jack and Shelly Ross provide BMO with a personal guarantee, on behalf of Sportsclick's predecessor, limited to $100,000 plus interest and costs.
>
> March 14, 2007: BMO extends an operating credit facility to Sportsclick with a limit of $1,000,000.

July 2008: Sportsclick acquires its predecessor along with its credit facilities and debt obligations.

July 08-June 09: Sportsclick uses its credit, at times operating beyond the authorized limit. Sportsclick enters negotiations with BMO regarding its credit, and simultaneously seeks other financial backing.

Spring 2009: Sportsclick acquires Southprint Corporation ("Southprint"), which becomes its US subsidiary.

June 2009: Sportsclick deposits $600,000 in its BMO account that was obtained from private placements of its stock and the proposed acquisition of Greenswan Capital Corporation, which company had cash reserves. BMO freezes Sportsclick's account and caps its credit.

June 16, 2009: BMO rejects alternative financing arrangements proposed by Sportsclick. BMO threatens to issue a formal demand for repayment if Sportsclick does not consent to allowing E&Y to review its operations and financial circumstances. Sportsclick consents to a review by E&Y.

June 26, 2009: BMO issues a demand letter to Sportsclick for repayment of its debt, and notifies Sportsclick of its intention to enforce security.

June 29, 2009: Sportsclick asks BMO for a forbearance agreement to allow a potential buyer of Sportsclick to conduct due diligence.

June 30, 2009: BMO suspends its demand letter for an unspecified period of time to allow the buyer to conduct due diligence.

July 3, 2009: BMO informs Sportsclick that it will be re-issuing its demand letter on July 6, 2009.

July 6, 2009: BMO issues a new demand letter to Sportsclick for repayment of its debt, and notifies Sportsclick of its intention to enforce security.

July 6, 2009: BMO issues demand letters to the defendants to enforce the various personal guarantees.

July 7, 2009: The potential buyer signs a draft letter of intent with Sportsclick. BMO refuses to enter into further negotiations with Sportsclick.

July 13, 2009: The potential buyer withdraws the letter of intent on the basis he has not had sufficient time to complete due diligence.

July 14, 2009: BMO successfully brings an ex parte motion, pursuant to s. 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, to appoint Ernst & Young ("E&Y") as an interim receiver on a "proceed and protect" basis. Counsel for Sportsclick receives 2 hours notice of this motion, and appears, without instructions, on a watching brief only. Neither Sportsclick nor the defendants appeal this order.

July 17, 2009: BMO appoints E&Y as its private receiver pursuant to its general security. E&Y informs Jack Ross and Stephen Patterson, marketing officer of Sportsclick, that E&Y were now the shareholders of Southprint and instructs them to have no further contact with Southprint.

July 18, 2009: E&Y removes Jack Ross as a signatory on Southprint's bank accounts.

July 20, 2009: BMO commences the Sportsclick Action, which includes a claim for the appointment of a receiver.

July 24, 2009: The interim receiver order is extended indefinitely by Order of the Registrar in Bankruptcy. Neither Sportsclick or the defendants challenge this order.

September 2009: E&Y, as private receiver, sells all of Sportsclick's personal property, with the exception of the subsidiary shares of Southprint and Kelbel Inc ("Kelbel"), realizing approximately $250,000.

October 9, 2009: BMO successfully brings an inter partes motion, pursuant to the Judicature Act and the Nova Scotia Civil Procedure Rules, to have E&Y installed as a court-appointed receiver. The defendants and Sportsclick receive notice, but do not oppose this motion. Neither takes steps to appeal this order.

Fall, 2009: E&Y, as court-appointed receiver, sells all shares in Sportsclick subsidiary Southprint.

November 10, 2009: E&Y applies for court approval of the Southprint sale. Sportsclick receives notice and opposes this application.

November 12, 2009: Court approval of the Southprint sale. Sportsclick does not appeal this order.

March/April 2010: E&Y, as court-appointed receiver, sells all shares in Sportsclick subsidiary KelBel.

May 2010: E&Y applies for court approval of the KelBel sale. Sportsclick receives notice and opposes this application.

June 8, 2010: Court approval of the KelBel sale. Sportsclick does not appeal this order.

July [16], 2010: BMO commences the Ross Action.

September [27], 2010: Sportsclick files a defence and counterclaim.

November [29], 2010: Sportsclick files an amended defence and counterclaim in the Sportsclick Action.

February 18, 2011: BMO files its notice of motion seeking summary judgment.

April 26, 2011: The defendants request that an unfiled motion to consolidate be heard prior to BMO's summary judgment motion. This request is opposed by BMO.

April 27, 2011: The parties participate in a conference call during which I grant the defendants' request to have their motion to consolidate heard at the same time as BMO's summary judgment motion, and for an abridgment of time to file their Motion materials.

[5] This is a useful outline of many of the facts set out in the pleadings, the evidence or that were agreed to by the parties, and that are contained in the record.

[6] However, it is important to point out that there is nothing to support some of these stated facts. For instance, there is nothing to indicate that the Rosses had notice of, instructed counsel, participated in or knew the outcome of the various

receivership proceedings, including those that gave rise to the October 9 order. Nor is there anything to support the "facts" the judge stated with respect to the sale of Sportsclick's assets from September 2009 to June 2010.

[7] I should also point out that it is unclear from the record exactly what occurred during the receivership. The parties agree that the October 9 order authorized the receiver to enforce the Bank's security and sell some of Sportsclick's assets, but the record before us does not contain a copy of that order or a copy of any material filed in connection with it or a transcript of the hearing. Nor does it include a copy of the July 14 or July 24 orders or any materials with respect to them or anything with respect to the appointment of the private receiver. **Rule** 13.03(3) says that a motion for summary judgment on the pleadings 'must be determined only on the pleadings'. **Rule** 13.04(3) says that, in a motion for summary judgment 'on the evidence', the genuine issue for trial 'depends on the evidence presented'. Under **Rule** 88 the judge may assume facts from a pleading, in order to characterize that party's claim or defence. But any findings of fact must derive from evidence, or from counsel's express, and jointly agreed stipulations on behalf of their clients. Under none of these **Rules** may the judge make findings of fact drawn simply from one counsel's suggestions, unstipulated by the opposing party, and without any supporting evidence. This record has no such pleadings, evidence or factual agreements of the parties respecting the elements of the receivership.

[8] While not summarized by the judge, there is evidence that at all material times Sportsclick was a publicly traded company, traded on the Venture Exchange of the Toronto Stock Exchange, that the Rosses filed a defence to the Bank's action against them on September 27, 2010 and an amended defence on January 18, 2011, and that the Bank filed its defence to Sportsclick's counterclaim on October 13, 2010.

[9] It was suggested at the hearing before us that the correct date for the October 2009 order was October 13, not October 9. I will continue to refer to it as the October 9 order as that was the date disclosed in the record.

[10] There was confusion at the commencement of the May 4, 2011 hearing before the judge as a result of the Bank's last minute amendment of its notice of motion to include a reference to **Rule** 88, the abuse of process rule, and the

Rosses' last minute request to consolidate the Bank's action against them with the Bank's action against Sportsclick and to amend the Rosses' defence to the Bank's action against them.

[11] The judge referred to this in his reasons:

> [25] Prior to the hearing, BMO added abuse of process, Rule 88, as a ground for their motion, and I accepted this addition. At the hearing, as part of the preliminary discussions regarding amendment and consolidation, BMO agreed to limit its argument on summary judgment to the claims of *res judicata*, issue estoppel, cause of action estoppel, and abuse of process. This allowed the hearing date to be saved, and argument to proceed, without a complete ruling on the impact of consolidation. BMO reserved its right to bring a subsequent summary judgment motion, post-consolidation, if it was of the view that the consolidated pleadings were clearly unsustainable for other reasons, such as disclosing no cause of action. It was on this basis that the summary judgment motion proceeded.

[12] Following the hearing, the judge granted the amendments to their defence sought by the Rosses and ordered the consolidation, still without details of the form the consolidation would take. There is no appeal from those decisions. He then struck the Rosses' defence and that part of Sportsclick's defence and counterclaim that allege improper conduct by the Bank prior to and including the calling of Sportsclick's loan and the application for the appointment of an interim receiver on July 14. This was after he found the Bank's arguments of issue estoppel and estoppel by conduct failed (which the Bank now challenges by way of notice of contention), but that its argument of abuse of process was well founded:

> [38] It is trite law that *res judicata* applies to causes or issues that could have been raised in a prior proceeding, by a party or its privy, but were not raised (*Henderson v. Henderson* (1843), 3 Hare 100, [1815-1865] 67 All E.R. 319). One aspect of the doctrine of *res judicata* that was not discussed by the parties is the requirement that the previous decision must have been a final determination of the issue or cause that forms the basis for the claim of *res judicata*. In *Tassone* [*Bank of Montreal v. Tassone*, [1999] OJ No. 1935 (Ont CA)] and *Got* [*Royal Bank v. W. Got & Associates Electric Ltd.,* [1999] 3 SCR 408], the impugned previous order was a final receivership order. In this case, the previous order was an interim receivership order, which is not final.

[39] In these circumstances, I question whether *res judicata* can apply. Also, since the interim order was awarded on an *ex parte* motion, for which Sportsclick and the defendants received only minimal notice, and for which their counsel attended only on a watching brief basis, I question whether either Sportsclick or the defendants were a party to the interim order proceeding; this is also a prerequisite for *res judicata* to apply.

[40] BMO also alleged estoppel by conduct. In *Scotsburn Co-operative Services Ltd v. WT Goodwin Ltd.*, [1985] 1 S.C.R. 54 at para. 26, the Supreme Court of Canada adopted the following definition of estoppel by conduct from Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed 1977), p. 4:

> ... where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

[41] I am not convinced that estoppel by conduct applies in the circumstances of this case. Neither Sportsclick nor the defendants were obligated to attend and make submissions at the various receivership stages. Further, it cannot be said that BMO relied on the defendants' silence. Therefore, estoppel by conduct does not apply.

[42] This does not mean that the Court can accept the conduct of Sportsclick and the defendants in these proceedings. While Sportsclick and the defendants received minimal notice of the *ex parte* motion for an interim receiver order, they were represented by counsel at the hearing on a watching brief. If Sportsclick and the defendants were concerned with the representations made by BMO on that motion, they could and should have challenged the interim receiver order. Instead, Sportsclick and the defendants did nothing.

[43] Sportsclick and the defendants had notice of all the subsequent steps up to and including the appointment of the permanent receiver. They could and should have challenged the appointment of E&Y as a private receiver, the removal of

> Jack Ross as a signatory on Southprint's bank accounts, the indefinite extension of the interim receiver order, the sale of Sportsclick's personal property, and the appointment of a permanent receiver. Instead, Sportsclick and the defendants stood by and watched.
>
> ...
>
> [45] BMO submits that it would be an abuse of process to allow the defendants to now make allegations that they could and should have made at a much earlier date.
>
> ...
>
> [50] Both Sportsclick and the defendants had the ability to appeal the interim receiver order had they truly thought that BMO misrepresented the facts to the Court. The stakes were of such a magnitude that a full and robust response was warranted. If they had challenged the interim receiver order, Sportsclick and the defendants could have argued that BMO misrepresented the facts, and they could also have argued that BMO acted unreasonably and in bad faith by calling in the loan and by not allowing sufficient time for repayment upon issuance of the formal demand.
>
> [51] Sportsclick and the defendants had notice and the ability to challenge all subsequent steps making similar arguments, and to appeal any contrary orders. Nonetheless, Sportsclick and the defendants stood by and watched, even though the circumstances required action. In my view, it would be an abuse of process to allow the defendants to now, at the eleventh hour, emerge from the weeds and make arguments that they should, in all the circumstances, have made many, many months ago.
>
> [52] Rule 88.02 governs the various remedies that a judge may use to control an abuse of process. In these circumstances, the appropriate remedy is to strike all aspects of the defendants' pleadings that impugn the appointment and actions of an interim, private, or permanent receiver, as well as all aspects of the defendants' pleadings that impugn the reasonableness of BMO's actions in calling in the debt.

Issues

[13] There are three issues to be determined on this appeal:

(1) Did the judge err in law in striking paragraphs in Sportsclick's defence and counterclaim when it was not, and never had been, a party to the Bank's motion for summary judgment and to strike its defence as an abuse of process, and had not received notice that its interests were in jeopardy?

(2) Did the judge err in law in finding that the Rosses' defence was not subject to issue estoppel or estoppel by conduct?

(3) Did the judge err in law in striking the Rosses' defence on the basis it constituted an abuse of process?

Analysis

[14] The order under appeal striking the Rosses' defence terminated the action in favour of the Bank. With respect to Sportsclick, it gutted its defence and counterclaim, terminating its ability to argue that the Bank acted improperly prior to the July 14, 2009 order appointing an interim receiver. The standard of review is whether the judge erred in law, committed a palpable and overriding error of fact or exercised his discretion in a manner that resulted in a patent injustice: **Innocente v. Canada (Attorney General)**, 2012 NSCA 36.

First issue

[15] Sportsclick argues that the judge erred in striking parts of its defence and counterclaim when it was not, and never had been, a party to the Bank's motion for summary judgment and to strike its defence as an abuse of process, and had no notice that its interests were in jeopardy.

[16] The Bank defends the judge's decision on the basis no injustice has occurred. It points out that the same counsel represents Sportsclick and the Rosses in connection with their defences to the Bank's actions against them and that accordingly counsel knew that Sportsclick's defence would suffer the same fate as the Rosses because both defences are based on the same alleged misconduct of the Bank.

[17] There was nothing in the Bank's notice of motion, brief or oral arguments before the motions judge notifying Sportsclick that its defence or counterclaim was in jeopardy. The knowledge of Sportsclick's counsel that a motion had been made to strike the Rosses' defence based on defence allegations similar to Sportsclick's, was insufficient notice that Sportsclick's interests were in jeopardy. Nothing in the record satisfies me that Sportsclick knew its defence and counterclaim were at risk before the judge's reasons were released. By that time, Sportsclick had been deprived of its right to be heard on the issue. Our **Rules** clearly contemplate that, before a court strikes a defence, a defendant is entitled to receive proper notice of motion that the plaintiff is seeking such an order from the court. It is unjust to grant an order affecting the rights of a person who has been deprived of its right to be heard and the judge erred in doing so; **Bache v. Charles**, [1982] B.C.J. No. 1757.

[18] I would allow Sportsclick's appeal.

Second Issue

[19] The Bank argues, in support of its notice of contention, that the judge erred in law in finding that the Rosses' defence was not barred by issue estoppel or estoppel by conduct.

Issue Estoppel

[20] Issue estoppel is a branch of *res judicata* (the other being cause of action estoppel). *Res judicata* precludes the relitigation of an issue or a cause of action previously decided in another court proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies **(Danyluk v. Ainsworth Technologies Inc**., [2001] 2 S.C.R. 460, 2001 SCC 44, para. 25).

[21] In **Montreal Trust Company of Canada v. Hoque**, 1997 NSCA 153, 1997 N.S.J. No. 430, a case dealing with cause of action estoppel, Cromwell, J.A., as he then was, found with respect to the first precondition, that for issues not actually raised and decided in a previous action, the test as to whether a subsequent action

should be prevented from raising these issues is whether the party **should** have raised the issues in the previous action:

> 37 Although many of these authorities cite with approval the broad language of **Henderson v. Henderson**, [*Henderson v. Henderson* (1843), 3 Hare 100, [1815-1865] 67 All EF 319], 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.... [Emphasis added]

[22] I am satisfied the same test applies when considering issue estoppel, as in this case.

[23] The Bank does not challenge the judge's conclusion that there is no issue estoppel with respect to the July 14 order on the basis it was not a final order. Nor does it suggest issue estoppel arises from the July 24 order. What it argues is that the judge erred by not recognizing that the October 9 order is a *de facto* final order because it authorized the receiver to enforce the Bank's security and realize on some of Sportsclick's assets. It argues that the Rosses were privies to the October 9 order and that the issues raised in their defence should have been raised in connection with the October 9 order.

[24] The essence of the Rosses' defence is that the Bank misconducted itself with respect to Sportsclick, prior to and including, when it called Sportsclick's loan and applied for the appointment of an interim receiver on July 14, that Sportsclick, being a publicly traded company, was irreversibly harmed by the granting of the July 14 order and that the Bank's misconduct caused the harm and the deficiency that the Bank is now suing them for. Their defence contains no allegation of wrongdoing with respect to the actions of the Bank or the receiver after July 14. Sportsclick's defence to the Bank's action against it is based on the same claims.

[25] Essentially, the Rosses' cause of action derives from the July 14 order, and the Bank's conduct shortly thereafter, under that order. They say that the cause of action was complete, and the damage was irretrievable, before the October 9 order. The July 14 order was an *ex parte* interim order that the judge and the Bank

acknowledge does not establish an estoppel of the Rosses' defence or counterclaim.

[26] What we know about the October 9 order is that it authorized the receiver to realize the Bank's security and sell some of Sportsclick's assets in the ordinary course of fulfilling its receivership mandate. This is a different issue from those raised in the Rosses' defence which all deal with the Bank's conduct prior to July 14.

[27] If the Rosses had raised the allegations contained in their defence in October, a trial would have been required. This would have significantly slowed down the continuation of the receiver's work by months, if not longer. Such a delay would not have been in anyone's interest in October. At that time everyone's interests would be best served by having the receiver authorized to sell Sportsclick's assets without delay to minimize the damage the Rosses allege was irreversibly done with the granting of the July 14 order.

[28] Accordingly, I am not satisfied the Rosses should have raised the issues contained in their defence at the time of the October hearing. The judge did not err in finding no issue estoppel.

Estoppel by Conduct

[29] There are no water-tight compartments in estoppel; Bruce MacDougall, *Estoppel* (Markham, Ontario: LexisNexis Canada Inc., 2012), 1.34 p. 17. Estoppel by conduct is sometimes characterized as a subset of estoppel by representation; MacDougall, **supra**, 1.34 p. 18.

[30] In **Ryan v. Moore**, [2005] SCC 38, the Supreme Court of Canada considered the elements of estoppel by representation:

> 5 Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (*Page v. Austin* (1884), 10 S.C.R. 132, at p. 164).

> ...
>
> 76 ....The added difficulty in such a case is that an estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel: see Wilken, at p. 227; Bower, at pp. 46-47.

[31] Thus there must be a positive representation, or silence where the party is under a duty to speak; an intention that the other party would act on the representation; and detrimental reliance by the other party.

[32] The judge applied this law properly when he found the Rosses' defence was not barred by estoppel by conduct:

> [40] BMO also alleged estoppel by conduct. In *Scotsburn Co-operative Services Ltd v. WT Goodwin Ltd.*, [1985] 1 S.C.R. 54 at para. 26, the Supreme Court of Canada adopted the following definition of estoppel by conduct from Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed 1977), p. 4:
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> > ... where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.
>
> [41] I am not convinced that estoppel by conduct applies in the circumstances of this case. Neither Sportsclick nor the defendants were obligated to attend and make submissions at the various receivership stages. Further, it cannot be said that BMO relied on the defendants' silence. Therefore, estoppel by conduct does not apply.

[33] I am satisfied the judge did not err when he found the Rosses' defence was not barred by estoppel by conduct.

[34] The Bank's notice of contention fails.

Third Issue

[35] The Rosses argue the judge erred in striking their defence on the basis it constituted an abuse of process.

[36] The leading case on abuse of process is **Toronto (City) v. C.U.P.E., Local 79**, 2003 SCC 63. The Court provided a wide-ranging, purposive definition of abuse of process:

> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis in original.]
>
> As Goudge J.A.'s comments indicate, **Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.** (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v.*

> *Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) [Emphasis added]

[37] After finding the Rosses had notice of the July 14 order and the subsequent proceedings in Sportsclick's receivership, the conduct which the judge found amounted to abuse of process by the Rosses was their failure to take steps to cause the court's July 14 order to be appealed, together with their failure to cause to be opposed and/or appealed the appointment of a private receiver, the removal of Mr. Ross from the operations of Southprint Inc., the indefinite extension of the interim receiver, the sale of Sportsclick's personal property, and the appointment of a permanent receiver.

[38] The judge stated:

> [51] Sportsclick and the defendants had notice and the ability to challenge all subsequent steps making similar arguments, and to appeal any contrary orders. Nonetheless, Sportsclick and the defendants stood by and watched, even though the circumstances required action. In my view, it would be an abuse of process to allow the defendants to now, at the eleventh hour, emerge from the weeds and make arguments that they should, in all the circumstances, have made many, many months ago.

[39] With respect to notice, the pleadings, the evidence and the agreements of the parties in the record are unclear as to whether the Rosses had notice of the July 14 order or of the subsequent receivership proceedings. There is evidence that Mr. Ross was the president, CEO and a director of Sportsclick, but there is nothing suggesting that Mrs. Ross had notice.

[40] There are no pleadings, no evidence and no factual agreements of the parties to suggest whether, how or why the Rosses reacted to receivership proceedings after the July 14 interim order. There are no pleadings, no evidence and no factual agreements of the parties from which the judge could infer that they sat idly while the receivership progressed, then 'emerged from the weeds'. As set out in paragraph 7, a summary judgment ruling under **Rule** 13.03 that strikes a defence and counterclaim, must be determined only on the pleadings. A summary judgment ruling under **Rule** 13.04 depends on the evidence presented. Under **Rule**

88 the judge may assume facts from a pleading to characterize a party's defence. But any findings of fact must derive from the evidence or factual agreements of the parties. The judge made a palpable and overriding error by inferring a pivotal fact from a record that was devoid of supporting pleadings, evidence or factual agreements of the parties on that point.

[41] Even if there was support for the judge's finding that the Rosses had notice of these receivership proceedings and their outcomes, I am satisfied the judge erred in concluding that their conduct amounted to abuse of process.

[42] As indicated in connection with the second issue, the relevant issue in October was different from the issues raised in the Rosses' defence. In October, the issue was the authorization of the receiver to continue its mandate by selling some of Sportsclick's assets. It would have been in everyone's interest to have that done without delay, to minimize the potential loss that the Rosses allege was caused when the July 14 order was granted. The issues raised in the Rosses' defence focus exclusively on the Bank's alleged misconduct prior to and including its calling of Sportsclick's loan and its application for the appointment of an interim receiver on July 14.

[43] Also, as discussed in relation to the second issue, the determination of the issues raised in the Rosses' defence would require a trial which would significantly slow down the fulfillment of the receiver's mandate that was set in motion by the appointment of the interim receiver on July 14. This would not have been in anyone's interest.

[44] The Rosses' theory would suggest that their cooperation with the receivership in October was just compliance with their duty to mitigate their loss. Whether the Rosses' theory prevails is for trial, and I should not be taken as commenting on its merits. But the judge misunderstood their theory, and treated any cooperation with the receivership as barring their claim under principles of abuse of process. That was an error of law.

[45] Considering: (1) the limited material in the record with respect to the appointment of the private receiver, the July 24 order and the October 9 order; (2) the lack of material in the record with respect to the sale of Sportsclick's personal property that the judge referred to; (3) the Rosses' allegation that irreversible

damage was done to Sportsclick once the July 14 order was granted; (4) that a different issue was at play in October than those raised in the Rosses' defence; (5) the increased damage that may have occurred if the receiver's ability to sell Sportsclick's assets had been delayed by the Rosses raising the issues raised in their defence in connection with the October 9 order; and (6) that Sportsclick had been sued by the Bank in July 2009 (approximately two months earlier), had requested an extension of time to file its defence, and had been told by the Bank that it would not take out a default judgment against it except on five days notice; it is not unfair to allow the Rosses to proceed with their defence to the Bank's claim against them at the same time the Bank's claim against Sportsclick is adjudicated, rather than in connection with the October 9 order.

[46] I am satisfied the judge erred in law by misunderstanding the nature of the Rosses' claim, as I have outlined, and committed a palpable and overriding error by inferring pivotal facts without any pleadings, evidence or factual agreements of the parties. These errors resulted in an erroneous conclusion that the defence and counterclaim constituted an abuse of process.

[47] Accordingly, I would allow the appeals of Sportsclick and of the Rosses and overturn the judge's rulings that struck the Rosses' defence and portions of Sportsclick's defence and counterclaim. I would order the Bank to forthwith pay to the appellants total appeal costs of $1,500 including disbursements, the amount agreed to by the parties. I would reverse any costs ordered by the motions judge. I would not order that the Bank's actions against Sportsclick and the Rosses now proceed to trial, as requested by the appellants. As referred to in paragraph 11 of these reasons, the motion before the judge proceeded on a restricted basis with the Bank having the right to make a subsequent motion for summary judgment if it sees fit once the terms of the consolidated action are determined. That option remains open to it.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.