SUPREME COURT OF NOVA SCOTIA
Citation: *Stewart v. Bardsley*, 2015 NSSC 155

Date: 20150522
Docket: Hfx No. 317250
Registry: Halifax

Between:

David Stewart

Applicant/Defendant

v.

James Bardsley

Respondent/Plaintiff

Judge: The Honourable Justice Denise M. Boudreau

Heard: March 19, 2015, in Halifax, Nova Scotia

Counsel: Jasmine Ghosn, for the Applicant/Defendant
Kent Noseworthy, for the Respondent/Plaintiff

By the Court:

[1] The Applicant / Defendant David Stewart seeks, *inter alia*, a dismissal of the present Action. His motion seeks the following specific relief:

(a) dismissing the within action;

(b) requiring James Bardsley to seek leave of the Court before taking any further legal steps in any current or future legal proceedings in which David Stewart is a party or an intended party, including but not limited to the following proceedings:

(i) Bardsley v. Stewart, Hfx No. 317250 (the within action)
(ii) Bardsley v. Beaini and Stewart, Hfx No. 325704
(iii) Stewart v. Bardsley, Hfx No. 328760

(c) requiring James Bardsley to post security for costs in an amount to be determined by the Court, in the event that the Court may grant leave permitting Mr. Bardsley to take any further steps in legal proceedings involving David Stewart;

(d) requiring James Bardsley to pay costs of this motion on a substantial indemnity basis;

(e) granting such further and other relief as this honourable court deems just.

[2] I shall deal with the dismissal motion first. Mr. Stewart submits that this Action could be dismissed in a number of different ways: firstly, that the claim should be dismissed by way of *res judicata* / issue estoppel, and/or constitutes an abuse of process. Mr. Stewart further argues that the Court should grant summary judgment on evidence, as the claim raises no grounds of genuine issue for trial and has no chance of success.

Facts

[3] The Action before the court (Hfx No. 317250) is an action for debt, commenced by Respondent / Plaintiff James Bardsley against Mr. Stewart in September 2009. The statement of claim provides the following basis for the action:

1. The Plaintiff is James Bardsley of Halifax, Nova Scotia, a former Partner in the High Performance Energy Systems Partnership ("Partnership").
2. The Defendant is David Stewart of Dartmouth, Nova Scotia, a former partner in the Partnership.
3. On or about May 4, 2006, the Plaintiff, the Defendant, and two (2) other individuals executed the High Performance Energy Systems Partnership Agreement (" Agreement") thereby becoming partners in the Partnership.
4. Pursuant to the Agreement, the Defendant participated in the profits and losses of the Partnership at a rate of 40.0%.

5. On or about August 29, 2006, the Partnership dissolved and the partners became liable for their share of the debts and liabilities of the Partnership.
6. On or about August 29, 2006, the debts and liabilities of the Partnership totaled $418, 723.00.
7. On or about August 29, 2006, the Defendant's liability for the debt of the Partnership amounted to $167,489.20.
8. The Plaintiff paid the debts and liabilities of the Partnership, including the amount owed by the Defendant.
9. The Defendant owes the Plaintiff $167,489.20 ("Debt"), the Defendant's share of the debts of the Partnership at the time of dissolution.

[4] Mr. Bardsley further claims 5% per year prejudgment interest, for a total claim of $193,025.57. Mr. Stewart had filed a Notice of Defence, denying that he is liable for any debt to Mr. Bardsley.

[5] The evidence on this motion shows that after the dissolution of this partnership in the summer of 2006, Mr. Bardsley and Mr. Stewart, along with others, incorporated a company called High Performance Energy Systems Inc.

[6] Both the HPES partnership and HPES Inc. were created with precious little legal or financial formality. Most of the normal financial controls and originating documentation one would find in such organizations, were completely lacking. As a direct result of this lack of due care and attention in setting up this partnership and this company, the parties have, for years, been involved in protracted and complex litigation.

[7] The present action (Hfx No. 317250) is only one of multiple proceedings that have been initiated, involving this plaintiff, this defendant, their partnership, their subsequent incorporated company, and various third-party individuals and companies.

[8] Notably for our purposes, during the spring of 2009, Mr. Stewart (along with another director of the company, Peter Beaini), brought an application to Supreme Court pursuant to the *Companies Act,* seeking a finding that Mr. Bardsley had acted in an "oppressive manner" as defined by that *Act*. The Court granted the applicants' motion and issued an Order (dated March 13th 2009), providing direction as to further actions of the company and its directors. Part of that Order involved the following direction:

> 5. The Directors of the Company shall arrange for financial statements of the Company in each of the forms required by the Articles of Association to be prepared within thirty (30) days of the date of this Order. Such statements to be prepared by the firm AC Dockrill Horwich Rossiter under the direction of Jim Horwich, CA. If for any reason that firm cannot complete the work, then it shall be done by another firm to be selected by a majority of the Directors. The financial statements shall cover the period beginning with the company's inception in August 2006. The chartered accountant who prepares the financial statements shall be provided with full and frank disclosure of all information that is relevant to the preparation of those statements, and all supporting documentation for that information, including source records and verification of source records for all deposits, withdrawals and payments, and including all bank records and all entries on the opening balance sheet…

[9] Throughout 2009 and 2010, many more legal actions were commenced by persons and/or companies involved with HPES, both partnership and company. In an affidavit executed and filed by Mr. Stewart in a court proceeding in 2010, (and provided to this Court), he listed 23 actions, directly or indirectly involving HPES, in existence in 2010.

Decision of Justice Moir

[10] In the spring of 2010 Mr. Stewart and Mr. Beaini filed an Application in Court in relation to all of the outstanding actions. According to Mr. Stewart's affidavit (filed in this motion), this Application was made in an effort to try and "bring some sense of control over the multiplicity of proceedings, and having all matters in issue as between Mr. Beaini, myself, Mr. Bardsley, and the Palmer group of companies, dealt with before a single judge". This Notice of Application, filed June 29, 2010, listed as applicants David Stewart, Peter Beaini, and High Performance Energy Systems Inc. The respondents were James Bardsley, Palmer Refrigeration Inc., and Palmer Engineering Limited (both companies being companies of Mr. Bardsley which were also involved in these various lawsuits). One of the outstanding Actions at that time, was the present Action (Hfx No. 317250).

[11] This application resulted in an extensive nine day hearing before Justice Moir of this Court; it would thereafter be known as the "omnibus" application and hearing. The applicants sought a number of orders within this application, described by the court as follows:

> [14] The relief sought through the notice of application is to be summarized as follows:
>
> > 1. An order requiring the respondents to return assets of High Performance including a drill rig, a Kubota tractor, field equipment, and office equipment.
> >
> > 2. An order requiring the respondents to repay $125,000 improperly withdrawn from High Performance in June of 2009.
> >
> > 3. An order requiring the respondents to repay $225,000 overpaid for credit extended to, or on behalf of, High Performance. Lately, the applicants argue for numerous additional awards of damages that were not pleaded.
> >
> > 4. A mandatory injunction requiring the assignment to High Performance of patent applications for a coaxial borehole cold energy storage system and other intellectual property.
> >
> > 5. Damages for "interference" with contracts between High Performance and its clients, and an injunction.
> >
> > 6. Damages for inducement of breach of these contracts, and an injunction.
> >
> > 7. Damages for breach of Mr. Bardsley's fiduciary duties owed to High Performance.
> >
> > 8. Damages for inducing others to present a petition in bankruptcy against High Performance.
> >
> > 9. An order for an accounting for profits.
> >
> > 10. An order altering the governance of High Performance by removing Mr. Bardsley as an officer and director, restraining him from retaining counsel for High Performance, and removing him as recognized agent.
> >
> > 11. An order staying various actions started by High Performance under the direction of Mr. Bardsley or started by Mr. Bardsley or the Palmer companies against High Performance, Mr. Stewart, or Mr.Beaini, or clients of High Performance. (emphasis added)

> 12. Solicitor and client costs of suits started in contravention of the first shareholder oppression order.
>
> 13. Punitive, aggravated, or exemplary damages.
>
> 14. Costs.

> [15] The final submission on behalf of the applicants particularizes the request for stays, purports to add an unpleaded claim for an order against Mr. Bardsley under subsection 45B(1) of the *Judicature Act*, and it seeks additional relief in the form of a claim for directions "on how it may be possible for [High Performance] to 'clean up' the mess and to move forward".

[12] I have underlined the above-noted paragraph 11, as it is a direct reference to the action presently before me.

[13] Justice Moir's decision, in response to this application and hearing, is lengthy and detailed. It describes the extensive, confusing, and ultimately unsatisfactory evidence that was proffered to the court by all parties (*Bardsley v. Stewart* 2012 NSSC 191). The court starts by describing the many failings of the company, due to mismanagement and a complete disrespect of basic accounting and legal principles from the very start:

> [4] The company lacked basic financial controls. It did not regularly record accounts payable or accounts receivable. It failed to maintain a general ledger. It operated on cash and on credit extended by an investor, by Mr. Bardsley, and by persons related to him. It did not reliably record credit extended through Mr. Bardsley.
>
> [5] There was no opening balance sheet. Years after incorporation, the shareholders were arguing about the value of their initial investments and how the investment should be treated if financial statements could ever be produced.
>
> [6] There was a homemade shareholder agreement, which included usual terms but failed to address the issues specific to the business. These were issues professional advisors

would uncover and cause the principles to confront had professionals been consulted. What assets and liabilities moved from the separate businesses? How were their values to be accounted? Would intellectual property resulting from work done by principals, employees, or contractors belong to the company?

[7] In operation, the engineers and the technician were content with their own legal and accounting advice, or they ignored legal and accounting issues. For example, when Mr. Bardsley fell into dispute with the other two, both sides issued peculiar instruments that purported impossibly to have various legal effects.

[8] Despite the absence of financial controls, the company hired staff, undertook other expenses, and embarked on expensive underground thermal energy contracts in Dartmouth, Halifax, and Abu Dhabi.

[9] After a couple years, the principals found themselves embroiled in hopeless financial disputes. They engaged in dubious tactics, never facing the essential problems of the company's flimsy legal and accounting foundation. Their major customers became exasperated with the results.

[10] Against this background, Mr. Stewart and Mr.Beaini came to court in March of 2009 to get relief under the shareholder oppression provisions of the Third Schedule of the *Companies Act* against outrageous tactics engaged in by Mr. Bardsley, who was backed at that time by the outside investor. This court reversed the purported effects of the tactics.

[11] The shareholder oppression order also provided for just what the company needed: the appointment of a chartered accountant to prepare financial statements, imposition of duties to co-operate with the accountant, appointment of an auditor, and imposition of duties to cooperate with the auditor. The order also froze all payments to directors including salary, and it froze payments for expenses incurred before the order except trade payables, non-director employee salaries, and expenses approved unanimously by the directors.

[12] Almost immediately, all three principals were in default of the order. Mr. Bardsley engaged in outrageous tactics again. The investor switched sides. Mr. Stewart and Mr. Beaini engaged in unfair tactics against Mr. Bardsley, tactics that were violations of the very order they had obtained. The chartered accountant appointed by the court was unable to complete his work. No audit was ever done. To this day, the principals have no understanding of the serious impediment financial disorganization caused to their venture.

…

[14] Despite the extensive evidence that he heard, Justice Moir was not able to untangle much of the financial disorder that existed, both with the original partnership and then flowing into the subsequent company. This is clear from a reading of his decision.

[15] The applicant's "late claims", mentioned by Justice Moir at paragraph 15, involved "pre-incorporation" amounts that were said to be owed by Mr. Bardsley to HPES Inc. I quote the following from his decision:

> [224] The late claims include an attempt to delve into the pre-incorporation contributions that are said to reveal $162,877 and $70,587 due from Mr. Bardsley. Mr. Horwich was unable to unravel the opening balance sheet. The evidence puts me in no position to do so. The claims have not been proved. (emphasis is mine)

[16] In other words, it was claimed that HPES Inc. owed money to Mr. Bardsley, Ms. Harrietha, or the Palmer companies; these claims were dismissed, as the accounting "pre-incorporation" could not be "unravelled". The present Action is a claim initiated by Mr. Bardsley, relating to pre-incorporation debt, as opposed to a claim against him. However, any such claim must, of necessity, be based on this same evidence of "pre-incorporation" accounting.

[17] It should be noted that Justice Moir issued two further decisions after this main decision, clarifying or amending his decision, and dealing with the issue of set-off. In particular, because of certain credits in the company accounting, he

indicated that there remained a possibility of HPES Inc. owing money to Mr. Bardsley. There remained, however, great difficulty in proving any debt:

> [23] …I concluded, at para. 231 of the main decision: "Except as discussed elsewhere, I will dismiss the applicant's claim for judgment based on the state of accounts between High Performance and the respondents".
>
> [24] One of the reasons the applicants failed to prove the state of accounts between High Performance and the respondents, and the reason the respondents will have difficulty with any future claim, is that the directors utterly failed in their duty to set up adequate financial controls for their company. (*Stewart v. Bardsley*, 2013 NSSC 11)

[18] The Action before me (Hfx No. 317250) was specifically referenced in a section of Justice Moir's decision headed "Groundless Suits":

> [170] *Groundless Suits.* Mr. Bardsley caused numerous peculiar suits to be started.
>
> …
>
> [180] In the third suit, Mr. Bardsley alleges Mr. Stewart owes him $193,025 from the rollover of the High Performance partnership into the High Performance company. He relies on an unsigned draft agreement, and a draft financial statement on which an accountant's signature has been forged. Mr. Stewart and Mr. Beaini allege that this suit, which was brought in this court, is an abuse of process.
>
> …

[19] The application before Justice Moir sought, among other things, the staying of outstanding claims, including the present claim (Hfx No. 317250). Of this, the court said the following:

> [275] *Staying Actions:* It does not appear that any suit started by Mr. Bardsley in the name of High Performance remains outstanding. If any is, the request for a stay has to be made by motion in that proceeding with all parties before the court.
>
> [276] I refer to the summary of Palmer Refrigeration suits at para. 176. Two of these are for causes that, if they had merit, would belong to High Performance. Also, I found them to be wholly, or largely, unfounded. However, their future depends on the outcome of a motion in each, with the parties in the action before the court.
>
> [277] The actions started by Mr. Bardsley against Mr. Stewart or Mr. Beaini are summarized at para. 177 to para. 181. A stay under Rule 88 - Abuse of Process must be made on motion in the proceeding: Rule 88.02 (2).
>
> [278] The requests for stays and costs in this proceeding are refused, without a party being precluded from seeking a stay and costs in any other outstanding proceeding.

[20] The present motion seeks a dismissal of this Action. In relation to Justice Moir's ruling, I find that he anticipated future applications for stays of individual proceedings, and did not preclude them.

Decision of Justice Duncan

[21] Since the decision of Justice Moir, one of the other outstanding actions involving these parties, has already been the subject of a motion to dismiss. In *Northeast Equipment Limited v. High Performance Energy Systems Inc.* (2013) NSSC 334, the defendant Halifax Regional Municipality ("HRM") sought summary judgment on evidence to strike the claim. This claim involved construction work carried out by HPES Inc. for the city, at municipal buildings located in Dartmouth Nova Scotia. Palmer Refrigeration (Mr. Bardsley's company which has been intimately involved with both HPES partnership and HPES Inc.)

claimed to be an unpaid subcontractor in relation this this work, and filed a lien against HRM. The claim originally sought payment of $128,290; however, at the time of the hearing it was essentially reduced to the cost of rentals of a cube van and tractor.

[22] The application for dismissal of the action came before Justice Duncan. In his decision granting dismissal, Justice Duncan referred extensively to the earlier decision of Justice Moir:

> [8] Justice Moir exhaustively dealt with the various deeds and misdeeds between Stewart and Beaini, on the one hand, and Bardsley on the other. He cited a number of breaches of fiduciary duty on the part of both sides. He dealt with the claims made between High Performance and the Palmer group of companies. It was in this larger context that in paragraph 219 of his decision it was determined by Justice Moir that no amount was owed by High Performance Energy Systems Inc. to Palmer refrigeration in relation to various claims including the claim on this project.

[23] Justice Duncan then reviewed the law in respect of summary judgment motions and *res judicata,* in the context of the findings of Justice Moir:

> [17] It is clear that the tractor and van rentals, as well as the labor costs that Palmer claimed against HPES, and in relation to the Alderney project, where life issues in the *Stewart* case, and that in the end analysis there was nothing owing to Palmer by HPES.
>
> [18] Justice Moir recognized that notwithstanding his findings he did not have all of the parties before him that were parties to the Palmer claims he described in paragraph 176 (included above). In this regard he stated:
>
> > 276 I refer to the summary of Palmer refrigeration suits at para. 176. Two of these are for causes that, if they had merit, would belong to High Performance. Also, I found them to be wholly, or largely, unfounded.

> However, their future depends on the outcome of a motion in each, with the parties in the action before the court.
>
> [19] In my view, he correctly anticipated a proceeding such as this one which seeks to bring to a close a Palmer claim against HRM based on disputes that arose between Palmer and HPES.
>
> [20] I conclude that the Palmer claim against HRP for rentals to HPES of the cube van and the tractor; and the claimed labor costs, constitutes a collateral attack on the earlier findings of Justice Moir. Palmer can only succeed against HRM by the court finding that monies are due to it by High Performance. I am satisfied that it has already been determined by previous litigation that, as a matter of fact and law, no amount is owing between the contractor (High Performance) and the alleged subcontractor (Palmer) in relation to the Alderney project. I am not prepared to permit the re-litigation of issues already determined.
>
> [21] To the extent that this claim may now allege anything new, I am satisfied that there was a full opportunity for the contractor and alleged subcontractor to raise all issues and defenses in the proceeding before Justice Moir and that they should have done so. There were opportunities to present counterclaims or claims of set-off.
>
> Conclusion
>
> [22] Palmer's claim is doomed to fail and must be struck. I find that there is no genuine issue of material fact requiring trial. The claim fails on the basis that there is no amount owing by the contractor to the subcontractor as has already been determined by this court. The doctrine of *res judicata* applies. To permit this claim to continue what amount to an abuse of process.

Res judicata **/ issue estoppel**

[24] The applicant has argued that the present action should be dismissed on the basis of *res judicata*, or issue estoppel. He argues that the facts underpinning the present action have already been heard and adjudicated by Justice Moir. Findings of fact have been made, and decisions rendered. The applicant argues that the

continuation of this litigation would in fact amount to "re-litigation", and constitute a collateral attack on the decisions and findings of Justice Moir.

[25] Mr. Bardsley disagrees. His position is that the omnibus proceeding did not specifically resolve the claim he makes in Hfx No. 317250. While he agrees that Justice Moir did hear evidence regarding the financial circumstances of the partnership, he submits that Justice Moir "was not in a position to make a finding that there were no monies owed by David Stewart to James Bardsley related to pre-incorporation activities of HPES" (see the pre-hearing brief of counsel for Mr. Bardsley).

[26] I have carefully considered the arguments of both parties, and I have carefully reviewed the record before me. Given the complexity of matters as they presently stand, the question as to whether this claim should be dismissed due to estoppel, is not a simple one.

[27] In *Hoque v. Montreal Trust Co. of Canada*, [1997] N.S.J. No. 430 (N.S.C.A.) the court reviewed the principles of res judicata:

> [20] *Res Judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC)… The first, 'cause of action estoppel', precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. … The second

> species of estoppel per *rem judicatam* is known as 'issue estoppel', a phrase coined by Higgins, J., Of the High Court of Australia in *Hoysted et al v. Federal Commissioner of Taxation* (1921)29 C.L.R. 537 at pp. 560 – 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, because of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").
>
> [21] *Res judicata* is mainly concerned with two principles. First, there is a principle that "… prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed": see Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defenses with respect to the cause of action issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "… Prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it." : ibid at 998.
>
> …
>
> [37] …The better principle is that those issues which the parties have the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, will consider whether the preceding constitutes a collateral attack on the earlier findings, whether it's simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second preceding constitutes an abuse of process. (Emphasis added)

[28] The applicant submits that we are dealing here with "issue" estoppel. I refer to the Supreme Court of Canada decision *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44:

> [25] The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[29] There is little question that #3 is made out, in that the same parties were before Justice Moir, as are here. The more difficult issue is: have the same questions been decided, and were those decisions final?

[30] It is clear that the concept of *per rem judicatem* is "closely linked to the rule against collateral attack"; *Danyluk*, supra, para. 48. As regards to the "same question" test, the court in *Danyluk* said this:

> [54] …Issue estoppel imply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

[31] The ultimate question, as posed by Mr. Bardsley in his submissions before me, is: does Mr. Stewart owe Mr. Bardsley any money as a result of the 2006 partnership and its dissolution? It is true that Justice Moir did not explicitly answer that ultimate question. However, he did make important findings as to material facts which are crucial to the case.

[32] Justice Moir specifically referred to this Action. He specifically described the evidence in support of it, by concluding:

> [180]…Mr. Bardsley alleges Mr. Stewart owes him $193,025 from the rollover of the High Performance partnership into the High Performance company. He relies on an unsigned draft agreement, and a draft financial statement on which an accountant's signature has been forged.

[33] As described in the pleadings, Mr. Bardsley's claim is founded, in part, upon a partnership agreement signed in May 2006. Mr. Bardsley, in his affidavit to this Court sworn February 2015, attached as Exhibit "B" a document which he called "the duly signed partnership agreement". He confirmed that this same document was in evidence before the court at the omnibus proceeding.

[34] This document states that:

> The Partners shall participate in the profits and losses of the Partnership in the percentages beside their respective names (their "Partnership Shares"):

[35] The names then appear; where "David Charles Stewart" appears, beside his name is "40.0%". The document further provides the following:

> TERM
>
> 2.01 The Partnership begins on May 3, 2004 and continues until terminated in accordance with this agreement.

[36] This particular provision is initialed by two persons: it is the only provision that is initialed. One of those initials is clearly "DCS".

[37] While I have not been provided with a transcript of the entire proceeding before Justice Moir, the parties have provided me with portions of the transcript; those which the parties felt were most relevant to the motions before me. I am satisfied that in the context of the present motion, it is appropriate and necessary to review the evidence before Justice Moir in order to determine what he had before him in making his findings (*B.C. (A.G.) v. Malik* [2011] 1 S.C.R. 657; *Can-Euro Investments v. Coles* 2012 NSSC 247)

[38] I was provided with a partial transcript of the testimony of David Stewart. Mr. Stewart testified as follows, in relation to this Agreement, in cross-examination (starting at page 325):

> Q. So is that--- are you looking at a partnership agreement?
>
> A. Yes, but this is different than the one I have because there's a date wrong in 2.01, it should be May 3rd, 2006, not 2004.
>
> Q. Okay. It seems to have initials of JB and DCS, would those – DCS, with those be your initials?
>
> A. Yeah.
>
> Q. Okay. Look at page 4, did you sign this partnership agreement?
>
> A. Um-hmm.

[39] In re-direct, in reference to that same document:

> Q. Now, Mr. Noseworthy had asked you if those were your initials.
>
> A. Um-hmm.
>
> Q. And I think you said yes…

A. Yes.

Q. … Because that's DCS.

A. Um-hmm.

Q. Did you sign that yourself? Is that you signing that there?

A. No, this varies -- this is different from the one that I signed, which had 2006 on it, because it was May the 3rd, 2006, that the partnership agreement was basically developed. 2004 Maurice Safatly was working for me, but we did not enter any conversations with Mr. Safatly about a partnership agreement until the beginning of May 2006.

Q. Okay. So this was --- because the same partnership agreement that Mr. Bardsley filed, at the back there it has signatures, but it shows a date that it was executed on seal May 4, '06.

A. Right.

Q. Okay.

A. Yeah.

Q. But at the very front of that there's a 2.01 term that says:

> "the partnership begins on May 3, 2004, and continues until terminated."

Did you agree in May 2006, when the partnership was started, that the term of the partnership goes back two years prior?

A. No.

Q. To May of 2004?

A. No. And in fact, in his affidavit he swore in the oppression one, we've got a different version of the partnership agree -- of the shareholder agreement that is dated May the 3rd, 2006, and that is the one I signed.

[40] The confusion was not resolved by the testimony of Mr. Bardsley. He was asked to comment on the partnership agreement that he had filed as an exhibit before Justice Murphy (page 817):

Q. I'm going to give you a copy of what was exhibit C of that affidavit. Is that the partnership agreement that you attached to that exhibit --- in that affidavit?

A. Yes. But there's also a revision in one of those -- I don't know if revisions the proper word, but when Peter Beaini – Ms. Ghosn, when Peter Beaini had come to the company and he did not want to pay for the -- any of the pre-incorporation

debt. I -- at one time I was upset about that. I couldn't understand that, and I have to tell you -- set this up for you, whatever. I'm not putting any particular spin on it at the risk of frustrating you and I'm trying to answer the question, Your Honor, but just prior to that Mr. Stewart had -- because I was maybe -- I was caught by surprise and everything else, and Mr. Stewart had made a change to backdate that or whatever because it was unfair that Mr. Beaini was getting the benefits of all the debt that me and Mr. Stewart had put into the company until that time.

Q. Mr. Bardsley, my question was, is that the partnership agreement that you attached as an exhibit to your affidavit sworn in March 2009?

A. it could be.

…

[41] And later (page 819):

Q. So on the first page there, which has the commission stamp of your counsel, Mr. Kent Noseworthy there, showing that that's exhibit C referred to in the affidavit of James Bardsley sworn 8th of March, 09. Under the heading "Term" at 2.01 it says:

> "The partnership begins on May 3, 2006…"

And continues. This is the agreement that you had put in your affidavit at that time, right?

A. And that was the agreement up until the date of incorporation where there was a revision made.

[42] And at page 821:

Q. So your lawyer, Mr. Jamie MacNeil, wrote to Mr. Stewart September 4, 2009, and provided a copy of the partnership agreement.

A. I thought it was Peter Rumscheidt was originally was working with us on that, but okay.

Q. There's a partnership agreement there, and again, I mean, I'm going to show it to you, but do you have it there, a copy of the partnership agreement?

A. Yeah. I think it it's in this -- in this section, yes. I just seen it.

Q. And, again, the terms reference there as being May 3, 2006?

> A. Yeah. Yeah, I see this.
>
> Q. Okay. So again, in this version there's no initials or anything on the part of the partnership agreement?
>
> **THE COURT:** Well, it's not signed, let alone initialed.
>
> **MS. GHOSN:** And that one's not signed.
>
> **THE COURT:** No. That's just a draft.

[43] Justice Moir (at paragraph 180) concluded, having heard all of this evidence, that the Plaintiff's claim was based (in part) on an "unsigned draft agreement"; he does not refer to any signed agreement.

[44] Paragraph 180 of Justice Moir's decision further notes that the present claim is based on "a draft financial statement on which an accountant signature has been forged".

[45] James Horwich, CA, testified before Justice Moir. I have been provided with excerpts from Mr. Horwich's testimony. He described having great difficulty in preparing financial statements in this case, since the most basic of accounting principles had not been followed by the parties from the start. Neither could he provide any assurance that he had seen the full picture of the partnership/company's financial paperwork. Mr. Horwich resigned from his duties before completing his work, although he had provided draft statements to the parties.

[46] Mr. Horwich's testimony provides as follows (page 1405, line 19):

> Q. Okay. What was the bank balance there, to your understanding, at the time of incorporation?
>
> A. It looks to me to be – I'm using September 1 as my memory now, $41,931.26.
>
> Q. Now, there is a startup on the draft financial statements which you've allocated approximately $117,000 to Mr. Bardsley.
>
> A. That's correct.
>
> Q. Do you recall that?
>
> A. Yes.
>
> Q. And how did you come up with that figure?
>
> A. That consists of the opening balance of the bank statement of $41,000 together with the first two deposits that were collected by the incorporated enterprise for $14, 099 and $61, 616.
>
> Q. So do you know what these two deposits were?
>
> A. From memory, no. I be – they were – they were from billings that would have predated or work that would have been done prior to the incorporation. I believe one was maybe a holdback on a property that your family may have been involved in, but I'm not exactly certain of all that, and I don't recall the specifics of it.
>
> Q. The property located on Main Avenue?
>
> A. That – Main Avenue has been kicked around a lot. I get confused by all the different properties they may have worked on, but that sounds correct to me.
>
> Q. Okay. So why is it then that you would have allocated to Mr. Bardsley's benefit all those dollars?
>
> A. Sure. Originally they were not. Back in – when we had our – I'd say the first meeting with or second meeting with all of the lawyers at my office, we had a draft financial statement at June the 6th, if I recall, or around that time. This liability, for lack of a better term, was reported as an amount owing to the partnership, because I didn't understand the partnership to be quite honest. Their prior arrangements or how they formed this company is, to this very day, still somewhat of a mystery to me as to what their deal was. (emphasis added)
>
> …

[47] At page 1408:

Q. Right. Your final draft of the shareholder loan statement shows the Bardsley, Palmer and Harrietha group as having a startup contribution of a hundred – around $117,000?

A. That is what the final drafts, the June 8 drafts do report, correct.

Q. So if you – if it is your understanding now that this was partnership money, and if there's a partnership agreement in place, would you agree that that's actually partnership money and not for the group?

A. Well, yes. But then you need to look behind the partnership and see who was – who did the partnership owe?

Q. Okay. But, I mean, for the purpose of these books, somehow – anyways, that's how you allocated it in the draft.

A. Yes. And I want to explain. I don't know that the partnership still exists, whether it was wound up. The confusion here is when they formed the company, there's no documentation as to what they intended to do. (emphasis added)

[48] Upon questioning by the Court, at page 1450:

THE COURT: The balance sheet on the partnership...

HORWICH: Yes.

THE COURT: …had that been worked to any level of assurance?

HORWICH: No.

THE COURT: Had you ever signed anything…

HORWICH: No.

THE COURT:…or lent your name to it?

HORWICH: No.

…

THE COURT: And what level of assurance did we reach with the balance sheet of the corporation?

HORWICH: Virtually no level of assurance. I would – my report is significantly qualified, and officially the financial statements have never been released and I'm not comfortable releasing them until such time as all of these issues get resolved, which, at this stage of the game, I don't believe is ever going to happen.

THE COURT: So is it fair to say that I have no opinion from you?

HORWICH: Fair to say.

> THE COURT: Do you know if there was a shareholder's agreement?
>
> HORWICH: There was a shareholder's – I've seen a copy of a shareholder's agreement. It looks to me as if it was something that somebody took off the internet and tried to do on their own, and it was – didn't look to be very good and I'm not even sure it was properly executed.

[49] One of the documents provided by James Bardsley to the court in support of his claims, included one of these draft documents. It purported to show the signature of Mr. Horwich. I note the following exchange which occurred between witness Mr. Horwich and counsel in relation to that document (page 1415):

> Q. Can you take a look at that document there? The top of it says ESEH, slash, HPES partnership.
>
> A. Yes. It's a balance sheet, and it's a very compressed balance sheet and an income statement for the period ended 2003, 2004, 2005 and 2006. That's what it says.
>
> Q. Okay. So did you look at – did you prepare that?
>
> A. Yes.
>
> Q. You did? And did you prepare the bottom part there?
>
> A. No. If you're talking about – somebody has clearly cut and pasted my signature off of our email server and put it on the bottom of that, and my contact information and this detail on the right, this looks like it was typed in afterwards.
>
> Q. And those figures in the bottom right-hand corner…
>
> A. No.
>
> Q. It's not something you did?
>
> A. No.

[50] I should note that this document was also placed in evidence before me, as Exhibit 4. I did not accept it for the truth of its contents. I merely accepted it, on

the motion of Mr. Bardsley's counsel, to have before me the document "where a signature was forged", referred to in Justice Moir's decision.

[51] Justice Moir's decision dealt with the evidence of James Horwich in the following manner:

> [186] *Financial Statements*. The order also provided a remedy for a fundamental failing of the company. The directors were required to "arrange for financial statements", which were to be prepared by James Horwich, Chartered Accountant. Mr. Horwich gave evidence. I accept his affidavit evidence and his testimony.
>
> [187] Not long after the order was made, the principals signed an engagement letter prepared by Mr. Horwich. In addition to their obligations under the shareholder oppression order, they undertook to provide AC Dockrill Horwich Rossiter with "accurate and complete information necessary for us to prepare the financial statements."
>
> [188] No financial statements were produced by the accounting firm, only two sets of drafts. This is because "the company had only rudimentary business records" and "no reliable accounting records", it did not produce all source documents Mr. Horwich required, and he "did not get full cooperation from all three of the principals".
>
> [189] Financial recording was so primitive that the accountants had to start by creating a general ledger. The bookkeeper provided "very little": cheque stubs and a listing of accounts payable. Another provided "some form of general ledger" containing unclear dates and unexplained transactions.
>
> [190] There was a payroll record and an attempt at financial statements for no discernible period. There were undated notes about undated payments by and to the company.

[52] This court was also provided with portions of the evidence of Carol Harrietha from the hearing before Justice Moir. Ms. Harrietha testified that she was the sole officer and director of Palmer. Ms. Harrietha testified that she was

involved in financial dealings with the partnership and incorporation of HPES. She further acknowledged that several large checks had been made out to herself personally in 2008, apparently against "pre-incorporation debt" (at page 1551):

> Q… But aside from the VISA I'm asking you for money in and out of the company there. There were some -- several big large checks that were written to you personally, Ms. Harrietha, and they are referred to, I believe -- let's see if I can find it.
>
> A. The 250 is March 26th.
>
> …
>
> Q. Okay. So that was on March 28th -- that was March 8th -- March 26th, 2008, you got $250,000. All right. As of that date, can you tell us what expenses those -- that 250 was related to?
>
> A. Yeah. There was -- as we already talked about, there was a partnership between Mr. Stewart and Mr. Bardsley. And I think we all understand that the partnership made no money. In fact, it -- and it was a loss. And during the partnership I had put money into Palmer, and Palmer invested the partnership. And during that time period used to keep records of the amount that was owed to me. And at the end of July 2006 Mr. -- we -- it came to the amount of -- it was 231K. and, I mean, we had the spreadsheet which Mr. Stewart would work on, and I would provide him input. He would come to my house and I would -- he would input information on this document. It was last sent to me on April 26, 2008. Never seen a copy after that.
>
> And so that was -- and when -- then when the -- it became the corporation. Mr. Beaini was going to join, then the question was, before they left the partnership, what about this debt? They all agreed when they joined forces that they were all going to equally pay this back from the pre-incorporation amount. And they decided that because they felt that the partnership did, even though it made no money, it was probably the basis of the Corporation for getting contracts, such as the Alderney. Like, when Mr. Julian talked about the S -- I don't even know, the SD -- you know, the pre-proposal that they done, that was all done during the partnership, feasibility study. And that was the agreement they had.
>
> And Mr. Stewart kept records of this in the spreadsheet. And then what happened, we had a dispute. And when Justice Murphy made the request for high-performance to look at their books, he drew a line in the sand. He said, "okay. I want you to look at corporation." So that's when Mr. Horwich started his starting point.

> So then what happened, even -- then I ended up getting paid this 250K during the corporation, which was to be put against pre-incorporation. And I explained this to Mr. Horwich. He apparently, with Mr. Stewart and Mr.Beaini, they did a -- they disputed that, and he had told me that he has to look at money and money out, and he was starting from that date. And so he then took the 250, he put it in the incorporation. And so if you look at, as money goes in and money goes out -- so I received that, what, on March 26th.
>
> And if you look through my affidavit, look at the money then later in September of '08. You can see 20,000 K going in, 15,000 K, 50,000 K, 100 K, 25,000 K (sic), all going back in. So that money, just -- they put it back for pre-incorporation, it went right back into High Performance again.
>
> …

[53] And then later at page 1555:

> A. The partnership of Beaini – of, sorry, of Stewart and Bardsley had a partnership, the pre-incorporation partnership.
>
> Q. Ms. Harrietha, we've been over the language of source documents many times, and we were simply asking what receipts, expenses, specifically relate to that $250,000?
>
> A. Well, this is what I'm telling…
>
> Q. But you understand that it is to do with some general debt that you state is something that these directors agree to inherit, is that it?
>
> A. Yes. And you heard Mr. Beaini's testimony. That's what he said. It was for a pre-incorporation amount. And, you see, I ended up then in a position after the books were to be done with corporation…

[54] Justice Moir's decision was unsuccessfully appealed. The Court of Appeal stated:

> [47] … The judge at no time stated that he accepted her [Carol Harrietha's] accounting as accurate. Nor is it reasonable to infer this, as it would be contrary to the major common theme throughout his reasons; namely, that on the evidence before him, there was no way to determine certainty the state of these accounts because of the disarray of High Performance's financial records from the start. (emphasis is mine) (*Bardsley v. Stewart* 2014 NSCA 106).

[55] Mr. Bardsley submits that this motion is premature. He argues that all pre-trial procedures were not exhausted in the matter, including discoveries. In fact, the parties had engaged in discoveries, prior to the omnibus hearing; I note that both parties, along with Ms. Harrietha and Mr. Beaini, were discovered in October 2010. Although the discoveries were time-limited, I have no evidence to suggest that more time was requested or needed.

[56] Mr. Bardsley further refers to spreadsheets which, I was advised, was prepared in various draft versions by Ms. Stewart. Mr. Bardsley claims that this (these) document(s) would afford evidence as to the partnership accounts. These documents were created before the omnibus proceeding; in fact, Mr. Bardsley sought to introduce one version of the spreadsheet as evidence before Justice Moir, but then withdrew that request after some discussion between counsel and the court as to its admissibility and/or usefulness. Based on my review of the record and submissions of counsel, I am completely unpersuaded that these draft documents would offer anything new, or of value; moreover, they could have and should have been put before Justice Moir.

[57] In relation to the question of whether Mr. Bardsley could offer anything new to this litigation, he filed an affidavit before me in this motion, where he states:

> 20. That my claim against the Defendant, David Stewart, in the within preceding Hfx #317250 is for determination of the accounts and debts of the partnership, High Performance Energy Systems at the time of its dissolution on or about August 29th, 2006. I am in the process of hiring an expert witness to examine the records and bank statements of the partnership and produce an expert's report for submission to the court as to this accounting and the determination of the monies owed by David Stewart to myself as plaintiff.

[58] It is remarkable that Mr. Bardsley is, only now, "in the process" of hiring "an expert witness" to review the documents. No individual is identified; nor, in fact, does Mr. Bardsley even identify an area of expertise. Assuming that Mr. Bardsley is proposing an accountant, this has already been attempted with Mr. Horwich. I am satisfied that there was full opportunity for Mr. Bardsley to have presented his case to Justice Moir, and that he should have done so.

Conclusion

[59] Justice Moir did not explicitly rule as to whether Mr. Stewart owed Mr. Bardsley any money as a result of the partnership. However, Mr. Bardsley's claim depends on the very same evidence that was before Justice Moir. This evidence was found to be inconclusive, to say the least; in particular, for our purposes, in relation to pre-incorporation debt.

[60] Justice Moir, more specifically, held that the evidence in support of this Action consisted of a draft agreement, and a draft financial statement with a forged

signature. He concluded that this particular claim was "groundless", based on incomplete accounting and draft documents.

[61] Justice Moir heard the evidence of a chartered accountant who was tasked with creating opening financial statements, but unable to do so. The court found that it was completely unable to unravel the financial dealings of these parties at the time this partnership was dissolved and the corporation was commenced.

[62] All of these material questions of fact have now been answered by a court. I am persuaded that these answers were final. I am satisfied that the continuation of this claim, by Mr. Bardsley against Mr. Stewart, would constitute a collateral attack against the findings of Justice Moir.

[63] In my view all three requirements for issue estoppel has been made out. The claim must be struck.

[64] Furthermore, and in the alternative, I am persuaded that the continuation of this litigation would constitute an abuse of process. I quote and adopt the following passage from the leading case of *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63 (CanLII):

> [37] 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)). 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 358) (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.

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. (emphasis added)

[65] Under the circumstances as I have already outlined in detail, in my view a relitigation of this claim would offend the principles of finality and judicial economy, as well as constituting a collateral attack on the findings of Justice Moir. He has already heard this evidence and found that it simply does not support Mr. Bardsley's claim.

[66] I therefore grant the applicants motion, dismissing the Action *Bardsley v. Stewart*, Hfx No. 317250. I award costs to the Applicant/Defendant Stewart (for this motion) in the amount of $2000, payable by the Respondent/Plaintiff Bardsley forthwith, based on Tariff C of the Rules (1 day hearing).

[67] The applicant further requested an order "Requiring James Bardsley to seek leave of the Court before taking any further legal steps in any current or future legal proceedings in which David Stewart is a party or an intended party". The present action being dismissed, there is no need to order anything further in respect of it.

[68] Mr. Stewart seeks orders in relation to other court proceedings. I am advised that there are at least two other proceedings in existence, specifically involving these two parties. Those proceedings were not, strictly speaking, before me, although I was given some summary information about their respective subject-matters. I do not consider that I have been provided with enough evidence, or information, allowing me to make further orders in these other proceedings, and I am not prepared to do so.

Boudreau, J.