IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Silver Sands Realty Ltd. v. Nova Scotia (Attorney General), 2006 NSSC 388

Date: 20061130
Docket: SH 261348
Registry: Halifax

Between:

Silver Sands Realty Ltd., a body corporate

Applicant

- and -

The Attorney General for the Province of Nova Scotia, The Registrar General of Land Titles and Service Nova Scotia and Municipal Relations

Respondents

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	November 28, 2006 (*Special Chambers)* in Halifax, Nova Scotia
Written Decision:	January 12, 2007 *(Oral decision rendered November 30, 2006)*
Counsel:	James D. MacNeil, for the Applicant Alex Cameron, for the Respondent

By the Court: [Orally]

[1] Silver Sands Realty Ltd. commenced action against the Attorney General for the Province of Nova Scotia, the Registrar General of Land Titles and Service Nova Scotia Municipal Relations. In its statement of claim, para. 5 it sets out that it subdivided lands it owned in accordance with the provincial requirements and that the eleven parcels so subdivided were registered under the new Land Registration System. Paras. 6-9 of the statement of claim state:

> 6. On or about October 20, 2005, the Registrar General of Land Titles for the Province of Nova Scotia issued eleven Stop Orders, pursuant to s. 56(2)(b) of the *Land registration Act*, S.N.S. 2001, c. 6 (the '**Stop Orders**'), prohibiting further registration or recording with respect to the eleven parcels...
>
> 7. The Plaintiff was advised by the Defendants that Cow Bay Lake is a watercourse within the meaning of s. 103 of the *Nova Scotia Environment Act* and its predecessor, The Nova Scotia *Water Act* and, therefore, the Defendants took the position that Cow Bay Lake is owned by the Province of Nova Scotia.
>
> 8. The plaintiff states that Cow Bay Lake is connected to the ocean via an open inlet, is tidal and brackish; therefore, making Cow Bay Lake coastal rather than inland and that the expropriating provisions of the *Environment Act* do not apply to Cow Bay Lake or any portion of the Property.

> 9. The Plaintiff states that the body of water known as Cow Bay Lake is connected to the ocean, tidal and brackish. The Plaintiff states it is the owner of the land surrounding and under Cow Bay Lake.

[2] The plaintiff seeks the following remedies among others:

> 13 (a) An Order pursuant to the *Land Registration Act* and the Nova Scotia Civil Procedure Rules, compelling the Defendants to rescind the Stop Orders and to perfect the registration of the Property;
>
> (b) Alternatively, an Order in the nature of mandamus to compel the Defendants to perfect the registration of the Property;
>
> It also claims special and general damages, pre-judgment interest, etc.

[3] The Crown has applied pursuant to *Civil Procedure Rule* 25 to determine if Silver Sands' action is precluded by application of the doctrine of *res judicata*. An agreed statement of facts, which is a usual pre-condition to such an application, has been provided. The Crown submits that a 1919 Order-in-Council pursuant to the *Water Act* 1919, S.N.S. 1919, c. 5 has already determined the issue at stake in the Silver Sands action. The 1919 *Water Act* vested in the Crown every water course as defined in the *Act.* The definition of water course in the 1919 *Act* is as follows:

> **2.** (b) 'Water Course' includes every water course and the bed thereof and every source of water supply, whether the same usually contains water or not, and every stream, river, lake, pond, creek, spring, ravine, and gulch; but shall not include small rivelets *(sic)* or brooks unsuitable for milling, merchanical *(sic)* or power purposes;

[4] Section 4 (1) of the *Act* provides:

> **4.** (1) Where any person within two years from the passing of this Act establishes to the satisfaction of the minister that any water course or any water therein was at the time of the passing of this Act being lawfully used by him or that he was entitled to use the same, such person shall be entitled to be authorized by the Governor-in-Council to use such water course and water therein, subject to such terms and conditions as the Governor-in-Council deems just.

[5] Pursuant to that provision an Order-in-Council issued which is at Tab C to the Affidavit of John A. Theakston. It states in part:

> The Commissioner of Public Works and Mines, as Minister under 'The Nova Scotia Water Act 1919', in a report dated the 23rd day of July, A.D. 1919, states that Robert Stanford of Dartmouth in the County of Halifax has established to his satisfaction that a water course and the water therein at Cow Bay, in the County of Halifax, being that part of Cow Bay River south of the main highway from Dartmouth into Cow Bay that is included in land owned and occupied by Robert Stanford and described as follows: --
>
> ...
>
> were, at the time of the passing of the said Act being lawfully used by the said Robert Stanford and that he was entitled to use the same.

On the basis of this, the Crown says it has been established that Cow Bay Lake is a water course and therefore the doctrine of *res judicata* applies.

[6] The first question to be answered is whether the Order-in-Council is a decision to which *res judicata* can apply. To be such, it must be a judicial or quasi-judicial decision. It is clearly not the former. In *Canada (M.N.R.) v. Coopers & Lybrand Ltd.*, [1979] 1 S.C.R. 495, Justice Dickson (as he then was) addressed the issue of distinguishing administrative from quasi-judicial decisions. At p. 7 (of the Quicklaw version) he said:

> It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.
>
> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?

> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?
>
> These are all factors to be weighed and evaluated, no one of which is necessarily determinative. ...

[7] Earlier in that decision, he distinguished between one who gathers information and one who uses that information to make a decision which affects rights. I apply the above four criteria to the 1919 decision as follows.

[8] Firstly, although a hearing was not explicitly provided for, s. 4(1) provided that a person who could establish certain things to the satisfaction of the Minister would be granted certain rights. At Tabs (F) and (G) of the Theakston affidavit are a letter and application from Robert Stanford. The letter from his lawyer refers to an application and the document itself is entitled “application”. This coupled with the wording of s. 4(1) satisfies me that a hearing was contemplated. It may have been, as Mr. MacNeil, counsel for Silver Sands, called it, “a paper hearing,” but it was a hearing nonetheless.

[9] Secondly, Robert Stanford’s rights were affected by the Order-in-Council and that was contemplated by s. 4(1) of the *Act*. Section 3 of the *Act* took away

any title he may have had to water courses. But s. 4(1) provided that, once he had satisfied the Minister that he had lawfully used or was entitled to use the water course, he "shall be entitled" to continue to use it subject to such conditions as the order-in council provided. The parties do not dispute that rights were in fact affected.

[10] Thirdly, whether there was an adversary process is more problematic, especially on the issue of satisfying the Minister that the body of water in question was a water course. That did not appear to have been in dispute. Robert Stanford made the application without contesting that his lands included a water course or water courses. The Minister did not do more than say in his report to the Governor-in-Council at Tab E:

> that Robert Stanford, ... has established to the satisfaction of the undersigned, that a water course and the waters therein ... were, at the time of the passing of the said *Act* being lawfully used by the said Robert Stanford and that he was entitled to use the same.

[11] As Justice Dickson said at p. 9 of Canada (Minister of National Revenue - M.N.R.) v. Coopers and Lybrand:

> (3) The decision of the Minister does not involve the adversary process. It is not the 'triangular' case of A being called upon to resolve a dispute between B and C. There is a dispute but not in an adversarial sense. The analogy of a court is entirely inappropriate. There are no curial procedural rules imposed by the legislation.

[12] That is similar to the situation here but here there is not even a dispute let alone an adversarial dispute about the existence of the water course within the definition in the *Water Act*. It was assumed, or perhaps even acknowledged, by Robert Stanford and that seems to have been sufficient for the Minister and for the Governor-in-Council.

[13] Fourthly, there are rules set out in s. 4(1). They are that the person must satisfy the Minister that any water course was either lawfully used by him when the *Act* was passed or that he was entitled to use it. This did not contemplate the implementation of broad social and economic policy.

[14] As Justice Dickson said at p. 8:

> ... One must weigh the factors ...

and having done so I can only conclude that the Order-in-Council is a quasi-judicial decision, although there were no truly adversarial proceedings with respect to the issue of the water course. I will return to that specific issue hereinafter.

[15] These criteria were restated somewhat differently in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 35 as follows:

> 35 ... there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner?

[16] Regardless of how the criteria are stated, in my view, it is clear that *res judicata* can operate with respect to the Order-in-Council.

[17] In *Danyluk,* Justice Binnie, at the beginning of his analysis, said at paras. 18 and 19:

> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the

> benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. ...

He then continues in para. 20 to say:

> 20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: ...

[18] In para. 24, Binnie, J. said:

> 24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in McIntosh v. Parent, [1924] 4 D.L.R. 420, at p. 422:
>
> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

[19] Further on in that decision, Justice Binnie referred to the two-step analysis with respect to issue estoppel. He said at para. 33:

> 33 ... The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson.J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: ....

[20] He also said in that para.:

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. ...

[21] In para. 25, he related the three preconditions for issue estoppel as set out in *Angle v. Minister of National Revenue,* [1975] 2 S.C.R. 248 by Justice Dickson. They are:

> ...
>
> (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.

[22] To deal with the first precondition: it is the matter of whether it is the same issue and, in my view, that is the critical question. What was the issue before the Minister pursuant to s. 4(1) of the *Water Act* in 1919? In my view, it is determined by looking at what Mr. Stanford sought and what the Minister reported on and what the Order-in-Council approved. Mr. MacNeil says the issue was in any event with respect to Cow Bay River not Cow Bay Lake and I agree that is so. However, the wording of the agreed statement of facts is not entirely clear on this. It says in para. 4:

> 4. The Plaintiff's claim in respect of Cow Bay Lake is, and Mr. Robert Stanford's claim in respect of Cow Bay lake was ...

and then it goes on to refer to the description.

[23] That seems to contemplate that the lake was the subject of the application made by Robert Stanford in 1919. However, when one looks at the application in Tab G of the Theakston affidavit, it clearly refers to Cow Bay River both with respect to the use of lot 1 as a resort and lot 2 for a dam and mill to provide power

to lot 1 as well as for sawing of lumber. Mr. Stanford then, in the last paragraph of his application, sets out what he was seeking:

> The applicant therefore requests that he, and his heirs and assigns, may be authorized to use the said water course and the water therein flowing through and upon the said lots or parcels of land as aforesaid, subject to such terms and conditions as may be just and in accordance with the provisions of Section 4 of the Nova Scotia Water Act 1919.

[24] The Minister's Report at Tab E refers to Cow Bay River as does the Order-in-Council at Tab C. Accordingly, I conclude that whether Cow Bay Lake is a water course was not at issue at all in 1919 and therefore *res judicata* does not apply to the Order-in-Council from 1919.

[25] Subsequent to the hearing of this application, Mr. Cameron, for the Crown, has pointed out wording in the decision of *Stanford v. Imperial Oil Co.*, [1920] N.S.R. 106, wording which he says casts doubt on this. He refers to p. 107 of the decision where the Court of Appeal quotes from the lower court decision as follows:

> ... The plaintiff uses a lake near where the river runs into the ocean for boating, canoeing and swimming in connection with a summer resort which he carries on near by, and he says the waters are made stagnant by this flow being cut off in the dry season. ...

[26] However, I am not satisfied that that means that the Order-in-Council dealt with that issue. When Chief Justice Harris refers to the Order-in-Council, he says at p. 110:

> It was argued by counsel that all the right plaintiff got under the Orders-in-Council was a right to use the water which might come down the river. ...
>
> It is evident, however, I think, that the Act and Order-in-Council do not take away from plaintiff the right to the natural flow of the water.

[27] The Court of Appeal's conclusion about the decision of Harris, C.J. was simply stated (at p. 112):

> ... I am in entire accord with his judgment and adopt it without going over the same ground.

[28] I therefore do not conclude that what was said in the Trial Court decision to which Mr. Cameron refers does anything more than describe Mr. Stanford's business which used both the lake and the river. The issue before the Trial Judge and on appeal was, as set out at p. 108 of that decision:

> I am clearly of the opinion that it is impossible to say that what the defendants do does not occasion sensible diminution of the plaintiff's enjoyment of the stream during the summer season, and if the plaintiff developed the power on the river his enjoyment would be further interfered with.

[29] Therefore, I conclude that what was really in issue in 1919 was Robert Stanford's entitlement to use the water and the rights to be granted to him to continue to use it.

[30] A letter from Mr. Stanford's counsel in 1919 (Tab F, Theakston affidavit) says:

> I enclose the application of Robert Stanford under Section 4 of the Nova Scotia Water Act 1919 for authority to use the waters flowing through his lands at Cow Bay, Halifax County.
>
> ...

[31] The application itself (Tab G) at pp. 5 and 6 speaks of the uses to which Mr. Stanford put Cow Bay River for boating, a source of electricity and for sawing of lumber.

[32] The Minister's Report (Tab E of the Theakston affidavit) simply refers in its opening lines to:

> ... a water course and the water therein at Cow Bay, in the county of Halifax, being that part of Cow Bay river ...

[33] The report goes on at p. 2 to set out the conditions under which the use of that water course could continue. This is consistent with what Mr. Stanford sought in his application as referred to above.

[34] In *Danyluk*, *supra*, Justice Binnie said in para. 24:

> 24 ... Dickson J. (later C.J.), speaking for the majority in Angle, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. 'It will not suffice' he said, 'if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment.' The question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ('the questions') that were necessarily (even if not explicitly) determined in the earlier proceedings.

[35] In my view, that poses the critical question here. Was there a determination that Cow Bay Lake was a water course? Was it a question raised collaterally or incidentally or which must be inferred from the decision or was it fundamental to the decision arrived at? Was it a conclusion of law or of mixed fact and law which

is necessarily, if not explicitly determined in the earlier proceedings? The words are surely there:

> ... has established to his satisfaction that ... the water course and the water therein ... being that part of Cow Bay River ... (Tab B, Theakston affidavit)

From this, Mr. Cameron says it was not something collateral or incidental but fundamental to the rest of the Order-in-Council and, if it was not a water course, there would be no need to have conditions on its use.

[36] Where the owner makes application on the basis that it is a water course, without ever arguing that it is not and having that point adjudicated upon, is that sufficient to make it the same question as is before the court now in the Silver Sands action? There is nothing in the application or in the Minister's report to suggest it was a live issue or an issue in dispute between the parties. In my view, there was no dispute before the Minister in 1919 about whether the body of water in question was a water course. Mr. Stanford, in making his application, did not dispute it. The Minister, under s. 4, had to satisfy himself it was a water course which Mr. Stanford lawfully had used or which he was entitled to use. The application by Mr. Stanford made that an easy decision. The lands included a lake

and a river and the parties today do not dispute that. The application focussed on title, that is, Mr. Stanford's entitlement to use the water course not on whether it was one. It must also be noted that the Minister, the Commissioner of Public Works and Mines, as defined in the 1919 *Act*, is also the representative the Crown most closely connected to the ownership of water courses and the beds of water courses. In my view, with such an application having been made and a lake and a river referred to in the description of the lands, it would be surprising if the Minister made much inquiry about whether the bodies of water were in fact water courses.

[37] I therefore conclude that the issue of whether the water courses fell within the definition of "water course" in the *Act* was not fundamental to the decision arrived at since it was simply assumed, with the focus being on Mr. Stanford's title and his entitlement under s. 4(1) to certain rights with respect to the water course.

[38] Although the above disposes of this application by the Crown, I will deal briefly with the other two preconditions. In the event that I am wrong with respect to all of the above, I will deal with the second part of the two step analysis.

[39] The second precondition for the operation of issue estoppel is with respect to the finality of the decision. The Crown says the decision was final but Mr. MacNeil points out that the license granted was for thirty years. In my view, that does not change the nature of the decision the Order-in-Council made, that is, that Robert Stanford had title to the lands. That is the underpinning to the granting of the license. It was not challenged nor was it likely to be. Mr. Stanford got what he sought: the right to continue to use the waters. Nor was the Crown likely to dispute it since Robert Stanford was not alleging that the river or the lake was not a water course and therefore not vested in the Crown. Furthermore, there was no right of appeal available for a decision under s. 4.

[40] The third precondition for the operation of issue estoppel is the issue of privity. Silver Sands says it is not in privity with Robert Stanford. The principal of Silver Sands has filed an affidavit with title information to show that Silver Sands did not take title directly from Robert Stanford. In my view, that is not the issue. As the Alberta Court of Appeal said in *Medicine Hat (City) v. Wilson*, [2000] A.J. No. 1098 (C.A.) at para. 41:

> 41 Traditional rules hold that res judicata applies only where both parties to the new suit were also parties to the old suit said to create res judicata. That is so

> whether one speaks of cause of action estoppel, or (as here) of issue estoppel. The only traditional exception was for privies of parties. Apart from assignees or successors in title, who is a privy is largely unsettled. ...

[41] In Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd ed. (Toronto and Vancouver: Butterworths, 1999) at pp. 1087-88, the authors say in para. 19.84:

> **19.84** *Res judicata* operates not only against the parties but also against persons in privity with the parties. Privity it is stated may arise out of a blood relationship or a coincidence of title or interest. ...

They continued in 19.85:

> **19.85** Privies in title or estate include vendor and purchaser, and lessor and lessee provided, however, that the privies claim or derive their title from the parties. The suit of course must be relevant to that title or interest. ...

[42] The authors continue at p. 1088 in para. 19.86:

> **19.86** It is impossible to be categorical about the degree of interest which will create privity. It has been said that 'there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is a party'.

I will deal with that further under the second part of the analysis.

[43] This too raises the issue of whether the decision, that is the Order-in-Council, was one *in personam* or *in rem*. These phrases are defined in John Yogis's Canadian Law Dictionary, 4th ed.132. *In personam* means "against the person" and is defined as follows:

> In **pleading**, an **action** against a person or persons, founded on personal **liability**, and requiring **jurisdiction** by the court over the **defendant**; an action whereby the plaintiff either seeks to subject defendant's general **assets** to **execution** in order to satisfy a money **judgment** or to obtain a judgment directing defendant to do an act or refrain from doing an act under sanction of the court's contempt power. Distinguished from an action **in rem**, ...

[44] The definition of *in rem* means "against the thing" and signifies an action that is against the ***res*** or thing rather than against the person. The last part of the definition of *in personam* says:

> ...A judgment *in rem* is conclusive upon all who may have or claim any **interest** in the subject matter of the litigation.

[45] The Order-in-Council was for the benefit of Robert Stanford and, according to its terms, his executors, administrators or assigns. However, in my view, it was in the nature of a license which is personal to Robert Stanford. Therefore, the

decision is not one *in rem* which makes it binding on the whole world, including Silver Sands.

[46] If I am wrong on all of the above, I conclude in my discretion that I should nevertheless refuse to apply the doctrine of *res judicata*. Justice Binnie said in para. 63 of *Danyluk*, *supra*:

> 63 In Bugbusters, supra, Finch J.A. (now C.J.B.C.) observed, at para. 32:
>
> > It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. it inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

[47] In my view, it would work an injustice on Silver Sands to prevent it, more than eighty years after the issuance of the Order-in-Council and with no notice of it, from litigating an issue which was not squarely dealt with by the Order-in-Council in an adversarial process.

[48] Quoting again from para. 63, Justice Binnie said:

... Finch J.A.'s dictum was adopted and applied by the Ontario Court of Appeal in Schweneke, supra, at paras. 38 and 43:

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist... . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask - - is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> ...
>
> ...The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

[49] When I ask the question whether there is something in this case that would make it unjust to apply the doctrine of *res judicata*, I can only conclude that, in the circumstances of this case, I need to exercise my discretion to prevent unfairness. These are not abstract concerns but real ones and they are as follows.

[50] First, the Order-in-Council was issued in 1919 and with no evidence there was any dispute about whether the waters were a water course as defined in the *Water Act*. Second, there was really no adversarial process at play. To paraphrase Justice Dickson, C was not deciding a dispute between A and B. Third, the party with whom Robert Stanford would have had the dispute was the party making the

decision or at least making a report to the Governor-in-Council who would make the decision. The Crown was the very body in whom, if a water course existed as defined, it would vest. Fourth, there was no notice to Silver Sands by its predecessor in title, Robert Stanford, or any of his successors in title between Stanford and Silver Sands that such an Order-in-Council existed. Fifth, the Order-in-Council granted an *in personam* right rather than one *in rem*.

[51] For all of these reasons, even were I to conclude that the doctrine of *res judicata* existed, I would exercise my discretion to refuse it.

[52] Although it is unnecessary to do so, I will refer briefly to the decision in *Stanford v. Imperial Oil, supra*. In my view, it does not assist the Crown. The element of mutuality of parties is missing, even if the decision was not one primarily dealing with riparian rights as the plaintiffs submit and with which submission I agree.

COSTS

[53] In my view, this does dispose of the issue of *res judicata* which obviously cannot be raised again at trial, although some of the related issues obviously will be dealt with at trial. However, the fundamental issue before me was the issue of res judicata and has this has been successfully concluded in favour of the plaintiff. Accordingly, it is my view that costs should be awarded now, not in the cause. Because it was a special time chambers application and substantial materials were filed by both parties and the matter did take several hours of court time, I conclude that the appropriate award of costs would be $1,500.00 to be paid forthwith.

Hood, J.