SUPREME COURT OF NOVA SCOTIA
Citation: Kasperson v. Halifax (Regional Municipality), 2011 NSSC 65

Date: 20110211
Docket: Hfx. No. 278759
Registry: Halifax

Between:

Paul Eric Kasperson, Deborah Diane Kasperson

Applicants

v.

Halifax Regional Municipality

Respondents

v.

Ray Cox, Jr., Ray Cox Consturuction

Third Parties

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	September 23, 2010, in Halifax, Nova Scotia
Counsel:	Franco Tarulli, for the applicants Peter Landry, for the respondents Emad Al-Sharif for the third parties

By the Court:

[1] This is an application for summary judgment on the evidence pursuant to Rule 13.04 of the *Nova Scotia Civil Procedure Rules* by the defendant and the third parties. The applicants maintain that the plaintiffs' action should be estopped either by applying the common-law doctrine of *res judicata* or pursuant to the *Tortfeasors Act*, R.S.N.S. 1989, c. 471, and that as a result the plaintiffs' claim should be dismissed.

Background

[2] The plaintiffs started construction of the their residence on property which they owned in Porters Lake, Nova Scotia. At the time they were living in British Columbia. The plaintiffs acted as their own general contractor. They relocated to Nova Scotia in order to oversee construction of their home. The plaintiffs hired the defendants, Ray Cox, Jr., and Ray Cox Construction, to act as the agent in obtaining a building permit and hiring contractors and subcontractors. Ray Cox, Jr., and Ray Cox Construction are also third parties in these proceedings. During the course of construction of the residence, the Cox defendants performed various

aspects of the construction. The plaintiffs and the Cox defendants had not reduced their arrangement to a written contract.

[3] The construction of the home did not proceed to the plaintiffs' satisfaction. The defendant, the Halifax Regional Municipality (HRM), inspected the home on seven different occasions during the construction phase, between April 23, 2004 and June 5, 2004. The plaintiffs apparently terminated their relationship with the third parties in the fall of 2004 at which point their residence was mostly built.

[4] The plaintiffs allege that upon moving in they discovered numerous problems with the residence. They allege that these problems include, among others, a basement that was built as a crawl space when the design plans call for a full height basement and an in-floor heating system that was incorrectly installed. The plaintiffs also allege that various aspects of their home do not comply with the *National Building Code of Canada, 1995*, and the *Nova Scotia Building Code 2004*, and that these deficiencies forced them to hire engineers and contractors to effect repairs and to bring the building up to Code.

[5] On August 22, 2006, Ray Cox, Jr., and Ray Cox Construction filed a Notice of Claim in the Small Claims Court for breach of contract, claiming that they had been unpaid for services rendered in building the plaintiffs' home. The plaintiffs retained legal counsel. On September 8, 2006, the plaintiffs filed a defence and counterclaim alleging that the third-parties were negligent in constructing the residence. The relevant portion of the plaintiffs' statement of defence reads as follows:

> The Claimant's job performance was substandard resulting in many deficiencies. The Respondents state the Claimant owed the Respondents a duty of care as the builder of their home and was negligent in the performance of his duties as builder of the Respondents' home causing damages to the Respondents. These deficiencies or errors include but are not limited to, substandard or incorrect installation of the dining room floor, locks, trim, doorways, front entrance, fireplace, basement, furnace, hot water tank, air ventilation system, oil tank, electrical, windows, door openings and plumbing.

[6] Prior to the matter coming on for hearing, the plaintiffs retained alternate counsel, who represents them on this application. When the matter was before the Small Claims Court, the plaintiffs' first counsel sought a stay or dismissal of the third parties' Small Claims Court claim on the basis that the plaintiffs were contemplating an action related to the matter in the Supreme Court. The plaintiffs' current counsel provided a letter to the Small Claims Court stating that the plaintiffs intended to file a statement of claim against both the third party and

HRM but were awaiting an engineers report. The adjudicator rejected this request and the hearing on the merits was held on December 5, 2006. At the conclusion of the hearing, and prior to any decision on the merits being rendered, the plaintiffs' counsel withdrew and amended the counterclaim so that it related specifically and only to heating and plumbing issues.

[7] On January 22, 2007, the adjudicator rendered a decision in the matter of *Ray Cox Construction v. Kasperson*. The written decision included the refusal to grant a stay pending the action in this court that had not yet been filed. The adjudicator considered s. 15 of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, which provides:

> The Court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with section 19.

[8] The adjudicator concluded that a contemplated proceeding, as yet unfiled in the Supreme Court, was not a "proceeding" within the meaning of s. 15 of the Act, and concluded that he lacked jurisdiction to stay the proceedings.

[9] The adjudicator found that the third parties were not the overall builders of the home and that the plaintiffs owed the third parties for 837 hours of unpaid wages. He also held that the claim advanced in the counterclaim was limited to the heating and plumbing issues. At para. 42 of the decision, the Adjudicator stated:

> Mr. Kasperson testified to a number of difficulties and deficiencies with the work. I do not intend to review those in detail because at the end of this hearing counsel for the defendant indicated that they were withdrawing and amending the counterclaim so that it only related to heating and plumbing issues. Based on the defendant's motion, those matters are no longer part of this present proceeding and I will not comment on that evidence.

[10] The adjudicator found that the third parties had negligently installed the in-floor heating system by deviating from the design plans without consulting the designer as to whether such a deviation would affect the system. Nonetheless, the adjudicator limited the amount of the recovery to $7000, rejecting the claim by the Kaspersons that the cost of remediation would be $110,000.

[11] The plaintiffs appealed the adjudicator's damage award. By order dated July 16, 2007, the matter was remitted back to the Small Claims Court for a reassessment, by a different adjudicator, of damages owed by the third parties to the plaintiffs for the negligent installation of the in-floor heating system. The

second arbitrator awarded the plaintiffs damages of $25,000, the statutory limit available under the Act. The adjudicator observed that it would cost in the range of $100,000 to rip up the wood floor, remove all of the concrete and install another similar heating system, in addition to the inconvenience that would be massively disruptive of the plaintiffs' lives. In the meantime, after attempting to make the system work, the plaintiffs had decided to abandon the system as planned, and paid $30,400 to install a heat pump and to retrofit their house with a forced air system. The adjudicator determined that this was a reasonable course of conduct, despite the fact that it deprived the third parties of an opportunity to evaluate the system to determine if a cheaper reparation could have been provided. The adjudicator determined that the plaintiffs had essentially paid for two complete heating systems when they ought to have paid for only one. The adjudicator determined that even if the cost of the replacement system was $60,800 or more, it did not matter, because the statutory damages limit under the Act is $25,000. Taking into account the amount owed by the plaintiffs the to the third parties, it was determined that the third parties owed the plaintiffs $10,561.75.

[12] In the meantime, on March 19, 2007, the plaintiffs, with the assistance of counsel, filed the underlying action against HRM. On January 18, 2008, the HRM added a claim against the third parties.

Issues

[13] The issues are as follows:

> (1) The determination of the appropriate test for a summary judgment application claiming that an action should be dismissed because it is *res judicata*;
>
> (2) Whether there is no genuine issue for trial because the matter is *res judicata*;
>
> (3) If the action is *res judicata*, whether the Court should exercise its discretion to let the action proceed;

(4) If the action is not *res judicata*, whether there is no genuine issue for trial because the action is limited by the *Tortfeasors Act*, R.S.N.S. 1989, c. 471.

Discussion

[14] The applicants have framed this application as an application for summary judgment on the evidence, pursuant to Rule 13.04. Without concluding that this is fatal, it appears to me that if an application for summary judgment is based on the principle of *res judicata*, the appropriate approach would be to seek an application for summary judgment on the pleadings. The applicants rely on the doctrines of cause of action estoppel and issue estoppel. If cause of action estoppel applies, no re-litigation of the same cause will be permitted. If issue estoppel applies, then only re-litigation of that issue is prohibited. It may be that in the second action the parties must accept the prior findings on the particular issue, but this would not necessarily be determinative of the entire subsequent action.

[15] As I understand the concept of cause of action estoppel, estoppel arises not because there is no genuine issue for trial, but because the issue in dispute or the

underlying cause of action has already been finally determined and therefore re-litigation is clearly unsustainable. *Res judicata*, is "a concept quite different from and more substantial than a mere rule of evidence". It appears to suggest "a rule that goes either to the capacity of the parties to raise the matter, or to the capacity of the Court to try it": see *Masunda v. Downing* (1985), 27 D.L.R. (4th) 268, 1986 CarswellBC 196, at para. 21.

[16] Therefore, in several respects, the question of whether this is an application on the evidence or on the pleadings is not relevant. It does not appear to matter whether *res judicata* is raised on an application for summary judgment on pleadings or on an application for summary judgment on evidence - if the matter is *res judicata*, barring an exercise of discretion by the presiding judge the matter is estopped. There may be cases where the appropriate test for each form of summary judgment does have an impact on the determination of *res judicata*. I have concluded, however, that that is not such a case.

[17] It could be stated that the basis for bringing this application on the evidence is that there is a need to present affidavit evidence before the Court. A motion for summary judgment on the pleadings is determined only on the pleadings and no

affidavit evidence may be filed in support of or opposition to the motion: Rule 13.03(3). Affidavit evidence is permissible on a motion for summary judgment on evidence. In this case, the applicants have provided an affidavit that includes reported decisions from the Small Claims Court, as well as documents filed with the Small Claims Court and with this Court. The parties agreed that all of these documents are public documents, and that it is appropriate to include them in a single affidavit. I relied on these documents to frame the issues and causes of action that were before the Small Claims Court as well as those matters that are before this Court.

[18] On a motion for summary judgment the applicant must show that there is no genuine issue of material fact requiring a trial and therefore summary judgment is a proper question for consideration by the Court. Obviously, if the issue is *res judicata*, it can fairly be said that there is no genuine issue of fact requiring trial because the matter is estopped. Therefore the question that has to be determined is whether there is no genuine issue for trial because the matter is *res judicata*. HRM argues that both issue and cause of action estoppel apply to estop the plaintiffs' claim, and that the Small Claims Court decision was a final decision by a court of competent jurisdiction. Furthermore, HRM argues that the damages claimed in

the Small Claims Court proceeding are the same damages claimed in this Court, and cite in support of that position the decision of the Nova Scotia Court of Appeal in *Williams v. Kameka*, 2009 NSCA 107, where the Court determined that a party does not need to be named as a defendant in the previous action in order to be considered a privy of the defendant in the second action.

[19] The third parties submit that it makes little difference whether this application is analysed on the basis of issue or cause of action estoppel, but contend that cause of action estoppel is the more appropriate branch of *res judicata* to apply. This position is based on the fact that the plaintiffs are claiming for the same negligence in this action as in the Small Claims Court, and that the Small Claims Court, a Court of competent jurisdiction, finally determined the issues of liability between the plaintiffs and the third parties. They also rely on *Williams*, *supra* for the proposition that as third parties, they are privies of HRM, because the ruling in the Small Claims Court regarding negligent construction affected any potential liability of HRM. The third parties also argue that the plaintiffs knew about the role of HRM when they filed their counterclaim in the Small Claims Court but chose not to include HRM as a defendant, thereby making a strategic

decision to reduce their claim to fit within the jurisdiction of the Small Claims Court and to attempt to litigate their claim against HRM at a subsequent time.

[20] The plaintiffs contend that *res judicata* does not apply because the Small Claims Court proceeding was a claim for breach of contract whereas the action in this Court is in tort. They also submit that the parties to the Small Claims Court proceeding are not the same as the parties in the current action. To support their position, the plaintiffs rely on *Danyluk Living v. Ainsworth Technologies Inc*. 2001 SCC 44, [2001] 2 S.C.R. 460, for the proposition that the existence of common material facts between two proceedings is not sufficient to establish cause of action estoppel. They also contend that there has been no adjudication of HRM's alleged failure to properly inspect during the construction process, either before the Small Claims Court or elsewhere, and that by allowing the application the court would be stretching the concept of a privy too far if it concluded that HRM and the third parties were privies.

[21] In order to assess the arguments, it is important to understand the nature of the claim being made by the plaintiffs against HRM and the third parties. HRM and the third parties characterized the plaintiffs' claims broadly as a general failure

to ensure the plaintiffs' house was properly built. On the other hand, the plaintiffs characterize their claim more narrowly; the claim against the third parties was for the failure to build to an adequate standard and the claim against HRM is for failure to adequately inspect the building process.

[22] In my view, the plaintiffs were owed different duties by HRM and the third parties. The third parties owed the plaintiffs a contractual duty to perform the agreed upon tasks as well as a duty of care to perform those tasks with a reasonable level of quality. HRM owed the plaintiffs a duty to conduct statutory building inspections with a reasonable level of diligence. Although related, the duties are distinct. The duty to inspect required HRM to ensure that the building plans were consistent with the Codes but did not require it to ensure that the plaintiffs' design plans were followed. In fact, there was no obligation on HRM to ensure that a full basement was built, as called for in the design plans, rather than a crawl space. However, the third parties were under a duty to ensure that the design plans were followed and that the house was complaint with the Building Codes and that it accorded with the design plans. The third parties' failure to build to the Code standard was a precondition for HRM's allegedly negligent inspection to result in damages.

[23] Assuming without deciding that the third parties and HRM breached their respective duties, the result is the commission of independent torts that work together because the common head of damages. As a result, HRM and the third parties are allegedly concurrent tortfeasors. Several concurrent tortfeasors are independent tortfeasors whose acts contribute to a single damage. According to the text, Williams, *Joint Torts and Contributory Negligence*, concurrent torts are characterized by "the logical impossibility of apportioning the damage among the different tortfeasors". In this case, if it were established that the residence was not built to Code by the third parties, and that a reasonable inspection by HRM would have caught deficiencies, it would not be possible to apportion the damages between the third parties and HRM. Consequently, the tortfeasors would be concurrent tortfeasors.

[24] In order for the applicant to succeed on issue estoppel, the Court must be satisfied that the three preconditions set out in *Danyluk, supra* have been met:

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.

[25] There is no debate that the decision was final. However, there was considerable disagreement between the parties regarding the first and third preconditions.

[26] In *Danyluk*, the Supreme Court held that issue estoppel extends to the material facts and the conclusions of law or of mixed fact and law that were necessarily (even not if explicitly) determined in the earlier proceedings. Thus, in this application, in order to determine whether the same question has been decided, it is necessary to establish what material facts and conclusions of law or mixed fact and law were determined by the Small Claims Court.

[27] The plaintiffs say the Small Claims Court decision is limited to the issue of breach of contract and the determination of the counterclaim. It must be remembered however that the counterclaim alleges that the third parties owed a duty of care as the builder of the home, and were negligent in the performance of their duties as builder of the plaintiff's home, causing damages to the plaintiffs. It is obvious that this allegation is not based in contract, but in negligence.

[28] The questions that were before the Small Claims Court were whether the third parties were the plaintiffs' builder and whether the third parties were negligent in constructing the plaintiffs' home. The Small Claims Court determined that the third parties were not the plaintiffs' builder, that the third parties were not a general contractor, and that the plaintiffs contracted directly with the various sub-contractors. The Small Claims Court also determined that the third parties were negligent in installing the plaintiffs' in-floor heating system. However, the Court did not determine whether the third parties were negligent in other aspects of the construction of the plaintiffs' home because the plaintiffs amended their statement of claim and abandoned any and all other allegations of negligence.

[29] There are additional questions that were not before the Small Claims Court, either explicitly or implicitly. The Small Claims Court was not asked to consider whether some contractors, other than third parties, were liable in contract or tort; the Small Claims Court was not asked to determine whether the plaintiffs' home was inconsistent with the Codes; the Small Claims Court was not asked to consider whether HRM conducted negligent inspections of the building process; and the Small Claims Court was not asked to consider whether reasonable building inspections would have discovered the deficiencies the plaintiffs allege exist. In short, the questions that were before the Small Claims Court, and that were finally decided by that Court, are not the same questions as are raised by the present action; therefore, the first precondition for establishing issue estoppel is not met. Given this finding, it is unnecessary to address the mutuality precondition of issue estoppel.

[30] The leading Canadian case on cause of action estoppel is *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621. The preconditions from *Grandview* were described as follows in *Cobb v. Holding Lumber Co.* (1977), 79 D.L.R. (3d) 332 (B.C.S.C.), at 334:

1. Where a given matter becomes the subject of litigation the law requires the parties to bring forward their whole case.

2. This applies where the issue sought to be litigated anew was not pursued in the first action either through negligence, inadvertence or even accident and covers every point which properly belonged to the first action.

3. In special circumstances one party may be allowed to pursue the same matter in a second action but only if he can show that the new facts he has discovered could not have been ascertained by reasonable diligence on his part and presented by him in the first action.

4. The burden lies upon the party who brings the second action to at least allege the new facts could not have been ascertained by reasonable diligence in the first instance.

[31] The preconditions were described in the following manner in *Bjarnarson v. Manitoba* (1987), 21 C.P.C. (2d) 302 (Man. Q.B.) at 305:

1. That must be a final decision of a court of competent jurisdiction in the prior action.

2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action (mutuality).

3. The cause of action in the prior action must not be separate and distinct; and

4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[32] In *Hoque v. Montreal Trust Co. of Canada*, (1997), 162 N.S.R. (2d) 321 (C.A.), Cromwell, J.A. speaking for the Court, modified the precondition that only in special circumstances may a party be allowed to pursue the same matter in the second action if it is established that new facts which have been discovered which could not have been ascertained by reasonable diligence and presented in the first action. He said:

> ...The better principle is that those issues which the parties had the opportunity to raise, and, in all circumstances, should have raised, will be debarred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it 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 proceeding constitutes an abuse of process.

[33] Therefore, the question as to who was a privy and hence bound by, or able to assert cause of action or issue estoppel, is not an easy one to answer. In *Williams, supra*, the Court of Appeal cited *Ontario v. National Hard Chrome Plating Co.*, 1996 Carswell Ont 119 (Ont. Ct. Gen. Div.), where the Court stated, at para. 24:

> ... The principle is asserted that in determining whether a party is a "privy" to an earlier proceeding, a privy is "a person having a participation in some act so as to

> be bound thereby for a participation in interest". In determining whether a party had a participatory interest in the outcome of the proceeding, the courts have held that the essential question to be determined is whether the outcome of the action could affect the liability of such parties.

[34] Therefore, it is not any interest in a prior proceeding that creates privity, but a sufficient degree of interest. This must be determined based on the facts of each case.

[35] Although the applicants have cited no case law for the proposition that concurrent tortfeasors are privies, it is my view that they can be, and that in the circumstances of this case, if liability were to be established, HRM and the third parties would be privies.

[36] In *Britannia Airways Limited v. Royal Bank* (20045), 5 C.P.C. (6th) 262, (Ont. Sup. Ct. J.), the Court held that a nonparty was vicariously liable for the actions of another other party as a privy. In *Britannia*, the defendant, Royal Bank offered a credit card system for the aviation industry with Air Routing International Corporation (Canada). Britannia purchased the system in question, and, for unknown reasons, the system resulted in overpayments by Britannia Airways to its agents. Britannia brought an action against Air Routing in Texas in

1999 and an action against the Royal Bank in 2001. The action in Texas was dismissed and the Royal Bank brought a motion to strike the Ontario action on the basis that it was *res judicata*. The Court determined that vicarious liability established a common interest sufficient to find privity and stated that "Air Routing and RBC shared a common interest in defending the Texas lawsuit as its outcome would decide Air Routing's direct liability to Britannia and provide Britannia with the basis for pursuing indirect or vicarious liability claims against RBC in Ontario". (para. 58)

[37] Although this case is not directly applicable to the situation of concurrent tortfeasors, it is important to understand that while concurrent tortfeasors are jointly and severally liable for the common damage caused, they are not necessarily vicariously liable to each other. The liability of one concurrent tortfeasor does not flow from the liability of the other. The plaintiff must establish that each alleged tortfeasor is liable for the tort they are alleged to have committed, and that together these torts produced common damage. However, the joint and several liability of concurrent tortfeasors means that each tortfeasor will have an interest in, and may in fact be bound by, the calculation of the damages. If the plaintiff elects to bring an action against one concurrent tortfeasor where damages

are calculated, and then the plaintiff brings an action against the second concurrent tortfeasor, the second concurrent tortfeasor will be bound by the damages calculation in the first proceeding.

[38] It is also my view that privity between concurrent tortfeasors is established where the liability of each tortfeasor depends on common material facts. Therefore, the assessment of the common material facts in the first proceeding against one concurrent tortfeasor will be binding against the other concurrent tortfeasor the second proceeding.

[39] In this application, HRM is bound by the damages calculation of the Small Claims Court. Further, the concurrent liability claimed in this proceeding requires the plaintiffs to establish that the third parties failed to build the house to Code and that HRM failed to catch deviations from the Code in the building process. The material fact in common here is that the house was in fact not build to Code standards. If the plaintiffs had not abandoned their remaining deficiency claims, and the Small Claims Court had assessed whether the building was built to Code, that finding would be binding on HRM.

[40] Therefore, given these findings, I conclude that the third parties and HRM had a sufficient degree of common interest in the Small Claims Court proceeding to be considered privies and therefore, the mutuality requirement for cause of action estoppel is satisfied.

[41] However, privity standing alone is insufficient to establish cause of action estoppel. The applicant must also show that the cause of action in the prior action was substantially the same, or that the respondent could and should have raised the substantially similar cause of action in the prior action. "Cause", in the sense of "cause of action estoppel" does not, in my opinion, mean a technical legal cause. Rather, it is the issues involved in the proceeding. "Where the facts are the same and the causes of action are the same, although different legal descriptions are used in the two actions, the second action is barred: *Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.*, 2008 B.C.S.C. 756, 2008 CarswellBC 1191, at para. 28. Conversely, where "issues involved in the second action are totally distinct from the issues in the first action" cause of action estoppel does not apply (*Abramson v. Oshawa* (1998), 79 A.C.W.S. (3d) 1252, 1998 Carswell Ont 2230 (Ont. Ct. J. (Gen. Div.)) at para. 9, aff'd (1999), 86 A.C.W.S. (3d) 192 (Ont. C.A.), unless it

can be said that these issues should have been raised in the first proceeding: see *Williams* at para. 22.

[42] I believe that the cause of action in this case is substantially the same as the cause of action that was before the Small Claims Court. The plaintiffs' claim against the third parties in the Small Claims Court and the plaintiffs' claim against HRM in this court stemmed from the exact same set of facts. Although not so in each and every case, in the circumstances of this case, the liability of HRM and the third parties flows from the same events. In fact, the liability of HRM is predicated on the liability of the third parties, in that negligent building inspection only produces actionable damages where the builder fails to build to Code in an area that should have been discovered by HRM under a proper inspection.

[43] The plaintiffs were well aware of the role of HRM in the construction of their home and the fact that the issue of HRM's building inspection was not directly before the Small Claims Court does not make any difference. In the proceeding between the plaintiffs and the third parties in the Small Claims Court, the plaintiffs attempted to stay the proceeding on the basis of the contemplated action in this court against both HRM and the third parties. This request was

rejected, but more importantly, the making of the request signifies that the plaintiffs were well aware of the potential liability on the part of HRM. Although there is no specific provision in the Act or associated Regulations governing the joinder of a non-party by way of counterclaim in Small Claims Court proceedings, nonetheless, if the plaintiffs had sought to join HRM as a defendant by way of the counterclaim, such a request would be permissible.

[44] There are reported decisions where proceedings in Small Claims Court have formed the basis for a claim of *res judicata* in subsequent proceedings: See *Big Wheels Transport and Leasing Limited v. Hansen* (1990), 102 N.S.R. 371, *Bond v. Morse,* 2009 NSSC 270 and *Faulds v. O'Connor,* 2010 NSSC 55. Admittedly, this may produce harsh results where the parties limit themselves to a Small Claims Court proceeding without considering that by doing so they may be estopped in subsequent proceedings, where a privy is unaware of the Small Claims Court proceeding brought by their privy that has the effect of estopping their own action. In *Gough v. Whyte* (1983), 56 N.S.R. (2d) 68, the Court found that *res judicata* did not apply because the non-party to the prior Small Claims Court proceeding was not prejudiced, having had knowledge of that claim, and the Small Claims Court did not have jurisdiction to grant the relief claimed in the subsequent proceeding.

[45] In the matter before me, there are no such special circumstances as in *Gough* to avoid the application of *res judicata*. Cause of action estoppel applies regardless of whether the plaintiffs negligently, inadvertently or accidentally failed to counterclaim against HRM in the Small Claims Court. The plaintiffs were aware of HRM's role in the building of the house. The plaintiffs chose to limit their counterclaim to the $25,000 monetary limit of the Small Claims Court. This was a strategic decision made by the plaintiffs.

[46] Although the plaintiffs argue that they were bound by a limited counterclaim in the action of the third parties in the Small Claims Court, I believe that there would be a number of options available to the plaintiffs. The most appropriate approach would have been to counterclaim for the monetary amount of the entire claim against both HRM and the third parties. With the amount being over the jurisdictional limits of the Small Claims Court, the Court would lose jurisdiction to hear the matter and it would be necessary then to transfer the proceeding to the Supreme Court: see *Llewelyn (R.) Building Supplies Ltd v. Nevitt* (1987), 80 N.S.R. (2d) 415 (Co. Ct.). The plaintiffs could have expediently filed a statement of claim in the Supreme Court which would also have the effect of removing jurisdiction

from the Small Claims Court. Finally, the plaintiffs could have appealed the decision of the adjudicator to refuse to grant the stay on the grounds that such a refusal would expose them to a claim of *res judicata* in their contemplated proceeding. Rather than doing any of these, the plaintiffs made the decision to counterclaim within the monetary limits of the Court, and ignore the role of HRM.

[47] It is my view that cause of action estoppel has been established. There was a final decision by a court of competent jurisdiction prior to this action, between the same parties or privies of the parties, which dealt with the same cause of action and where the plaintiffs could and should have raised, all of the claims they raised in the current action, but did not do so. The result is that the applicants have satisfied me that cause of action estoppel is applicable.

[48] Having determined that cause of action estoppel has been established, the next question to be determined is whether the Court should exercise its discretion and allow this action to proceed.

[49] In *Faulds*, supra, Bryson, J. discussed whether the exercise of discretion was justified. At para. 87, he stated:

> In cases of cause of action estoppel, the discretion should be limited to fraud, collusion, or the unavailability of something in the original proceeding which could not have been brought forward with reasonable diligence and which would have changed the results: *Hoque, supra*; *Phosphate Sewage Co. v. Molleson* (1879), (1878 – 79). L.R. 4 App. Cas. 801 (Scotland H.L.) and *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621(S.C.C.) at 638.

[50] Although there is no distinct analysis as to whether or not the restrictive approach should be applied to cause of action estoppel and a more relaxed approach taken in the case of issue estoppel, in this case, there is no need for me to address that question. In the matter before me, the plaintiffs were represented by counsel. The plaintiffs also claimed that before they counterclaimed in the small Claims Court proceedings, they were aware that their residence was not built according to Code standards. It is my view that this proceeding and the proceeding in the Small Claims Court did not relate to separate and distinct causes of action and it would be, in my opinion, an abuse of process to allow the plaintiffs to re-litigate concurrent liability of the three parties and HRM.

[51] I believe as well that s. 3(b) of the *Tortfeasors Act* limits the plaintiffs' potential recovery spare $25,000. Under the common law, successive actions against tortfeasors are permissible unless satisfaction has been obtained from one

of the concurrent tortfeasors. In Williams, *Joint Tortfeasors*, at p. 33, the author states:

> Satisfaction by any of the concurrent tortfeasors discharges the others. Satisfaction means payment of damages, whether after judgment, by way of accord and satisfaction, or the rendering of any agreed substitution therefor. If the payment is of damages, it must be of the full damages agreed by the plaintiff or a judge by the court at the damages due to him; otherwise it will only be satisfaction *pro tanto*.

[52] Although permission to bring successive action against the concurrent tortfeasors is codified in s. 3(a) of the *Tortfeasors Act*, s. 3(b) limits the damages in aggregate to the quantum awarded in the first proceeding. Subsection 3(b) provides:

> 3 Where damage is suffered by any person as a result of a tort, whether a crime or not,
> ...
>
> (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tortfeasors liable in respect of the damage, whether as joint tortfeasors or otherwise, the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and in any of those actions other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the judge presiding at the trial or the court on appeal is of the opinion that there was reasonable ground for bringing the action;

[53] Although this provision does not directly refer to concurrent tortfeasors, the Court of Appeal has held that it applies to both joint and concurrent tortfeasors: See *Williams* at para. 83.

[54] This conclusion is confirmed and supported by s. 30 of the *Small Claims Court Act* which provides:

> An order in an action brought for the balance of the account, or for part of a claim where the residue is abandoned to bring the claim within the jurisdiction of the adjudicator, is a full discharge of all demands in respect of the account, for the balance of which such claim was brought or for the whole claim, as the case may be.

[55] There is a bar to plaintiffs from splitting their cases. However, this section refers to "a claim," not to "claims," so does not bar successive actions against concurrent tortfeasors. What s. 30 does is to state expressly that a claim is a full discharge of all demands in respect of such claim. The effect of this provision is that if the plaintiff chooses to bring an action in Small Claims Court and is awarded damages, those damages are full discharge of the claim. In situations where plaintiffs have a claim in excess of the limits, the claimant cannot bring successive action for damages that could be awarded if the plaintiff had chosen to bring the action in the Supreme Court.

[56] In the matter before me, the plaintiffs decided to counterclaim in the Small Claims Court for the limit of $25,000 against the third parties. The result is that the damages awarded are a full discharge of the claim against the third party even though the plaintiffs' full claim for damages is significantly higher than this amount.

Conclusion

[57] Issue estoppel does not apply because the questions before the Small Claims Court and this Court are not the same questions. However, cause of action estoppel does apply. The parties to this action are the same, or are in privy with the parties to the Small Claims Court claim. The cause of action before the Small Claims Court is not separate and distinct from this action. The plaintiffs could have brought this claim initially before the Small Claims Court.

[58] The Court has exercised its discretion not to allow the action to proceed, as the plaintiffs were represented by counsel throughout and were fully aware of

HRM's role in the construction of the residence. The plaintiffs cannot split their case.

[59] In addition, it is my view that the plaintiffs are limited to claiming $25,000 from HRM and to recovering only $25,000 as between HRM and the third parties.

[60] Therefore, as against HRM and the third parties either as joint or concurrent tortfeasors, the proceeding is dismissed. This result does not affect any potential concurrent liability of HRM with parties other than the named third parties.

[61] The parties have a period of three weeks to come to an agreement on costs. If they are unable to agree, they are asked to submit their positions in writing not later than March 25, 2011.

J.