

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Lienaux v. Purcell, 2012 NSSC 38

**Date:** 20120124

**Docket:** Hfx. No. 357864

**Registry:** Halifax

**Between:**

Charles D. Lienaux

Applicant

v.

Laurel Purcell

Respondent

**Judge:**

The Honourable Justice Peter P. Rosinski.

**Heard:**

January 12, 2012, in Halifax, Nova Scotia

**Counsel:**

Charles D. Lienaux, Self-Represented  
Stephen McGrath and Sheldon Choo, for the Respondent

**By the Court:**

**Introduction**

[1] This is a Motion by Ms. Purcell, Sheriff in and for the County of Halifax, to have dismissed or stayed an application in Chambers made by Mr. Lienaux. While the Sheriff has only recently been drawn into this litigation, the historical context of Mr. Lienaux's involvement reaches back to 1989.

[2] Mr. Lienaux and his wife have continuously lived at 332 Purcells Cove Road since receiving "the property" by warranty deed as joint tenants, which deed was registered at the Registry of Deeds on June 20, 1989.

[3] Since that time, it is undisputed that the circumstances affecting their respective interests in the matrimonial property have dramatically changed.

**Background**

[4] Some of the significant events include:

- 1- On April 27, 1992 the property was conveyed to Ms. Turner-Lienaux solely, such warranty deed being registered that same day. On August 4, 2004, a judgment against her was registered regarding the property. On February 15, 2010, she conveyed the property to herself and Mr. Lienaux as joint tenants.
  
- 2- On October 8, 2010, Ms. Lienaux assigned her estate into bankruptcy, which remains outstanding at today's date;
  
- 3 - On June 7, 2011, Warner, J. refused the application of Mr. Lienaux seeking an order cancelling a sheriff's sale of 332 Purcells Cove Road, set for June 15, 2011, which would see sold, pursuant to an Execution Order issued February 24, 2010:

All that ½ interest of Charles D. Lienaux in certain parcels of land and land covered with water known as 332 Purcells Cove Road, Halifax County, Nova Scotia, being the land, right of ways and water lot more fully described in a deed recorded at the Halifax County Registry of Deeds in Book 5220 p. 360 and legally described as PID# 00271015, 00633503, and 41318585.

- 4- On June 15, 2011, the Sheriff sold the property above noted to a third party;
  
- 5- On October 20, 2011, Mr. Lienaux filed a Notice of Application in Chambers as against Laurel Purcell, Sheriff, for and in the County of Halifax, Nova Scotia seeking:

The applicant is applying to a judge in chambers for:

(i) a declaratory judgment of the Court pursuant to **Rule 38.07(5)** ruling that the Sheriff's Deed recorded at the Halifax County Land Registration Office on June 30, 2011, as document #98618730 is void and of no lawful force or effect upon the Applicant's legal and/or beneficial title to the lands purported to be conveyed thereby; and

(ii) an order of the Court directing the Respondent to cause to be registered at the Halifax County Land Registration Office all documents required thereby to show that the said Sheriff's Deed is void and a nullity and requesting that the registered interests in the parcel register for the said lands of the Applicant be changed to show that the Applicant is one of the registered owners of the Applicant's lands.

[5] And claimed such on the grounds that:

**Grounds for order**

The applicant is applying for the order on the following grounds:

(i) the Respondent executed against lands of the Applicant to recover a judgment (the “Campbell Judgment”) which is not against the Applicant contrary to **Civil Procedure Rule 79.07** and s. 4 of the **Sale of Land Under Execution Act**;

(ii) the Respondent executed against lands of the Applicant after the Campbell Judgment was stayed contrary to s. 69(3) of the **Bankruptcy and Insolvency Act**;

(iii) the Respondent executed against lands of the Applicant under the authority of an execution order (the “Campbell Execution Order”) which is not against the Applicant contrary to **Civil Procedure Rule 79.07** and contrary to s. 4 of the **Sale of Land Under Execution Act**;

(iv) the Respondent executed against lands of the Applicant after the Campbell Execution Order was stayed contrary to s. 69(3) of the **Bankruptcy and Insolvency Act**;

(v) the Respondent executed against lands of the Applicant which were never beneficially owned by the judgment debtor named in the Campbell Judgment or in the Campbell Execution Order, contrary to s. 13 of the **Sale of Land Under Execution Act** and the common law;

(vi) the Respondent proceeded with a sale of lands of the Applicant contrary to s. 13 of the **Sale of Land Under Execution Act** and contrary to the common law after receiving written notice from the Applicant on two occasions that: (a) the Applicant was at all times material hereto the legal and/or beneficial owner of the lands being executed against, and (b) the Applicant did not authorize the sale of the Applicant’s interests in the lands;

(vii) the Respondent neglected to apply to the Court pursuant to **Rules 76.01** and **76.02** for a ruling determining who was the legal and/or beneficial owner of the lands being executed against after receiving written notice from the Applicant on two occasions that: (a) the Applicant was at all times material hereto the legal and/or beneficial owner of the lands being executed against, and (b) the Applicant did not authorize the sale of the Applicant's interests in the lands;

(viii) the Respondent conveyed the Applicant's lands to a purchaser whom the Respondent knew had actual notice that the Applicant is the legal and/or beneficial owner of interests in the lands which were being executed against;

(ix) the Respondent conveyed the Applicant's lands to a purchaser who had actual notice that: (a) the Applicant was at all times material hereto the legal and/or beneficial owner of the lands being executed against, and (b) the Applicant did not authorize the sale of the Applicant's lands; which purchase and sale constitutes fraud by the purchaser within the meaning of s. 4(4) of the **Land Registration Act**.

5. On November 7, 2011, the Sheriff filed a Notice of Contest claiming the application should be dismissed on the grounds that:

**Grounds of contest**

The Respondent says that your application should be dismissed because:

1. Prior to the sale of land under execution that is the subject of the dispute in this proceeding (the "Property"), the Applicant brought a motion to the Supreme Court of

Nova Scotia seeking to direct the Sheriff in and for the County of Halifax to cancel the public auction of the Property and that motion was dismissed.

2. The Applicant subsequently appealed this decision to the Nova Scotia Court of Appeal, and sought an order of the court setting aside the Sheriff Sale by public auction of the Property, but the Applicant's appeal was dismissed when he failed to comply with a requirement to pay security for costs.
3. The Applicant is estopped from making the claims advanced in this proceeding on the basis of the doctrine of *res judicata* (either issue estoppel or cause of action estoppel or both).
4. The Sheriff Sale was undertaken by the Sheriff under the authority of an execution order issued by the court and the ***Sale of Land Under Execution Act***, R.S.N.S. 1989, c. 409.
5. The Applicant has not identified the authority pursuant to which is requested relief is being sought, but it would appear to be a challenge in respect of the actions taken by the Sheriff pursuant to the ***Sale of Land Under Execution Act***, R.S.N.S. 1989, c. 409.
6. If the matter is not *res judicata*, a challenge in respect of the actions taken by the Sheriff pursuant to the ***Sale of Land Under***

*Execution Act*, R.S.N.S. 1989. C. 409 should have been made pursuant to a proceeding under Civil Procedure Rule 7.

7. The present proceeding was filed beyond the time limitation set out in Rule 7.05(1)(a).
8. The actions of the Sheriff were reasonable and correct.
9. If the matter is not *res judicata*, then to the extent that the Applicant has requested an order “that the registered interests in the parcel register for the said lands be changed to show that the Applicant is one of the registered owners of the Applicant’s lands”, this should have been advanced as a proceeding under s. 35 of the *Land Registration Act*, S.N.S. 2001, c. 6.
10. The Applicant has not complied with the procedural requirements of s. 35 of the *Land Registration Act*, S.N.S. 2001, c. 6., and in particular, has not made the registered owners of the parcels parties to this proceeding and has failed to notify interest holders of the proceeding pursuant to subsections 35(2) and 35(3) of the *Land Registration Act*, S.N.S. 2001, c. 6.
11. The Applicant is not entitled to any relief under s. 35 of the *Land Registration Act*, S.N.S. 2001, c. 6.
12. In any event, a Marriage Agreement alleged to have been made by the Applicant and his



wife in 1992 did not, if such an agreement was actually made, create a valid trust.

13. In any event, if the Applicant had a beneficial interest in the Property prior to its migration the under the ***Land Registration Act***, S.N.S. 2001, c.6, this interest was not reflected in the parcel registers when the Property was migrated, and subject to s. 20 of the ***Land Registration Act***, S.N.S. 2001, c.6, is not an interest affecting the Property.
14. In any event, the Sheriff's Deed conveys the interest described in s. 13 of the ***Sale of Land Under Execution Act***, R.S.N.S. 1989, c. 409. Whether or not other interests exist in the Property does not render the Sheriff's Deed null and void but goes to the scope of the conveyance.

7- On November 7, 2011, the Sheriff filed her Motion in Chambers pursuant to *Civil Procedure Rule* 23.03 claiming as relief:

Laurell Purcell, Sheriff in and for the county of Halifax, the Respondent in this proceeding, moves for an order dismissing this proceeding for abuse of process pursuant to Civil Procedure Rule 88.02(1)(a). Alternatively, the Sheriff seeks an order for any other remedy that may be appropriate under Civil Procedure Rule 88.02(1). In the further alternative, the Sheriff seeks an order for directions for the conduct of this proceeding, including directions with respect to proceeding under Civil Procedure Rule 7, whether any of the requested attracts the requirements of s. 35 of the ***Land Registration Act***, S.N.S. 2001 c.6, and/or the conversion of this proceeding from an "application in chambers" to an "application in court".

[6] She based this request on:

### References

The moving party relies on the following legislation, Rules, or point of law:

1. Civil Procedure Rule 88;
2. The doctrine of *res judicata* (either issue estoppel or cause of action estoppel or both);
3. Civil Procedure Rule 7;
4. *Land Registration Act*, S.N.S. 2001 c.6, s.35;
5. *Sale of Lands Under Execution Act*, R.S.N.S. 1989 c.409.

### This Proceeding and its context

[7] Over 2.5 hours I heard, Mr. Lienaux briefly cross-examined on his affidavit, and fulsome oral argument from both counsel for the Sheriff and Mr. Lienaux as a self-represented person who is also a barrister at the Nova Scotia Bar. I also had available to me two affidavits of Mr. Lienaux, an affidavit of the Sheriff and two extensive briefs filed by Mr. Lienaux and the brief filed by the Sheriff.

[8] Other notable undisputed circumstances herein include:

1. On April 27, 1992, Mr. Lienaux and his wife conveyed the matrimonial property to the wife alone, which warranty deed was registered April 27, 1992.

2. On April 27, 1992, Mr. Lienaux and his wife executed a “Marriage Agreement”. Its primary purpose was to record a *quid pro quo* between the two regarding the matrimonial home. Mr. Lienaux swore to its contents in his affidavit of October 19, 2011, that (para. 12):

I agreed to deed the property into my wife’s name solely on the condition that she would agree to sign a marriage contract that provided that she would hold an undivided ½ interest in the property in trust for me until I retire from the practice of law in consideration for me paying the expenses for the property and providing all of the maintenance to keep up the property while we lived there until our retirement.

[9] Mr. Lienaux had set the context at para. 8:

Section 6 of the Matrimonial Property Act provides that at the time title to my matrimonial home was conveyed to myself and my wife, I became vested with an undivided possessory interest in the property.

[10] He elaborated at para. 16:

The contract remains in force between myself and my wife at the time of deposing this affidavit.

[11] That Marriage Agreement was not registered at the Registry of Deeds until, by way of a Statutory Declaration dated and filed, June 14, 2011.

**3.** On January 25, 1995, Mr. Lienaux assigned his estate into bankruptcy and was absolutely discharged on October 31, 1995; Mr. Lienaux swore that he had received confirmation from Paul Goodman, Trustee in bankruptcy, that Mr. Lienaux was considered to have had no equity in the property “before or during my bankruptcy or at the time I was discharged from bankruptcy”.

**4.** On March 7, 2002, the “Campbell judgment” (\$360,532.67) issued against his wife in an action identified as Court file #93-5567 (SH 101803). The judgment debtors were Smith’s Field Manor Development Limited and Karen L. Turner-Lienaux. The sole judgment creditor was Wesley G. Campbell. That judgment was registered at the Registry of Deeds in Halifax on August 4, 2004.

**5.** On February 15, 2010, Mr. Lienaux and his wife executed a warranty deed for the property from her to both of them as joint tenants, which property Mr. Lienaux as a lawyer, caused to be migrated February 18, 2010 - see s. 20 *Land Registration Act S.N.S.* 2001 c. 6;

**6.** On February 24, 2010, an Execution Order in 2002, Hfx. No. 93-5567 (SH 101803) was issued by the Prothonotary on the motion of Wesley G. Campbell as against the judgment debtors Smith's Field Manor Development Limited and Karen L. Turner-Lienaux. This Execution Order was received by the Sheriff on March 1, 2010, from counsel for Mr. Campbell with a request that she, pursuant to the *Sale of Land Under Execution Act* sell (per the wording in the "Notice of Public Auction" provided to the Sheriff by Campbell's counsel):

All the interest Karen L. Turner-Lienaux has in [the lands at 332 Purcells Cove Road, Halifax being PID# 00271015, 00633503 and 4131 8585].

[12] The sale was to take place April 22, 2010.

**7.** Mrs. Lienaux successfully applied to this Court for a stay of proceeding regarding the sale. That Order of Justice Coady commenced April 15, 2010 and was set to expire October 12, 2010. Mr. Lienaux's motion to have the sale stayed was dismissed.

**8.** On May 9, 2011, counsel for Campbell sent, and the Sheriff received, a letter requesting the Sheriff to sell at public auction on June 15, 2011, pursuant to the same Execution Order noted above:

All the ½ interest of Charles D. Lienaux in [the lands at 332 Purcells Cove Road, Halifax being PID# 00271015, 00633503 and 4131 85 85].

[13] Mr. Campbell took the position that the judgment registered August 4, 2004, attached to the property before February 15, 2010, and therefore the deed of February 15, 2010 could only convey to Mr. Lienaux , his wife's encumbered interest, and that that had priority to his interest, if any, in the property.

**9.** On October 8, 2010, Mrs. Turner-Lienaux assigned her Estate into bankruptcy.

**10.** On May 24, 2011, Mr. Lienaux made a motion to this Court in the proceeding (Estate No. 51-14163130) being: in the Matter of the Bankruptcy of Karen L. Turner-Lienaux. That Motion was signed by each of the moving parties, all being alleged creditors as follows:

- Charles Lienaux JR
- David H. Reardon, Q.C.
- Ronald J. Ford
- David M. Gallant
- Charles D. Lienaux

[14] Notably, in the style of cause for that Motion, Mr. Lienaus, acting as spokesman for the collection of alleged creditors, chose to include 2002 SH 101803 (formerly 93-5587) being the action that led to the Campbell judgment against Smith's Field Manor Development Limited and Karen L. Turner-Lienaux which was registered in the Halifax Registry of Deeds August 4, 2004.

[15] The creditors' claims arose, it would appear, through other proceedings which Mr. Lienaus included in the style of cause as well - *viz*:

1993 Hfx. No. 102390 and the Bankruptcy proceeding regarding his wife - 2010 Hfx. No. 338096.

**11.** That motion was set down to be heard June 7, 2011, before Justice Warner. The motion contained manifold requests for relief, as a direct consequence of its applicability to several different proceedings as noted above.

[16] Of particular interest here was the request in the Motion in relation to 2002 Hfx. No. 101803 (Item number 9):

An order of the Court in 2002 Halifax proceeding No. 101803 (formerly Hfx. No. 93-5567) pursuant to the inherent jurisdiction of the Court to prevent abuse of process, directing the Sheriff in and for the County of Halifax to cancel a public auction of lands at 332 Purcells Cove Road, in the County of Halifax, scheduled to be held on June 15, 2011, on the grounds that...

(a) the judgment against Karen L. Turner-Lienaux dated March 7, 2002, in 1993 Halifax proceeding No. 102390 (being the consolidation of proceeding numbers 93-5807 and 93-5909), sought to be executed upon by the Sheriff, was stayed on October 8, 2010 pursuant to s 69(3) of the **Bankruptcy and Insolvency Act**, RSC 1985, c B-3;

(b) the execution order against Karen L. Turner-Lienaux dated February 24, 2010, in 1993 Halifax proceeding No. 102390 (being the consolidation of proceeding numbers 93-5807 and 93-5909), sought to be executed upon by the Sheriff, was stayed on October 8, 2010 pursuant to s 69(3) of the **Bankruptcy and Insolvency Act** RSC 1985, c B-3;

(c) the deed in book 5220 at page 360, at the Halifax County Land Registry Office, pursuant to which the Sheriff purports to sell lands at public auction, does not convey to Charles D. Lienaux any exigible interest in the lands sought to be executed against;

(d) a hearing to determine the right of Wesley G. Campbell to execute against Charles D. Lienaux in 2002 Halifax proceeding No. 101803 (formerly Hfx. No. 93-5567), has been set down to be heard by case management Justice Kevin Coady commencing on November 7, 2011.

[17] In the brief supporting their motion [Tab 1, Charles Lienaux affidavit, sworn January 3, 2012], the creditor's legal arguments are set out, at paras. 36 - 49.



[18] The relevant parts of their argument (oral and written) can be reduced to the following:

(a) On February 14, 2010, Mr. Lienaux had an equitable undivided  $\frac{1}{2}$  interest in the property which, when he became a joint tenant by the February 15, 2010 deed, gave him, **in addition to** his prior equitable interest in the property (an undivided half interest therein) the right of survivorship only, which had remained intact beyond the bankruptcy of his wife and to which the judgment registered in 2004, could not attach because Mr. Lienaux was not a judgment debtor of that creditor; so that his interest therein could not be sold by the Sheriff.

(b) That the bankruptcy on October 8, 2010, of Mrs. Turner-Lienaux vested all her interest in the property in her Trustee under provisions of the *Bankruptcy and Insolvency Act* so any of her interest could not be sold.

[19] The creditors cited as authorities, ss. 69, 70 and 74 of the *Bankruptcy and Insolvency Act*, as well as cases:

- *Starratt v. Turner et al.* (1989) 78 CBR (NS) 83 [1989] NSJ No. 382 (NSSCAD) (a bankrupt can only

assign into bankruptcy the property interest then owned by the person);

- The Law of Real Property (1984) Megarry 5<sup>th</sup> ed. At p. 417 (joint tenants are a single owner - as against third parties, they do not have a ½ interest).

[20] In the June 7, 2011 hearing, Mr. Lienaux initially argued that the February 15, 2010 deed to his wife and him as joint tenants only gave him a right of survivorship to be exercised in the future, which interest could not be sold. When Warner, J. sceptically opined on such a claim, Mr. Lienaux started “switching horses” [p.223 (4) transcript Tab “K” Purcell affidavit] and claimed that the 1992 Marriage Agreement created an equitable undivided half interest in the property in his favour to which the judgment against his wife did not attach.

[21] Mr. Lienaux also followed that up with references to s. 66 *Land Registration Act*, SNS 2001 c.6, regarding the “Effect of Judgment”, and that a judgment against one joint tenant cannot extend to or bind other joint tenants’ interests. I observe here, parenthetically, that the mere claim that a “joint tenancy” is established by a conveyance may not necessarily guarantee such a result in law unless the conveyance carries the hallmarks of joint tenancy - i.e. the right of

survivorship and “the four unities” [i.e. unity of possession, interest, title and time] - Megarry, *The Law of Real Property*, 1975 (4<sup>th</sup> ed), Stevens and Sons, London, England at pp. 391 - 396.

[22] Justice Warner concluded that the February 15, 2010 conveyance by deed from Mrs. Lienaux to herself and Mr. Lienaux was encumbered by the judgment and thus Mr. Lienaux’s interest, though not a judgment debtor, was encumbered thereby. It follows that Justice Warner decided that any interest that Mr. Lienaux received was properly subject to the Execution Order against his wife.

[23] On June 7, 2011, Justice Warner dismissed the application to cancel the June 15, 2011 Sheriff’s Sale.

[24] On June 8, 2011, Mr. Lienaux wrote to Warner, J. (Tab 2, Lienaux affidavit, sworn January 3, 2012 - which letter does not indicate it was copied to counsel for Mr. Campbell). Mr. Lienaux requested that Warner, J. reconsider his decision in part to “bring to your attention case authorities which you may not have been aware [of] when you made your ruling yesterday”.

[25] Mr. Lienaux stated therein:

Your Lordship ruled that since the 1992 marriage contract was not recorded on the public record, it did not stop the judgment from attaching to the interest that my wife holds in trust for me. That ruling is not in accord with the case law set out in *Pat King Ltd. v. Moore* (1970) 1 NSR (2d) 837...

[26] By letter June 8, 2011, Warner, J. declined to accede to Mr. Lienaux's requests.

[27] By letter June 9, 2011, Mr. Lienaux sought to persuade the Sheriff on the same basis that the June 15, 2011 Sale should not proceed. He enclosed the 1992 Marriage Agreement and the *Pat King Ltd.* case. On June 14, 2011, he, by Statutory Declaration, registered the 1992 Marriage Agreement.

[28] The Sheriff proceeded with the sale as scheduled, and provided a deed confirming the sale to Norbridge Management Limited, dated June 21, 2011 - Tab 23 - Lienaux affidavit sworn October 19, 2011.

[29] On July 5, 2011, Justice Warner's Order in 2002 Hfx. No. 101803 regarding the Motion by Mr. Lienaux et al. was issued. In relation to Item Number 9 in the request for relief portion of the Motion [directing the Sheriff to cancel the public auction] his order read:

The remaining aforesaid motions being numbered 2 to 9 inclusive above, are dismissed.

[30] On July 18, 2011, Mr. Lienaux alone, filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) with the Nova Scotia Court of Appeal.

[31] The grounds of appeal of Justice Warner's decision included:

5. That the learned Chambers Judge erred in law when he denied procedural fairness to creditors when he refused to consider legal authority which supported a legal argument relating to an issue raised in the Chambers hearing of which the creditors had no prior notice

[i.e. in my view this is a reference to the marriage agreement basis of Mr. Lienaux's claim above noted];

6. That the learned Chambers Judge erred in law when he allowed the Halifax County Sheriff to auction an interest in the Lienaux matrimonial home without an execution order and to recover a judgment which was not binding on the interest auctioned by the Sheriff.

[32] In his claim for relief he requested:

(6) an order of the Court setting aside the Sheriff's sale by public auction of lands at 332 Purcells Cove Road in the City of Halifax, held on June 15, 2011;

[33] On October 20, 2011, he filed the herein Application in Chambers requesting that, in effect, the sale of his interest in the property be reversed as it is void and is of no lawful force and effect.

[34] On October 25, 2011, Justice Saunders of the Court of Appeal, in relation to Mr. Lienaus's appeal of Justice Warner's decision, had issued the following order:

2011

C.A. No. 352526

Nova Scotia Court Of Appeal

BETWEEN:

Charles D. Lienaus

APPELLANT

and

Wesley G. Campbell, 2301072 Nova Scotia Limited and Green Hunt Wedlake Inc.

RESPONDENTS

Order

Before the Honourable MR. JUSTICE JAMIE W. S. SAUNDERS In Chambers:

**WHEREAS** the appellant Charles D. Lienux was required to post security for costs in the total amount of \$20,000 with respect to the above appeal no later than 4:00 p.m. local time October 21, 2011 failing which either respondent may move to dismiss the appeal without further notice to the appellant.

**AND WHEREAS** there is evidence before this Honourable Court that the aforesaid security for costs was not posted.

**IT IS HEREBY ORDERED** that the within appeal is dismissed.

**DATED** at Halifax, Nova Scotia, this 25<sup>th</sup> day of October, 2011.

## **Issues**

[35] Should the existing Application in Chambers (2011 Hfx. No. 357864) by this Motion:

(i) be dismissed or stayed either on the basis of the doctrine of *res judicata* or as an abuse of process; or some lesser remedy be ordered as against Mr. Lienux; or

(ii) be continued as a judicial review under CPR 7; or

(iv) be continued as an application under s. 35 of the *Land Registration Act* SNS 2001 c. 6; or

(iv) be converted to an application in court?

## **Analysis**

### **Res judicata / abuse of process**

[36] Mr. Lienaux concedes in his written materials that:

...if my application to have the Court rule that the Sheriff's Deed executed on June 30, 2011 is a relitigation of issues considered by Justice Warner on June 7, 2011 then my application would be an abuse of process - para. 7, January 4, 2012 brief.

[37] Is this a case where Mr. Lienaux is asking in his Application in Chambers that the Court re-litigate the issues considered by Justice Warner?

[38] Mr. Lienaux strenuously suggests that that is not the case. He writes:

In fact, the record shows that my application only relates to actions by the Sheriff that took place **after** Justice Warner made his decision.

[My emphasis]



[39] To allow this issue be more readily examined, I earlier included a lengthy recitation of the background herein.

[40] To decide this issue, I will also need to examine carefully the position of the parties.

### **Position of the Sheriff**

[41] The Sheriff argues that the Application in Chambers by Mr. Lienux is “an attempt to relitigate a claim which the Court has already determined”. The Sheriff seeks a ruling that, the matters Mr. Lienux is raising in his Application in Chambers, have already been ruled upon by Warner, J. June 7, 2011, if one examines the substance of those pleadings and findings of Warner, J., and that they are therefore *res judicata*. On that basis, or a broader view of the doctrine of abuse of process, the Application in Chambers proceeding should be dismissed - CPR 88.02(1)(a).

[42] Alternately, the Sheriff seeks:

- (i) Other appropriate remedies under CPR 88.02(1) which could include a permanent stay of proceedings; or

(ii) an order for Directions for the conduct of this proceeding as a judicial review under CPR 7, if Mr. Lienaux's complaint is viewed as one challenging the legality of the Sheriff's sale;

(iii) an order for Directions for the conduct of this proceeding to continue as pursuant to s. 35 of the *Land Registration Act* if Mr. Lienaux's complaint is viewed as one not challenging the legality of the Sheriff's sale, but rather that the legal effect of that sale is not properly represented in the Land Registry; or

(iv) an order converting this Application in Chambers to an Application in Court - *Polycorp Properties Incorporated v. Halifax (Regional Municipality)* 2010 NSSC 283, per Justice Wright.

### **Mr. Lienaux's position**

[43] Broadly, he argues that:

(i) His Application in Chambers would not constitute relitigation of the issues before Warner, J. because:

(a) his claim is based on “actions by the Sheriff that took place after Justice Warner made his decision” [p. 2 January 4, 2012 brief]; and

(b) it is “based upon legal issues which were not raised - and indeed could not be raised - before Justice Warner because they did not occur until after his decision was finalized”; furthermore, regarding the six pre conditions to finding *res judicata*, the onus of which is on the Sheriff for each element [*Merriam v. Nova Scotia (Attorney General)* 2003 NSCA 111], the last 3 are not satisfied in this case - i.e.

- Justice Warner’s decision was not “final”;

- his decision did not involve “a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised”;

- the “parties to the decision, or their privies”, were not the same as those in which the estoppel is raised.

(ii) Since the Sheriff was “not acting as a public servant”, but under the direction of an execution creditor for the purpose of recovering money, judicial review is inappropriate;

(iii) Since Mr. Lienaux is not seeking to correct the registration in a parcel register (a property title issue) but rather “seeking to have the Sheriff’s deed removed from the parcel register because it was not executed by the Sheriff with lawful authority and because the interest acquired by the deed was acquired by fraud” [p. 7 January 4, 2012 brief] the application should not be viewed as properly brought under s. 35 of the *Land Registration Act*;

(iv) Since an Application in Chambers is focussed on questions of law not involving any summary resolution of factual disputes, it is more appropriate as constituted rather than an Application in Court.

### **Is there an abuse of process here?**

[44] More specifically, Mr. Lienaux argues that his Application in Chambers is not a re-litigation of Warner, J.’s decision because:

(i) Justice Warner’s decision only applied in the context of a “bankruptcy proceeding” and “had nothing to do with the issues raised in the notice for my Application”;

(ii) “The issues submitted on my Application... were not considered or ruled upon” in the Motion before Justice Warner;

(iii) The Motion before Warner, J. [Exh. “H”, November 7, 2011, Purcell Affidavit] “was made by five creditors who were disputing a bankruptcy claim... they are not parties to my Application because it raises completely different legal questions relating to my property rights pursuant to the *Matrimonial Property Act*. The fact that I am a party to two distinct litigations involving legal issues relating to my matrimonial home does not bar me from seeking a determination of legal issues which involve similar parties, but involve different legal issues and arise from different factual events which took place after earlier legal proceedings had been concluded” [p. 6, January 4, 2012 brief].

(iv) Moreover, the Sheriff was not a party to the bankruptcy proceeding or Motion before Justice Warner.

[45] This Court has a discretion to dismiss or stay a proceeding as an abuse of process in exceptional and rare cases where on a consideration of the circumstances and law (CPR 88, s. 41(e) *Judicature Act* R.S.N.S. 1989 c. 40, and the jurisprudence pertaining to the issues in each case), it is in the interests of justice to do so.

[46] The Sheriff argues that whether seen as falling under the rubric of cause of action estoppel or issue estoppel, if either scenario is shown to exist as between

Justice Warner's June 7, 2011 decision and the Application in Chambers filed October 20, 2011 by Mr. Lienaus, then the doctrine of *res judicata* will provide a sound basis for the court to dismiss or stay the Application in Chambers proceeding as an abuse of process - *Williams v. Kameka* 2009 NSCA 107 citing *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44; **or** on the broadened view of abuse of process wherein flexibility is allowed to courts to apply:

...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... [citing Gouge, JA in *Coles* (2001) 51 O.R. (3d) 481 (CA) at para. 55 as approved in [2002] 3 SCR 307 2002 SCC 63]..

...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 Gouge, JA, comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements for 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...

In all of its applications the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts... the focus is less on the interests of the parties [as it is in the case of *res judicata* strictly speaking] and more on the integrity of judicial decision making as a branch of the administration of justice.

- Per Arbour, J. for the Majority at paras. 37 - 42 in *Toronto (City) v. CUPE Local 79* 2003 SCC 63 [2003] 3 SCR 77.

***Res Judicata?***

[47] While there were two sets of reasons, concurring in the result, Justice Beveridge's comments in *Kameka*, supra, regarding *res judicata* were concurred in by both of the other Justices in that case. *Kameka* is therefore a recent binding formulation of the relevant law. Although in practice there is little difference analytically between issue estoppel and cause of action estoppel, since their preconditions are in essence the same, MacKeigan, JA's comments in *Feener v. Surette* (1982) 56 NSR (2d) 89 (CA) [1982] N.S.J. No. 42 (QL) at paras. 7 and 10 confirm that this view has been clearly articulated for some time, and that issue estoppel becomes especially relevant when cause of action estoppel can not be established.

**(i) Was Justice Warner's decision final?**

[48] Although in part under the nomenclature of a "bankruptcy" proceeding, which also included in the style of cause SH 338096 and 2002 SH 101803, that is a distinction without a difference in this case. Relevant to this motion is the relief

that Mr. Lienaux sought in para. 9, regarding i.e. “an order... pursuant to the inherent jurisdiction of the court to prevent abuse of process, directing the Sheriff... to cancel a public auction of lands at 332 Purcells Cove Road... scheduled to be held June 15, 2011”.

[49] In his Order dated July 5, 2011 [under the proceeding 2002 SH 101803] Justice Warner stated (having listed each paragraph of requested relief):

The remaining aforesaid Motions being numbers 2 to 9 inclusive above are dismissed.

[50] Mr. Lienaux, in his name alone, appealed Justice Warner’s decision on July 18, 2011, as stemming from proceeding 2002 SH 101803, yet he substituted himself in that style of cause instead of his wife as Appellant and added 23017072 Nova Scotia Limited and Green Hunt Wedlake Inc. [representative of his wife’s estate] as Respondents to Wesley G. Campbell who was the original party listed in the style of cause in 2002 SH 101803.

[51] For failing to post security for costs as ordered by a deadline, Mr. Lienaux’s appeal of Justice Warner’s decision in 2002 SH 101803 to not order cancellation of the June 15, 2011 sale of the 332 Purcells Cove Road property, was dismissed by Justice Saunders on October 25, 2011.



[52] In these circumstances, Justice Warner’s decision was clearly a “final” decision.

**(ii) Was the same issue litigated before Justice Warner?**

[53] In his Application in Chambers, Mr. Lienaux seeks to, in essence, have his proprietary interest, as opposed to possessory interest under the *Matrimonial Property Act*, recognized on the parcel register for the lands at 332 Purcells Cove Road. He requests a declaration that the Sheriff’s deed is of no force and effect “upon the Applicant’s legal and/or beneficial title to the lands purported to be conveyed thereby” and that documents be ordered to be registered “to show that the Applicant is one of the registered owners...”.

[54] He argued before Justice Warner that his proprietary interest in the property arose either as a result of the February 15, 2010 deed from his wife to herself and him as joint tenants and/or by virtue of the (April 27, 1992 executed) Marriage Agreement, registered June 14, 2011 by way of Statutory Declaration.

[55] Before Justice Warner, he sought the sale to be cancelled on four grounds in his Notice of Motion (paraphrased):

- a. The judgment against Ms. Turner-Lienaux sought to be executed upon by the Sheriff was stayed pursuant to s.69(3) of the *Bankruptcy and Insolvency Act*
- b. The execution order against Ms. Turner Lienaux sought to be executed upon by the Sheriff was stayed on October 8, 2010 pursuant to s.69(3) of the *Bankruptcy and Insolvency Act*
- c. The deed to Mr. Lienaux on February 15, 2010 which interest of Mr. Lienaux the Sheriff purports to sell at the public auction did not convey to Mr. Lienaux an interest that can be executed against.
- d. The hearing to determine the right of Mr. Campbell to execute against Mr. Lienaux was set down to be heard by Justice Coady on November 7, 2011 [Notably Justice Coady's Order at Tab "E" of the Purcell affidavit, dismissed Mr. Lienaux's application to stay the April 22, 2010 Sheriff's sale].

[56] That the *Bankruptcy and Insolvency Act* provisions stayed the Judgment and Execution Order was argued before Justice Warner; that Mr. Lienaux had no present proprietary interest in 332 Purcells Cove Road (he argued he had a future right of survivorship which could not be sold) was argued before Justice Warner - see eg. on the hearing transcript [Tab "I", Purcell affidavit pages: 221 (9 - 21), 226(4) - 227(16), 234 (3 - 20), 235 (5 - 18)].

[57] Justice Warner decided that the judgment, registered in 2004, encumbered the property, then registered solely in Karen Lynn Turner-Lienaux's name, and that on February 15, 2010, when she conveyed it to herself and Mr. Lienaux, the judgment remained an encumbrance thereon. Her bankruptcy on October 8, 2010

prevented execution against her property. The Sheriff purported nominally only to sell Mr. Lienaux's interest. Justice Warner concluded that it was not appropriate to cancel the sale. The Sheriff's Deed as drafted, purported only to convey "all the estate, right, title, interest, claim, property and demand of Charles D. Lienaux in and to the lands...".

[58] Thus, in effect, Justice Warner decided that though the Sheriff was nominally selling Mr. Lienaux's proprietary interest in the property, it was really his wife's encumbered interest that he received on February 15, 2010, and this proprietary interest was subject to the Judgment and Execution Order. By the time of her bankruptcy on October 8, 2010, Mr. Lienaux already had received this interest in the February 15, 2010 deed. To the extent that Mr. Lienaux disagrees with Justice Warner's legal reasoning process, his avenue was to appeal Justice Warner's decision.

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

[60] While Mr. Lienaux submits that his claim is based on “the actions by the Sheriff that took place **after** Warner, J. made his decision”, and that those issues could not have been raised before Warner, J.’s decision “because they did not occur until **after** his decision was finalized”, these arguments are without merit.

[61] The Sheriff’s actions were entirely consistent with her instructions and her expressed intentions, which were clearly communicated to Mr. Lienaux in a timely manner [see Exh. “F”, Purcell affidavit - a letter from Mr. Lienaux to Coady, J. dated May 10, 2011; and Exh. “E”, a May 9, 2011 letter from Mr. Parish , counsel for the judgment creditor to the Sheriff requesting that Mr. Lienaux’s interest in the property be sold on June 15, 2011; and see Mr. Lienaux’s affidavit sworn October 19, 2011 at paras. 53 -65].

**(iii) Do the June 7, 2011 Motion before Warner, J. and the application in Chambers herein involve the same parties or privies?**

[62] As noted by Justice Davison in *Fancy v. Clayton Professional Centre Ltd.* 2004 NSSC 66 at para. 18, the Supreme Court of Canada has acknowledged that the concept of privity in the context of estoppel is “elastic”. Justice Davison reviewed further helpful authorities between paras. 19 - 26 in *Fancy*.

[63] In the case at Bar, Mr. Lienaux has taken the position that the Sheriff is akin to an “agent” of judgment creditor when following the creditor’s instructions to realize on the Execution Order issued February 24, 2010, and proceeding to sell the property at 332 Purcells Cove Road on June 15, 2011.

[64] Given the authorities, Mr. Lienaux’s position, and the circumstances here, I conclude that the Sheriff was “privy” to the hearing before Justice Warner on June 7, 2011.

## **Conclusion**

[65] I am satisfied that the pre conditions for *res judicata* have been established. While a narrow discretion exists to not dismiss or stay a proceeding when *res judicata* is established [per Binnie, J. for the Court in *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 SCR 460 at paras. 33, 62 and 80], I do not find this is an appropriate case to do so.

[66] I say this because Mr. Lienaux had: a clear understanding of the law and facts that would be engaged at the hearing before Warner, J.; had ample

opportunity as spokesperson for the five creditors to argue on expanded bases for a cancellation of the Sheriff's sale; and had a further opportunity to have Justice Warner's decision reviewed on appeal (including Mr. Lienaux's claim that he was denied fair process by Justice Warner, who declined to reopen the proceeding / reconsider his decision after receiving Mr. Lienaux's June 8, 2011 letter requesting same).

[67] Having determined that the Application in Chambers filed by Mr. Lienaux would in essence be a relitigation of the issues before Justice Warner, I conclude that this is one those exceptional cases where the Court should dismiss the claims made by Mr. Lineaux in SH 357864 (an Application in Chambers), to prevent an abuse of process, and I so order.

[68] I need not address the remaining grounds mentioned in the motion, and therefore will not do so.

[69] I request that the Sheriff prepare an Order for my signature, once the costs issue is decided. I will receive the parties written submissions on costs by January 30, 2012.

**J.**