IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Turner-Lienaux v. Campbell, 2002 NSSC 248

Date: 20021114
Docket: SH 177300A
Registry: Halifax

Between:

Karen L. Turner-Lienaux and Smith's Field Manor Development Limited

Appellants

v.

Wesley G. Campbell

Respondent

Judge:	The Honourable Justice Walter R. E. Goodfellow
Heard:	October 15, 2002 in Halifax, Nova Scotia
Counsel:	Charles D. Lienaux, represents his wife, the Appellant, Karen L. Turner-Lienaux and Smith's Field Manor Development Limited as its corporate secretary Alan V. Parish, Q.C. and C. Gavin Giles, for the Respondent

By the Court:

Background

[1] This action has been before the Supreme Court of Nova Scotia in one form or another since November 1993, including determinations by the Court of Appeal.

[2] The trial before Justice Suzanne Hood lasted 38 days from January 8, 2001 to March 21, 2001. Justice Hood rendered her decision June the 18, 2001 and signed the order July 4, 2001. It was appealed by Karen L. Turner-Lienaux and Smith's Field Manor Developments Limited. The appeal was dismissed and with respect to costs, Freeman J.A. for the Court said:

> [81] In my view there is no basis for this Court to interfere with the exercise of Justice Hood's discretion in awarding solicitor-and-client costs against the appellants.
>
> [82] Lienaux has submitted that the costs have been taxed at $656,796.12 presumably before a taxing master, and this amount has been appealed to the Supreme Court of Nova Scotia.
>
> [83] The respondents have submitted that costs on the appeal should be $20,000.00 which the appellants have paid into court. I agree with that submission and I would award costs on the appeal of $20,000.00 all inclusive.

[3] Justice Hood made her cost determination in the clearest of language,

Smith's Field Manor Development Limited, Karen L. Turner-Lienaux and Byrne Architects Inc. v. Wesley G. Campbell (2001), 195 N.S.R. (2nd) 220.

At p.301:

> This action began with the counter-claim of Lienaux, Turner-Lienaux and Smith's Field against Campbell. Campbell withdrew his action, over the objection of the then plaintiffs by counter-claim, of which Lienaux was one. After Lienaux declared bankruptcy, the action was dormant until 1996 when Lienaux was discharged from bankruptcy. Thereafter, he brought a plethora of applications on behalf of Smith's Field and Turner-Lienaux, most of which were unsuccessful and most of which were unsuccessfully appealed. The Supreme Court file alone consisted of five boxes before the trial began.
>
> Campbell should not, in the circumstances of this case, be put to any expense for his costs in defending the outrageous and scandalous allegations against him. He has been completely vindicated. Furthermore, I conclude that this action was pursued almost as a vendetta against Campbell.

Grounds of Appeal

1. The Standard of Review on Appeals from Taxation of a Solicitor's Client Award of Costs.

2. Did the adjudicator err in law in taxing accounts on a solicitor and client basis that included interlocutory proceedings where either no costs were ordered or party and party costs on a taxed amount were ordered and appeal proceedings where the Court of Appeal addressed costs?

3. That the adjudicator erred in law and declined his jurisdiction when he failed to require the respondent to remove from his bill of costs items as directed by a written decision of the adjudicator dated November 30, 2001.

4. That the adjudicator erred in law and proceeded unfairly when he did not advise the appellants that they were entitled to an opportunity to review the solicitors' files in respect of which the subject costs were being taxed.

5. That the adjudicator erred in law and declined his jurisdiction when he did not make any review of the files and times charges in respect of which the subject costs were being taxed.

6. That the adjudicator erred in law and proceeded unfairly when he refused to recuse himself after the appellants raised an objection based upon a reasonable apprehension of bias.

Civil Procedure Rules

[4] **Costs**

> ***CPR* 40.03.(1)** Subject to rule 40.02, a party, discontinuing a proceeding or withdrawing any cause of action therein, or withdrawing his defence or any part thereof, shall pay the costs of any opposing party to the date of giving notice of discontinuance or withdrawal to the party, and if before payment of the costs he subsequently brings a proceeding for the same, or substantially the same claim, the court may order the proceeding to be stayed until the costs are paid.

[5] *Civil Procedure Rule 40.02* deals with the order which may contain such terms as to costs where a proceeding is entered for trial or is about to be heard in chambers and is at that time discontinued.

> ***CPR 1.05 (w)*** 'proceeding' means any action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by

a writ of summons, third party notice, counterclaim, petition, originating summons, originating motion, or in any other manner;

When costs follow the event or are determined by the Rules

63.03. (1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.

(3) Where a party discontinues a proceeding, withdraws any cause of action therein, or withdraws his defence or any part thereof, liability for the costs are determined as provided in rule 40.03.

Costs on interlocutory applications

63.05. (1) Unless the court otherwise orders, the costs of any interlocutory application, whether *ex parte* or otherwise, are costs in the cause and shall be included in the general costs of the proceeding.

Costs on appeal

63.08. The costs of an appeal and of the proceeding in the court below shall be as directed by the judgment of the Nova Scotia Court of Appeal, or in default of direction shall be in accordance with the applicable provisions of Tariffs.

Appeal confined to items specified

63.39. (1) Unless the court otherwise orders, an appeal from a taxation shall be confined to the items and grounds specified and shall be heard on the evidence before the taxing officer.

(2) The decision of the taxing officer shall be final and conclusive on all matters which have not been appealed from.

Powers of judge on appeal

63.40. On an appeal from a taxation, the court may

(a) exercise all the powers of a taxing officer;

(b) review any discretion exercised by the taxing officer as fully as if the taxation were made by the court in the first instance; and

(c) grant such order on the application, including the costs of appeal and taxation, as is just.

Appeal Ground No. 1

- **The Standard of Review on Appeals from Taxation of a Solicitor's Client Award of Costs**

[6] As of April, 2001, the *Taxing Masters Act* was repealed and the *Small Claims Court Act* was amended to transfer the duties of Taxing Masters to Small Claims Court Adjudicators. Section 9A(1) of the *Act* now reads:

Taxations

9A(1) An Adjudicator has all the powers that were exercised by Taxing Masters appointed pursuant to the *Taxing Masters Act* immediately before the repeal of that *Act*, and may carry out any taxations of fees, costs, charges or disbursements

that a Taxing Master had jurisdiction to perform pursuant to any enactment or rule.

[7] Appeals from taxation are now subject to the provisions of Section 32 of the *Small Claims Court Act* which reads as follows:

Appeal

32(1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an Adjudicator on the ground of

(a) jurisdictional errors;

(b) error in law; or

(c) failure to follow the requirements of natural justice, ...

[8] Prior to the transfer of the taxation jurisdiction to the Small Claims Court, appeals from taxations were governed by *Civil Procedure Rule* 63. *Inter alia*, that *Rule* provided as follows:

63.39 (1) Unless the Court otherwise orders, an appeal from a taxation shall be confined to the items and grounds specified and shall be heard on the evidence before the taxing officer.

(2) The decision of the taxing officer shall be final and conclusive on all matters which have not been appealed from.

63.40 On appeal from a taxation, the court may

(a) exercise all the powers of a taxing officer;

> **(b)** review any discretion exercised by the taxing officer as fully as if the taxation were made by the court in the first instance; and
>
> **(c)** grant such order on the application, including the costs of appeal and taxation as is just.

[9] The *Civil Procedure Rules* have not been amended or modified as a result of the transfer to a Small Claims adjudicator of the powers that were exercised by Taxing Masters previously under the *Taxing Masters Act*.

[10] In *Higgins v. Saunders*, 1998 Carswell N.S. 476, the Court of Appeal (per: Chipman, J.A.) held that: "Under s.32(1) of the *Small Claims Act*, an appeal from an adjudicator's decision to the Supreme Court is limited to: (a) jurisdictional error; (b) error of Law; or (c) failure to follow the requirements of natural justice."

[11] In *Walker v. Scotia Career Academy Limited* (1999), 177 N.S.R. (2d) 316 Robertson J. interpreted the provisions of s.32(1) of the Small Claims Court (at para.11) as follows:

> Now that is the nub. I now have to determine whether she has made an error in law. I have already explained to you that the *Act* restricts the type of review that this Court has over the Adjudicator's findings. I must find an error in law and I am restricted to Section 32(1) of the *Small Claims Court Act*. I am not rehearing the evidence; I am not retrying the matter again; I can only determine whether there has been an error in law.

[12] It seems to me that the existence of *Civil Procedure Rule 63.40* provides this court on an appeal from the taxing of a solicitor's account a level of review and authority to substitute this court's determination as to the appropriate discretion to be exercised if it finds the Small Claims adjudicator, acting in the capacity of a Taxing Master, did not exercise proper judicial discretion. This is clear from *Civil Procedure Rule 63.40.(b)*. This does not mean, however, that a taxation appeal is an automatic review and second taxation. It means that this court, on appeal, has broader authority and scope than normally available to an appellate jurisdiction and can examine the process, extent and nature of the exercise of discretion by the Taxing Master and if it's just, make whatever appropriate adjustment that this court on appeal thinks ought to have been made in the first instance. It should be noted that this Court is the author and master of its rules and those governing taxation appeals have not, as I have indicated, been amended or modified. This court, on appeal, will continue to show a high level of deference to the determination at a taxation hearing depending in part on the circumstances. For example, if there were witnesses called on the taxation and determinations of credibility made, etc., it seems to me that this additional dimension of jurisdiction conferred by the *Civil Procedure Rules* is not

meant to be a re-taxation; it simply entitles this court, on appeal, to make a broader more in-depth analysis of what has transpired than is the case for Small Claims appeals. *Civil Procedure Rule 63.40* applies.

[13] When a ground of appeal under s. 32(1) of the *Act* has been established, then the court does what it considers necessary to address the matter or, if appropriate, gives a direction to refer the matter back for re-taxation. *Cape Breton Landowners v. Nova Scotia Forest Industries* (1983), 58 N.S.R. (2d) 193. *Tannous v. Halifax City* (1995), 145 N.S.R. (2d) 23 and *David L. Parsons & Associates v. Reid* (1998), 167 N.S.R. (2d) 145.

Appeal Ground No. 2

- **Did the adjudicator err in law in taxing accounts on a solicitor and client basis that included interlocutory proceedings where either no costs were ordered or party and party costs on a taxed amount were ordered and appeal proceedings where the Court of Appeal addressed costs?**

[14] The orders in question are as follows:

(i) order of Bateman, J. dated November 12, 1993 *inter alia* appointing a receiver to take possession of the assets of Smith's Field Manor Development from Mrs. Turner-Lienaux; The order provided that costs of this application would be costs in the cause.

(ii) order of Boudreau, J. dated April 17, 1996 allowing Mrs. Turner-Lienaux to amend pleadings; The order fixed party and party costs at $500.00 in addition to any other costs in the proceeding, plus GST. This order did

not take into consideration *Roose v. Hollett et al* (1996), 154 N.S.R. (2d) 161.

(iii) order of Saunders, J. dated April 17, 1996 allowing Mr. Campbell to discontinue his action; The order provided that the Campbell action would be discontinued without costs up to April 17, 1996.

(iv) order of Hood, J. dated May 27, 1996 fixing party and party costs of an application to remove Green Parish as counsel at $1,200; These costs have been paid to Mr. Campbell.

(v) order of Nova Scotia Court of Appeal dated October 8, 1996 fixing costs of an appeal from the decision of Hood, J. at $2,000; These costs have been paid to Mr. Campbell.

(vi) order of Nova Scotia Court of Appeal dated October 15, 1996 fixing costs of an appeal from the decision of Justice Saunders allowing Mr. Campbell to discontinue his action at $1,000; These costs have been paid to Mr. Campbell.

(vii) order of Nathanson, J. dated February 3, 1997 fixing costs of an application to order Mr. Campbell to produce documents for discovery at $500 plus GST; This order did not take into consideration *Roose v. Hollett et al* (1996), 154 N.S.R. (2d) 161.

(viii) order of Nathanson, J. dated February 3, 1997 fixing costs of an application to order Adelaide Capital Corporation and Toronto-Dominion Bank to produce documents for discovery at $500 plus GST; This order did not take into consideration *Roose v. Hollett et al.* (1996), 154 N.S.R. (2d) 161.

(ix) order of Tidman, J. dated March 6, 1997 allowing amendments to the pleadings of Smith's Field Manor Development Limited and Mrs. Turner-Lienaux; This order provided that there were not costs to any party.

(x) decision on costs of Saunders, J. dated June 2, 1997 refusing to award solicitor and client costs on application for summary judgment against Mr. Campbell;

(xi) supplementary decision on costs of Saunders, J. dated July 24, 1997 fixing party and party costs of $12,000 plus disbursements of $817.49;

(xii) order of Saunders, J. dated September 10, 1997 dismissing an application for summary judgment against Mr. Campbell and fixing party and party costs, disbursements and HST applicable thereto at $12,907.41; These costs have been paid to Mr. Campbell.

(xiii) order of Bateman, J.A. dated November 3, 1997 dismissing an application to stay Saunders' J.'s order for costs; The order provided that costs of the application would be costs in the appeal.

(xiv) order of Nova Scotia Court of Appeal dated April 8, 1998 fixing party and party costs of an appeal from the decision of Justice Saunders dismissing an application for summary judgment against Mr. Campbell at $4,800; These costs have been paid to Mr. Campbell.

(xv) order of Nova Scotia Court of Appeal dated April 23, 1998 fixing party and party costs of stay application before Bateman, J.A. at $500 inclusive of disbursements; These costs have been paid to Mr. Campbell.

(xvi) order of MacAdam, J. dated September 13, 1999 fixing costs of an application to order Mr. Campbell to produce documents for discovery at $1,000 in addition to any other costs in the proceeding;

(xvii) order of Gruchy, J. dated March 8, 2000 dismissing claims against Mr. Campbell for professional negligence and consequential damage; This

order provides that all claims dealt with in the order are dismissed without costs to any party.

(xviii) decision of Bateman, J.A. dated August 24, 2000 dismissing application to allow new evidence and reconsider appeal; This decision fixed party and party costs of this application at $1,500. These costs have been paid to Mr. Campbell.

(xix) draft order of Scanlan, J. dated in or about November, 2000, dismissing an application for abuse of process and allowing an application for increased security for costs and fixing party and party costs at $5,000; These costs have been paid to Mr. Campbell.

[15] Adjudicator Richardson, in his first decision, stated *[at paras]*:

[47] As I have already noted, I was advised by counsel that the main action saw a large number of interlocutory applications, many of which were appealed. It is my understanding that on many (if not all) of these applications the solicitors for Mr. Campbell asked for solicitor and client costs. Costs were awarded in these applications, against the defendants, but only on a party and party basis. The costs were fixed in various amounts and were payable by the defendants to Mr. Campbell.

[51] Following argument, and on the understanding that all the awards had been made against the defendants on a party and party basis; and without the benefit of any authorities from counsel on either side; I ruled that a party and party award against the defendants did not preclude a subsequent taxation, on a solicitor and client basis, of awards in respect of those applications.

[52] I also indicated that the fact that the fees and services in respect of such applications were to be considered by me should not be taken as an indication that their reasonableness could not be challenged. Rather, it was simply to say that I was prepared to review them and to assess their reasonableness.

[53] I hope to make myself clear with the following example. Legal fees of $10,000 were incurred by the plaintiff in respect of a particular application. Party and party costs were ordered against the defendants, fixed in the amount of $3,000. Following taxation on a solicitor and client basis, the "reasonable" fees are set at $7,500. In my view, that assessment is binding on the parties (subject to their right of appeal). However, the question of whether the defendants are liable to pay that $7,500 (subject to a credit of $3,000); or whether the earlier order of party and party costs relieves them of such liability (whether on the grounds of *res judicata* or otherwise) is outside the scope of my jurisdiction. It is a matter to be determined by a justice of the Supreme Court.

[54] Having said this, I should also note that I have some concern about whether or not my assessment can be binding without a ruling from the Court as to whether there is a binding *liability or obligation* on the part of the defendants to pay solicitor and client costs associated with the services rendered on such applications, where they have already received the benefit of a costs order.

[58] A decision on this point is beyond my jurisdiction. I can assess whether the solicitor and client costs claimed in respect of those interlocutory applications are "reasonable"; but whether the defendants here are in fact liable to pay those "reasonable" costs is for a judge of the Supreme Court.

[16] In his final decision, the adjudicator stated *[at paras]*:

[5] One of the objections of Mr. Lienaux was that the accounts to be taxed included fees incurred in respect of various interlocutory applications (and appeals therefrom) which had taken place during the course of the proceedings; and which had resulted in specific costs orders. Mr. Lienaux's position was that the trial judge lacked the jurisdiction to change these orders; and that according her award of solicitor and client costs could not apply to fees incurred in respect of those applications, since they were already the subject of cost orders.

[6] I ruled, without the benefit of any authority being cited to me, that while I lacked the jurisdiction to determine the defendants' *liability* to pay solicitor and client costs in respect of such costs, I did have the

> jurisdiction to address the issue of whether such costs were *reasonable*. The question of whether any such costs, once found by me to be reasonable, were to be paid was left to a justice of the Supreme Court: see paras.51-53, *Smith's Fields Manor v. Campbell* [2001] NSJ No.531.

[17] Adjudicator Richardson proceeded to determine the reasonableness of the bill of costs presented for taxation and decided to leave to this Court the legal issue of whether or not the direction by Justice Hood, in unequivocal terms, that Wesley G. Campbell should be fully compensated in costs extended and applied to interlocutory proceedings and appeals where the respective courts exercised their discretion and made specific rulings as to costs, which rulings were subject to appeal, or at least an application for leave to appeal, and none of which originated in this court went to appeal. In addition, many of which were complied with by payment.

Summary of Orders

1. Court of Appeal

[18] Five of the orders were made by the Court of Appeal. In four of these orders, the Court of Appeal specifically addressed and fixed the amount of costs payable to Mr. Campbell. In the fifth order, Justice Bateman

November 3rd, 1997 ordered the appellants' appeal to stay an order of costs, granted by this court, dismissed with costs to be in the appeal.

[19] With respect to the orders of the Court of Appeal relating to the costs issue, there is no authority or jurisdiction in the trial judge to alter or vary a costs discretion exercised by the Court of Appeal unless there is a specific direction from the Court of Appeal giving such jurisdiction to this court by way of referral. In my view, it is an error in law for the Small Claims adjudicator to have included in the taxation of the bill of costs on a solicitor and client basis, as directed by Justice Hood, any professional services directly related to the applications for which the Court of Appeal gave orders as to costs and this necessitates a review and deletion of any such items of professional services that were included.

[20] The listing of the orders in this decision is taken directly from the appellants' brief, however, it should be noted that items (x) and (xi) are actually decisions of Saunders, J. which resulted in the order of Saunders, J. in (xii).

2. Supreme Court of Nova Scotia

[21] The *Civil Procedure Rules* with respect to costs on interlocutory applications is clear. CPR 63.05(1) indicates that such costs on interlocutory applications

are costs in the cause and shall be included in the general cost of the proceeding **unless the court otherwise orders**. In all of the orders where the Supreme Court has on interlocutory applications exercised its discretion and addressed the issue of costs, the determination is subject to appeal or leave to appeal and becomes a final determination not subject to appeal, review or amendment by the trial judge. I note, for example, that on occasions in the interlocutory applications, solicitor and client costs were sought and declined by the chambers judge. On one of the applications, Justice Jamie W. S. Saunders (as he then was) filed a decision June 25th, 1997 reviewing the issue of costs and concluding the proper exercise of his discretion was to deny solicitor and client costs on that particular application before him and in a supplementary decision, taxed the party and party costs of the application to Mr. Campbell at $12,000.00 plus disbursements of $817.49 and the decision was finalized by order the 10th of September, 1997. The order went on to appeal and the Court of Appeal declined overruling the exercise of discretion by Justice Saunders and confirmed the denial of solicitor and client costs for that interlocutory application.

[22] On interlocutory applications the justice presiding has discretion with respect to costs and can choose to deal with them by “costs in the cause”

which defers the issue of recovery and quantum to the trial justice and follows the determination of costs made by the trial judge. If on an interlocutory application the issue of costs is not addressed, then CPR 63.05(1) applies and the costs of that application are costs in the cause and subject to determination by the trial justice. It appears from the orders as recited in the appellants' brief that there were no orders silent as to costs that would therefore invoke CPR 63.05 and only the one order of then Bateman, J. November the 12th, 1993 directed that costs of that application be costs in the cause. In all other applications, it appears that costs were addressed.

[23] It is clear that costs already addressed could not be retaxed on a solicitor and client basis was not brought to the attention of the trial justice and understandably so because this is an unique case insofar as one can ascertain in that this issue being determined on appeal never arose before in Nova Scotia. The only way a trial justice might be able to provide a higher level of compensation and indemnification to a party, in a case such as this is where the trial justice is able to conclude the full force and impact of the appellants' unjustified litigation, justifies an order of solicitor and client costs covering all matters that have not been the subject of costs determinations and adding a gross sum, in addition to the taxed costs. CPR

63.02(1)(a). The adding of a gross sum would not be any interference, appeal or review of the determination made by a chambers judge on an interlocutory application.

[24] A chambers judge may give costs to a named party in the cause which means that if the party in whose favour the order is made is later awarded costs of the action, that party will also be entitled to the costs of that interlocutory proceeding. The quantum of costs would in such circumstance be determined by the trial justice which would include the jurisdiction to order solicitor and client costs. If the other party is successful and obtains an order for costs at trial, the party who obtained costs as a named party in the cause makes no recovery, as such an award is conditional upon being successful in costs at trial.

[25] The interlocutory application could result in “costs to a party in any event of the cause” which would permit that party in the order to an entitlement to costs regardless of the outcome of the trial. This simply establishes an entitlement to costs but the recovery is postponed.

[26] There are no limitations on the terms and terminology that a justice can utilize in the proper judicial exercise of discretion with respect to costs on interlocutory proceedings.

[27] In each and every case where the trial justice has exercised his or her discretion and costs are not left to be in the cause, then the determination is subject to appeal or leave to appeal and if not appealed successfully, represents a final determination on the issue of costs in that interlocutory proceeding. It follows therefore that the adjudicator is in error to have taxed on a solicitor and client basis services for interlocutory applications where the cost determination had already been addressed.

Appeal Ground No. 3

- **That the adjudicator erred in law and declined his jurisdiction when he failed to require the respondent to remove from his bill of costs items as directed by a written decision of the adjudicator dated November 30, 2001.**

[28] There is no substance to this issue. The appellants refer to a decision dated November 30, 2001 and I think the decision is actually dated December 3, 2001. This was a preliminary decision by the adjudicator given after a thorough review of the material and, as the adjudicator stated, the purpose of his ruling was two-fold: to enable each side to know the case they have to meet and to streamline the taxation process, if possible, by achieving agreement in respect of some or all of the various charges for time and disbursements. The matter is complex in volume and content, compounded by a somewhat hostile non-objective environment that not surprisingly

followed from a matter in which the advocate on the part of the corporate company, although a lawyer, presented himself as the secretary of the corporate party and also as the husband of the non-corporate party. The adjudicator, rather than being condemned, is commended for his thoroughness and the attempt he made to address the process before the taxation actually took place. The record does not disclose any inadequacies in the manner in which the adjudicator proceeded with the process and taxation. The record supports his conclusion that his directions with respect to the exclusion fees charged for matters not relevant to this matter or encompassed in Justice Hood's direction were complied with.

Appeal Ground No. 4

- **That the adjudicator erred in law and proceeded unfairly when he did not advise the appellants that they were entitled to an opportunity to review the solicitors' files in respect of which the subject costs were being taxed.**

[29] The record discloses every courtesy and fairness extended to the appellants. The appellants chose not to attend the actual taxation after having more than adequate notice. Their non-attendance is the sole reason they did not exercise their rights of examination and cross-examination. They chose, as they were entitled, to reply upon their written representations. In that regard, I specifically note that the adjudicator, in his decision of December 3, 2001,

commented on all of the twenty-seven "issues" or "objections" raised by Mr. Lienaux as representative for the appellants.

Appeal Ground No. 5

- That the adjudicator erred in law and declined his jurisdiction when he did not make any review of the files and times charges in respect of which the subject costs were being taxed.

[30] There is no merit to this ground or issue of appeal. The adjudicator did more than one might reasonably expect in addressing the volume of material presented to him and the record disclosed a more than adequate and, in fact in the circumstances, a sufficiently thorough review of the record.

Appeal Ground No. 6

- That the adjudicator erred in law and proceeded unfairly when he refused to recuse himself after the appellants raised an objection based upon a reasonable apprehension of bias.

[31] During the course of argument, I commented to Mr. Lienaux that I saw absolutely nothing on the record that warranted Mr. Richardson even considering recusing himself and that to allege bias or a perception of bias on the part of an officer of this court acting in a judicial capacity is not something to be done lightly. I suggested to Mr. Lienaux that an allegation of bias clearly impugned the character of the individual against whom it was

addressed and suggested unequivocally that such person did not have or exercise the impartiality required. Mr. Lienaux's explanation was that he really wasn't challenging Mr. Richardson's character and integrity but was concerned about what he labelled a perception of bias. No matter how you address it, this ground of appeal is totally unfounded and, in the circumstances, inappropriate.

General - Absence of Appellants at Taxation

[32] The adjudicator, in his decision of December 3, 2001, stated at p. 10:

> **[69]** Mr Lienaux had a right to challenge the reasonableness of the account that was being taxed. Nothing in my ruling prevented him from exercising that right. He wilfully chose to refrain from exercising that right for, I believe, a tactical reason. His decision deprived me of his assistance in evaluating a *(sic)* enormous account. His decision was also taken in full knowledge that Mr Parish would argue that he had in fact *waived* any objection based on reasonableness.
>
> **[70]** I *(sic*) my view Mr Lienaux must be taken to have waived his right to challenge the reasonableness of the account; or to have conceded their reasonableness; or both. I am accordingly satisfied that, subject to a reduction of $50,000 discussed below, the amount is reasonable because:
>
> **a.** the lawsuit was conducted in such a way as to inflate the amounts that would otherwise have been charged had it been conducted in a more reasonable fashion;

> **b.** Mr Campbell's reputation and character had been put into issue which also warranted higher amounts than what might otherwise have been incurred,
>
> **c.** Mr Lienaux intentionally chose not to exercise his right to question the reasonableness of the accounts, giving rise to an inference that he accepted that the charges were reasonable; and
>
> **d.** as discussed below, my own review of the accounts, as limited as it was by Mr. Lienaux's failure to provide any assistance or guidance, supports a conclusion that the accounts were reasonable.

[33] The statement that nonattendance by the appellants amounted to a waiver of their right to challenge the reasonableness of the account or that nonattendance was a concession or admission that the accounts were reasonable would be an error in law. There is no taxation by default or absence. The exercise of taxation of a solicitor's account is a judicial function. The taxing official must approach such taxation on the basis that the solicitor seeking recovery must establish, on the balance of probabilities, the relevance and reasonableness of the costs and disbursements advanced. This onus remains upon the party seeking taxation and is not altered or shifted in any way by the nonattendance of the other party.

[34] If the adjudicator had based his determination on his remarks in these two paragraphs, then it would have constituted an error in law and required a complete re-taxation.

[35] I do note, however, that the adjudicator was exceptionally thorough in his determinations and, although he made such remarks, he very clearly understood and applied the law. In his preliminary decision, the adjudicator showed an awareness that his jurisdiction required an assessment of the reasonableness of the costs being claimed where he stated in part at para. 29:

> **[29]** Where the amount in issue is in excess of the Small Claim's *(sic)* Court monetary jurisdiction (which is currently $10,000) a taxing officer only has jurisdiction to assess the reasonableness of the costs being claimed.

and at para 32:

> **[32]** A taxing officers is obligated to tax a solicitor and client costs coss *(sic)* award as though his or her client were the one resisting the bill ...

He then went on to refer to the Court of Appeal decision in *Lindsay v. Stewart, MacKeen & Covert*, [1988] NSJ No. 9 (CA). He specifically recited the principles that govern in para. 38:

> **[38]** **a.** The provisions of CPR 63.16(1) and s. 42 and s. 43 of the Barristers and Solicitors Act were 'primarily for the protection of the client and must be enforced';

> **b.** Such protection is not ensured by a ‘cursory examination’ of the solicitor’s bill;
>
> **c.** The ‘ultimate test’ in all cases, even where there is an express agreement regarding the basis of remuneration, is whether the account is ‘reasonable’; and
>
> **d.** Any suggestion that a lawyer ‘may charge what the traffic will bear is contrary’ to that principle.

and at para. 40:

> **[40]** The application of these principles means that a taxing officer’s assessment is not restricted to determining whether the work billed was actually performed. He or she may also consider ‘the fruits of professional labour as it relates to the benefit achieved by the client.’

[36] In his final decision, the adjudicator specifically addressed the objections raised by Mr. Lienaux with respect to the required determination of reasonableness said at paras. 47, 48, 49 and 50:

> **[47]** As I have already noted, I was advised by counsel that the main action saw a large number of interlocutory applications, many of which were appealed. It is my understanding that on many (if not all) of these applications the solicitors for Mr Campbell asked for solicitor and client costs. Costs were awarded in these applications, against the defendants, but only on a party and party basis. The costs were fixed in various amounts and were payable by the defendants to Mr Campbell.
>
> **[48]** The question then becomes whether there is anything left for me to tax in respect of the services surrounding such applications; or whether the costs

> orders have predetermined what can and cannot be allowed in respect of those applications.
>
> **[49]** Mr Lienaux says that the fact that the orders were made on a party and party basis precludes any further award in respect of those applications. The matter is *res judicata*.
>
> **[50]** The solicitors for Mr Campbell acknowledged that they could not ignore these awards. They say that a credit equal to the total of these cost awards will or should be granted. However, they say that the fact that awards were made on a party and party basis does not prevent them from asking for full indemnity in respect of those applications (subject to that credit).

[37] It is clear in the thoroughness of his approach and handling of the taxation, that the adjudicator, while stating in error the impact of the appellants' non-attendance, fully and completely applied correctly the law and the taxation, other than as indicated in issue number two, was fairly and properly conducted in accordance with the law, and was conducted without any jurisdictional error or failure to follow fully the requirements of natural justice.

Directions

[38] This has been a long, exhausting, expensive and unnecessary litigation requiring every effort, no matter how minuscule compared to the overall effort, to expedite its conclusion is appropriate and accordingly, rather than refer the matter back to the adjudicator to address the removal of services

relating to the appeals and interlocutory applications from the bill of costs as taxed, the court exercises its discretion and will proceed without undo delay to address the matter itself and bring this aspect, subject to appeal, to a conclusion.

1. It should be clearly understood that this is not a re-taxation and all other matters addressed by the adjudicator stand. For example, the adjudicator's determination with respect to time and disbursements related to the assignment of Mr. Lienaux's rights against Mr. Campbell to Mr. Campbell by the Trustee in Bankruptcy for Mr. Lienaux, mortgage actions, etc. have all been addressed and this court's further review is limited as directed in this decision.
2. The respondent shall within a reasonable period of time present to the court its calculations and determination on the removal of professional services that were included in the adjudicator's taxation relating to the interlocutory applications and appeals where costs were addressed.
3. Once the position of the respondent has been advanced, Mr. Lienaux, on behalf of the appellants, will have a reasonable opportunity to respond.
4. In the further representations the respondent and appellants should address the extent to which the global reduction of $50,000.00 voluntarily advanced by the

respondent are related to services that were taxed and included in the final account relating to interlocutory applications and appeals and if so, to what extent.

5. Once the court has the representations from the parties, it will determine whether to proceed with a decision or call for further representations, oral and/or written.

6. The court on making its final determination will then present the parties with an opportunity to advance their representations with respect to costs of this appeal and in particular, the impact of the direction for solicitor and client costs given by the trial justice.

J.