IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
***Birch v. MacQuarrie* 2022 NSSM 2**

SCCH 509804

Between:

Aimee Leigh Birch and Thomas Henry Birch

Claimants

— and —

Robert Dion MacQuarrie and Carla Ann MacQuarrie

Defendants

Adjudicator:	Augustus M. Richardson, QC
For the Claimants:	Meaghan Kells
For the Defendants:	Tipper McEwan
Heard by Written Submissions:	December 17 and 29, 2021 and January 7, 2022
Decision:	January 10, 2022

Introduction

[1] This decision deals with whether this court has the jurisdiction to hear or stay a claim that is otherwise properly before it on the ground that the defendant has a counterclaim, arising from the same facts and issues in dispute, that is greater than the financial jurisdiction of this court (currently $25,000.00).

[2] The claim arises out of an abortive agreement of purchase and sale for a house. The purchaser (here the claimants) and the vendor (here the defendants) disagree as to whether the claimants were entitled to terminate the agreement. The claimants filed a claim in this court for the return of their deposit of $15,000.00. The defendants say that the claimants were not entitled to terminate the agreement, and moreover that they have a claim for $65,000.00 against the claimants for damages when they re-sold their house at a loss. After the claim in this court was filed the defendants commenced an action in the Supreme Court for those damages.

[3] The defendants move for an order staying the claim. They say that their decision to launch an action in the Supreme Court ousts the jurisdiction of this court. They also say in any

event that the claimant's claim should be stayed, and that they should in effect be forced to advance their claim instead by way of a counterclaim in the Supreme Court action.

[4] The claimants resist the defendants' motion. They say that they have a presumptive right to have their claim heard in this court. There is no reason—and no statutory authority—that would authorize or justify the stay sought by the defendants.

[5] The question then becomes whether this court has jurisdiction and, if it does, should it stay the claimants' claim so as to permit all facts and issues in dispute be resolved in the Supreme Court proceedings. On the facts and for the reasons set out below I have concluded that a stay should be granted—not because this court lacks jurisdiction to hear the claim, but rather because of its mandate pursuant to s.2 of the *Small Claims Court Act* to ensure that claims are adjudicated "in accordance with established principles of law and natural justice."

The Facts

[6] The following facts are collected from the materials filed on the defendants' motion for an order staying the claimants' action in this court. The defendants filed

a. An affidavit of Folu Adesanya, Articled Clerk, attaching various documents, including the agreement of purchase and sale giving rise to the dispute between the parties, together with various email and text correspondence between them or their real estate agents, and a few other documents;

b. Submissions dated December 17, 2021; and

c. A Book of Authorities.

[7] The claimants filed

a. An affidavit of Taylor Rudolph, legal assistant, attaching a septic services report,

b. Submissions dated December 29, 2021, and

c. A Book of Authorities.

[8] I should note that notwithstanding the subtitle I am not setting out actual findings of fact. I am treating the "facts" as allegations made by the parties which are supported by evidence, and which are set down here in order to provide the context for the ruling I was asked to make.

The Abortive Agreement of Purchase and Sale

[9] On July 2, 2021 the claimants, who lived in Ontario at the material time, made an offer to the defendants to purchase property at 1448 West Porter's Lake in the Halifax Regional Municipality for $750,000.00. They submitted a deposit of $15,000.00. The offer was accepted by the defendants the same day. The purchase was to close on August 5, 2021.

[10] The offer was conditional on the buyers (*i.e.* the claimants) satisfying themselves as to the quality and quantity of the well water and the condition and function of the septic system. This condition was "deemed satisfactory unless the Seller ([*i.e.* the defendants] or the Seller's Agent is notified to the contrary, in writing, on or before the 9th day of July 2021." In the event such notice was given "either party shall be at liberty to terminate this Agreement and the deposit shall be returned to the Buyer."

[11] The agreement also contained a standard clause to the effect that the seller, buyer and agents were required to "submit to the jurisdiction of the Courts of the Province of Nova Scotia for the resolution of any disputes that may arise out of this Agreement."

[12] The claimants' investigation of the well and septic system was delayed and/or raised some concerns for them. On July 9th they (or their agent) requested an amendment to the agreement of purchase and sale ("APS") to extend the date for compliance from July 9th to July 13th. The defendants were not prepared to extend but were prepared to lower the purchase price by $3,000.00. On the evidence before me there appears to have been some communication problems between the parties (I make no finding on the point). In any event the deal fell apart on July 10th.

[13] The claimants asked for the return of their deposit. They took the position that they had given "unsatisfactory" notice pursuant to the water/septic clause on July 9th and so were entitled to a return of their deposit. The defendants refused. They were, at least initially, prepared to continue the deal but were not prepared to return the deposit. By July 12th it was clear that the claimants were not interested in continuing with the purchase. The defendants' position was that the claimants had breached the contract by unilaterally terminating it. They refused to return the

deposit, put the house back on the market, and eventually sold it for $685,000.00 in September 2021.

The Resulting Litigation

[14] On October 8, 2021 the claimants commenced the within claim against the defendants in this court. The Notice of Claim detailed the events leading to the collapse of the APS, They alleged that they had given proper notice of dissatisfaction and were entitled to and claimed the return of their deposit. As per this court's COVID procedures, a teleconference was set for December 7th, 2021.

[15] On October 29, 2021 the defendants as plaintiffs (*i.e.* Mr and Mrs MacQuarrie, or "the vendors") commenced an action against the claimants as defendants (*i.e.* Mr and Mrs Birch, or "the purchasers") in the Supreme Court of Nova Scotia (Hfx No. 510178). The vendors sought a declaration that the purchaser's deposit was forfeit, and damages in respect of the loss on the resale ($50,000.00 net of the deposit), the carrying costs of the property and such other losses as might be proved.

[16] On November 17th, 2021 counsel for the defendant vendors in these proceedings wrote to this court. He advised that proceedings in respect of the same APS and the same issues, which involved a claim for damages in excess of this court's jurisdiction of $25,000.00, had been commenced in the Supreme Court. That being the case he submitted that this court no longer had jurisdiction to hear the claim for the return of the deposit. He advised that he would not be filing a defence until the issue of jurisdiction had been resolved.

[17] On December 7th the matter came before me by way of teleconference. The parties agreed that the issue could be resolved by way of written submissions only. The defendants agreed to file their materials by December 17th; the claimants by December 29th; and any reply by the defendants by January 7, 2022. All of that was done.

Submissions of the Parties in General

[18] The submissions of the parties included suggestions as to whose claim was the better grounded in fact or in law. That is not before me on this motion. What is before me is whether the vendors' decision to commence an action in the Supreme Court ousts this court's jurisdiction to hear the purchasers' claim for the return of their deposit; or that it would justify an order staying the Small Claims action and thereby, in effect, forcing the claimants to have their claim determined instead in the defendants' Supreme Court action.

Submissions on Behalf of the Defendant Vendors (the MacQuarries)

[19] The defendants grounded their submissions on sections 2, 13 and 15 of the *Small Claims Court Act*, RSNS 1989, c. 430, as amended:

> 2 It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.
>
> 13 A claim may not be divided into two or more claims for the purpose of bringing it within the jurisdiction of the Court.
>
> 15 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.

[20] (Section 19 deals with transfers of certain proceedings from the Supreme Court to the Small Claims Court.)

[21] The defendants argue first that the claimants are trying to split the defendants' claim by having liability heard in this court, and damages heard in the Supreme Court. They say this is contrary to s.13 of the Act. They then argue that to hear the liability claim in this court is in effect to determine a much higher claim (that of the defendant vendors). That is contrary to this court's current financial limit of $25,000.00. Finally, they argue that s.15, properly construed, removes the jurisdiction of this court where the issues in dispute are being litigated in another court. They argue that their claim for damages for breach cannot be severed from the claimants' claim for the return of their deposit. That being the case both claims should be heard and determined in the Supreme Court proceedings.

Submissions on Behalf of the Claimant Purchasers (the Birches)

[22] The claimants submit that there are two lines of authority with respect to whether a Supreme Court action commenced after a Small Claims Court action ousts the jurisdiction of the latter pursuant to s.15. One line of authority is found in *Big Wheels Transport & Leasing Ltd v Hansen* 1990 CarswellNS 352, when Roscoe, J (as she then was) ruled that it did. The second line of authority stems from *American Home Assurance Company v. Brett Pontiac Buick GMC et al* 1991 CarswellNS 166, where Saunders, J (as he then was) ruled that it did not.

[23] The claimants submit that both lines of authority can be understood by an overarching principle of fairness. In other words, what determined the ultimate result in both *Big Wheels* and *American Home Assurance* was whether a litigant was attempting to manipulate or abuse the system.

[24] The claimants argue that their claim was filed in good faith. They have a presumptive right to have their claim heard in this court. They argue that there is no prejudice to the vendors in permitting the purchases to have their claim adjudicated in this court. The fact that the evidence and issues in their claim and in that of the defendants overlap does not mean they are identical.

[25] The claimants also argue that s.13 has no application. They are not splitting their claim, as was the case in *Williams v. Kameka* 2009 NSCA 107. Rather, there are two separate distinct claims for different types of damage based on different legal principles and findings of fact.

[26] The purchasers accordingly submit that their claim should be allowed to proceed in this court. The claim of the vendors ought to be severed.

Reply Submissions on Behalf of the Defendant Vendors

[27] The defendants in reply submit that the claims of the parties each against the other are for breach of contract and are inextricably linked. That being the case the claimants' claim should be stayed for three reasons.

[28] First, damages are a remedy not a separate cause of action. A loss is part of a party's claim. The defendants have a "basic right" to have all issues in their dispute with the claimants heard together in one action.

[29] Second, the defendants submit that to hear the claim would in effect be to force the defendants to "litigate in instalments and that the Small Claims Court effectively sever the issue of liability from damages in the MacQuarries' claim so that the Birches' claim may proceed." They submit that this court lacks the power to sever the MacQuarries' damages from their claim for breach of contract. They add that a finding in this court might not give rise to *res judicata* in the Supreme Court because the defendants do not have a claim in this court and in any event the Supreme Court would have the residual jurisdiction to hear the MacQuarries' claim on the merits "even if all other elements in the test for issue estoppel or cause of action estoppel were met."

[30] Third, this court lacks the power to sever the damages claim of the MacQuarries from liability. The issues in the two causes of action for breach are inextricably linked and so should be heard together, in the Supreme Court.

Analysis and Decision

[31] First, I should make clear that in this court there is only a Notice of Claim. The defendant vendors have not as yet filed a defence or, *a fortiori*, a counterclaim. Instead of doing that they filed a claim in the Supreme Court and then challenged this court's jurisdiction to proceed with the purchasers' claim.

[32] Second, and related to the first, there is no question but that the claimants' claim is properly before this court. They make a claim for the return of a $15,000.00 deposit paid pursuant to a standard form agreement of purchase and sale. The claim is one that this court has the jurisdiction to hear. It is the type of claim that is routinely dealt with in this court: see, for a recent example, *Kimm v. Almadina International Limited* 2021 NSSM 62.

[33] Third, this is a statutory court. The court draws its jurisdiction and authority—and no more than that—from the *Small Claims Court Act* and any regulations thereunder. It has no inherent jurisdiction. That being the case, any power to stay a claim that is otherwise properly before it must be found in some express—or necessarily implied—statutory authority.

[34] The defendants say that such authority can be found in s.15. They rely in part on *Big Wheels Transport & Leasing Ltd v. Hansen* 1990 CarswellNS 352. Madame Justice Roscoe (as she then was) stated at para.12 that a party sued in Small Claims Court could have the matter effectively removed by immediately commencing an action in the Supreme Court since on that event s.15 would remove jurisdiction from this court. That approach may be seen in a practice

that developed in this court. When a defendant claimed to have a counterclaim in excess of this court's financial jurisdiction this court would adjourn the claim for a set period to permit the defendant to commence an action in the Supreme Court for those damages. If it did, then the proceedings in this court were stayed. If it did not, the proposed counterclaim was severed and the claimant was permitted to proceed with its claim: see the discussion in *Lone Cypress Woodworking v. Manabe* 2006 NSSM 2 at paras.24-27 and 34-36.

[35] On reviewing the wording of s.15 carefully it is clear that it can no longer be said that s.15 or *Big Wheels* or *Lone Cypress Woodworking* supports such a practice. I come to this conclusion because, with respect, Roscoe, J's interpretation of s.15 in *Big Wheels* Roscoe, J is inconsistent with that section's actual wording. Justice Roscoe did not explain how she arrived at that interpretation. Justice Saunders in *American Home Assurance* suggested it was *obiter dicta*, and stated at para. 57 that "[t]he word 'already' must refer ... to proceedings previously commenced in either the County Court or the Supreme Court." In other words, it could not apply where, as here, the proceeding in the other court was commenced *after* the Small Claims Court claim was commenced. His Lordship added that so long as the previously commenced proceedings in the Small Claims Court were "properly prepared, motivated and show a legitimate cause of action," and there was no evidence of bad faith or abuse, then there was no reason for this court to lose its jurisdiction or have its proceedings stayed by an order of the Supreme Court: see also *Doucette Estate v. Muise* 2015 NSSM 8 at para.19.

[36] In short, the fact that the defendants filed a Supreme Court action involving the same issues in dispute *after* the Small Claims action was filed does not oust the jurisdiction of this court. Nor, by the same token, does it authorize a stay. A defendant who seeks to stay a Small Claims action because of a subsequent proceeding in the Supreme Court based on the same issues in dispute must find something other than s.15 to support its position.

[37] What then about s.13, which the defendants also rely upon. With respect, I was not persuaded that s.13 has any application here. The claimants have not split their claim. The situation before me is not like the one in one in *Williams v. Kameka*, where the claimant sought to have his claim for property damage in a motor vehicle accident determined in this court but his claim for personal injuries arising from the same accident determined in the Supreme Court. The fact that the defendants here might have their own claim in the Supreme Court—or that determinations in this court might create an estoppel in the Supreme Court—does not mean that the claimants are splitting their own claim.

[38] Is there any other provision in the *Small Claims Court Act* that could support the existence of a power to stay an otherwise proper claim? Adjudicator Nickerson addressed this question in *Doucette v. Muise*. When the same question came before him he concluded that a power to stay could be located in the obligations imposed on this court by s.2 and, in particular, the requirement that proceedings in this court be conducted "in accordance with established principles of law and natural justice." If it can be established that for the claimants here to proceed with their claim against the defendants for a return of their deposit would violate the latter's right to have their defence heard according to those principles then this court could refuse jurisdiction: *Duocette Estate, ibid* at para.30.

[39] Adjudicator Nickerson analysed several natural justice objections raised by the defendant who had been seeking a stay in that case. He was not persuaded that the absence of formal discovery or disclosure was a barrier to natural justice. (I would add here that some of the supposed defects in disclosure in this court can be met by a judicious use of subpoenas; and that most arbitrations comply with natural justice without the need of discovery.) Adjudicator Nickerson also dealt with an objection that proceedings in this court might give rise to res judicata and issue estoppel in the subsequent Supreme Court proceedings. He noted that the risks of findings made in the Small Claims court giving rise to an estoppel in the Supreme Court ran both ways between the parties, and that in any event the applicability of those principles would depend on a number of factors and were not sufficient to justify a stay based on the evidence before him. He accordingly dismissed the application for a stay.

[40] Adjudicator O'Hara in *The Roofing Connection v. Select Projects Ltd* 2011 NSSM 20 accepted that this court did have the jurisdiction to stay a claim in such circumstances. While he did not expressly locate that power in s.2 he did recognize "other principles at play," one of them being "the right of the party in the position of the Select [*i.e.* the defendant] to have its claim adjudicated without having to abandon some part of it:" para.25. He concluded that where the counterclaim had 'an air of reality," and involved facts "relating to both claims [that] arise [out of] exactly the same contractual relationship and exactly the same performance of work under the contractual relationship" that it would be appropriate to have them heard together—and hence, to stay the claim: see paras.23, 26 and 33.

[41] I note too the decision of Glube, CJSC in *Haines, Miller & Associates v. Foss* 1996 CarswellNS 301. As I read the decision the court held that in a case like this a claim could proceed in the Small Claims Court "unless and until" an Adjudicator found that the issues in a proposed counterclaim had to be determined in order to deal with those in the claim. In other words, while the claim in Small Claims Court was not automatically stayed by the launching of a

Supreme Court action, it remained open for an Adjudicator, having heard evidence on the point, to rule that both claim and counterclaim ought to be heard together in the Supreme Court: see paras.23 and 27.

[42] What these decisions amount to in my view is this.

[43] First, where a defendant seeks to stay a claim because they say they have a counterclaim for an amount greater than the financial jurisdiction of this court, or where they have actually then commenced an action in the Supreme Court for such a claim, this court retains jurisdiction over the claim. In other words, and unlike the case where s.15 does apply, this court does not automatically lose jurisdiction simply because a defendant has their own claim against the claimant for an amount greater than this court's financial jurisdiction.

[44] Second, s.2 of the Act provides an Adjudicator with the discretion to issue a stay in such cases where he or she is persuaded that it would be appropriate so as to ensure that the claims are "adjudicated informally and inexpensively but in accordance with established principles of law and natural justice."

[45] Third, in the exercise of that jurisdiction an Adjudicator should, on evidence, consider such questions as

a. Is the defendant's proposed counterclaim (or its subsequently commenced Supreme Court action) made in good faith;

b. Is the amount of the alleged counterclaim one that appears reasonable and has an 'air of reality;'

c. Do the issues in dispute between the parties involve facts and issues that are the same or substantially the same in both proceedings;

d. Would the resolution of those issues, regardless of which court decides, likely dispose of the issue of which party is liable and for how much;

e. Whether permitting the claim and "counterclaim" to proceed separately, one in this court and one in the Supreme Court, would result in such a significant increase in complexity or in the cost in money and time as to threaten as to

> undermine the basic premise of this court, which is to ensure the determination of a claimant's claim "informally and inexpensively."

[46] Perhaps the best expression of how an Adjudicator's discretion ought to be exercised may be found in the observations of Judge Haliburton (as he then was) i *Llewellyn Building Supplies Limited v. Nevitt* (1987) 80 NSR (2d) 415, cited by Chief Justice Glube in *Haines, Miller, supra* and in *The Roofing Connection, supra*:

> "It will be apparent, then, that the Adjudicator of the Small Claims Court must exercise his judicial discretion as to the most effective and convenient way for the matter before him to proceed. He must bear in mind the objective of the Small Claims Court procedure; which is to provide a cheap, effective and relatively speedy method of adjudicating civil disputes. It is his duty in exercising his discretion to ensure that specious or frivolous allegations raised by a defendant in the pleadings before him not be permitted to subvert the purposes of the Act and of his court. He must be mindful of the right of a plaintiff to choose the forum in which his action will be heard. He must consider whether the issues raised in the claim and the counterclaim can be conveniently severed and be heard in that fashion without adding unnecessary or unreasonable expense to the proceedings, or whether the most "judicious" method of dealing with the issues before him would be to have the whole proceeding consolidated in an action which is outside his jurisdiction and which would, therefore, involve the proceedings being commenced in another court."

[47] Turning to the defendants' motion, it is clear on the evidence that the central issue insofar as liability (and the clamants' claim for the return of the deposit) is concerned—that is, whether the claimants properly terminated the contract—is simple. It turns on the wording of a standard form residential real estate contract and a few emails and texts over the course of one or two days. As I have already noted, it is the type of case over the type of contract with the type of evidence that is routinely heard in this court. On the face of it there would ordinarily be no reason to stay the claim unless the defendants (and in my view the onus is on them) establish that "established principles of law and natural justice" require both claims to be heard in the Supreme Court.

[48] There are three factors that lead me to conclude that the defendants have met that onus, and that a stay ought to be granted.

[49] First, there is the point that on the evidence the defendants' claim is one that clearly has an air of reality. They seek no more than the standard claim for a loss on a resale of property. Moreover, the amount sought is one that is based on actual events as opposed to speculation. It would be unfair to force them to waive in this court any claim over $25,000.00.

[50] Second, there is the question of procedural efficiency. Assume the claim is not stayed. Assume further that the defendants elect not to pursue their claim by way of a counterclaim here, but instead maintain it in the Supreme Court. The parties would then open themselves up to a new issue, that being whether the result in the Small Claims Court would result in *res judicata* or issue estoppel in the Supreme Court action. So, for example, if the defendants' defence in this court succeeded they would still have to establish that the finding should be accepted in their Supreme Court action (thereby adding an extra issue). And even if they could establish that point, they would also have to establish their entitlement to the loss on the resale against a possible defence of lack of mitigation. The claimants, if successful in this court, would face the same problem in the Supreme Court action, albeit in reverse. In short, a simple question—did the claimants have a right to terminate—would become more complex, and more expensive in time and money, if the issues in dispute became spread over two actions, one here and one in the Supreme Court.

[51] Third, there is the fact that the evidence and the issues with respect to both claims are relatively simple. That is important because, as Adjudicator O'Hara noted in *The Roofing Connection*, there are enhanced procedures available in the Supreme Court that make it reasonable to conclude that the evidence and the issues in dispute here can be adjudicated in that court in a reasonably expeditious manner. In other words, a stay of claim in this court would not do unreasonable harm to the rights of both the claimants and the defendants to have their respective claims adjudicated in an informal and inexpensive manner.

[52] All of these lead me to conclude that the issues in dispute ought most reasonably to be dealt with all together in the Supreme Court proceedings. That being the case I order that the claimants' claim be and the same is hereby stayed without costs to either party.

DATED at Halifax, Nova Scotia
this 10th day of January, 2022

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Augustus M. Richardson, QC

Adjudicator