IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *D. Jockel Holdings Limited v. Provincewide Holding Limited*, 2022 NSSM 3

2022
SCC NO. 508480

BETWEEN:

D. JOCKEL HOLDINGS LIMITED

Claimant

- and -

PROVINCEWIDE HOLDINGS LIMITED

Defendant

DECISION ON MOTION FOR STAY

Hearing Date:
November 15, 2021 (Motion)

Appearances:
Matthew J. D. Moir - Moving Party on Motion, Counsel for Defendant
Andrew Christofi - Responding Party on Motion, Counsel for Claimant

[1] This is a motion brought by Provincewide Holdings Limited, the Defendant in this matter.

[2] The order sought is set out in a letter dated October 25, 2021, from counsel, Matthew Moir, in which the Defendant seeks:

> An order staying the proceeding in Small Claims Court on the grounds that (a) the counterclaim exceeds the monetary jurisdiction of the court, (b) the counterclaim is not reasonably severable from the claim, (c) the counterclaim is being filed in the Supreme Court of Nova Scotia, and (d) the claim would more justly and conveniently be heard in the Supreme Court of Nova Scotia proceeding.

Background

[3] The initial claim in this matter was brought by Notice of Claim filed August 13, 2021, for the sum of $11,811.25. This amount comprises a deposit of $10,000 paid by the Claimant pursuant to an Agreement of Purchase and Sale for a property at 89 Mossman Lake Road, Lunenburg County (PID 60281789) entered into with the Defendant as Seller. The Claimant also seeks its legal fees on the terminated transaction, general damages of $100 and prejudgment interest at 5%.

[4] The Agreement was dated June 14, 2021, and was on a standard Nova Scotia Real Estate Commission form. The closing date was scheduled for July 7, 2021.

[5] On June 25th the solicitor for the Purchaser (Claimant herein) discovered a textual qualification on the parcel register for the property and objected to it in writing to the Seller's solicitor. The textual qualification related to a tax deed in the back title. I should note here that I heard no evidence in this matter and am relying on the parties' pleadings and the statement of facts in their written submissions, much of which is identical. Indeed, there appears to be very little dispute on the facts

relevant to this motion.

[6] The Claimant says that it terminated the Agreement because of the textual qualification which was not satisfactorily resolved.

[7] The Defendant says that the Claimant did not terminate or at least did not properly terminate pursuant to the Agreement of Purchase and Sale (Section 10.2) in that the objection was not a valid objection to title.

[8] It is apparent that a central issue in this case will be whether or not the textual qualification relating to the tax deed was a "valid objection to title." Not surprisingly, the parties take competing positions on that issue.

[9] While the Claimant is seeking the return of the deposit and some incidental damages, the Defendant is seeking to not only retain the deposit but, as well, seeks special damages representing the difference between the agreed-to sale price of $121,200 on the one hand and the actual price it ended up receiving on the sale to a third party of $92,000, for a loss of $29,200. This, together with the deposit of $10,000 comprises the total counterclaim amount of $39,200.

[10] The Defendant's Amended Written Defence was filed on October 18, 2021, and, as noted, contains a counterclaim in the amount of $39,200. This amount clearly

exceeds the $25,000 monetary jurisdiction of the Small Claims Court.

[11] On October 27, 2021, counsel for the Defendant filed a Notice of Application in Chambers in the Nova Scotia Supreme Court. At the time of the arguing of this motion – November 15, 2021 – the Supreme Court matter had yet to be assigned a date and in the result there was no court stamp on the Notice. However, it had been assigned a Court file number – Hfx. No. 510201. A copy of that Notice of Application in Chambers was submitted by counsel as part of its documents on the motion before me.

Issues

[12] The Defendant's position is that where a counterclaim filed in this Court exceeds the Small Claims Court's jurisdiction and the factual nexus of the claim and counterclaim are the same, then the Small Claims matter ought to be stayed to allow the matter to be heard in Supreme Court.

[13] In its view, there is just one issue in the motion and that is whether the matter should be stayed in the Small Claims Court and allowed to proceed in the Supreme Court with the claim and counterclaim being heard together.

[14] The Claimant articulates the issues somewhat differently, as follows:

1. Does this Honourable Court have the jurisdiction (outside of Section 15 of the *Act*) to stay a proceeding where the counterclaim exceeds the monetary jurisdiction of the Court?

2. If the answer to question 1 is "yes:"

a. Would the continuance of this proceeding in this Court cause an injustice to the Defendant?

b. Would a stay of this proceeding not cause an injustice to the Claimant?

[15] The Claimant argues that the Small Claims Court has no jurisdiction to issue a stay and, accordingly, The Small Claims Court is required to hear its claim.

[16] In my view, the issues raised in this case should be stated and dealt with as followings:

1. Should both the claim and the counterclaim be heard in one proceeding, in the Supreme Court of Nova Scotia?

2. Does the Small Claims Court have the power to issue a stay and is a stay of this proceeding the appropriate legal remedial "tool"?

Analysis

Should both the claim and the counterclaim be heard in one proceeding, in the Supreme Court of Nova Scotia?

[17] It is clear that if this issue is resolved in the affirmative, there must necessarily be some form of a "pausing" of the Small Claims matter. Conceivably, it could be

any of an adjournment without day, a stay, or a dismissal. However, which tool is chosen is a distinct issue which should be dealt with separately. That is the subject of the discussion under the second issue.

[18] I start with what may be a self-evident observation – the reason these types of cases arise from time to time is because of the limits of jurisdiction of the Small Claims Court prescribed in the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 (the "*Act").* These limits relate to both the monetary amount of the claim which, by virtue of Section 9(a) of the *Act* is limited to $25,000 and, as well, the kind of claim that may be made in the Small Claims Court as the claim must be one which arises under a contract or a tort (s. 9(a). So, there are limits as to the amount and as to the kind of claim.

[19] Then, there are the explicit exceptions from jurisdiction in Section 10. For example, no claim may be made for the recovery of land (s. 10(a)), in respect of entitlement under a will (s. 10(b)), for defamation (s. 10(c)), in respect of residential tenancies, unless it is an appeal from the Director of Residential Tenancies (s, 10(d)), and general damages are limited to $100 (s. 10(e)).

[20] Occasionally claims are filed in the Small Claims Court which are outside of the Court's jurisdiction. For example, a claim involving residential tenancies that is

not an appeal, or a claim for defamation, or a claim that does not arise under a contract or tort but involves the law of trusts. In these types of cases, the typical result will be a dismissal of the claim. No one would doubt the Court's jurisdiction to take that approach in those cases.

[21] In this present case, the originating Notice of Claim is clearly within the jurisdiction of the Court both as to amount and as to kind of claim. But for the counterclaim, the primary claim would have proceeded in the normal course to a hearing and ultimately a decision without any issue of jurisdiction being raised.

[22] It is the counterclaim, specifically the amount of the counterclaim, which is outside of the Court's jurisdiction since it exceeds the $25,000 limit. Had it been filed by itself as a stand-alone claim, it would have been dismissed (unless the Defendant had abandoned the portion of its claim above $25,000, which was not done here).

[23] The foregoing makes it clear that one response to the issue confronted in these type of cases is to simply dismiss the counterclaim as being outside of the jurisdiction of the Court. In some situations that will be the appropriate response, particularly where the counterclaim is properly severable from the primary claim.

[24] However, where the claim and the counterclaim arise from the same basic facts and, to use counsel's terminology, share a "factual nexus", then it becomes more compelling that all of the matters in dispute be dealt with in one proceeding and this necessarily means having the entire proceeding in the Supreme Court.

[25] There are several decisions from the Small Claims Court[1]1 where this issue has arisen. However, to my knowledge there are just two decisions of higher courts where the exact issue has been dealt with. Those decisions are clearly binding on this Court and this Court should adhere to the principles espoused in these decisions.

[26] The first of these two cases is ***Llewellyn (R.) Building Supplies*** (1987), 80 N.S.R. (2d) 415 N.S.C.C., where Haliburton, J.C.C. (as he then was) dealt with an appeal of a Small Claims decision where the counterclaim exceeded the Court's then monetary jurisdiction of $3,000. The claim was for a holdback amount of $2000 on a construction contract. The counterclaim was for $3,700 in respect of deficiencies and defects in the work. The Adjudicator had held that the entire matter was beyond the jurisdiction of the Court since the claim and counterclaim arose from the same set of facts and would be best dealt with together.

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[1] See for example: *TJ Inspection Services v. Halifax Shipyard*, 2004 NSSM 5 (CanLII); *Lone Cypress Woodworking v. Manabe*, 2006 NSSM 2; *Ray Cox Construction v. Kasperson*, 2007 NSSM 8;, *Johnson v. Christink*, 2008 NSSM 57; *Miller Lake Learning Services Inc. v. Latta*, 2009 NSSM 59 *(CanLII): Roofing Connection v. Select Projects Ltd.*, 2011 NSSM 20 *(CanLII).*

[27] In upholding the Adjudicator's decision, Haliburton J.C.C. states (par. 9-10) as follows:

> 9. 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.
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> 10. Where the claims of the two parties "arise from the same set of facts," it will ordinarily be advisable to consolidate the two matters and hear them as one. That will be so even if the effect is to remove the combined proceeding from the jurisdiction of the Adjudicator.

[28] In the result, the appeal was dismissed, and the Adjudicator's decision was affirmed.

[29] I consider Judge Haliburton's comments to be a very useful summary of the applicable principles to be considered in a case such as the present. He makes it clear that the adjudicator is making a discretionary decision in which he or she must consider and weigh a number of competing factors.

[30] The other case is ***Haines, Miller & Associates Inc. v. Foss***, 1996 CanLII 5528

(NS S.C.), a decision of Chief Justice Constance Glube (as she then was) of the Supreme Court of Nova Scotia.

[31] The background there was that Mr. Foss sued in Small Claims Court alleging that he had loaned $5,000 to Haines Miller. Haines Miller filed a defence and counterclaim pleading that the matter was beyond the jurisdiction of the Small Claims Court. It denied that there was a loan but rather asserted that the $5,000 was a deposit for the purchase of shares in the company which were forfeited by Mr. Foss by not completing. In its counterclaim, Haines Miller claimed a setoff for $5,600 and damages for breach of contract, breach of fiduciary duties, wrongful interference with economic relations and/or defamation as well as injunctive relief restraining Mr. Foss from dealing with clients and employees of Haines Miller.

[32] Haines Miller then commenced an action in the Supreme Court repeating the same allegations but in greater detail to which Mr. Foss filed a defence and counterclaim for damages for wrongful dismissal, special damages, and accounting for a bonus which he claimed was due and never paid.

[33] Haines Miller applied in the Supreme Court seeking a stay of the Small Claims Court action on the basis that it was outside of the jurisdiction of the Small Claims Court.

[34] In her decision, Chief Justice Glube states (similar to this present case), that the Small Claims Court would have had jurisdiction to hear Mr. Foss's claim but for the counterclaim. She quotes with apparent approval the statements of Judge Haliburton in the *Llewellyn* case, as above. In making her ruling, she states as follows (pp. 6-7, CanLII):

> In the present case, the total counterclaim of the applicant if proven would exceed the jurisdiction of $5,000.00. The applicant claims the facts on this issue, whether it was a loan or a deposit on the purchase of shares, are all tied up together with the allegations in the counterclaim against Mr. Foss. In my view, this is not the case. I find that unless and until the adjudicator finds
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> otherwise, that is, that it is necessary to determine the other issues in the counterclaim in order to deal with Mr. Foss' claim, then his claim and the defence raised is a matter which can be decided in the Small Claims Court. I acknowledge the claim and counterclaim by Haines, Miller are not frivolous, but at this time, the issue of alleged breach of duties and the other allegations regarding Mr. Foss' employment, are a separate matter.
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> The applicant also argues this will result in duplication of proceedings and would increase the costs. It is submitted the presumption is against severance. (Bank of Montreal v. Brett and Taylor et al. (1991), 111 N.S.R. (2d) 335.) Although there is an argument to be made that the delay and prejudice to Mr. Foss could be compensated for by interest and costs, there is, in my opinion, no real prejudice to the company by severing the counterclaim. It can still pursue its counterclaim as at this time I see no possibility of there being inconsistent findings. I am not satisfied any inconvenience or cost to Haines, Miller outweighs the currently existing cost and inconvenience to Mr. Foss.
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> I do not accept that the one issue in the Small Claims Court action requires discoveries, experts or an audit. These all relate to the counterclaim and to the action by Haines, Miller. The case is simply not that complex, although I do agree if possible, there should be an exchange of documents on the one issue, the $5,000.00. Is it a loan or a deposit for the purchase of shares.
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> The purpose of the Small Claims Court is to have matters adjudicated informally and inexpensively. Mr. Foss has waited a considerable length of time for that to happen. It would have been far better, and, in my opinion, the appropriate forum, if the matter had proceeded in the first instance, as the parties attempted to do in Small Claims Court with

> the adjudicator determining jurisdiction. That did not occur. I suggest this application has concluded that issue and as counsel for Mr. Foss suggests, the hearing in Small Claims Court should proceed and should be concluded, unless the adjudicator determines at some point the matter exceeds his or her jurisdiction. If there is an error of law or breach of natural justice, either party can appeal the matter.
>
> It is my opinion, the best course in a case of this nature is to let the matter proceed in Small Claims Court where the matter was first started. Adding a counterclaim, which can still be dealt with on its own in Supreme Court, should not alter the Small Claims Court action unless so ruled upon when the evidence unfolds in Small Claims Court.
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> Considering all of the factors previously mentioned, I find the requirements for a stay have not been met in this case. The Small Claims Court action is severable from the counterclaim.

[35] Chief Justice Glube found that the only issue in common between the two proceedings was whether or not the $5,000 was a loan or a deposit for the purchase of shares. In her view the claim filed by Mr. Foss in the Small Claims Court was simply not that complex. Of significance was her view that the issue of whether the $5,000 was a loan or a deposit of the purchase would not have a direct connection with the other matters being dealt with in the Supreme Court. As well, she found that there was no real prejudice in severing the counterclaim.

[36] In the result, she severed the counterclaim and dismissed the application for a stay of the Small Claims action.

[37] As I read the ***Haines*** decision, it is an affirmation and an application of the principles set out by Judge Haliburton. I will repeat part of his comments, quoted

above:

> 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.

[38] In ***Haines***, this is exactly what Chief Justice did. In doing so, she also considered and found that the essential facts were not common to each and found that there was no possibility of inconsistent findings. She emphasized that the purpose of Small Claims Court is to have matters adjudicated informally and inexpensively. Interestingly, she left open the possibility that as the matter proceeded the adjudicator might determine that the matter exceeded his or her jurisdiction.

[39] In the ***Haines*** case the severed claims could have proceeded concurrently and the result of the severed claim in Supreme Court would not have had any direct effect on the standalone claim in the Small Claims Court and *vise versa*. Here, the same cannot be said. The finding on the principal issue of whether or not there was legal justification to not close the transaction would be a central issue in both courts.

[40] In my view, it is untenable that the Supreme Court action could potentially proceed along its route as an Application in Chambers at the same the Small Claims

Court was proceeding with the Supreme Court action either issuing its decision first on that issue or, in the more likely scenario, the Supreme Court in effect, waiting for the answer from Small Claims Court on whether or not the failure to close was justified. This latter scenario would seem to be mandated by the application of issue estoppel on that question.[2]

[41] On some level, this could be viewed as an abuse of process. Certainly, it would be viewed as an inefficient use of judicial resources.

[42] It is appropriate that I consider as well the relative equities, or to put it another way, whether granting some form of "pause" on the Small Claim proceeding works an undue injustice on either party.

[43] To be clear, I should point out here that I do not consider the counterclaim matters to be specious or frivolous or clearly intended only to exact a tactical advantage. On the face of it, the claims of the Defendant (Applicant in Supreme Court) appear legitimate. Of course, I am not in a position and it would not be appropriate in any event to attempt to gauge the relative merits of the cases and the likelihood of outcomes.

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[2] See *Big Wheels Transport v. Hansen et al.*, 1990 NSSC 135 (CanLII).

[44] In considering the relative interests, and at the risk of over-analyzing this, I will set out the several potential or hypothetical scenarios that may result depending on how this application is resolved.

a) First, if the Small Claims Court proceeding is "paused" and the entire matter proceeds in the Supreme Court, then either:

    1) Jockel is successful in its claim for the return of the deposit, or

    2) Provincewide is successful on its claim to retain the deposit and for damages for the difference in the sales price.

b) If the counterclaim is severed and the Small Claims court action for the return of the deposit proceeds and the Supreme Court action for the other damages also proceeds:

    1) Jockel is successful and receives its full claim of $11,711 or some part thereof. In this scenario, barring an appeal, Provincewide would likely discontinue its Supreme Court action since the primary issue would have already been determined adverse to its position and issue estoppel would presumably apply.[3]

    2) Provincewide is successful in Small Claims Court and retains the deposit amount.

    3) Provincewide would continue with the Supreme Court matter, and the result would be either:

        i. Provincewide is successful in Supreme Court, relying on the decision in Small Claims Court on the principal issue and being able to prove all of its additional damages.

        ii. Provincewide is unsuccessful in Supreme Court or

[3] See *Big Wheels* case, *supra*

> partially successful as to the claimed amount, possibly as a result of mitigation issues or other issues.

[45] As will be seen, in (a) there is one proceeding only. In (b), there is the very real potential for two separate proceedings. This increases expense to everyone. This weighs in favor of pausing the Small Claims proceeding.

[46] Against that, there are the interests of the Claimant. There is some prejudice to Jockel in that presumably it will take longer to get to a decision and it will incur greater actual solicitor/client legal costs. This latter point will be somewhat countered by the fact that it will receive party-party costs in the Supreme Court if it is successful.

[47] It is recognized that a claimant normally has a right to the forum of its choosing. However, it is not an absolute right and must be considered in the matrix of considerations that inform this discretionary decision.

[48] In my opinion, upon consideration of all of the relevant factors, this matter ought to be heard in one proceeding, where all of the issues can be considered. The main issue to be considered – whether or not there was valid objection to title – is a central and necessary issue to all of the matters in dispute here. One decision maker should make that decision. That requires the matter to be heard in Supreme Court.

Does the Small Claims Court have the power to issue a stay and is a stay of this proceeding the appropriate legal remedial "tool" ?

[49] The Defendant submits that the Small Claims Court has jurisdiction to deal with the motion and may issue a stay on common law grounds and Section 9(a) of the *Small Claims Court Act*. At the hearing before me, it was submitted that there was no serious issue of jurisdiction to grant a stay.

[50] In its written brief, the Claimant disagrees that Section 9(a) confers jurisdiction to stay a proceeding and also disagrees that the common law confers such a jurisdiction. Counsel for the Claimant reviews several cases from this Court and the Supreme Court in support of its position that the Small Claims Court has no jurisdiction to issue a stay except if it is under Section 15.

[51] I should note here that both parties agree that s. 15 has no application to the facts here. I take the law as settled that it would only apply if the Supreme Court action had been filed before the Small Claims action, and that is not the case here (see ***American Home Assurance Co. v. Brett Pontiac Buick GMC Ltd.***, 1991 CanLII 4378 (NCSC) and ***Haines, Miller and Associates Inc. v. Foss,*** 1996 CanLII 5416 (NS SC)).

[52] While s. 15 has no direct application here, it is of interest to note that counsel

for the Claimant appears to take the position that this Court would only have jurisdiction to issue a stay if the matter fell under s. 15. I do not comprehend the logic of such a distinction. If the Court can issue a stay of proceedings for a matter that is outside of its jurisdiction by virtue of s. 15, why can it not equally issue a stay of proceedings for a matter that is outside of its jurisdiction by virtue of s. 9 or s. 10?

[53] I note that Section 15 itself does not contain the word "stay". With all due respect, to recognize the power to issue a stay in one type of case where there is a lack of jurisdiction but not another type where there is a lack of jurisdiction defies logic.

[54] Returning to the Claimant's principal submission, I note that counsel refers to the case of ***Doucette Estate v. Muise***, 2015 NSSM 8. This is a very carefully reasoned and comprehensive written decision which the Claimant places great reliance on. Given that I diverge from its conclusion, it is appropriate that I provide my reasons for doing so.

[55] In ***Doucette Estate*** the Claimant had sued the Defendant in Small Claims Court alleging that the Defendant had removed a cash box belonging to the Claimant containing $20,000. A defence was filed denying that allegation. Subsequent to the filing of the Small Claims Court action, Mr. Muise, as Plaintiff, filed a Supreme

Court action for defamation and malicious prosecution against the Estate of Edward Doucette.

[56] The Plaintiff (Defendant in the Small Claims case) then filed an application in the Supreme Court seeking a joinder of the two proceedings. Justice Wright denied the application, ruling that he had no jurisdiction to join two actions in two different courts. In delivering his ruling, Justice Wright made it clear that it would be desirable for the two matters to be heard together since they shared the common fact issue of whether or not the cash box was wrongfully taken.

[57] The Defendant then made an application in Small Claims Court, seeking a stay of the Small Claims action. In his decision, the Adjudicator Nickerson concluded that he did not have jurisdiction to grant a stay and denied the application.

[58] As I read the decision, Adjudicator Nickerson's search for jurisdiction to issue a stay was based on the reasoning of Justice Warner in ***Kemp v. Prescesky***, 2006 NSSC 122 (CanLII). Adjudicator Nickerson states (para 30-31):

> [30]…My reading of the whole of Justice Warner's decision is that he was not invoking any inherent jurisdiction of the Supreme Court but rather interpreting and applying Section 2 of the *Small Claims Court Act.* Thus I take it from Justice Warner's analysis that, where the case is clear, an Adjudicator can act to ensure a fair process even though the Act does not address the point specifically. I infer from Justice Warner's decision that he would sanction the application of a remedy by the Small Claims Court on a finding that the principles of natural justice had been

> violated. I see no reason why this would not include the power to grant a stay.
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> [31] I therefore conclude that if I find that the principles of natural justice are violated by the lack of disclosure and discovery and/or by the fact that res judicata (or issue estoppel) may apply, I do have the jurisdiction to remedy that violation.

[59] After a careful review, he finds that there was no denial of natural justice by the lack of disclosure and discoveries, and no denial of natural justice because of the potential for the application of issue estoppel. Therefore, it followed that there was no jurisdiction to issue a stay.

[60] For the reasons that follow, I would respectfully depart from a finding that the Small Claims Court lacks the jurisdiction to issue a stay in cases such as the present, that is, where there are two proceedings between the same parties with one in the Small Claims Court and another in the jurisdiction of the Supreme Court for monetary or subject matter reasons, with closely connected factual and legal issues.

[61] It has been said many times in this Court and in the Nova Scotia Supreme Court that, being a creature of statute, the Small Claims Court has only the powers and jurisdiction that are set out in its enabling statute (for example, see paras. 19 and 24 of the *Doucette* decision). And, unlike a superior court, such as the Nova Scotia Supreme Court, a statutory court or tribunal has no inherent jurisdiction.

[62] While these general statements cannot be denied, they do not provide a

complete story. There is a significant body of law that holds that a statutory court or tribunal has by implication, all powers that are reasonably necessary to accomplish its mandate.

[63] This was clearly articulated in the Supreme of Canada case of ***R. v. 974649 Ontario Inc. ("Dunedin")***, 2001 SCC 81 (CanLII), where Chief Justice McLachlin made the following comments for a unanimous Court:

> 70. It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate: Halsbury's Laws of England (4th ed. 1995), vol. 44(1), at para. 1335. In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission),* 1989 CanLII 67 (SCC), [1989] 1 S.C.R. 1722.
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> 71. Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose: *National Energy Board Act (Can.) (Re)*, 1986 CanLII 4033 (FCA), [1986] 3 F.C. 275 (C.A.). While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose: *Interprovincial Pipe Line Ltd. v. National Energy Board*, 1977 CanLII 1721 (FCA), [1978] 1 F.C. 601 (C.A.); *Bell Canada*, *supra*; Macaulay and Sprague, *supra*, vol. 4, at p. 29-2. This emphasis on the function of a court or tribunal, in discerning the powers with which the legislature impliedly endowed it, accords with the functional and structural approach to the *Mills* test set out above.

[64] In the Nova Scotia case of ***R. v. Reeve***, 2018 NSPC 30 (CanLII), Judge Tax states:

> [62] A statutory court, like the Provincial Court of Nova Scotia does not have an inherent jurisdiction and as such, it derives its jurisdiction from statute. It is well-established that a statutory court or tribunal enjoys both the powers that are expressly conferred upon it and, by implication, any powers that are reasonably necessary to accomplish its mandate: **R. v. 974649 Ontario Inc., carrying on business as Dunedin Construction**, 2001 SCC 81 at para. 70.
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> [63] In addition, there is also jurisprudence that has recognized that statutory courts possess certain implied powers as courts of law. In addition, powers may be implied in the context of the particular statutory schemes as well. In **R. v. Fercan Developments Inc.,** 2016 ONCA 260, which dealt with the issue of whether the Ontario Court of Justice had the power to order costs against the Crown, Laforme JA noted at para. 45 that they had recently considered the "doctrine of jurisdiction by necessarily implication" and that a power or authority may be implied.
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> [64] Whether a statutory court is vested with the power to grant a particular remedy depends on the interpretation of its enabling legislation: see **Atco Gas and Pipelines Ltd v. Alberta (Energy and Utilities Board)**, 2000 SCC 4, at para. 36. When ascertaining legislative intent, a court is to keep in mind that such intention is not frozen in time. Rather, a court must approach the task so as to promote the purpose of the legislation and render it capable of responding to changing circumstances: see **Dunedin Construction** at para. 38. Furthermore, as in any other statutory interpretation exercise, courts need to consider the legislative context when interpreting the legislation at issue: see **Atco Gas and Pipelines Ltd**. at para. 49.

[65] In this Court, Adjudicator Barnett reviewed the law supporting the issuance of a stay in the case of ***Davison v. Canadian Artists Syndicate*** 2011 NSSM 28 and concluded that he had jurisdiction to issue a stay (although ultimately, he did not find that the merits supported issuing a stay in that case). The reasoning is persuasive and I quote at some length from the decision as follows (paras 31-40):

> [31] In my view, the answer lies in the inherent jurisdiction of this Court to control its own process or perhaps better identified as the implied jurisdiction of this Court as opposed to "inherent jurisdiction," a phrase also used in referring to the powers of a superior court: *R. v. Gunn*, 2003 ABQB 314 (CanLII), [2003] A.J. No. 467 (Q.B.). The Small Claims Court is a

statutory or inferior court.

[32] Chief Justice Samuel Freedman cited a definition of inherent jurisdiction in the sense that I mean it here (i.e. implied jurisdiction) in *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.*, 1971 CanLII 960 (MB CA), [1971] M.J. No. 38 (C.A.) at para. 16:

> "In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[33] In an informative article discussing the inherent jurisdiction of inferior courts (S. Sugunasiri, "The Inherent Jurisdiction of Inferior Courts", (1990 – 1991) 12 *Adv. Q.* 215), the following is noted at page 216:

> [39] "Although the inherent jurisdiction of a court was probably most significant in a time when rules of court were not as comprehensive and as general, or indeed as generous, as they are today, this power cannot now be discounted, for it may still be exercised in respect of matters that are already regulated by statute or by rule of court. It should not be forgotten that many inferior courts in Canada, especially those presided over by provincially appointed judges or magistrates, have very simple and superficial rules of practice and procedure, often doing little more than prescribing forms, and some have no rules at all. In any given case, therefore, a court may proceed under any one or more of the three sets of powers: statute, rule of court or inherent power."

[34] The author of the aforementioned article provides a list of areas of action by courts that have been held (up to the time of the writing of the article) to fall within the proper exercise of implied jurisdiction including, among many others, the ability to adjourn proceedings: see pages 219 to 223. The staying of an execution order is not on the list.

[35] There is a recent decision from the Ontario Court of Justice, however, which directly addresses the question before me: *Figliola v. Ontario (Director, Family Responsibility Office)*, [2009] O.J. No. 2538 (Ont. C.J.). The Ontario Court of Justice as it was called at the time, now renamed under Ontario's *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended, was a creature of statute like the Small Claims Court of Nova Scotia. After considering relevant authorities addressing the scope of inherent jurisdiction of inferior courts, Justice Zisman held as follows at para. 31:

> [31] "The enforcement of an order in my view is a matter of **procedural** law, rather than substantive law and therefore, it is an area over which a court may properly

exercise a measure of inherent jurisdiction."

[36] I also note the decision in *Re Henning and Weber*, 1984 CanLII 1782 (ON CJ), [1984] O.J. No. 3117(Ont. Prov. Ct., Fam. Div.) which holds that the exercise of an inferior court's discretion may be guided with due regard to equitable principles.

[37] To use wording that is sometimes used in this context, I am satisfied that addressing a request for relief from an execution order issued by this Court is necessarily incidental or ancillary to this Court's jurisdiction as conferred by statute. It is reasonable to conclude that mechanisms of enforcement can and should be dealt with in the Small Claims Court in respect of Orders of the Small Claims Court (exclusive of *ex facie* contempt issues).

[38] I also believe that the interest of litigants in the Small Claims Court, many of whom are self- represented (as they are in the case before me) in accessing an informal and inexpensive court process applies not only to the adjudication of issues but also in the enforcement of Small Claims Court Orders that flow from that adjudication process. The prospect of initiating proceedings in the Supreme Court of Nova Scotia in respect of all enforcement issues that may arise from Small Claims Court Orders may be overwhelmingly daunting to self-represented litigants even though there may be valid issues that cannot be resolved between judgment creditors and debtors without the assistance of a court.

[39] That being said, the exercise of this Court's discretion with respect to its implied jurisdiction should be carried out in a very cautious manner (*Cocker v. Tempest* (1841), 151 E.R. 864 at 865 (Exch.)) and consistent with principles applied in the Supreme Court of Nova Scotia in similar situations.

[40] In summary, I believe that this Court does have jurisdiction to consider Ms. Davison's request for relief from the Small Claims Court Execution Order.

[66] To again refer to the comments of Chief Justice McLachlin in the ***Dunedin*** case quoted previously, I find that the power to issue stays is reasonably necessary for the Small Claims Court to accomplish its mandate. Further, I would find that the power to issue a stay is required a matter of "practical necessity" for the Court to accomplish its purpose and while arguably not absolutely necessary, a power to issue a stay is "necessary to effectively and efficiently carry out its purpose."

[67] For example, I earlier made mention that not infrequently matters come before the Small Claims Court which, for one reason or another, are outside of the Court's jurisdiction. Most typically, such claims will be dismissed[4].

[68] It may well be argued that where a claim is outside of the Court's jurisdiction, the Court can and should, in all such cases, dismiss such claims. While that might be the appropriate response in many cases, it will not be appropriate in all cases and certainly will not in all cases accord with established principles of law and natural justice.

[69] In many scenarios, such as the one presently before the Court, a dismissal of a claim is too extreme a remedy. Significantly, it is not reversible by the Court. That may have implications for limitations issues.

[70] Sometimes, cases can be reactivated by consent or upon motion to the Court, and a stay, lifted. For example, this could happen if, for whatever reason, a party with a claim that exceeds $25,000 changes his or her position about whether to abandon the portion of the claim that exceeds the $25,000.

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[4] It may be noted that there is no explicit provision in the Act giving the Court the power to dismiss for want of jurisdiction. The only instance where the word "dismiss" occurs in the Act is in s. 29(1) where it used in the context of the contents of an order that an adjudicator may make following a hearing. A dismissal for want of jurisdiction would not follow a hearing, at least not the type of hearing contemplated by the Act. Such a dismissal would therefore not be within the four corners of s. 29. If that is correct, and if there is a power to dismiss for want of jurisdiction, it must be by way of implied jurisdiction.

[71] A stay provides more flexibility to the process. It is a necessary device to achieve the Court's object to "adjudicate informally and inexpensively and in accordance with established principles of law and natural justice" (s. 2 of the *Act*).

[72] Often, claims (or counterclaims) will come before this Court which are outside of the $25,000 monetary limit but only marginally outside. Very often, the parties in those cases will indicate that they are abandoning the balance of the claim in order to bring it within the jurisdiction of the Court. Such is clearly mandated by Section 30 of the *Act* quoted above. A stay facilitates that type of process.

[73] Parties will do this because of the economics and timeliness of proceeding in the Small Claims Court as compared to the Supreme Court. After all, the main and significant mandate of the Court is to constitute a court with a limited monetary jurisdiction where claims are adjudicated informally and inexpensively.

[74] As stated above, the ability to issue a stay fosters and enhances the Court's mandate as set out in Section 2.

[75] The Small Claims Court exercises other powers in carrying out its mandate other than those that are set out in the *Act*. It adjourns matters, sometimes without day. It hears and rules on objections on evidentiary concerns. It conducts case

management hearings or organizational hearings. It sets timelines for the filing of briefs or, in the current era of pandemic, for exchange of documents. As here, it hears motions. All of these things are done without any explicit power set out in the *Act*.

[76] It would be recognized that these powers are authorized by way of implied jurisdiction and are necessary to "*effectively and efficiently carry out its purpose".*

[77] I would find therefore that the Small Claims Court has power to issue a stay.

[78] Further, I further find that a stay is the appropriate remedy in this case.

Summary

[79] In the reasons for this decision, I have considered the various factors that favour a consolidated hearing to decide both the claim and the counter claim as well as those that go the other way, and suggest a severing of the two claims. In my discretion, I have concluded that, based on the facts and circumstances here, this matter should be heard as a consolidated action which, necessarily means in the Supreme Court rather than the Small Claims Court.

[80] With respect to the appropriate remedy, I have found that the Small Claims Court has the power to issue a stay of its own proceeding. In my view, this Court

must be able to issue a stay in order to "*effectively and efficiently carry out its purpose"* (***Dunedin***, *supra*). Here I would specifically highlight the purpose of the *Small Claims Court Act* referenced in Section 2.

[81] I further find that a stay is the appropriate remedy in this case.

[82] As a final comment, I take note of the very recent decision in the case of ***Birch v. MacQuarrie,*** 2022 NSSM 2, which came to my attention as this decision was nearly completed. I am reinforced in my conclusion from that case as, on almost identical facts, Adjudicator Richardson came to the same conclusion and granted a stay of the Small Claims proceeding.

[83] ORDER

> **It is hereby ordered that this proceeding, including the claim, defence and counterclaim, is hereby stayed.**
>
> **There shall be no costs in this Court.**

DATED at Halifax, Nova Scotia, this 17th day of January, 2022.

MICHAEL J. O'HARA
ADJUDICATOR