PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. 10187

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

PAUL MAJOR and BERNARD GILLIS

Plaintiffs

- and -

LOUIS GANNON AND HURRICANE COOPERATIVE HOUSING LIMITED, a body corporate

Defendants

- and -

DONALD GREEN

Third Party

Peter Landry, Esq., for the defendants-appellant.
David F. Farwell, Esq., for the plaintiffs-respondent.

1976, January 7, O Hearn, J.C.C:- This is an appeal under *Civil Procedure Rule* 63.38 from the taxation of the defendant's bill of costs on a counterclaim by the taxing master at Halifax, G.William MacDougall. The learned taxing master with some doubt accepted the plaintiff's contention that costs on a counterclaim are limited by *Mechanics Lien Act*, R.S.N.S. 1967 c.178, s.40(2) which reads as follows:

> (2) Where the costs are awarded against the plaintiff or other persons claiming the lien, such costs shall not exceed an amount in the aggregate equal to twenty-five percent of the claims of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the judge may direct.

The appellent's judgment on the counterclaim was for $987.00 and the items allowed by the learned taxing master as I read the bill of costs total $1,278.75, but he applied the

statutory provision with respect to costs to reduce this to $246.75 plus disbursements of $279.25. That is, he applied the 25% to the defendant's counterclaim amount rather than to the amount of the plaintiff's claim (which is what appears to be contemplated by s.40(2)). The justification for doing so could be either under s.40(1) which provides 'the costs of the action under this Act awarded to the plaintiffs and successful lienholders, shall not exceed in the aggregate amount equal to twenty-five percent of the amount of the judgment, besides actual disbursements,...', or it might be conceived of as an equitable application of the taxing master's discretion in view of the statutory limitation upon the plaintiff's recovery. The plaintiff recovered judgment for $450.00 and $112.50 costs, plus disbursements.

Counsel referred to the Ontario legislation on costs in mechanics lien cases. It is similar to ours but it contains a specific reference to counterclaims, which ours does not, and exempts costs on counterclaims from the 25% limit. This is a result of an amendment to the Ontario Act by 1939 Stat. Ont. c.47, which also enacted jurisdiction under Mechanics' Lien Act to deal with counterclaims. There having been some doubt about this in Ontario although the weight of the decisions was in favour of such a jurisdiction: see *Trynor Construction Company Limited v. Industrial Estates Limited, et al.*, 1970, August 28 C.C.37848 (unreported) where I discussed the Ontario jurisprudence and concluded that under our own case law and statute, the county court has jurisdiction to deal with counterclaims that are fairly referable to the lien claim and are necessary to be disposed of in order to dispose of the matters between the parties. This was followed by His Honour Judge McLellan in *Maritime Automatic Sprinkler Limited v. The Governors of Acadia University et al.* 1971, January 26, C.C.4 (Kings) 14553 (also unreported).

In Ontario the legislature has frequently confirmed the conclusions of the courts by enactment such as 1939 Stat. Ont. 347, and I don't think it gives any great help in deciding the meaning of legislation such as ours which has not been so amended. The solution of the problem of costs in Ontario is a legislative solution, not a judicial one and it is not easy to ascertain the policy behind it. On the other hand, there is a firm line of judicial opinion in Ontario favouring the awarding of costs to a defendant or counter claimant on the scale applicable in the court in which the action is brought, although discretion is preserved and occasionally other factors are given precedence: see *Foster v. Viegel* (1889), 13 P.R. 133; *Frank v. Rowlandson* (1920), 48 O.L.R. 464, 57 D.L.R. 591, C.A.; *Gordon v. Gowling* (1913), 25 O.W.R. 276, 5 O.W.N. 269, 14 D.L.R. 517, C.A.; *Modern Cloak Company v. Bruce Mfg. Company*, 53 O.L.R. 366, [1924] 1 D.L.R. 434, C.A.; *Coulter v. Sweet* (1903), 2 O.W.R. 1; *Stark v. Batcherlor*, 63 O.L.R. 135, [1928] 4 D.L.R. 815, C.A.

I find it difficult to apply s.40(1) in terms so as to justify the taxing master's conclusion, because the costs of the counterclaimant do not appear to be 'The costs of the action under this Act awarded to the plaintiffs...'. I think this must be so interpreted despite *Civil Procedure Rule* 16.03, which provides that a counterclaim is a separate proceeding and despite C.P.R. Form 16.02A, which indicates that the defendant is to be referred to as the 'plaintiff (counterclaim)' in the title and the body of the counterclaim documents.

Whether this is so or not however (and I am not all that positive about it) it seems to me that the taxing master exercised his discretion in this case on proper equitable principles, taking into account the Ontario case law, above mentioned, the respect of judgment recoveries on the claim and counterclaim and the limitation imposed upon the costs recoverable by the

plaintiff. I accordingly dismiss the appeal and award the costs of the application to the plaintiff.

N. R. Anderson, J.C.C.

for P.J.T. O Hearn
Judge of the County Court
of District Number One