NOVA SCOTIA COURT OF APPEAL
Citation: ***Van de Wiel v. Werry***, 2005 NSCA 131

Date: 20051019
Docket: CA 235401
Registry: Halifax

Between:

Anthony J. van de Wiel & Deborah van de Wiel

Appellants

v.

Mervin Werry & Marguerite Werry,
Frank Benjamin & Carol Benjamin,
Sell-Tech Coastal Realty

Respondents

Judge(s): Oland, Hamilton & Fichaud, JJ.A.

Appeal Heard: September 20, 2005, in Halifax, Nova Scotia

Revised Decision: The text of the original cover page has been corrected incorporating the text of the erratum (released October 27, 2005).

Held: Appeal dismissed, with costs payable by the van de Wiels as follows: $1,000 plus disbursements as taxed or agreed to Mr. & Mrs. Werry collectively and $1,000 plus disbursements as taxed or agreed to Mr. & Mrs. Benjamin and Sell-Tech Coastal Realty collectively, as per reasons for judgment of Hamilton, J.A.; Oland and Fichaud, JJ.A. concurring.

Counsel: Bradford G. Yuill, for the Appellants
Alden Blaikie, for the Respondents, Werry
Darlene Willcott, for the Respondents,
Benjamin & Sun-Tech Coastal Realty

Reasons for judgment:

[1] The appellants (originally defendants), Anthony J. and Deborah van de Wiel, appeal the October 7, 2004 decisions and the October 22 and 27, 2004 orders of Associate Chief Justice J. Michael MacDonald of the Supreme Court of Nova Scotia (as he then was). The chambers judge struck the van de Wiels' defence to an action commenced against them by the respondents (originally plaintiffs), Mervin and Marguerite Werry, pursuant to **Civil Procedure Rule** 18.15 and ordered summary judgment in favour of the Werrys. He also granted summary judgment pursuant to **Rule** 13.01(a) to the respondents (originally third parties), Frank and Carol Benjamin and Sell-Tech Coastal Realty (collectively hereinafter called the "Benjamins"), with respect to the third party action commenced against them by the van de Wiels.

[2] The van de Wiels also appeal the November 5, 2004 decision of Hall, J. assessing damages relating to this action. There was almost no argument with respect to Hall, J.'s decision; the van de Wiels appearing to be content to have it set aside if the chambers judge's decision is overturned and remain if it is upheld.

[3] While for the most part the van de Wiels represented themselves at the trial level, they were represented by counsel on appeal.

FACTS

[4] The Werrys bought a house near Pugwash, Nova Scotia from the van de Wiels in the summer of 2000. The Benjamins were the real estate agents involved in the sale.

[5] The Werrys commenced an action against the van de Wiels on August 1, 2001, alleging latent deficiencies in the house of which the van de Wiels were aware and fraudulent or negligent misrepresentations by the van de Wiels to the Werrys about the condition of the house to induce the Werrys to purchase it.

[6] A rough chronology of the events that followed the commencement of the action is as follows:

- September 24, 2001 - order for substituted service on the van de Wiels granted by Goodfellow, J. relying on the process server's affidavit

setting out the basis of his belief that the van de Wiels were evading service.

- October 15, 2001 - the van de Wiels filed with the court their explanation of the events leading to the application for substituted service.

- October 19, 2001 - defence and counterclaim filed by the van de Wiels.

- October 19, 2001 - third party action commenced by the van de Wiels against the Benjamins alleging that the Benjamins did not disclose to them or to the Werrys any defects or deficiencies in the house, which defects and deficiencies they denied existed; that the Werrys induced the Benjamins to enter into a Limited Dual Agency agreement whereby the Benjamins were acting for both parties to the house transaction and that the Benjamins were negligent in the performance of their professional duties. They sought contribution and indemnity from the Benjamins if the van de Wiels were held liable to the Werrys.

- October 26, 2001 - third party defence filed by the Benjamins.

- November 7, 2001 - defence to counterclaim filed by the Werrys.

- November 23, 2001 - **the van de Wiels were served with notice of examination for discovery to be held on December 13, 2001**.

- December 11, 2001 - **the van de Wiels filed with the court a reply to the notice of examination for discovery indicating they could not attend for discovery on December 13, 2001** or “be involved in any matters pertaining to this legal issue due to health problems until further notice." and attaching December 10 and 11, 2001 letters from their psychiatrist. Their psychiatrist indicated Mr. van de Wiel could not attend discoveries because he “is currently stressed beyond his coping capacities and has great fear of negative emotional repercussions if he is to appear in court for a discovery session on December 13, 2001." The psychiatrist indicated that Mrs. van de Wiel

could not attend due to “serious psychiatric disorders” and that she could not appear at the discovery “without serious consequences to her mental health.” The van de Wiels also questioned the procedure followed by the Werrys’ counsel, raised questions about the scope of the discoveries, discussed certain details of the claim against them and returned the witness fees.

- February 5, 2002 - **the Werrys' counsel wrote to the van de Wiels trying to schedule discoveries and suggesting they may wish to have a litigation guardian appointed** if they were not able “to deal with these proceedings” themselves.

- February 8, 2002 - **the van de Wiels wrote to the Werrys' counsel emphasizing that it was their doctors who had previously indicated the van de Wiels could not participate in discoveries** because of the "dramatic deterioration to our physical, mental and emotional states due to this action" and also stating that they had no money for a lawyer.

- February 12, 2002 - **the Benjamins' counsel wrote to the van de Wiels** indicating Mr. Benjamin would be available for discovery by the Werrys and the van de Wiels on February 20, 2002 and asked the van de Wiels to be in attendance, indicating they could not wait indefinitely to discover the van de Wiels and **asking them when they would be available to be discovered.**

- February 15, 2002 - **the van de Wiels sent a letter to the Benjamins' counsel indicating they were not available for discovery** because in their psychiatrist’s opinion they were not “‘competent’ nor ‘fit’ to participate in any proceedings in this legal matter at this time due to the drastic deterioration of our physical, mental, and emotional states brought on by the [Werrys]". **They also indicated they could not “provide an exact date when [they could] be available to attend for discovery.”**

- February 20, 2002 - Mr. Benjamin examined on behalf of the Werrys.

- February 20, 2002 - **counsel for the Werrys and the Benjamins requested a case management telephone conference with a judge** on the basis the van de Wiels were unrepresented and indicated they did not intend to hire counsel, communications with them had been difficult and **the van de Wiels had indicated that they** were "emotionally unwell" and could not deal with the law suit and **were unwilling to consider appointing a litigation guardian.**

- March 20, 2002 - **Mrs. van de Wiel advised the court they would not be participating in the case management telephone conference involving the court**.

- April 8, 2002 - the van de Wiels filed a letter/affidavit dated March 27, 2002 with the court stating that they had cooperated in the law suit, that they could not afford legal counsel yet but if their circumstances changed they would hire one, that Mr. van de Wiel was on blood pressure medication for his hypertension and was under doctors' care and that in their doctors' opinions they were not "competent" or "fit" to deal nor cope with this very serious legal matter.

- April 8, 2002 - telephone case management conference with Scanlan, J. in which the van de Wiels did not participate.

- April 9, 2002 - case management report letter from Scanlan, J. which **suggested the Werrys and the Benjamins may wish to apply to court to have a litigation guardian appointed for the van de Wiels** so that the matter could proceed in a timely fashion if the van de Wiels were not mentally fit, noting the additional costs to the van de Wiels that would entail and encouraging all parties to cooperate.

- April 25, 2002 - **letter to the Werrys' counsel from the van de Wiels indicating** they were now going to seek punitive, special and general damages and damages for duress because of his suggestion to Scanlan, J. that they were not cooperating. They also alleged breaches of "**The Charter of Rights**" against physical and mental disabled persons; discrimination; intimidation; harassment; threats; the use of

"strong-hold" tactics because [they did not and could not] afford a lawyer and that [they were] also being discriminated against because of [their] "disabilities." The van de Wiels also indicated they had contacted the Ontario police, the local police and Revenue Canada about the Werrys, suggested they should purchase reports from the van de Wiels' doctors and that **they should stop suggesting the need for litigation guardians, applications and discoveries.**

- May 13, 2002 - **letter from the Werrys' counsel to the van de Wiels suggesting the appointment of a litigation guardian and indicating that such an application would be made by them on June 20, 2002.**

- May 16, 2002 - **letter from the Benjamins' counsel to the van de Wiels re appointment of litigation guardian**.

- May 28, 2002 - **letter from the van de Wiels' newly engaged lawyer to counsel for the Werrys and the Benjamins, advising that the van de Wiels would contest the Werrys' June 20, 2002 application to have a litigation guardian appointed for them** because such an application violated their human rights and their right to be heard, especially on an action that would be largely decided on credibility. He suggested the Werrys were trying to take advantage of the van de Wiels' vulnerability as disabled pensioners. He indicated the van de Wiels could not attend court for the application on June 20, 2002 because of their health and offered to settle the action due to the van de Wiels' lack of health and wealth.

- June 14, 2002 - the Werrys' counsel wrote to the van de Wiels new counsel.

- June 19, 2002 - letter from the van de Wiels to the Werrys' counsel indicating they only consulted the lawyer who wrote the May 28, 2002 letter from time to time and that he did not represent them for the law suit because they did not have enough money to hire a lawyer. They emphasized it was their doctors who said they were too ill to appear at hearings, took issue with the Werrys' knowledge of another law suit the van de Wiels were then involved with and discussed the

efforts Mr. van de Wiel had made to settle the action, suggesting the Benjamins may wish to join in settlement efforts.

- May 22, 2003 - **dates suggested by the Werrys' counsel for discoveries**.

- June 3, 2003 - **notice of examination for discovery of the van de Wiels to be held June 11, 2003.** It is not clear if this notice was ever served on the van de Wiels.

- August 21, 2003 - **letter from the Benjamins' counsel to the van de Wiels' sometime counsel and to the van de Wiels personally trying to schedule discoveries for September 25, 2003.**

- August 25, 2003 - letter from the van de Wiels' sometime counsel indicating he had not been retained for the law suit.

- September 2, 2003 - letter from the Benjamins' counsel to the Werrys' counsel, copied to the van de Wiels, **rescheduling discoveries to October 15, 2003.**

- September 3, 2003 - **Letter to the Benjamins' counsel from the van de Wiels' sometime counsel indicating the van de Wiels medical disabilities were preventing them from "attending to these legal proceedings"** and forwarding a psychiatrist's letter of April 30, 2003 in which Mrs. van de Wiels' general practitioner concurred on May 14th, 2003. The psychiatrist indicated the van de Wiels were not "emotionally capable of participating productively in the [proposed discoveries]." Mrs. van de Wiel was "significantly depressed, . . . destructive, volatile, and manifesting significant deficits in coping strategies." Mr. van de Wiel was "showing signs of extreme emotional fragility" and had "tendencies toward emotional decompensation."

- December 2, 2003 - **ex parte application by the Werrys' counsel**, ex parte because he did not know how to contact the van de Wiels, **seeking directions on how to manage this case because of difficulties in discovering the van de Wiels or having them**

respond to Interrogatories. The affidavit filed in connection with this application referred to their emotional and physical illness but also noted the van de Wiels' actions with respect to other matters since this action was commenced including that they had filed various documents and engaged a lawyer periodically to represent themselves in connection with this law suit; Mrs. van de Wiel had settled another law suit for a personal injury claim, written a book and been interviewed about it and Mr. van de Wiel had met with Mr. Werry to discuss the action.

- December 4, 2003 - **direction from Moir, J. to the Werrys to file and personally serve the van de Wiels with notice of examination for discovery, commenting that if the van de Wiels did not appear, an application to strike their defence may be made.**

- April 27, 2004 - **notice of examination for discovery of the van de Wiels filed with a return date of May 19, 2004**.

- May 2, 2004 - **the van de Wiels were served with notice of examination for discovery**.

- May 12, 2004 - **the van de Wiels wrote to the Werrys' counsel enclosing a note from Mrs. van de Wiel's general practitioner indicating the van de Wiels could not attend the May 19, 2004 discovery because of illness.**

- May 31, 2004 - the van de Wiels commenced an action against the Werrys' counsel personally for harassment in connection with this law suit.

- September 20, 2004 - interlocutory application by the Werrys to strike the van de Wiels' defence and enter summary judgment in the main action on the basis there is no arguable issue and that the van de Wiels were unwilling to participate in the law suit in any meaningful way, returnable September 23, 2004.

- September 21, 2004 - the van de Wiels filed a document with the court indicating they knew of the court hearing on the 23rd and asked the judge to instead dismiss the action against them “forever and eternity”. . . “because there is no arguable issue to be tried.” They referred to the loss of their home to fire and their “significant” health problems, indicated they personally sued the Werrys' counsel because of “his ongoing intimidation, bullying, threats, and stalking,” and again emphasized it was their doctors who were saying they were ill because it was true. They addressed their use of a lawyer from time to time in this law suit and Mrs. van de Wiel’s writing. They indicated they could not discuss the settlement of Mrs. van de Wiel’s personal injury law suit and indicated they had made efforts to settle this action. They outlined the number of visits the Werrys made to the house before they bought it, the reduced price they paid for it, the use of the same lawyer, and other disputes that arose out of the sale of the house.

- September 22, 2004 - affidavit of process server outlining what he considered to be misinformation given to him by Mr. van de Wiel when he served him with the application. When Mr. van de Wiel opened the door he told the process server that he was not Mr. van de Wiel but Jack Day and that the van de Wiels were in Florida. The process server knew Mr. van de Wiel from prior service.

- September 23, 2004 - hearing of application before Goodfellow, J. The application was adjourned to October 7, 2004 to permit proper length of service on the van de Wiels. Goodfellow, J. indicated he felt the van de Wiels were “playing games,” that the file had to be “dealt with,” that it just couldn't continue, that it had to be brought “to a head,” that **the van de Wiels had to “get on with it or get a guardian appointed.”**

- September 24, 2004 - copy of **Dorey v. Green** (2000), 186 N.S.R. (2d) 362 setting out law with respect to the striking of a defence was sent to the van de Wiels at the direction of Goodfellow, J.

- September 24, 2004 - interlocutory application by the Benjamins for summary judgment with respect to the third party claim, returnable October 7, 2004.

- September 28, 2004 - notice of the Benjamins' application served on the van de Wiels.

- October 5, 2004 - letter from the van de Wiels enclosing letters from their psychiatrist and Mrs. van de Wiel's general practitioner as to the van de Wiels' inability to attend court on October 7, 2004. The psychiatrist indicated they could not appear in court because of "serious psychiatric problems which are potentially life threatening." He went on to say that "they desperately need proper legal counsel" and time away from Nova Scotia "for healing." He stated "They are being slowly degraded by the machinations of the legal system and need assistance, more than I can offer." Mrs. van de Wiel's general practitioner indicated she could not attend "due to health problems."

- October 7, 2004 - hearing before the chambers judge.

[7] The van de Wiels did not attend court on October 7, 2004 for the hearing of the application but their daughter did. She sought an adjournment for a few months until the van de Wiels' health improved but gave no indication when this might be. She indicated her father's medical problems were high blood pressure and stomach problems and that her step mother may never be well enough to be involved. She indicated her father was seeking legal aid and that if they could not get a lawyer, she would help them but would need time to prepare. She indicated that the van de Wiels' house had burned down and her father's mother had died within the previous year. She sought reimbursement of a "$1,100 penalty" the van de Wiels were ordered to pay. This was the amount Goodfellow, J. ordered the van de Wiels to pay as costs on September 23, 2004.

[8] The Werrys and the Benjamins objected to an adjournment. They pointed out the service difficulties they had with the van de Wiels, the latest being with respect to service for the application itself. They pointed out that the van de Wiels seemed to have money for some purposes, such as frequent trips to Florida, quickly replacing their home after it burned down and hiring a lawyer from time to time in connection with this law suit when it suited their purpose. They argued that

although the van de Wiels claimed they were too ill to participate in this action against them throughout the three years since it had been commenced, the van de Wiels had prepared and filed numerous court documents and engaged a lawyer from time to time in connection with this law suit and instructed him; had settled Mrs. van de Wiel's personal injury lawsuit which was to her benefit; Mrs. van de Wiel had written a book and been interviewed about it and the van de Wiels had commenced a new law suit against the Werrys' counsel on May 31, 2004.

[9] The chambers judge refused to adjourn stating:

> . . . I have reviewed this file and the so-called Blaikie file [the law suit commenced by the van de Wiels against the Werrys' counsel on May 31, 2004], and it seems to me that **there is a constant pattern of evasion** as far as seeing this matter through. Of course I'm concerned by the letters filed yesterday or the day before from physicians, but I can't stop the process on the basis of hearsay evidence filed, not affidavit evidence, just hearsay evidence filed by the respondents purportedly signed by their doctors, with no real detail as to the nature of the problem in all of these circumstances. (Emphasis mine)

[10] The chambers judge then heard argument on the two applications before him. He struck the van de Wiels' defence and granted summary judgment to the Werrys pursuant to **Rule** 18.15 on the basis the van de Wiels had wilfully and deliberately ignored their responsibilities in connection with this action, the latest example of which was failing to attend for discoveries on May 19, 2004. He stated:

> . . . I'm going to allow your application. . . . in all the circumstances of this case, including without repeating too much of what I said in the adjournment issue, the long time this has been going on and dragging on, and the fact that the van de Wiels have been unresponsive, and **I find wilfully and deliberately evading their participation in this matter**, I am in all of the circumstances, **including the problems you've had with discoveries** and the other matters set out in your affidavit evidence, that the matter should proceed on to an assessment of damages, and I strike the defence accordingly. (Emphasis mine)

[11] He also granted summary judgment to the Benjamins with respect to the third party claim against them pursuant to **Rule** 13.01 (a) on the basis there was no arguable issue disclosed in the van de Wiels' third party claim against the Benjamins.

[12] It is these decisions the van de Wiels appeal.

ISSUES

[13] There is no issue as to the standard of review. As all parties agreed, since the orders under appeal had a terminating effect on the litigation and plainly dispose of the rights of the parties, the usual rule of this court applicable to interlocutory orders does not apply. Rather the standard of review is whether there was an error of law resulting in an injustice. **Purdy Estate v. Frank** (1995), 142 N.S.R. (2d) 50.

[14] The two issues to be determined in this appeal are:

> (1) Did the chambers judge err in striking the van de Wiels' defence and granting summary judgment to the Werrys pursuant to **Rule** 18.15?, and
> (2) Did the chambers judge err in granting summary judgment to the Benjamins pursuant to **Rule** 13.01(a)?

ANALYSIS

[15] I will first deal with the question of whether the chambers judge erred in striking the van de Wiels' defence and granting summary judgment to the Werrys pursuant to **Rule** 18.15.

[16] The relevant portion of **Rule** 18.15 states:

> **18.15. When any person refuses or neglects to attend at the time and place appointed for his examination** or refuses to be sworn or answer any question properly put to him or produce any document which he is bound to produce, the court may
>
> (a) hold him guilty of contempt;
>
> (b) if he is a plaintiff, dismiss the proceeding;
>
> (c) **if a defendant, strike out the defence**;
>
> (d) **grant such other order as is just**.
>
> (Emphasis mine)

[17] The threshold that must be met before **Rule** 18.15 is engaged is high. This test is described in two cases, **Purdy Estate v. Frank**, supra, and **Dorey v. Green et al** (2000), 186 N.S.R. (2d) 362, the case sent to the van de Wiels on September 24, 2004 at the instance of Goodfellow, J..

[18] This court stated in **Purdy Estate v. Frank**, supra:

> [11] On the Chambers application counsel for the respondents referred to cases where there had been a finding of an abuse of process, under rule 14.25, but did not provide the Chambers judge with any authority suggesting the test that should be employed under rule 18.15. There does not appear to be any reported case in Nova Scotia where rule 18.15 was considered. In other jurisdictions the rule has been judicially considered infrequently as well, perhaps because of its severity. In any event, where a similar rule has been considered, **the remedy of dismissing the claim or defence has been used only in the most extreme cases as a last resort, those in which the failure of a party to comply with the Rules is found to be "contumacious".**
>
> . . .
>
> [15] Other examples of the threshold of conduct found to be necessary before dismissing an action or a defence because of noncompliance with the rules or court orders are: proof of contumelious behaviour (which means an insulting display of contempt) - **Saikaley v. Commonwealth Insurance Co**. (1978), 91 D.L.R. (3d) 298 (Ont. H.C.); and a deliberate flouting - **Anlagen und Trehand Contor GMBH v. International Chemalloy Corp.** (1982), 27 C.P.C. 195 (Ont. C.A.).
>
> . . .
>
> [17] **In my view, the comments of Meldrum, J. in Tremblay, Landry and Landry v. Chiasson (1980), 32 N.B.R. (2d) 501; 78 A.P.R. 501 (T.D.), a case where both counsel alleged delays and neglect by the other, and an application was made to strike out a defence for non-compliance with the discovery rules, are applicable to this case:**
>
> > **"The purpose of Order 31a, rule 12(2) is to protect innocent litigants and guarantee attendance for examination and adequate response on examination.**

> **It is not intended to be applied rigidly to those who through neglect or misunderstanding temporarily fail, but to those who wilfully refuse or consciously seek to avoid their duty to the court."**

(Emphasis mine)

[19] Goodfellow, J. later stated in **Dorey v. Green et al**, supra:

> [14] **To strike a defence for non-attendance at a scheduled discovery is a very heavy guillotine remedy. To do so requires evidence of wilful or deliberate ignoring of the process. It must be conduct of a contemptuous nature or conduct so indifferent as to amount to a deliberate flouting of the law.** (Emphasis mine)

[20] The van de Wiels pointed out that the chambers judge struck their defence after finding that their actions were a wilful and deliberate evasion of their participation in this action. They argued the chambers judge erred in reaching this conclusion because he failed to properly consider the medical evidence before him. They argued that with the medical letters before him, the chambers judge should have adjourned the hearing of the application for a couple of weeks to give the van de Wiels the opportunity to bring the doctors into court and be cross-examined on their letters. They argued that if the chambers judge had done this he would have come to the conclusion that the van de Wiels were ill. They argued that the chambers judge would have realized that their "self-protective" and "ostrich-like" actions, as they described them, relating to this law suit flowed from their illness and were not a wilful and deliberate evasion. They further argued that once the chambers judge recognized that their inaction arose from their illness, he would not have struck their defence but would have considered what other options were available. They conceded at the hearing that the pace of the litigation to date was unacceptable.

[21] The van de Wiels also argued that the chambers judge erred in not giving them time to hire a lawyer and that even if they were not ill, the history of the case, with the van de Wiels only failing to appear in response to one formal notice for examination for discovery, did not warrant their defence being struck.

[22] I will deal with these last two points first.

[23] I am satisfied the chambers judge made no error in refusing to adjourn to give the van de Wiels additional time to hire a lawyer on October 7, 2004. By that date the action was over three years old. The van de Wiels had already had plenty of time to retain a lawyer if they were going to. They had in fact engaged a lawyer from time to time as it suited them.

[24] I am also satisfied that if the van de Wiels were not suffering from a debilitating illness, the chambers judge made no error in determining that their inaction to the date of the application indicated they had wilfully and deliberately evaded their duty to the court, justifying their defence being struck.

[25] Contrary to their argument, the van de Wiels did not refuse to attend only one discovery set formally by a notice of examination. Even assuming they were not served with the notice of examination returnable June 11, 2003, they refused to attend twice. The first notice they refused was returnable December 13, 2001. The second was returnable May 19, 2004. In addition to these two formal attempts to arrange for discoveries the history of this action shows that numerous informal attempts were made to arrange for discoveries and that all were rejected by the van de Wiels on the basis of their illness. The van de Wiels' response to the informal attempts to arrange for discovery must be taken into account on a **Rule** 18.15 application as well. To require lawyers to proceed formally using the notice of examination route each time they try to arrange for a discovery would be totally unwieldy and would add to the already high cost of litigation.

[26] The van de Wiels' reaction to the Werrys' and Benjamins' numerous requests for discovery was not unlike their approach to service and discussions with the court concerning this action; they sought to avoid it as the chambers judge found. Reading the documents in the Supreme Court's file, many of which were filed by the van de Wiels, suggests the van de Wiels felt the action should wait until they felt they were ready to deal with it. In the absence of a debilitating illness, it is clear the chambers judge did not err.

[27] The question is did the van de Wiels' state of health as referred to in the doctors' letters change this.

[28] Even taking into account the high threshold that must be met before a defence is struck under **Rule** 18.15 and assuming, without deciding, that the van de

Wiels' arguments referred to in ¶ 20 above are sound, I am still not satisfied that the chambers judge erred on the particular facts of this appeal.

[29] The van de Wiels' arguments that I am referring to are their arguments that faced with the letters from the van de Wiels' physicians the chambers judge erred when he failed to adjourn for a couple of weeks to give the van de Wiels an opportunity to bring their physicians into court to be cross examined, and that if he had adjourned and heard the doctors' evidence that he would have been satisfied the van de Wiels had a debilitating illness and he would not have struck their defence but would have considered what other options were available.

[30] Following these arguments to their logical conclusion requires a consideration of the options that would have been available to the chambers judge in the face of proof of their debilitating illness, besides that of striking their defence. The van de Wiels conceded at the hearing that the progress of this action had been unacceptable; that the action could not be put off indefinitely until they were well enough to participate. Thus something would have had to be done to allow the law suit to move forward. If the chambers judge was satisfied the van de Wiels had a debilitating illness and that the action must move forward, the only option available to him aside from striking the defence would have been to order the appointment of a litigation guardian for the van de Wiels.

[31] The appointment of a litigation guardian had been raised with the van de Wiels several times before. The first time was by the Werrys' counsel in his February 5, 2002 letter. As indicated in the Werrys' counsel's letter of February 20, 2002 to the court, the van de Wiels' response to his suggestion was that they were unwilling to have a litigation guardian appointed.

[32] The appointment of a litigation guardian was again raised with the van de Wiels in the case management report letter from Scanlan, J. of April 9, 2002. In their April 25, 2002 letter to the Werrys' counsel they again rejected this suggestion. They went further suggesting it would be a breach of **"The Charter of Rights**" against themselves as mentally disabled persons. They also alleged discrimination, intimidation, harassment, threats and the use of "strong-hold" tactics. They indicated they were now seeking punitive, special and general damages as well as damages for duress.

[33] When the Werrys' counsel wrote to the van de Wiels on May 13, 2002 indicating he would be making an application for the appointment of a litigation guardian on June 20, 2002, which was followed by a letter of May 16, 2002 by counsel for the Benjamins to the same effect, the van de Wiels went to the extent of engaging a lawyer for the first time in this law suit. Their lawyer wrote to counsel for the Werrys and the Benjamins advising that the van de Wiels would contest such an application because it violated their human rights, especially their right to be heard. He went further and suggested the Werrys and Benjamins were taking advantage of the van de Wiels' disability and that they could not attend on the suggested date.

[34] Given this background, the possibility of appointing a litigation guardian rather than striking the van de Wiels' defence was not a realistic option for the chambers judge to consider.

[35] The van de Wiels have not satisfied me the chambers judge erred in ordering that the van de Wiels' defence be struck and summary judgment entered in favour of the Werrys.

[36] The second issue is whether the chambers judge erred in ordering summary judgment in favour of the Benjamins pursuant to **Rule** 13.01.(a).

[37] **Rule** 13.01.(a) states:

> **13.01.** After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> > (a) there is no arguable issue to be tried with respect to the claim or any part thereof;

[38] The van de Wiels argued the chambers judge referred to the correct test set out in **United Gulf Developments v. Iskandar** (2004), 222 N.S.R. (2d) 137 (C.A.), namely that the applicant for summary judgment must show there is no genuine issue of material fact requiring trial, after which the respondent must establish his claim as being one with a real chance of success, but failed to apply it.

[39] While the decision of the chambers judge is brief, it is clear he determined that there was no arguable issue for trial. He stated:

> Well, there has been nothing filed by the respondents, but in any event it is clear to me that there is no arguable issue for trial here when one reviews the various pleadings in the circumstances.

[40] The van de Wiels' argument on this issue was that there was an arguable issue raised in the third party statement of claim, namely that the Benjamins were liable to the van de Wiels for tort or breach of contract in not determining and disclosing any latent defects and deficiencies in the property to the van de Wiels and the Werrys. Mr. Benjamin had testified on discovery that he was not aware of any such defects or deficiencies and there was no suggestion Mrs. Benjamin or anyone else at Sell-Tech Coastal Realty was aware either. In fact, the van de Wiels themselves denied any defects or deficiencies existed. They did not refer to any contractual terms nor any case authority to support the existence of such a duty in tort. The bald proposition, without any support from evidence or case-law that a seller's real estate agent (not an inspector) owes a duty to notify the seller of latent defects in the seller's building, was not defensible on a summary judgment application.

[41] I am not satisfied the chambers judge erred in determining that there was no arguable issue. The van de Wiels have not satisfied me their third party statement of claim disclosed an arguable issue that the Benjamins breached a contractual obligation to the van de Wiels. In addition, as to the whole of the third party claim, there was not sufficient particularity to apprise the court of the nature of the questions to be tried. The third party claim did not provide enough detail to tell the Benjamins the case they would have to meet when the dispute came on for trial, which **Odgers, Procedure, Pleadings and Practice**, Fifth edition, p.114, indicates is required for pleadings.

[42] Accordingly I would dismiss the appeal with costs payable by the van de Wiels to each of the Werrys and the Benjamins in the amount of $1000 plus disbursements.

Hamilton, J. A.

Concurred in:

Oland, J.A.

Fichaud, J.A.