C.A. No. 127612

NOVA SCOTIA COURT OF APPEAL
Cite as: Skipper Fisheries Ltd. v. Thorbourne, 1997 NSCA 16

Hallett, Freeman and Roscoe, JJ.A.

BETWEEN:

SKIPPER FISHERIES LIMITED, a body corporate Appellant - and - WAYNE THORBOURNE, CLAUDETTE THORBOURNE, THOR SEINERS LIMITED, a body corporate, PHOENIX FISHERIES LIMITED, a body corporate, PAUL EDWARD BLADES, BRIAN ARTHUR BLADES, CLIFFORD V. GOREHAM, and S. CLIFFORD HOOD Clifford V. Goreham Respondents	)	Peter M. Rogers and Lloyd I. Berliner for the Appellant Thomas E. Pittman for the Respondents Wayne Thorbourne and Claudette Thorbourne Robert G. Belliveau, Q.C. and Christopher C. Robinson for the Respondents Phoenix Fisheries Limited, Paul Edward Blades, Brian Arthur Blades and David J. Bright, Q.C. and James L. Connors for the Respondent S. Clifford Hood Thor Seiners Limited not appearing Appeal Heard: November 13 and 14, 1996 Judgment Delivered: January 30, 1997

THE COURT: Appeal allowed and the part of the order dated July 5th, 1996, which dismissed the appellant's action is set aside and any party and party costs paid by the appellant pursuant to that Order to be repaid forthwith by the respective respondents per reasons for judgment of Hallett, J.A.; Freeman, J.A. concurring and Roscoe, J.A. dissenting.

ROSCOE, J.A.: (Dissenting)

This is an appeal of a decision of Justice Gruchy in which he dismissed the action brought by the appellant, Skipper, after finding that it had continued its actions of contempt by its failure to produce documents relating to one of its monetary claims. The decision under appeal is dated April 23, 1996 and is reported at 150 N.S.R. (2d) 296.

Background

A herring seiner, the Sealife III, was owned by Thor Seiners Limited (Thor). The appellant, Skipper Fisheries Limited (Skipper), owned 49% of Thor and the respondents Wayne and Claudette Thorbourne owned the other 51%. Skipper operated a fish plant and was owned by Comeau Seafood Limited (Comeau). The Fisheries Loan Board held a marine mortgage on the vessel. By an agreement between Skipper and the Thorbournes, Skipper was to have the right of first refusal to purchase all the fish caught by Thor. As well, the fishing licenses relating to the Sealife III were to be used for the sole benefit of Thor.

In 1985, the loan with the Fisheries Loan Board was in arrears. Skipper alleges in its statement of claim that the Thorbournes conspired with the defendants, Phoenix Fisheries Limited, Paul Blades, Brian Blades and Clifford Goreham (collectively the Phoenix defendants) to obtain money from those defendants to pay out the Fisheries Loan Board, take an assignment from the Fisheries Loan Board and then foreclose on the mortgage and transfer title in the Sealife III to Phoenix. The defendant, S. Clifford Hood, a barrister, is alleged to have participated in the conspiracy at a time when he represented the Thorbournes. Skipper also alleged that the respondents were in breach of Thor's obligation to provide the catches of the Sealife III to Skipper for the years following 1985. The remedies sought included a declaration that the transactions respecting the transfer of the Sealife III were unlawful, an accounting for the benefits obtained from the transaction by the

defendants, an order for the winding up of Thor and an order appointing a receiver, damages to Thor for conversion and breach of fiduciary duty by the Thorbournes, damages for the loss of its investment in the defendant Thor arising from the loss of Thor's interest in the Sealife III, damages to Thor for loss of profits which it would have earned from the Sealife III and from its fishing licenses, damages to Skipper for loss of profits or perspective loss of profits, and general damages.

The action was commenced in 1986 against all the defendants except Hood who was added as a defendant in 1990. Skipper filed the notice of trial and certificate of readiness on August 17, 1992. A two month trial was scheduled to begin on November 1, 1993 before Justice Gruchy who had also been the case management judge. With the notice of trial, Skipper filed three expert reports; one of which was prepared by Brian Keough, a Chartered Accountant with Doane Raymond. That report, dated March 31, 1992, contained an opinion of the value of the loss of contribution by the Sealife III to the earnings of Skipper. The defendants retained a Chartered Accountant, Grant Thompson, to review the Doane Raymond report and give his opinion of the value, if any, of the loss of contribution to earnings.

In June, 1993, Skipper gave an undertaking at a case management conference that it would provide Mr. Thompson with access to all the relevant financial documents. Mr. Thompson was told that some of the information he requested, that is the record of weight of raw herring it purchased from fishermen, was not available because Skipper did not keep any records of that nature. Mr. Thompson's report was then prepared without that information and was based on research into industry standards. During a discovery of Mr. Thompson on October 28, 1993, five days before the trial was to continue, it was revealed that Skipper did

in fact have information that Mr. Thompson had previously been led to believe did not exist.

At a pre-trial conference on October 29, 1993, the trial was postponed from November 1 to November 15. Justice Gruchy also ordered the parties to meet with the two experts to determine the precise information required and what was available. Justice Gruchy later determined that at that meeting the Vice President of Comeau told the defendants that fish were not weighed on receipt at the Skipper plant, nor did they have any truck scales or records of the weight of fish received.

The First Application

On the date the trial was to have commenced, the defendants applied for the dismissal of the action pursuant to **Civil Procedure Rule** 20.09 which provides:

> 20.09 (1) Where a party fails to make discovery of or produce for inspection any document under an order or Rule 20, he is liable to be punished for contempt, and if a plaintiff, to have the proceeding dismissed, or if a defendant, to have the defence struck out.
>
> (2) Where it appears that there has been a failure on the part of a party or his solicitor or, in the case of the Crown or a body corporate, or an officer thereof, to make a reasonable effort to give full discovery of all documents that relate to any matter in a proceeding, the court may impose on the party, solicitor, or officer such terms or penalty as it thinks just.

The hearing of that application took place over 11 days in November and December 1993.

The First Decision

The decision of Justice Gruchy is dated April 18, 1994 and is reported at 137 N.S.R. (2d) 63. Justice Gruchy made several findings of fact and credibility which

are relevant to this appeal. He found "to his complete satisfaction" that Skipper did have truck scales located at its plant and was in the practice of weighing herring on its arrival at the plant and keeping a record of the weight. Justice Gruchy found that the records of weights of raw material received at the plant were kept in a set of scribblers that the President of Comeau, Marcel Comeau, did not mention during his testimony. Justice Gruchy indicated there were two possible explanations for this failure:

> 1. Mr. Comeau did not know of their existence; but as the controlling officer of Skipper he should have known of them; or
>
> 2. Mr. Comeau did know of them and decided not to reveal them.
>
> Either explanation is contrary to the spirit and intent of the **Civil Procedure Rules**.
>
> [26] In addition, Mr. Comeau had reviewed Mr. Murdock's affidavit filed herein wherein it was stated that the number of pounds of herring taken in by the plant was not recorded. At that point Mr. Comeau, or Mr. Murdock, was under the distinct obligation to reveal that information which was subsequently found in the scribblers - whether it was accurate or not - and to give whatever explanation was necessary. On Mr. Comeau's review of Mr. Murdock's affidavit, he knew or ought to have known that the information contained in and put forth by it was either inaccurate or untruthful. As the spokesman of Skipper, he was under an obligation to inform himself fully of the relevant facts. He either ignored the incorrect information, did not detect it or decided to go along with a deception. Neither explanation is acceptable in terms of required disclosure.

Justice Gruchy also found that Skipper participated in a practice of reporting erroneous weights to the Department of Fisheries and Oceans. He also found that the Vice President of Comeau, Douglas Murdock, "seriously misled" Mr. Thompson and that he also participated in the "filing of deceptive reports with the Department of Fisheries and Oceans".

The scribblers in which the weight of incoming fish was recorded were

produced to the defendants during a discovery that took place on November 26, 1993 during an adjournment in the hearing of the application. Justice Gruchy found that the significance of the information in the scribblers was known to Skipper's employees as early as 1990. In conclusion, Justice Gruchy said:

> [48] The failure of a party to produce documents has attracted the sanction of the court, including the dismissal of actions or the striking of defence. See: **Church of Scientology of Toronto v. Maritime Broadcasting Co. et al**. (1979), 33 N.S.R. (2d) 500; 57 A.P.R. 500 (C.A.); **Kynock et al. v. Johnson** (supra); **Halifax (County) v. Fancy** (1992), 115 N.S.R.(2d) 196; 314 A.P.R. 196 (T.D.); and **Kin Franchising Ltd. v. Donco Ltd.** (1993), 14 C.P.C.(3d) 193 (Alta. C.A.).
>
> [49] Of those cases, however, those which resulted in dismissals, involved repeated failures to obey specific orders of the court for production, refusals to attend for discoveries and failures to live up to specific undertakings. In my view the failures of the plaintiff here fall short of the flagrant disregard for the **Rules** considered in those cases.
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> . . .
>
> [53] In the circumstances of this case I conclude that the plaintiff has not complied with Civil Procedure Rule 20.09(2) in that it has failed "... to make a reasonable effort to give full discovery of all documents that relate to any matter in a proceeding ..." While such failure is serious and with very considerable financial implications, I am not persuaded that it was of such a degree of contumacious conduct as to warrant dismissal of the action. Nor do I conclude that its failure warrants a dismissal of any damage claim arising from loss of contribution to margin.
>
> [54] I conclude that the appropriate remedy is to recognize that the plaintiff has incurred wasted costs and to redress that subject, but allowing the action to continue.
>
> [55] The plaintiff will be liable for:
>
> (a) Costs to date on a solicitor-client basis of each of the defendants for all time spent on this particular application and reasonable time spent in preparation for it;
>
> (b) Costs to date on a solicitor-client basis for all discoveries (or portions thereof) dealing with the matter of the weight of fish received at the Skipper plant and any other time spent to date on

attempts to quantify the alleged loss of Sealife III's contribution to margin;

(c) All throw-away costs incurred by Mr. Grant Thompson in the preparation of his report.

The Order

Counsel were unable to agree to the form of order necessary after Justice Gruchy's decision April 18, 1994, the result of which was that Justice Gruchy issued an addendum to his decision which is dated June 21, 1994. In the addendum, he said that the findings he made in the first decision amounted to a finding that the plaintiff Skipper was in contempt of court because it had failed to make a reasonable effort to give full discovery of all documents. He then said:

> 2. The sanction, or "punishment", which I concluded is most appropriate in the circumstances **and which will bring about compliance** with **Civil Procedure Rule** 20 is to order the payment of costs (as I have), and until such payment, the action will be stayed.
>
> I have reserved to myself the taxation of costs. If that step becomes necessary and is completed, or upon the resolution of the matter by agreement of counsel, then this action may proceed . . .
>
> (emphasis added)

The order dated June 28, 1994 provided:

> It is ordered, adjudged and decreed that the plaintiff is in contempt of court and this action is hereby stayed until the plaintiff has:
>
> (a) delivered to the defendants any and all documents in the custody, possession or control of the plaintiff related to its claim to have been deprived of the 'Sealife III's' contribution to overhead and profit margin, including, but not restricted to (1) the number of pounds of herring taken in by the plaintiff's production facility; (2) the number of pounds and variety of product produced at that facility; (3) the cost of the fish delivered to the facility; (4) the production costs; (5) the amount of product held in inventory; and (6) the sales figures for the herring products.

> (b) paid to the defendants the costs as further described in this order.
>
> It is further ordered that the defendants shall recover the following costs, as taxed or agreed, forthwith from the plaintiff . . .

Justice Gruchy had ordered that the decision and his order be sealed until after the trial of the matter because of the adverse findings of credibility it made against Mr. Comeau and Mr. Murdock. The defendants successfully appealed that portion of the order to this Court (see (1994), 137 N.S.R. (2d) 60).

Events following the June, 1994 Order

After the June, 1994 order, counsel spent several months dealing with the taxation of costs arising from that order. On July 22, 1994, the defendants claimed a total of $708,788.96 from Skipper in full satisfaction of their solicitor/client costs and disbursements. The dispute over the amount of the legal fees continued for several months during which counsel corresponded at length. On October 10, 1994, counsel for Hood wrote to Skipper's counsel saying:

> I note as well that in the many, many months which have gone by since Justice Gruchy granted his Order with respect to disclosure, that we have received absolutely nothing from your client in compliance with the Order.

On October 21, 1994 all counsel appeared before Justice Gruchy on the subject of costs. During that hearing, counsel for the Phoenix defendants noted that no documents had yet been produced in accordance with the June order. On July 21, 1995, counsel for Hood again wrote to Skipper's counsel stating that:

> . . . Your client, the Plaintiff, continues to be in contempt of Court for its failure to disclose numerous documents. I think it is clear to all concerned that if your client had any intention of complying with the Court Order respecting disclosure, it would have done so many many months ago . . . I wish to know whether your client will agree to an Order dismissing its claims against my client . . . [if not] . . .

> then I have instructions to proceed to have the matter brought back to Court on an application to have the Plaintiffs' claim dismissed for failure to purge its contempt of Court.

The reply from Skipper's counsel indicated that Skipper was waiting for additional information regarding the costs issue and:

> Upon a determination of costs against our client a decision will then be made on the main action. Accordingly, you are not correct in saying that our client has no intention of complying with the court order respecting disclosure.

On August 8, Hood's counsel advised Skipper's counsel, by letter, that in his view the settling of the order with respect to costs had nothing to do with Skipper's "ongoing obligation to purge its contempt by complying with the court order and the law respecting disclosure".

The second application

In September, 1995, the respondent Hood brought an application under **Civil Procedure Rule** 20.09(1) for an order dismissing Skipper's action against Hood as a result of the continued contempt of the order dated June 28, 1994. The Thorbournes and the Phoenix defendants brought applications to be heard at the same time requesting the dismissal of Skipper's claim against them respecting lost profits or loss of contribution. Originally, the applications were scheduled to be heard on October 4, 1995 but were postponed to November 10, 1995 at the request of Justice Gruchy.

At the time of the hearing of the application to dismiss in November 1995, the matter of costs had still not been finally determined. Justice Gruchy's decision with respect to costs was rendered on April 22, 1996 and it provided that Skipper pay a total of $338,312.64 to the defendants for their solicitor/client costs and

disbursements arising out of the first application.

On October 20, 1995, Skipper's counsel wrote to defence counsel advising that they had completed the review and photocopying of the majority of the documents relating to the period 1985 to 1990. The documents were not delivered, however, because he requested undertakings that the documents only be used for the purposes of the action. An application regarding the use that the defendants might make of the documents was heard by Justice Gruchy on November 3, 1995 at which time he decided no order was necessary in that respect.

As indicated, the applications to dismiss were heard on November 10, 1995, more than two years after the trial had originally been scheduled to begin. The day before the hearing, each of the lawyers acting for defendants received several large boxes measuring nine feet in total, containing photocopies of documents. Just before leaving their offices to attend at the hearing they each received another shipment of documents in boxes. The second shipment was approximately the same size as the first. Additionally, when they attended at court they were each given several more loose documents and nine computer disks. They did not receive any list or index of the documents and until the hearing before Justice Gruchy they did not have any assurance from plaintiff's counsel that indeed they had all the documents that had been ordered to be delivered.

The decision under appeal

In his decision, reported at (1996), 150 N.S.R. (2d) 296, Justice Gruchy reviewed his earlier decision and the affidavits that had been filed attaching correspondence between counsel to which reference has been made above. He stated the issues before him were:

(a) Is the plaintiff still in contempt of the court?

(b) If so, what is the appropriate sanction?

He made the following comments at paragraph 26 **et seq**:

[26] The staying of the action did not relieve the plaintiff of its obligation to produce the documents listed; it merely had the effect of preventing the plaintiff from proceeding with its action until the documents had been produced and the costs had been paid. Yet, until merely the day before the rescheduled hearing of this application, the plaintiff had not produced any documents and until October 20, 1995, had not indicated to the defendants that it was proceeding to obtain the documents.

[27] From the date of the decision, April 18, 1994, until October 20, 1995, there had been no indication of activity by the plaintiff to comply with the court order.

[28] It is my conclusion that the production of the documents was too late. The plaintiff had been given ample opportunity to produce the documents requested . . .

[29] The affidavit of Mr. Marcel Comeau, the President of the plaintiff, is clear. It was he who decided to take the position adopted by the plaintiff in this case. It is not a matter wherein counsel may be faulted in any way. Mr. Comeau said in his affidavit of September 28, 1995:

> "2. That following the decision of Mr. Justice Gruchy of April 18, 1994, together with his addendum to the decision dated June 21, 1994, I instructed our legal counsel to deal with the matter of costs from the application of 1993.
>
> . . .
>
> 4. That following a determination of the amount of costs which Skipper is liable to pay, Skipper will then be able to make a decision about the course of the remainder of the litigation presently before the Supreme Court of Nova Scotia which has been stayed pending the delivery of documents to the defendants and payment of costs to the defendants.
>
> 5. That the project of retrieving, obtaining and copying each and every document in the plaintiff's control, custody and possession as ordered by Justice Gruchy as of the 20th day of June, 1994, is immense in terms of the amount of

> time needed, costs associated with the task and personnel to complete the task.
>
> 6. That upon receiving notice of the application being brought by the defendants, I instructed Skipper's legal counsel to start the document review and oversee the retrieval and review of documents by Skipper's staff located at the Skipper facility in West Pubnico to ensure that all documents in Skipper's custody, possession or control are produced and delivered to the defendants in compliance with the order of Justice Gruchy."

[30] The notice referred to in paragraph 6 of Mr. Comeau's affidavit was dated September 15, 1995. The plaintiff had done nothing to comply with the decision and order from April 18, 1994, to September 15, 1995. Indeed, it is apparent that the plaintiff decided to do nothing about complying with the order and the **Rules** until the amount of costs have been determined. In my view, Skipper had decided to supplant the **Rules of Court** by its own rules. The plaintiff was required by the **Rules** to produce the documents in question when it chose to commence this action and to make the claims it put forward. If there had been any question about such a duty, it was amply clarified by the decision and order. The court cannot tolerate such arrogance. When a party embarks upon an action, it must comply with the **Rules**. It cannot be permitted to make its own rules as it moves along.

[31] This case is two months short of ten years old. The cause of action arose even earlier than that. By its actions, the plaintiff has to date added another two years' delay, assuming a trial could now proceed - an impossibility. In order to proceed, the defendants will be required again to obtain experts' reports and embark upon a further round of discoveries. Years of further delay is foreseeable. The consequential delay brought about by continued contemptuous behaviour of a plaintiff in a case which is already too old for many practical purposes is unacceptable.

After reviewing several tests and cases, Justice Gruchy concluded as follows:

> [42] My initial finding of the contempt of the plaintiff was remarkably similar to that of the learned trial judge in **Ultra Fuels Ltd. v. Kern et al**. when he said:
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> > "I find that the personal defendant, Kern, appears to be the operating individual behind the companies -- I will use plural -- has been obstructive

> nonco-operative, has failed to comply with requests of counsel for the plaintiff for discovery of records. The records were not produced until the day after the commencement of the day of the trial. And all the records, that were requested by the plaintiff, had not been produced. This obstructive conduct and failure to produce documents is the reason that I have struck this defence."

[43] That conclusion was upheld on appeal. In the case at hand the contempt is exacerbated by its continuance.

Conclusion

[44] Based on my finding that the plaintiff has deliberately continued its actions of contempt and all the consequences of that to the parties and to the court, I dismiss the plaintiff's action.

The appeal book appeal

When this appeal was set down, the parties had a disagreement about whether the appeal book should include the evidence heard at the first application before Justice Gruchy in November, 1993. Justice Flinn of this Court, sitting in Chambers, determined that it was not necessary to file materials relating to the first hearing. That decision was appealed to the panel hearing the main appeal and after receiving written submissions and hearing oral argument, this panel dismissed the appeal from Justice Flinn's order because we were not satisfied that the material was relevant to the main appeal. We did agree, however, that counsel could file pages from the transcript of the argument before Justice Gruchy in November, 1995 relating to whether or not an application had been made by the Phoenix defendants to amend their application to seek a dismissal of the entire action. During the course of the argument on the main appeal, we also agreed to receive other portions of the transcript of the argument before Justice Gruchy relating to the question of whether or not counsel for Skipper did, in fact, state during the argument

that as of that date all documents ordered to be produced had been produced. The pages submitted confirm that counsel for Skipper did state that the defendants then had all of the documents.

Issues

The issues on this appeal as framed by the appellant's counsel during his oral submission, are as follows:

(1) Was there clear non-compliance with the order dated June 28, 1994?

(2) If so, was it wilful contempt?

(3) What is the standard of proof that should be used on a civil contempt application?

(4) Did the trial judge err by having regard to irrelevant considerations?

(5) Alternatively, did the trial judge err by granting some of the defendants more relief than sought?

1. Was there clear non-compliance? and **2. If so, was it wilful?**

These are the issues that captured most of counsels' attention in both their written and oral arguments, and it is convenient to deal with them together. Skipper's most forceful submission is that the order of June, 1994 did not clearly require that the documents be filed either immediately or before a certain deadline and that because of ambiguity in the order, which was drafted by the respondents, it was not wilfully disobedient in accordance with its interpretation of the order. The appellant's argument respecting its understanding of the June 1994 order is summarized in paragraph 42 of its factum as:

> The plain meaning of the words contained in the Order of June 28, 1994, is that the entire action is stayed until two events have occurred, except for one obligation which is to arise "forthwith" upon the making of the Order. That obligation is the payment of

> costs. Apart from having to pay costs forthwith the stay has the effect of suspending both the rights and obligations of litigants to take steps in a proceeding.

The appellant contends that the sanction for not having filed the documents before the first application was the stay preventing the continuation of the action. If it decided to continue, after the payment of the costs, it would then begin the process of compilation of the documents and when completed apply to the court to request the lifting of the stay. The appellant says that the stay was the sanction requested by the respondents and that had they been further prejudiced by any delay after June 1994, they could have easily asked Justice Gruchy to insert a deadline for production of the documents. It is also suggested that to produce the documents before the costs issues were settled would have been a waste of effort and resources because the defendants could not do anything with the documents, such as conduct further discoveries, because of the stay. The burden of the order to pay the costs of the first application on a solicitor client basis was so enormous, the appellant asserts, that it could have decided just to pay those costs and seek to discontinue the action. Furthermore, the appellant says that since no deadline was stipulated, it was entitled to assume that the documents would have to be produced within a reasonable time, and it would not be reasonable to expect them to file the documents before the costs issues were finally determined.

The respondents contend that there was no doubt that the appellant had to file the documents as soon as possible, and that it is clear from the whole context of the proceeding including the events surrounding the first application, that the breach of the spirit and intent of the disclosure rules and the contempt of the court order was continuous and flagrant. They argue that the trial judge made findings of fact, based on the evidence before him that the reason the order was not obeyed

was not that there was a misunderstanding of its effect, but that the appellant made a business decision to breach the terms of the order. It is submitted that the appellant had the benefit of there not being a specified deadline because no doubt if one had been designated, it would have allowed the appellant only a couple of months to provide the documents. Also, the respondents submit that the use of the word "forthwith" to describe the time frame for the payment of costs was to distinguish it from the normal course where costs are paid at the end of an action, and that it in no way implied that the costs had to be settled before the documents had to be produced.

The appellant relies on several cases for its submission that a mistaken interpretation of the legal effect of an order constitutes a valid defence for failure to comply with it. In **St. John's Metro Area Board v. Bay Bulls Sea Products Ltd.** (1985), 55 Nfld. & P.E.I.R. 105 (Nfld.T.D.) on an application for a finding of civil contempt as a result of a breach of an injunction, Steele, J., adopted the following statement from the 1973 edition of **The Law of Contempt** by Borrie and Lowe:

> . . . the courts will only punish a person for contempt upon adequate proof of the following points:
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> 1. That the terms of the injunction are clear and unambiguous;
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> 2. That the defendant has had proper notice of such terms; and,
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> 3. There must be clear proof that the terms have been broken by the defendant.

The **Bay Bulls** case dealt with an injunction preventing the continuation of reconstruction of a fish plant after it had been destroyed by a fire. The injunction had been varied to allow for the completion of the roof of the structure for reasons of safety. The builders added a second storey when completing the roof, and the

Board thought that the terms of the injunction had been breached. Steele, J. found that there was a misunderstanding of what constituted completion of the roof and that there was no intention to deliberately disobey the injunction. The application for contempt was therefore dismissed.

The appellant also refers to **Deprenyl Research Limited v. Canguard Health Technologies Inc.** (1992), 41 C.P.R. (3d) 368 (F.C.) another case involving an injunction. There it was determined that the interim injunction order prohibiting the distribution of a product "until the return of the plaintiff's application for injunctive relief" was ambiguous in light of a further hearing that may or may not have been a "return" of the motion. Also in doubt was whether the defendant's activity of issuing a press release about the product was in violation of the injunction.

Other cases coming to a similar conclusion where the order was ambiguous include: **Positive Seal Dampers Inc. v. M & I Heat Transfer Products Limited**, [1995] O.J. No. 1506 (Ont. Gen. Div.), **Canada Games Company v. Hasbro Canada Inc.** (1989), 25 C.P.R. (3d) 191 (F.C.T.D.), **Filipovic v. Glusica** (1995), 174 A.R. 356 (Alta.C.A.) and **Swan River - The Pas Transfer Limited et al and Highway Traffic and Motor Transport Board** (1974), 51 D.L.R. (3d) 292 (Man.C.A.).

Interestingly, these were all cases where the defendant had been ordered **NOT** to do something and misunderstood the extent of that which was prohibited. None of these cases relied upon by the appellant involve a situation where a party had a positive duty to do something which was not done. In Borrie and Lowe's **Law of Contempt**, (second edition, 1983, Butterworth's) the authors, at page 394, indicate that no distinction should be drawn between prohibitory and mandatory

orders, although in the latter case it is the duty of the party bound by the injunction to find out the proper means of obeying the order. Here there is no indication that the appellant sought any clarification of the order, even after receipt of letters from the respondent Hood's counsel reminding them of the continued contempt. The appellant when faced with the application to dismiss started the process of locating and copying the documents, it did not apply to Justice Gruchy for permission to lift the stay. The submission now appears to be a new rationalization for the non-compliance with the first order, not one used as a defence to the second application.

Another more important distinguishing factor between the cases relied on by the appellant and the case under appeal is that here the contempt finding had already been made after the previous hearing and had not been appealed. After the first application, Justice Gruchy in the addendum to the decision, found the appellant to be in contempt because of its failure to produce documents in accordance with Rule 20. He stated: "...the degree of that contempt falls short of requiring the penalty of dismissal, but is nonetheless a finding of contempt." There was no question that the reason the appellant was found in contempt in April 1994 was that it had not filed the documents and that they continued to be in contempt until that obligation was fulfilled.

The respondents refer to several cases where claims were dismissed or defences struck out for failure to comply with a court order even though no deadline was specified. These cases in my opinion are more applicable to this case because they also involve failure to do something required by the rules as opposed to doing something prohibited by the order.

In **Criscore Enterprises Ltd. v. Jules** (1992), B.C.A.C. 147 the defendant failed to appear at discovery. On an application to strike out the defence the court

ordered that he pay the costs of that application and submit to discovery. The defendant did attend as ordered but did not pay the costs and also failed to produce documents requested by the plaintiff. On a second application for contempt, the defence was struck out despite the fact that the original costs order did not contain a deadline. The order was upheld on appeal.

Ultra Fuels Ltd. v. Kern et al. (1992), 14 B.C.A.C. 306, also concerned the non-production of documents and in my view the manoeuvres necessitated by the defendants' obstructiveness are very similar to those of this case. The banking records of various companies controlled by the defendant were requested by the plaintiff at a discovery. At a second discovery, production was still incomplete, so the plaintiff applied at the commencement of the trial to strike the defence. When the defendant appeared with a few more documents, the trial was adjourned to the next day to allow the plaintiff to review the material. On that day the defendant brought in yet another box of documents at which time the plaintiff moved for the striking of the defence, which motion was granted. In upholding that portion of the trial judge's order, Legg, J.A. for the Court of Appeal said:

> ... the trial judge was properly concerned with the defendants' failure to produce documents at the commencement of the trial and with the "obstructive conduct" of the appellants in failing to produce Bank of Nova Scotia and other records until the second day of the trial. Their production at that late date amounted to an acknowledgement by the appellants that they had neglected to make discovery of relevant documents until the last moment. In these circumstances it was incumbent upon the appellants to explain the reason for such neglect and show that there was a lawful excuse for such neglect. There is nothing in the record before us to give this explanation or to establish that there was a lawful excuse.

The **Kern** case, in my opinion, would have provided Justice Gruchy with authority to dismiss the appellant's claim for contribution to loss of profits at the hearing of the first application.

Other cases, similar to the matter under appeal, and relied upon by Justice Gruchy are **HDYC Holdings Ltd. v. Chu**, [1993] B.C.J. No. 88 and **Kin Franchising Ltd. v. Donco Limited and Donald Boone** (1993), 14 C.P.C. (3d) 193 (Alta.C.A.). In the **Kin** case, the Court of Appeal used words to describe the appellant's argument which I find are appropriate to this case:

> The appellants say that they may not have performed well, but they wish another chance, and that it is harsh to decide the suits against them without going into the merits. That is true, but that is an argument for never applying any final sanction, and always giving yet another chance. If no one case is ever bad enough to strike out pleadings, then the rules will have no teeth... We do not wish to leave the impression with the Bar that substantive results will never flow from repeated procedural contempts. These appellants had their "one more chance" when the previous chambers judge ordered interrogatories.

In other cases where a date for compliance has been specified in the first order, it has been held that it is not necessary for the party seeking compliance to return to the court on another contempt application; the dismissal is routine or automatic. See for example **Halifax (County) v. Fancy** (1992), 115 N.S.R. (2d) 196 (S.C.), where the defence was struck because of failure to comply with an order for production and an order for discovery before a specified date. Other cases along this line are: **Church of Scientology of Toronto v. Maritime Broadcasting Co. Ltd., et al.** (1979), 33 N.S.R. (2d) 500 (C.A.) and **Betzner v. Betzner**, [1943] 2 W.W.R. 353 (Sask. K.B.)

In my opinion the order was clear and unambiguous. The appellant had ample time within which to comply, and its failure was wilful. The operating minds of the appellant knew **what** had to be done; the documents required were adequately described in the first order. If there was any doubt about **when** the documents had to be filed, the onus was on the appellant to find out. It is difficult to comprehend that there was any doubt in light of the requirements of disclosure

generally and the history of this case in particular. The appellant surely did not need further clarification that the time for supplying the documents was long past. The last chance to comply with the rules was given by Justice Gruchy in the June, 1994 decision when he found the appellant's failures and deceits to be contemptuous but not quite so contumacious to deserve dismissal. The appellant "made a business decision" not to comply. Any reasonable deadline within which to obey that order had long since passed. If there was ever a situation where the powers of dismissal granted by **Rule** 20.09 should be employed, it was this case. I agree with, and would apply to this case, the sentiments expressed by Huddart, J., in **Damji v. Premier Cablesystems Limited** (1988), 26 B.C.L.R. (2d) 344 (S.C.) where she said:

> If this court is to control its process and to assist counsel in ensuring the "just, speedy and inexpensive determination of every proceeding on its merits", orders such as that made by Mackoff, J. must be taken seriously by counsel and by their clients. They must be obeyed unless they are varied. No application was made to Mackoff J. to vary the order. No appeal was taken from it. Fifteen months have passed. The limitation period has expired.

3. What is the standard of proof that should be used on a civil contempt application?

Under this ground, the appellant submits that the standard of proof for a finding of civil contempt should be the criminal burden, that is, proof beyond a reasonable doubt and furthermore, that the procedure set out in **Rule** 55, should have been utilized by the trial judge. **Rule** 55 provides that an application shall not be made for a contempt order unless the court first grants leave on an *ex parte* application. The respondents agree that the criminal burden applies and submit that the burden was met on the evidence presented at the first hearing where the finding

of contempt was made. The respondents further contend that **Rule** 55 does not apply to a situation where the initial application is made pursuant to **Rule** 20.09. Neither of these issues were argued before the trial judge.

I agree with the submissions of the respondents that since the contempt finding was made pursuant to **Rule** 20.09 at the first hearing and no appeal was taken from that decision, except in relation to the sealing of the decision, that it is inappropriate to be raising these issues at this point. In any event, there is no question, in my opinion, that there was proof beyond a reasonable doubt that the appellant was in contempt of court, at the time of the first hearing and that it continued up to the time of the second hearing. As well there was, in my view, given the history of this proceeding, no requirement for an application for leave to be made before the second application. There is no suggestion that the appellant was taken by surprise at any stage of the proceeding leading up to the order for dismissal.

4. Did the trial judge err by having regard to irrelevant considerations?

The appellant contends that the trial judge erred by placing so much emphasis on the issue of delay when there was no evidentiary foundation to establish that there was excessive delay or that the delay, if any, was caused by the appellant's failure to disclose the documents. As well, it is submitted that there was no evidence of prejudice to the respondents as a result of any delay. The appellant says that any delay from 1986 when the action was commenced to November 1993 when the trial was originally scheduled to begin should have been irrelevant at the second hearing in November 1995. The specific passages of the decision to which the appellant objects are those highlighted in the following paragraphs:

> [31] This case is two months short of ten years old. The cause of action arose even earlier than that. By its actions, **the plaintiff has to date added another two years' delay**, assuming a trial could now proceed - an impossibility. In order to proceed, the defendants

> will be required again to obtain experts' reports and embark upon a further round of discoveries. Years of further delay is foreseeable. The consequential delay brought about by continued contemptuous behaviour of a plaintiff in **a case which is already too old for many practical purposes** is unacceptable.
>
> . . .
>
> [39] . . .
>
> 2. There has in fact been prejudice to the defendants. **Another year and a half delay in an already stale case is *prima facie* prejudicial.** To that must be added further consequential delay. **The prejudice to the personal defendants Thorbourne and Hood is obvious and is spoken of eloquently in their affidavits.**

This ground of appeal must be examined in light of the principle that this Court will not interfere with a finding of fact made by a trial judge unless there is shown to be palpable and overriding errors that affected his assessment of the facts. Although this Court must review the record carefully to ensure the trial judge did not make findings in the absence of evidence or fail to consider material evidence, we cannot substitute our opinion or assessment of the evidence for that of the trial judge. In other words, this Court cannot retry the issue.

The trial was scheduled to begin on November 1, 1993. It did not commence on that date because of the appellant's failure to disclose and its deceit about the existence of documents required by the respondent's expert. The appellant has not cited any other reason why the trial did not proceed on that date. It is not an error in the assessment of the evidence to assign responsibility for any delay after November 1, 1993 to the appellant, because if it had complied with the rules to begin with, the trial would have been completed in 1993.

The respondent Hood in his affidavit stated that having the litigation hanging over his head was causing him considerable ongoing stress and was affecting him personally. The appellant did not cross examine him on the affidavit. The

Thorbourne's, who appeared without counsel at the hearing of the second application, did file an affidavit of the lawyer who had represented them previously which said that they could not afford further representation. That is sufficient evidence upon which the trial judge could find that there was prejudice to the personal defendants.

5. Did the trial judge err by granting some of the defendants more relief than was sought?

Although Mr. Hood, in his application heard in November 1995, requested the dismissal of the entire action because of the continued contempt of Skipper, the Thorbournes and the Phoenix defendants sought only the dismissal of the loss of contribution claim. During the hearing of the appeal a portion of the transcript of the argument before Justice Gruchy was admitted in relation to this argument. That transcript reveals that Mr. Belliveau, on behalf of the Phoenix defendants, made a motion to amend the application to seek the dismissal of the entire action. The Thorbournes, representing themselves, did not address the issue of the amendment, nor were they asked to comment. The appellant did not respond to the application to amend, and the trial judge made no mention of it.

Again, there is no indication that the appellant was misled or taken by surprise by the application to amend. The appellant must have known the entire action against all the defendants was at stake, just as it was on the first application to dismiss in November 1993. The court is not limited to granting only the relief requested on a Chambers application, and to have granted the remedy sought by one defendant to all of them is, in my opinion, an exercise of discretion that should not be interfered with by this Court.

Conclusion

The appeal should be dismissed. The trial judge committed no reviewable error in reaching the conclusion that the appellant deliberately continued its contempt and that the appropriate remedy on the second application was to dismiss the action. I would order that the appellant pay the costs of the respondents, taxed in the amount of $3,000.00, plus disbursements each.

Roscoe, J.A.

HALLETT, J.A.:

I have read Justice Roscoe's judgment and, with respect, I cannot agree that the learned trial judge did not err in granting the respondents' applications to dismiss the appellant's action.

Justice Roscoe has reviewed the facts in some detail. I will highlight those facts that are relevant to my conclusions.

Following the first application for contempt, and the rendering of a decision and a subsequent addendum thereto by Justice Gruchy, the June 28th, 1994, Order was issued. In the Addendum dated June 21, 1994, Justice Gruchy stated:

> "I have reserved to myself the taxation of costs. If that step becomes necessary and is completed, or upon the resolution of the matter by agreement of counsel, then this action may proceed . . ."

The Order provided that the appellant's action was stayed until the appellant produced the documents described in that Order and until the appellant paid certain costs to the respondents.

On July 21st, 1994, the respondents claimed a total of $708,788. from the appellant pursuant to the cost provisions of the June 28th, 1994, Order. The appellant disputed the quantum; the dispute continued for months; it was eventually shown the appellant was justified in disputing the cost claims of Phoenix and Thorbourne.

On October 10th, 1994, counsel for the respondent Hood wrote to counsel for the appellant:

> "I note as well that in the many, many months which have gone by since Justice Gruchy granted his Order with respect to disclosure, that we have received absolutely nothing from your client in compliance with the Order."

On October 21st, 1994, all counsel appeared before Justice Gruchy on the question of costs.

Due to the enormity of the costs being claimed by the respondents, the appellant's president made a business decision to get the costs issue resolved prior to making a decision whether he wished to continue with the action. Resolution of the costs issue dragged on. Apart from the amounts being claimed, counsel for the respondents, for strategic reasons, refused to produce details of accounts to their respective clients. In short, the parties never could reach agreement and the matter of costs, after submission of written Briefs, had to be resolved by Justice Gruchy.

On March 3rd, 1995, Mr. Justice Gruchy made a finding that the respondent, Phoenix, could not pass on to the appellant a $100,000.00 bonus the solicitor for Phoenix had charged to Phoenix, presumably for its success in having the action stayed.

On July 21st, 1995, counsel for Hood wrote to the appellant's counsel stating that:

> ". . . Your client, the Plaintiff, continues to be in contempt of Court for its failure to disclose numerous documents. I think it is clear to all concerned that if your client had any intention of complying with the Court Order respecting disclosure, it would have done so many many months ago . . . I wish to know whether your client will agree to an Order dismissing its claims against my client . . . [if not] . . . then I have instructions to proceed to have the matter brought back to Court on an application to have the Plaintiffs' claim dismissed for failure to purge its contempt of Court."

The appellant's counsel replied to this letter advising that he was waiting additional information regarding costs and stated:

> "Upon a determination of costs against our client a decision will then be made on the main action. Accordingly, you are not correct in saying that our client has no intention of complying with the court order respecting disclosure."

On August 8th, 1995, Hood's counsel advised the appellant's counsel by letter that, in his view, the settling of the Order with respect to costs had nothing to do with the appellant's "ongoing obligation to purge its contempt by complying with the Court Order and the law respecting disclosure". These letters can best be described as a self-serving paper trail; I would speculate that the last thing counsel for the respondents wanted was the continuation of a law suit which has been costly to all the parties.

On September 20th, 1995, the first application (Hood's) was made to dismiss the appellant's claim for the continued contempt by the appellant of the June 28th, 1994, Order. Applications by the respondents Phoenix and Thorbourne to dismiss certain aspects of the appellant's action followed shortly thereafter. The applications were scheduled to be heard on October 4th, 1995, but were postponed to November 10, 1995, at the request of Justice Gruchy.

As of the end of September 1995 the respondents had not yet submitted complete detailed accounts to support their costs claims for review by counsel for the appellant.

By affidavit dated September 28th, 1995, the president of the appellant company stated that he had been advised by his counsel that the matters of costs that the appellant had been ordered to pay had not yet been determined due to the failure of the respondents to file their bills of costs for taxation. He further stated that following a determination of the amount of the costs, the appellant would then be able to make a decision about the course of the remainder of the litigation which had been stayed pending delivery of the documents. He further stated that the project of retrieving, obtaining and copying the documents in question was an immense task

but that upon receiving notice of the applications to dismiss his action he instructed his counsel to start the document review process. His affidavit goes on to state that there were approximately 100 file boxes in the appellant's archives room which had to be examined to ensure that all documents were produced and delivered. He further states in his affidavit that this process proceeded but that it was incredibly time consuming and had had a major impact on the day-to-day work production at the office of the appellant and in the preparation of month-end financial statements. The appellant requested that the respondents' applications be stayed pending the production of taxation of the respondents' bills of costs. This request was not granted.

On November 9th, 1995, the appellant delivered numerous boxes of documents to the respondents.

On November 10th, 1995, the hearing of the respondents' applications to dismiss the proceedings commenced; more boxes of documents were delivered on that date.

Also in November, 1995, the costs issue was the subject of another hearing before Justice Gruchy.

On April 22nd, 1996, Justice Gruchy filed a decision reducing the respondents' claim for costs to be paid by the appellant pursuant to the June 28th, 1994, Order from $708,778.00 to $336,312.00 with an amount of approximately $80,000.00 in costs claimed yet to be resolved.

On April 23rd, 1996, Justice Gruchy filed his decision granting the applications for the dismissal of the appellant's action. Justice Gruchy had determined that the appellant had deliberately continued its actions of contempt. The Order giving effect to the decision was signed on July 5th, 1996.

With respect to the power to punish for contempt and what constitutes contempt of court in **Oswald's Contempt of Court (1911)** at p. 6 the author states:

> "The power to punish for contempt, however, will be extended to new cases as they arise, provided they are within the principle of those in which the power to punish has been decided to exist, the main question always being whether or not there has been an interference, or a tendency to interfere with the administration of justice.
>
> To speak generally, Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation."

With respect to civil contempt in the text **Borrie and Lowe's Law of Contempt**, 2nd edition (1983), the author states at p. 393:

> "Civil contempt provides the means by which an individual can, in his own interests and if he chooses to, seek to enforce a court order made in his favour. In many ways, therefore, this branch of contempt law exists to protect the private interests of litigants, and its prime function is coercive rather than punitive. However, the *underlying* object of this aspect of contempt law, even where invoked in the normal context of a private dispute between two litigants who hope and intend never to cross each other's path again, is to protect the public interest, namely, that every court must have the means of enforcing its own orders."

The jurisdiction of the Court to make a finding of contempt should be exercised with scrupulous care and only when the contempt is clear (**Rawlinson v. Rawlinson** (1986), 52 Sask. R. 191 (Q.B.)).

A citation for contempt must be defined with particularity (**Northwest Territories Public Service Association v. Commissioner of the Northwest Territories** (1979), 107 D.L.R. (3d) 458 (NWT. C.A.) at p. 479).

The terms of an order which it is alleged that a party has disobeyed and ought to be found in contempt must be clear and unambiguous (**Borrie and Lowe, The Law of Contempt**, 1973 at p. 315. It must be proven beyond a reasonable doubt that the court order was breached; **Filipovic v. Glusica** (1995), 174 A.R. 356 (Alta. C.A.)).

The three applications were for an order dismissing the plaintiff's action "as a result of the continued contempt by the plaintiff" of the Order of June 28th, 1994. In short, the applications were based on an alleged failure of the appellant to comply with that Order; that was the issue particularized in the application.

I do not agree with Justice Roscoe's conclusion that the Order was clear and unambiguous with respect to the issue of document production.

The appellant had been found in contempt following the initial application in 1993. The appellant was punished for that contempt by the June 28th, 1994, Order which stayed the appellant's action until the costs, as ordered, were paid and the documents described, produced. The June 28th, 1994, Order was not an order to produce documents.

While I agree that the appellant had not complied with the **Rules of Court** with respect to the production of documents until November 9th and 10th, 1995, the appellant had not violated the terms of the June 28th, 1994, Order. In effect, the appellant is being punished twice for its failure to comply with the **Rules of Court** requiring the production of documents. Justice Gruchy, by the cost aspect of his Order of June 28th, 1994, imposed what is, in effect, a substantial cash penalty for the appellant's failure to comply with the **Rules**. Had the June 28th, 1994, Order required production of the documents by a specific date, and the appellant had failed to comply with such an Order, it would clearly have been in contempt and a

dismissal of the action for contempt of that Order would have been justified. But there was no such order.

It must be kept in mind that the total of the solicitor and client costs claims put forward by the respondents in July, 1994, against the appellant were very large. It was not until March of 1995, that Justice Gruchy ruled that Phoenix could not pass on to the appellant anything charged by its solicitors by way of a bonus. The bonus charge was in the amount of $100,000.00. The costs issue could not be resolved quickly following the June 28th, 1994, Order as respondents' counsel did not to produce for the examination by solicitors for the appellant, the detailed accounts for legal services as to do so might disclose defence strategy. Considering the substantial costs claimed by the respondents, it was not unreasonable that, in the absence of a clear order to produce documents, the president of the appellant decided to get the costs issue resolved before determining whether he would continue with the proceeding. As late as the end of September, 1995, at the time the second round of contempt applications were being made, the costs issue had not been resolved; in fact, that issue was not resolved until Justice Gruchy's decision of April 22nd, 1996. In the June 21st, 1994, Addendum to his decision of April 18th, 1994, Justice Gruchy stated that upon the resolution of the costs issue the action could proceed. The appellant produced the documents by delivering the same to the respondents in November of 1995, some five months before the costs issue was resolved. By implication, the door was open to deliver the documents any time before the resolution of the costs issue.

In my opinion, Justice Gruchy unfairly and wrongly characterized the conduct of the appellant as arrogant. Justice Gruchy made such a characterization in paragraph 30 of his decision of April 23rd, 1996. He stated:

> "....The plaintiff had done nothing to comply with the decision and order from April 18, 1994, to September 15, 1995. Indeed, it is apparent that the plaintiff decided to do nothing about complying with the order and the **Rules** until the amount of costs have been determined. In my view, Skipper had decided to supplant the **Rules of Court** by its own rules. The plaintiff was required by the **Rules** to produce the documents in question when it chose to commence this action and to make the claims it put forward. If there had been any question about such a duty, it was amply clarified by the decision and order. The court cannot tolerate such arrogance. When a party embarks upon an action, it must comply with the **Rules**. It cannot be permitted to make its own rules as it moves along."

While Justice Gruchy's finding was correct that the plaintiff had done nothing to produce the documents prior to the fall of 1995, he erred in concluding that the plaintiff decided to do nothing to comply with the Order until the amount of costs for which the appellant was liable had been determined. There was nothing in the Order that required the appellant to produce the documents. The applications to the Court were made on the basis that the appellant was in contempt of court for its failure to comply with the Order of June 28th, 1994, not for its failure to comply with the **Rules**. What Justice Gruchy basically decided was that the appellant had not complied with the **Rules of Court** requiring production of documents. That was not the issue on the contempt application he heard in November, 1995. Where a motion is made to dismiss a plaintiff's action on the grounds of contempt of a court order, the plaintiff is entitled to have that issue determined, not some other issue.

I find myself in disagreement with Justice Gruchy's conclusion that if there had been any question about the appellant's duty to produce documents "it was amply clarified by the decision and Order [of June 28th, 1994]." With respect, to state that the decision and Order clarified the requirement to produce documents is

inaccurate. In the decision, Justice Gruchy properly found the appellant in contempt. In the Addendum to his decision, he stated the action could proceed upon the resolution of the costs issue. The Order stayed the action; it did not order production of documents. The stay was the remedy Justice Gruchy imposed for the initial contempt finding. The Addendum and the June 28th, 1994, Order - rather than making it clear that the appellant was being ordered to produce documents had the effect of lulling the appellant into thinking he could proceed in the manner he did.

In paragraph 31 of his decision, Justice Gruchy stated: "By its actions, the plaintiff has to date added another two years' delay." The principal cause of the delay from June 28th, 1994, until April 26th, 1996, when Justice Gruchy rendered his decision dismissing the appellant's action were the exorbitant claim for costs by Phoenix and Thorbourne and the unwillingness of the respondents to produce detailed solicitors' accounts for inspection on the grounds that the invoices would disclose defence strategy. The unreasonableness of the cost demand is clearly evidenced by the decision on April 22nd, 1996, to reduce the respondents' claim for costs against the appellant by over $300,000.00. The cost matter had not been resolved by the date of the contempt applications made by the respondents seeking to have the action dismissed. The application which was originally scheduled to be heard in October was postponed by Justice Gruchy to November 10th, 1995, and the decision on the applications was not rendered until April 23rd, 1996. The two year delay which Justice Gruchy refers to cannot be laid entirely at the feet of the appellant. Between June 28th, 1994, and September of 1995, when the applications were commenced, the parties had been unable to resolve the costs issue.

The June 28th, 1994, Order did not order the production of documents but simply stayed the action. It was not an unreasonable interpretation by the

appellant's president that the appellant had not been ordered to produce documents by the June 28th, 1994 Order. The application to the Court was for the "continued contempt" of the June 28th, 1994 Order. There was no wilful flouting of that Order by the appellant.

Under the circumstances, in the absence of a clear direction requiring the production of documents, the appellant ought not to have been found in contempt of the June 28th, 1994, Order for the failure to produce documents that the appellant had not been expressly ordered to produce.

Justice Roscoe has reasoned that if the appellant was confused about the intent of the Order of June 28th, 1994, the appellant ought to have applied to have it amended. The June 28th, 1994, Order had been drafted by the respondents. They had the obligation, if they really desired to get on with the law suit or have it dismissed for failure to produce documents, to have made an application to vary the order to require production of documents and to put a deadline on the appellant for the production of the same. The respondents did not make such an application, even after knowing the position of the appellant that it had taken a business decision that it wished to resolve the costs issue before deciding if it could proceed with the law suit. In my opinion the appellant was not disobeying the court order of June 28th, 1994.

In **Harwood v. Wilkinson**, [1930] 2 D.L.R. 199 (Ont. C.A.), Rev'g [1929] 4 D.L.R. 734 (Ont. H.C.), aff'd [1931] 2 D.L.R 479 (S.C.C.), the Ontario Supreme Court, Appeal Division was dealing with an appeal from an action which was dismissed partly because of the Plaintiff's alleged contempt in refusing to answer questions at a discovery examination. The Appeal Division allowed the appeal and overturned the dismissal of the action. Riddell, J.A. stated at p. 201:

> "The dismissal of the action is only to be ordered in the case of a wilfully disobedient party, not of one who has made a mistake on the advice of counsel or otherwise - and it is done only in the last resort. *Twycross v. Grant*, [1875] W.N. 201, 229; *Fisher v. Hughes* (1875), 25 W.R. 528; *Pike v. Keene* (1876), 35 L.T. 34.1 In general, another opportunity is given to act properly and answer the questions, even after an order has been made and disobeyed: *Denham v. Gooch* (1890), 13 P.R. (Ont.) 344."

The Supreme Court of Canada affirmed the judgment of the Appeal Division.

In **Swan River - The Pas Transfer Ltd. et al v. Highway Traffic and Motor Transport Board** (1974), 51 D.L.R. (3d) 292 (Man. C.A.) a finding of contempt was overturned on appeal on the basis that there might be legitimate differences of opinion as to what goods could not be transported under the phrase "general freight". The Manitoba Court of Appeal concluded that, under the circumstances, it was difficult to say that the carrier was actually in contempt in transporting the goods in question. The Court concluded that the carrier's action did not amount to an obstruction of or an interference with the administration of justice and did not demand a finding of contempt. The court went on to find, however, that the carrier was not entirely blameless and that under the circumstances, although it would allow the appeal against the finding of contempt, it would deprive the carrier of its costs.

The appellant has been anything but a model litigant and was properly censored by Justice Gruchy in the first instance and found by him to be in contempt. That finding led to the Order of June 28th, 1994.

The sanction of dismissing a plaintiff's action is as serious a sanction as can be imposed for contempt for disobedience of a court order. Accordingly, such a sanction should be imposed only if the court order has been clearly disobeyed.

The lawsuit has dragged on for an extraordinary length of time and the

remedies sought by the appellant in the suit are wide-ranging and appear to be duplicitous. While it might be sensible to give a proper burial to this suit, I cannot agree that the appellant was in contempt of the June 28th, 1994, Order.

In my opinion, Justice Gruchy erred in concluding that the June 28th, 1994,Order was of sufficient clarity to warrant a finding that the appellant was in contempt of that Order and erred in concluding that it was the appellant's actions that had added a further two years delay in the proceedings. The June 28th, 1994, Order, which was the subject-matter of the contempt application, did not require the appellant to produce documents and the appellant ought not to have been found in contempt for having failed to do so.

I would allow the appeal and set aside that part of the Order dated July 5th, 1996, which dismissed the appellant's action. I would further order that any party and party costs paid by the appellant pursuant to that Order be repaid forthwith by the respective respondents. Considering all of the circumstances I would not order the respondents to pay to the appellant any costs of the applications heard by Justice Gruchy in November, 1995, nor any costs on appeal.

Hallett, J.A.

Concurred in:

Freeman, J.A.

C.A. No. 127612

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SKIPPER FISHERIES LIMITED, a body corporate Appellant - and - WAYNE THORBOURNE, CLAUDETTE THORBOURNE, THOR SEINERS LIMITED, a body corporate, PHOENIX FISHERIES LIMITED, a body corporate, PAUL EDWARD BLADES, BRIAN ARTHUR BLADES, CLIFFORD V. GOREHAM, and S. CLIFFORD HOOD Respondents	)	REASONS FOR JUDGMENT BY: HALLETT, J.A. ROSCOE, J.A. (Dissenting)