

The reasons for judgment of the Court were delivered orally by:

HALLETT, J.A.:

On March 13th, 1995 the respondents (defendants) applied to a judge of the Supreme Court for

"a judgment pursuant to Civil Procedure Rules 20.02(b) and 30.02 for an Order adjourning the trial in this matter which was originally scheduled for April 10, 1995..."

The application was on the ground that the appellant (plaintiff) had failed to produce documents that had been agreed to be produced at a date assignment conference before Justice Bateman. The relief sought by the appellant was spelled out in an affidavit filed in support of the application. It included the following:

"29. THAT I hereby request that the following order be issued by this Honourable Court:

(a) That the trial in this matter be adjourned to a date selected by the Halifax Prothonotary's Office which will not be earlier than May 15, 1995;

(b) That the Plaintiff be ordered to produce the requested documentation immediately or on or before March 15, 1995 (or such fixed date as the court may select but which is not less than two months before trial);

(c) That in the event of continued non-compliance by the Plaintiff beyond the March 15, 1995 disclosure deadline, that the Plaintiff's case be dismissed with costs awarded to the Defendants."

On March 13th, 1995, the learned Chambers judge, following the hearing of the application, made the following Order:

"1. The trial in this matter which was originally scheduled for April 10 and 11, 1995 in Halifax has been rescheduled sine die to a date set by the Halifax Prothonotary's Office, with said date not being scheduled earlier than June 1, 1995;

2. The documents listed in paragraph six of the affidavit of Douglas J. Lloy and in the Discovery transcript on file herein shall be provided to the Defendants' solicitor on or before March 30, 1995 if said documents are in existence;

3. If these documents are in existence but are not provided to the Defendants' solicitor on or before March 30, 1995, then the Plaintiff's Statement of Claim shall be struck and forever dismissed forthwith on March 30, 1995;

4. If, after the Plaintiff's solicitor has made a careful and complete search for these documents or has been thoroughly satisfied after an extensive and complete search has been made by the Plaintiff that these documents are not in existence, then the Plaintiff's solicitor will draft his solemn undertaking stating that these documents have not been found and the methods employed by him or his client in attempting to locate the same. This undertaking must be filed with the court no later than March 30, 1995. An affidavit from the Plaintiff's auditors to the same effect is also required.

The appellant immediately appealed the order. In our opinion it was premature to include a provision in the order dismissing the appellant's claim when the agreement of counsel for the plaintiff at the date assignment conference was so vague as to what documents would be produced. Striking a statement of claim is a very serious matter (**Frank v. Colburne et al**, C.A. No. 113148 dated May 30th, 1995 (unreported)). In the circumstances the learned Chambers judge exercised his discretion improperly by making an order striking the statement of claim without determining if the documents ordered to be produced were relevant. Accordingly, he erred in law, his order resulted in an injustice to the appellant. Leave to appeal is granted, the appeal is allowed and the order is set aside. There will be no order for costs to either side.

Hallett, J.A.

Concurred in:

Jones, J.A.

Flinn, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

PARKWAY RENTALS LIMITD,
a body corporate

Appellant

- and -
FOR

BY:
1040405 NOVA SCOTIA LIMITED,
a body corporate, and BARRY MARTIN

Respondents

)
)
) REASONS

) JUDGMENT

)
) (HALLETT, J.A.
) (Orally)