C.A. No. 113148

NOVA SCOTIA COURT OF APPEAL

Hallett, Roscoe and Pugsley, JJ.A.

Cite as: Frank v. Colburne, 1995 NSCA 110

BETWEEN:	
CHARLOTTE FRANK Appellant	Bradford G. Yuill for the Appellant
- and -	
WILLARD LEON COLBURNE and FRANK ELROY LOCKE, Executors and Trustees of the Estate of the late RAYMOND S. PURDY Respondents	John T. Rafferty, Q.C. and R. Lorne MacDougall, Q.C. for the Respondents
	Appeal Heard: May 12, 1995
	Judgment Delivered: May 30, 1995

THE COURT: The appeal is allowed as per reasons for judgment of Roscoe, J.A.; Hallett and Pugsley, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision of a Supreme Court judge which ordered the dismissal of the appellant's counterclaim on an application made by the respondents pursuant

to **Civil Procedure Rules** 18.15(b) and 14.25(1)(d).

The relevant Rules provide as follows:

> "14.25 (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
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> (a) it discloses no reasonable cause of action or defence;
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> (b) it is false, scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
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> (d) it is otherwise an abuse of the process of the court;
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> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
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> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).
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> 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
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> (a) hold him guilty of contempt;
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> (b) if he is a plaintiff, dismiss the proceeding;
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> (c) if a defendant, strike out the defence;
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> (d) grant such other order as is just."

The action arises out of a relationship between the appellant and the deceased, Raymond Purdy. After his death on February 11, 1993, the executors brought an action alleging trespass against the appellant and seeking her removal from the deceased's home. The appellant defended and counterclaimed seeking relief under the **Testator's Family Maintenance Act**, or one of the doctrines of ***quantum meruit***, unjust enrichment or implied or constructive trust. She also claimed that the co-habitation agreement between herself and the deceased should be set aside on the basis of undue influence. The trespass action was

resolved by an order of summary judgment granted on August 31, 1993.

After the resolution of the trespass issue, the lawyers for the parties interviewed possible witnesses, and agreed to have discoveries in the near future. No dates were confirmed until late July when it was agreed to hold them on September 20, 1994. In late August counsel for the respondents asked for and received an agreement to postpone the first set of discoveries until November 17, 1994. Counsel for the respondents had formal notices of examination and conduct money personally served on the appellant, and two people expected to testify on her behalf, Mr. Holmes and Rev. McKillop. In late October the date was, at the request of the appellant's counsel, agreed to be adjourned one day to November 18, 1994.

On November 7, 1994 the appellant filed a Notice of Intention to Act in Person and delivered it to the respondents' counsel, together with a request to further postpone the discovery due to the illness of the appellant. The respondents would not consent to an adjournment and as a result Mr. Holmes, a friend of the appellant's, made an application in Chambers on November 16, 1994 on her behalf for an order postponing the discoveries for one month. The appellant had appointed Mr. Holmes, who is not a lawyer, under a Power of Attorney to act as her representative. Justice Kelly granted the request for the adjournment and ordered the discovery of the appellant to take place on December 14, 1994. Mr. Holmes had, in compliance with the direction of Justice Kelly, filed a letter from the appellant's doctor which stated that she had "been followed" for the previous six months for "anxiety, depression and anger relating to her current life situation." When ordering that the appellant attend at discovery, Justice Kelly admonished that there should be no further delays in the matter unless the appellant was ill and the illness preventing her attendance was verified by a doctor. The discoveries of Mr. Holmes and Rev. McKillop took place as scheduled on November 18, 1994.

On December 13, 1994, Mr. Holmes called respondents' counsel and advised

that he was suffering from bronchial pneumonia and asked to postpone the discovery scheduled for the next day. The request was refused. Mr. Holmes advised in writing later that day that the appellant would not attend without him and provided a medical certificate respecting his illness to the respondents' counsel. The appellant did not attend at the discovery as ordered. The respondents brought the application to dismiss the counterclaim pursuant to Rules 18.15 and 14.25, which was heard on December 22, 1994 by Justice Scanlan. After hearing from respondents counsel, who filed a lengthy affidavit and Mr. Holmes, Justice Scanlan commented as follows:

> "I note in terms of the comments before me here today that Mr. Holmes was not able to attend at the discovery but it was not in fact he who was going to be discovered, it was Mrs. Frank. In terms of assessing the application requesting dismissal on the basis of failure to attend, I note that there have been a number of arrangements made for discovery by agreement and pursuant to the court Order that none of the agreements were kept nor was the Order followed in terms of the discovery being arranged. This matter has been dragging on now for some substantial period of time. . ."
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> After quoting Rule 18.15(b) he continued:
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> "I have considered the numerous attempts by the plaintiff/defendant by counterclaim to arrange for a discovery. I find that the plaintiff by counterclaim has failed to attend at the discovery at the arranged times and it is appropriate that the court would dismiss the counterclaim on that basis."

The Chambers judge then referred to other actions of Mr. Holmes that the respondents' solicitor had objected to and found that the actions of Mr. Holmes in pursuance of the lawsuit "smack[ed] of champerty", that he had exerted "extra-judicial pressure" on the executors of the estate and that there was "slight likelihood of success in any event and that the litigation is not well founded." In consequence he dismissed the counterclaim.

Since the order made by the learned Chambers judge was one that finally disposes of the matter, the comments of Matthews, J.A. in **MacCulloch v. McInnes, Cooper & Robertson,** unreported, April 20, 1995, C.A. No. 113926 respecting the applicable standard

of review in such cases are applicable:

> "The order issued by the chambers judge is discretionary. As this Court has repeatedly said: we will not interfere with a discretionary order, especially an interlocutory one unless wrong principles of law have been applied or a patent injustice would result. See among others: **Exco Corporation Limited v. Nova Scotia Savings and Loan et al** (1983), 59 N.S.R. (2d) 331; **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54 and **Minkoff v. Poole et al** (1991), 101 N.S.R. (2d) 143 (N.S.A.D.). Are we concerned with an interlocutory order? In my opinion we are not.
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> In **Minkoff**, Chipman, J.A. after citing the above noted cases at p. 145-6 remarked:
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> > '...Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. **The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case,** are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. See **Charles Osenton and Company v. Johnston** (1941), 57 T.L.R. 515; **Finlay v. Minister of Finance of Canada et al.** (1990), 71 D.L.R. (4th) 422; and the decision of this court in **Attorney General of Canada v. Foundation Company of Canada Limited et al**. (S.C.A. No. 02272, as yet unreported). [emphasis added]'
>
> Justice John Sopinka and Mr. Mark A. Gelowitz in their text **The Conduct of an Appeal,** Butterworths 1993, set out an overview of the distinction, both real and perceived, between interlocutory and final orders. The authors comment at p. 6:

> 'One who has not been introduced to the intricacies of the matter could be forgiven for speculating that an 'interlocutory' order is one delivered in the course of litigation, prior to final judgment, and that a 'final' order is one that concludes litigation. Such an interpretation would be logical and in accordance with the common law understanding of final judgment; it is, however, sadly unsophisticated. What should be a straightforward application of a simple principle has never been anything of the kind. Every previously untested order appears to raise the question anew, with unpredictable and inconsistent results - so much so that the judges themselves have been driven to despair.'

They remark further at p. 15:

> It emerges from the cases that the distinction between interlocutory and final orders is not strictly parallel to the distinction between substance and procedure. Pleadings and joinder of claims and parties, for example, are generally regarded as matters of procedure, but orders in such matters can have drastic effects on what and against whom a party can claim. **Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly 'dispose of the rights of the parties' and are appropriately treated as final**. Where such orders set the stage for a determination on the merits, they do not 'dispose of the rights of the parties' and are appropriately treated as interlocutory. [emphasis added]'

> See also **Canada (Attorney General) v. Foundation Company of Canada Ltd. et al** (1990), 99 N.S.R. (2d) 327 (N.S.A.D.) and **Saulnier v. Dartmouth Fuels Ltd.** 106 N.S.R. (2d) 425 (N.S.A.D.)"

In this case, as in **MacCulloch**, the order appealed from had a terminating effect and plainly disposes of the rights of the parties. Therefore the usual test applied to

discretionary orders of an interlocutory nature does not apply. Rather the issue is whether there was an error of law resulting in an injustice.

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".

In **Wismer v. Maclean-Hunter et al., No. 6** (1954), 13 W.W.R. 105 the British Columbia Court of Appeal considered an appeal from an order striking out the defence of a journalist who repeatedly refused to answer certain questions on discovery. He had been ordered by a trial court judge to reveal his sources for an alleged defamatory article. Appeals of that order to the British Columbia Court of Appeal and the Supreme Court of Canada had been dismissed. At a further discovery he indicated that although he had no intention of being disrespectful to the court, he felt he had a moral obligation to refuse to answer the questions. On the appeal of the order striking out his defence, Bird, J.A. for the court said:

> "Here, in my view, the conduct of this defendant in refusing to divulge the sources of his information cannot be regarded as other than contumacious. He has persisted over the period of more than a year to resist the orders of the courts of the country. He now says, in effect, that after due deliberation, he considers that his moral obligation to the persons who furnished the information transcends his duty to obey the court order. In those circumstances, as was said by Macfarlane J., 'he must realize that refusal involves the result for which the rules provide.'"

In **Liang v. Liang**, [1993] B.C.J. No. 212 (Q.L.)(B.C.S.C.), the issue was whether a failure to appear for a discovery should result in the dismissal of the plaintiff's claim for

maintenance. The Rule at issue was substantially the same as Rule 18.15. After referring to **Wismer**, **supra**, Master Wilson said:

> " In ... **Wismer**, it appears that the defendant, in that case, had persisted, for more than one year, to resist legitimate orders directed towards his compliance. It seems to me that that would be a factor in a finding of contumacious conduct.
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> But I am not satisfied that, in the circumstances of this case, the plaintiff's conduct was contumacious.
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> Contumacious is defined in the Shorter Oxford English Dictionary, 3rd Edition, 1973, as:
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> '1. Exhibiting contumacy; stubbornly perverse, insubordinate, rebellious.
>
> 2. Wilfully disobedient to the summons or order of a court.'"

After reference to other cases in which the offending party was given a further opportunity to comply with the order or Rule, Master Wilson dismissed the application to dismiss.

Other examples of the threshold of conduct found to be necessary before dismissing an action or a defence because of non-compliance with the rules or court orders are: proof of contumelious behaviour (which means an insulting display of contempt) - **Saikaley v. Commonwealth Insurance Co. et al** (1978), 91 D.L.R. (3d) 298 (Ont.H.C.); and a deliberate flouting - **Analagen und Trehand Contor GMBH v. International Chemalloy Corp.** (1982), 27 C.P.C. 195 (Ont. C.A.).

In this case the failure to attend at the discovery examination, even though it was ordered by the court, cannot, in my opinion, be said to amount to conduct that is contemptuous, contumacious, or contumelious. Here, illness proved by a doctor's letter, was offered as the excuse for non-attendance on both occasions. Surely, if Mr. Holmes had been a member of the bar, respondents' counsel would have extended the courtesy of at least one further adjournment under the circumstances. There was no indication that the respondents suffered any prejudice as a result of the additional delay, a fact acknowledged by respondents'

counsel at the hearing of the appeal. The November date was not wasted; other witnesses were discovered. Another date in January was set aside for the discoveries of other parties in any event. Unfortunately, since the appellant was not represented by legal counsel in the hearing before Justice Scanlan, little argument was offered in opposition to the application. Mr. Holmes merely commented on the nature of his illness and advised the court that the appellant was still suffering from clinical depression. I agree with the submission by the appellant made on the appeal that even if her conduct caused delay, the remedy employed was disproportionate to the effect of her conduct.

In my view, the comments of Meldrum, J. in **Tremblay v. Chiasson** (1980), 32 N.B.R. (2d) 501 (N.B.Q.B.), 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."

It was an error of law for the Chambers judge not to have considered the effect of the delay on the proceeding and whether the conduct of the appellant was a wilful, deliberate refusal to abide by the Rules or an order of the court. The striking out of the appellant's counterclaim has resulted in a patent injustice to the appellant. The appeal ought to be allowed.

It is not necessary in my view to consider the other grounds of appeal. The comments of the Chambers judge in respect to the abuse of process application were merely afterthoughts. It is clear that he decided the application on the basis of Rule 18.15, not 14.25.

Costs of the appeal shall be in the cause.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.