

Date: 20011114
Docket: S. H. 167817

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Halifax (Regional Municipality) v. Joudrey 2001 NSSC 162]

BETWEEN:

HALIFAX REGIONAL MUNICIPALITY,
a municipal body corporate

PLAINTIFF

- and -

VANCE JOUDREY

DEFENDANT

D E C I S I O N

HEARD BEFORE: **The Honourable Justice Walter R. E. Goodfellow in the
Supreme Court of Halifax (Chambers) on November
13th, 2001**

DECISION: **November 14th, 2001**

COUNSEL: **Ian C. Pickard and Benjamin R. Durnford, Solicitors
for the Plaintiff**
Robert G. Cragg, Solicitor for the Defendant

GOODFELLOW, J.:

BACKGROUND

- [1] Vance Joudrey is the owner of the property 921 Brussel Street, Halifax and in 1999 planned renovations. On March 29th, 1999 his architect applied for a minor variance converting the existing R1 use to R2 use so as to have two units without changing the side yard requirements. The side yard requirements for a two unit dwelling is five foot clearance. After discussion with HRM, this application was withdrawn.
- [2] On April the 14th, 1999 a development permit was sought to convert the single family dwelling to two residential units and this was granted May the 12th on conditions that all R2 requirements would be met, including lot coverage, minimum five foot side yard, etcetera. This was followed by a further application for a development permit November the 30th, 1999 which was simply to add living space to the existing single unit dwelling. This was granted December the 24th, 1999 on the condition that all R2 general residential zone requirements were met and the plan was revised to show an addition to a single family dwelling and such plans indicated for example, one kitchen. The plans were reviewed by HRM and on June the 1st, 2000 a

notation on the plans confirmed it was a single family dwelling with one kitchen and on the 15th of June, 2000, the kitchen was to be relocated to a new kitchen in the extension. On July the 28th, 2000 an inspection revealed the existence of two kitchens - one in the original structure and one in the addition. On August the 9th, 2000, HRM was advised that the original kitchen was removed and plumbing sealed up, etcetera.

- [3] Negotiations took place between HRM and Mr. Joudrey in part because the accommodation was rented out to separate groups of students and the parties reached a Consent Order which was issued January the 9th, 2001.
- [4] HRM seeks a finding that Vance Joudrey is in contempt of the Consent Order.

CONSENT ORDER JANUARY 9th, 2001 -

UPON IT APPEARING the Plaintiff and Defendant have agreed to settle the within action based on the terms of this Order;

AND UPON HEARING Justin G. Kimball, on behalf of the Plaintiff, with Robert Cragg on behalf of the Defendant, consenting hereto:

NOW UPON MOTION:

IT IS DECLARED that the dwelling located at 921 Brussels Street, Halifax, Nova Scotia (the “property”) is in contravention of the Plaintiff’s Land Use By-Laws;

AND IT IS ORDERED:

- (a) The Defendant is permanently enjoined from maintaining and using the Property in contravention of the Plaintiff’s Land Use By-Laws;

- (b) The Defendant shall remove and/or destroy the part(s) of the Property contravening the Plaintiff’s Land Use By-Laws and, not to limit the generality of the foregoing, shall reconfigure the Property so:
 - (i) that it contains only one kitchen;

 - (ii) that it contains free internal access for its occupants between the original part of the dwelling structure and the recent addition;

 - (iii) that it contain no more than three (3) locking doors in the interior.

- (c) The Defendant shall complete the work specified in paragraph (b) hereof by no later than June 6, 2001.

[5] The Order went on to provide for access by HRM to ensure compliance and authority to HRM for the purpose of removal or destruction of any portion of the property that remains in contravention of the Land Use By-Laws with the expense to be recovered by HRM against Vance Joudrey.

RELIEF SOUGHT

[6] The Contempt Order sought by HRM is in the following form:

CONTEMPT ORDER

BEFORE THE HONOURABLE MR. JUSTICE DAVID W. GRUCHY IN CHAMBERS,

UPON THE APPLICATION of the Plaintiff, through its solicitor Ian Pickard, of Halifax, counsel for the Plaintiff, and upon reading the Affidavits of Steven Higgins, W.K. (Bill) MacGillivray and Sharon Bond, one sworn October 25, 2001 and the other two sworn October 26, 2001.

AND UPON this Honourable Court's Order, dated October 30, 2001, directing Vance Joudrey to appear before the Court on Tuesday, the 13th day of November, 2001, at the hour of 9:30 o'clock in the forenoon, to show cause why Vance Joudrey should not be held in contempt of Court and, if required, to perform or abide by such other Order as the Court may make;

AND UPON HEARING Ian Pickard on behalf of the Plaintiff and Robert Cragg on behalf of Vance Joudrey;

AND UPON IT APPEARING to the satisfaction of the Court that the said Vance Joudrey has been guilty of contempt of Court in that he failed to abide by the Order of this Honourable Court in the within proceeding dated January 9, 2001;

IT IS ORDERED that for his contempt, Vance Joudrey be ordered to pay a fine in the amount of Twenty-five Thousand Dollars (\$25,000);

AND IT IS FURTHER ORDERED that the Sheriff enter upon the property of the Defendant and collect and receive the rents, profits and income thereof until the Defendant clears his contempt by complying with Order of the Honourable Mr. Justice Robert Wright, dated the 9th day of January, 2001, namely, full compliance with the Land Use By-Laws of the Halifax Regional Municipality;

AND IT IS FURTHER ORDERED that in order to ensure compliance with the Order of the Honourable Mr. Justice Robert Wright, dated the 9th day of January, 2001, the Defendant must forthwith, in any event prior to December 1, 2001, undertake the following work:

1. The door at the rear of the kitchen in the "old house" that now connects the two dwelling units must be removed. The doorframe and all associated hardware must be removed as well creating an archway between the "old house" and the "new house"
2. All food preparation and storage facilities and appliances must be removed from the building with the exception of those contained within the one designated kitchen area.
3. All kitchen cabinets, counters and sinks must be removed from the building with the exception of those contained within the one designated kitchen area.
4. Any reference to Apartment A and Apartment B must be removed from the property. As an example, the property must only have one mailbox.
5. The second power meter must be removed from the property. All power within the entire structure has to be run through one power meter.
6. The second cable television connection and associated billing provisions must be eliminated. In the alternative, the property can have a second connection if we receive the necessary proof demonstrating the property only receives one cable bill.

7. The Plaintiff must be provided with a certified copy of the lease for the rental of the property containing the following provisions:
 - (a) names of the tenants;
 - (b) a clear and indisputable reference the lease is for the occupation of the entire structure and the building is only to be occupied as a single dwelling unit;
 - (c) a clear explanation within the terms of the lease that the rent for the entire premises is to be paid as one single payment to the landlord collectively by all of the tenants; and
 - (d) an undertaking Mr. Joudrey will provide an updated copy of the lease to the Development Officer each time it is altered in any way.

8. Commencing December 3, 2001, at a time suitable to the Plaintiff's officials and between the hours of 9:00 a.m. and 12:00 p.m.; the Defendant (or his successor(s) in title of the property as the case may be) shall grant access to the Plaintiff's officials to all parts of the property to ensure he is in compliance with the Plaintiff's Land Use By-Laws and thereafter the Plaintiff's officials will be permitted to perform random inspections to ensure long term conformance on not more than a weekly basis.

AND IT IS ORDERED that this Order shall not be executed, with the exception of the following clause, if the said Vance Joudrey complies on or before December 1, 2001 with the terms and conditions contained in the Order.

AND IT IS FURTHER ORDERED that Vance Joudrey pay to the Plaintiff costs of this Application on a solicitor and client basis, payable forthwith.

DATED at Halifax, this day of November, 2001.

CIVIL PROCEDURE RULE 55.05

The Contempt Order

55.05 (1) The court may make a contempt order in Form 55.05A which may order that;

(a) a person cited for contempt be imprisoned as ordered or until further order;

(b) when a person cited for contempt fails to comply with any term or condition in an order, he be imprisoned as ordered therein;

(c) a sheriff enter upon and take possession of any property of a person cited for contempt and receive and collect the rents, profits or income thereof until the person shall clear his contempt by complying with the terms of the order;

(d) direct a person cited for contempt to pay a find, give security for good behaviour, pay such costs and expenses or comply with such other order as the court may grant under rule 55.09.

(2) The court may order the execution of a contempt order to be modified or suspended for such period, or on such terms or conditions, as it thinks just, and unless the court otherwise orders, a copy of the order shall forthwith be served by the applicant on any person affected by it.

(3) When a person, pursuant to a contempt order, has been detained in custody or his property taken thereunder and he continues to disobey the terms of

the order, the court may make a further contempt order upon such terms as it thinks just.

(4) Where a person cannot be served with a contempt order because he is out of the jurisdiction or cannot be found by the sheriff after exercising due diligence, the court may, on an ex parte application, issue a contempt order against the property of the person and the sheriff may execute the order in the absence of the person.

CONTEMPT

- [7] Intention to disobey the court's order is not an element of civil contempt *TG Industries Ltd. v. Williams*, [2001] N.S.J. No. 241 NSCA. The contempt here is made all the more obvious in that I found as a fact the conduct of Joudrey leads to no other reasonable inference that he clearly intended to circumvent the By-Law and intended to disobey the Order of January the 9th, 2001. He proceeded to do so on the mistaken belief he could somehow weasel his way out of that to which he consented.
- [8] Mr. Joudrey is in contempt if he intentionally did an act which is prohibited by the Order of the Court to which he consented. The Court must first determine if there has been contempt of the Order and **then** consider the sanctions.
- [9] I found and so advised the parties at the conclusion of the hearing and argument that without reservation, Joudrey was in contempt of the January

9th, 2001 Order of the Court. In reaching that conclusion, I made the following findings of fact:

1. That there is an Order of the Court January 9th, 2001 containing the provisions sighted above.
2. That Mr. Joudrey knew of the Order, its contents and import. There is also the background of this matter and the fact that he consented to the Order.
3. Mr. Joudrey conducted himself in a manner that not only intended but clearly was in disobedience to the Order. First of all, he was permanently enjoined from using the property in contravention of the Land Use By-Laws and it is conceded on record that this meant he was to use the property in no other manner than as a single family dwelling. Secondly, he was to undertake specific steps to ensure conformity with the obligation to maintain only a single family dwelling on the property.
4. On June the 14th, 2001 Joudrey pled guilty in Provincial Court to charges that he did unlawfully permit a two unit structure to exist in an R2 zone in a manner contrary to the requirements outlined in s.

43E (a) of HRM's Land Use By-Law and fined One Hundred (\$100.00) Dollars. This plea of guilty is an admission in this application.

5. On May 24th, 2001 the property had a sign giving the phone number and advertising a three bedroom, living room and dining room.
6. The property was inspected by HRM on June the 7th, 2001 and the front portion of the property was unoccupied.
7. Joudrey filed Affidavits from three students which indicate that they installed kitchen appliances and in their view, Joudrey was not aware of the operation of the second kitchen until they brought it to his attention in late September, 2001. I do not accept this evidence because it is clear that Joudrey placed an advertisement in the Halifax Mail-Star Tuesday, August 21st, 2001 with the same telephone number as in the window sign posted in the property and essentially in the same terminology with the added words, "partial kitchen". Mr. Joudrey's counsel explains this as simply being an error or a stupid thing for his client to have done. Given the background of this matter and all that has transpired, I find as a fact that Joudrey in placing such

an ad clearly realized that the existence of a “partial kitchen” was a breach of the Order of the Court to which he had consented.

8. On September the 27th, 2001 the property was inspected and photographs taken which show the “partial kitchen”. There are microwaves, a two-burner hotplate, electric grill, full size fridge, bar fridge, deep freeze and a sink full of dishes. Clearly, this constitutes a “kitchen” and it is acknowledged that there was a new kitchen in the addition and therefore the existence of the kitchen in the original building on September the 27th was a clear violation of the specific provision in the Court Order of the 9th of January, 2001.
9. On September the 27th, 2001 the inspection revealed a mailbox with the letter “B”. An inquiry by HRM resulted in it being advised by EastLink that there are two current customer accounts at the property, one for apartment “A” in the name of J. Ellsworth and one for apartment “B” in the name of S. Carson. Ellsworth filed an Affidavit confirming he was a tenant of Joudrey. In addition, the Nova Scotia Power Corporation confirmed to HRM that there were separate hookups for the front and back portions of the property with the bills

for both units going to Vance Joudrey. The separate hookups and metres are confirmed in photographs filed in this application.

10. To operate as a single family unit required open access between the two units, the older part of the building and the addition. When HRM inspected the property September 27th, 2001 there existed a doorway connecting the front portion of the structure to the new addition at the back and although the door had no locking mechanism it was barely accessible due to a deep freeze in the front “partial kitchen” blocking the way.
11. The Court was advised in the hearing that the occupants in the front unit were in possession by virtue of a verbal lease and the occupants of the new addition were in occupation by virtue of a written lease and neither occupants were joined in their respective leases.
12. Mr. Joudrey’s counsel takes the position that his client has not benefited by being in contempt of the January 9th, 2001 Order and with respect, I disagree. The extent of the benefit and its calculation may be impossible to determine with mathematical precision. Nevertheless, advertising and renting the unit with a “partial kitchen” means it is highly probable that the breach rendered the unit more

rentable and highly probable that the rental obtained was of a higher level than might well have been otherwise without the breach.

13. There is nothing in Mr. Joudrey's Affidavit or the Affidavits of some of his tenants to indicate any concrete steps whatsoever have been taken to rectify the situation and place Mr. Joudrey in compliance with the Order of January the 9th, 2001. Mr. Joudrey may well have told the students to remove the items of the "partial kitchen" but nowhere is it suggested that they have been removed or any steps whatsoever taken to purge the existing contempt.

SANCTION

- [10] Once a finding of contempt has been made, the Court turns to the imposition of a sanction. In *TG Industries Ltd. v. Williams* above, Cromwell, J.A. at para. 35:

In civil contempt, the primary purpose of the sanction is to coerce compliance with the order ...The Judge in fashioning an order after a finding of civil contempt is entitled to do so in a way that will obtain compliance with the order so that the party entitled to the benefit of the order in fact receives it. The result is that the party in whose favour the order is made receives a remedy.

- [11] And at para. 37:

If there has been compliance with the order by the time of the contempt application, it will often be the case that no further sanction beyond an order for costs will be imposed.

SANCTIONS - FORM OF ORDER

- [12] HRM seeks a fine in the amount of \$25,000.00 payable if Joudrey fails to comply with the Order following the finding of contempt. Mr. Joudrey's counsel suggests that any fine ought to be in the range of a few hundred dollars at most. I conclude that the requested amount of \$25,000.00 is not required in order to encourage and coerce the highly probable compliance with this Order. On the other hand, there might be a tendency to consider an amount of a few hundred dollars as something in the nature of the cost of doing business. I consider the appropriate fine level to be \$10,000.00.
- [13] HRM seeks in essence an assignment of the rents to the sheriff until the contempt is purged. Such a provision is one that will very much foster compliance with this Order. I can see where in some situations it would be the major enforcement. I am not certain that such an expense is warranted immediately, therefore, the Order will include a provision that it will only

come in effect if there is not compliance as late as January 31st, 2002 so that the sheriff can exercise rent collection, etcetera, effective February the 1st, 2002.

[14] HRM seeks compliance with all the requested terms and conditions of this Order by December the 1st, 2001 and I conclude in the circumstances that it is more reasonable to use the deadline of January the 1st, 2002. The Court should guard against directing too restrictive of a time limit which might in itself result in a non-compliance. It seems to me more practical and reasonable in all the circumstances to set the deadline as the 1st of January, 2002.

[15] HRM's request for removal of the door is appropriate, along with the hardware pertaining to the door, however, I consider it unreasonable for any structural change such as creating an archway. Such is not necessary to reach conformity with the free access of a single family unit.

[16] Storage facilities that pre-exist are consistent with the free use of a single family dwelling and reference to such should be taken from paragraph 2 of the draft Order.

- [17] The cabinets that exist are designated kitchen cabinets because it is operating as a kitchen, however, such are capable of use for storage and the reference to kitchen cabinets and counters in paragraph 3 is to be deleted.
- [18] The sink is an integral part of the kitchen operation and I agree with HRM that the one in the “partial kitchen” must be removed.
- [19] Paragraphs 4, 5 and 6 are acknowledged by Mr. Joudrey’s counsel as being appropriate.
- [20] Paragraph 7 as presently drafted presents some difficulties. Given the history and difficulties with this property, I see no reason why Mr. Joudrey should not be required to provide within fifteen days the names of all tenants and if and when there are changes in any of the tenants, he should provide HRM within fifteen days of such change the particulars of the new and remaining tenants. Mr. Joudrey should advise any and all tenants in writing prior to entry of occupation that the entire structure and building is only to be occupied as a single dwelling unit. I consider the request for a single payment to the landlord collectively by all the tenants as to be too much of an interference and the manner of payment of rental should be subject to the contractual determination between the landlord and any tenant. I therefore do not consider paragraph 7(c) as appropriate.

- [21] With respect to paragraph 7(d), if there are any written leases now or in the future, then Mr. Joudrey is to provide a copy of any such lease within fifteen days of the lease's execution or any alternation in the lease or tenants to it.
- [22] With respect to entering into the property ensuring compliance by inspection, this is unfortunately necessary given the history of the matter, however, I consider random inspections that could be every week as an excessive imposition on Mr. Joudrey. He does not occupy the building and apparently resides in Blockhouse. He has, however, created the situation and some inspection capacity is necessary but I would limit it to twice a month, such inspections to be at least ten day apart with such bi-monthly inspections to continue until the City is satisfied that this Order has been complied with and thereafter, HRM shall be entitled to inspect at random once a month while Joudrey is the owner of the property.
- [23] The fine is not to be crystalized into a Judgment and Execution, if Vance Joudrey fully complies with all the requirements of this Order on or before January the 1st, 2002. HRM, however, is entitled to proceed with the taxation of its costs and disbursements and when taxed shall be payable forthwith.

COSTS

[24] HRM seeks costs on a solicitor and client basis. The awarding of costs on a solicitor and client basis is the exception rather than the rule. It requires conduct on the party against whom costs are awarded of such a nature and quality that clearly warrants the party seeking solicitor and client costs being fully indemnified for costs and disbursements that ought not to have been incurred.

[25] In *Morrow, Power v. Newfoundland Telephone Co.*, the Newfoundland Court of Appeal, [1994] N.J. No. 197, solicitor and client costs were denied where the Appellant was guilty of civil contempt because the Appellant acted speedily and with diligence to do everything possible to comply with the Order of the Court. In this case, Joudrey conducted himself post granting of the Order January the 9th, 2001 in a manner which I found as a fact he willfully and intentionally sought to avoid the Order to which he consented. The terms of the Consent Order were clear and included that the property was to have one kitchen - N. B. - A single family dwelling. After reviewing all of the findings of fact, I simply highlight that Joudrey knowing that to which he consented limited the property to a single dwelling with one kitchen, advertised for the rental of one portion of the building with a “partial kitchen”. It is not as suggested by his counsel a matter of the little

guy against the big guy - it is a matter of absolute necessity of compliance with the Court Order, particularly one to which you have consented.

[26] HRM has had to proceed to court to enforce the Court's Order - why should HRM, which is in essence the taxpayers, be required to expend public funds to enforce that which HRM was entitled to in compliance with the Consent Court Order? Mr. Cragg maintains that he wished to negotiate and had requested of HRM their position of which HRM responded with the conditions contained in the draft Order and there is nothing to indicate that Joudrey made any counter-proposal or any suggested courses of action for compliance with its obligations pursuant to the Consent Order. In fact, Joudrey conducted himself to the contrary and as of the date of this application, it is clear that the second functional kitchen continues as do all the other attributes of a non-single family dwelling, i.e., multiple unit usage of the building. It is all well and good to suggest that now Joudrey sees the light of day and will accept the wise advice of his counsel but until this hearing, he has done absolutely nothing to purge the deliberate contempt of the January 9th, 2001 Order. In all these circumstances, the proper exercise of discretion is to recognize the extraordinary circumstances that exists, willfulness of the contempt and the failure at any effort to purge requires an

award of solicitor and client costs and I so order. I am prepared to tax the solicitor and client costs and disbursements and ask HRM to present its statement of account on Affidavit within two weeks, along with any supporting material, and Joudrey's counsel will have ten days from receipt of same to respond after which I will conclude the taxation. This, at least, will save the additional costs of notice and formal taxation, including Taxing Master's fees.

J.