Date: 20010627
Docket: CA 169336

NOVA SCOTIA COURT OF APPEAL
[Cite as: TG Industries Inc. v. Williams, 2001 NSCA 105]

Bateman, Flinn and Cromwell, JJ.A.

BETWEEN:

TG INDUSTRIES LIMITED

Appellant

- and -

ALFRED WILLIAMS

Respondent

CA 168170

BETWEEN:

TG INDUSTRIES LIMITED, a body corporate

Appellant

- and -

CLARKE INC., a body corporate

Respondent

REASONS FOR JUDGMENT

Counsel:	Peter M. Landry for the appellant John E. MacDonell for the respondent, Clarke Inc.
Appeal Heard:	June 11, 2001
Judgment Delivered:	June 27, 2001
THE COURT:	Appeal in CA 169336 allowed; appeal in CA 168170 allowed in part per reasons for judgment of Cromwell, J.A.; Bateman and Flinn, JJ.A. concurring.

CROMWELL, J.A.:

I. INTRODUCTION:

[1] The appellant TG Industries ("TG") obtained a default judgment for roughly $11,000 against Alfred Williams. An execution order was issued. Williams was an independent trucker with the respondent Clarke Inc. ("Clarke"). TG hoped to enforce its execution order by requiring Clarke to pay to it money becoming payable by Clarke to Williams as a result of Williams' work. Accordingly, TG's execution order was served, in May of 1999, on Clarke. Between mid May and the end of November, roughly $18,000 gross became due from Clarke to Williams and roughly $8500 was actually paid by Clarke to him. However, no money was paid by Clarke to the sheriff in response to the execution order until late August when a series of payments totaling roughly $500 was made.

[2] Faced with what it considered to be a clear breach of the execution order by Clarke, TG pursued two potential remedies against Clarke: an action and a contempt application.

[3] In the action, TG sued Clarke for alleged breach of its obligations under the execution order. While the pleading alleges simply that Clarke breached its duty to TG to respond to the execution order, TG's position in this Court is that its claim is, in fact, one based in negligence. TG moved in the action for summary judgment. Clarke opposed the summary judgment application and moved to strike the statement of claim on the basis that it disclosed no cause of action.

[4] Hamilton, J. agreed with Clarke and struck out the statement of claim, dismissed the summary judgment application and dismissed TG's action with costs.

[5] TG then applied to Wright, J. (pursuant to leave granted by Davison, J.) for a contempt order against Clarke for failure to comply with the terms of the execution order. The affidavit filed on Clarke's behalf offered two excuses, which it characterized as "unintentional errors", for its failure to comply with the execution order. It thought (it is admitted erroneously) that it could not respond to the execution order until all monies due under a Revenue Canada Requirement to Pay had been satisfied and it erred by characterizing Williams as an employee rather than an independent contractor for the purposes of determining the amounts required to be paid pursuant to the execution order. There was no evidence of what steps, if any, Clarke took to inform itself about what the execution order required.

[6] Wright, J. dismissed the contempt application with costs. He held that to establish contempt, Clarke's intent to disobey the order must be proved and, in any event, that the contempt power could not be used to provide a remedy to TG for Clarke's failure to comply with the execution order.

[7] TG appeals the decisions of Hamilton and Wright, JJ.

II. ANALYSIS:

1. The appeal from Hamilton, J.'s order:

[8] The issue here is whether Hamilton, J. erred in striking out TG's statement of claim and dismissing its summary judgment application. With respect, the learned judge erred in principle in striking out this statement of claim. The claim asserted is novel; neither counsel could find law affirming or denying the viability of such an action. It is not so clearly devoid of merit in law as to be obviously unsustainable. It should not have been struck under **Rule 14.25**. Of course, in setting aside the order striking the action under **14.25**, I do not comment on the legal or factual merits of the case apart from expressing the opinion that it is not obviously unsustainable. Both the legal and factual merits must be determined at trial. As for the summary judgment application, I agree with the result reached by the learned judge because this is obviously not a case for summary judgment.

[9] I would, therefore, allow the appeal from the order of Hamilton, J. in part and vary her order by inserting operative paragraphs which dismiss Clarke's application to strike the statement of claim and dismiss the plaintiff's application for summary judgment. Given that success on the two issues is divided, there will be no costs of the application before Hamilton, J. or of the appeal.

2. The appeal from Wright, J.'s order:

[10] This appeal concerns the dismissal of TG's contempt application. In my respectful view, Wright, J. made two errors in principle and his order should be set aside and a new hearing ordered.

[11] The judge held that Clarke could only be found in contempt if it intentionally and wilfully acted contrary to the requirements of the order; in short, he found that Clarke could be found in contempt for breach of the

execution order only if it intended to disobey the order. That, however, is putting the test for a finding of civil contempt too high. If accepted, this view would mean that mistakes of law would be a defence to an allegation of civil contempt but not to a murder charge. That cannot be right. In my view, civil contempt may be found in the absence of proof that the alleged contemnor intended to disobey the order.

[12] The authorities on this point are confusing at first glance and I should say in fairness to the learned chambers judge that the most relevant cases were not brought to his attention. The difficulty in the cases has three sources. The first is that not all of the authorities observe the distinction between civil and criminal contempt when setting out the necessary elements. Second, terms such as "intention" and "intentional" are used to mean different things in the authorities. Third, there is sometimes insufficient attention in the cases to the difference between a finding of contempt and the imposition of a sanction for it.

[13] Civil and criminal contempt, although they are not mutually exclusive categories, have different elements and purposes. The core element of civil contempt is failure to obey a court order of which the alleged contemnor is aware. In **Poje v. British Columbia (Attorney General)**, [1953] 1 S.C.R. 516 at 522, Kellock, J. approved a definition of civil contempt as "...disregarding orders or judgments of a Civil Court, or in not doing something ordered to be done in a cause ...". To similar effect, McLachlin, J. (as she then was) in **United Nurses of Alberta v. Alberta (Attorney General)**, [1992] 1 S.C.R. 901 at 931 stated that "[a] person who simply breaches a court order ... is viewed as having committed civil contempt." See also **Baxter Travenol Laboratories v. Cutter (Canada) Ltd.**, [1983] 2 S.C.R. 388 at 396 - 397 and **Bhatnager v. Canada (Minister of Employment and Immigration)**, [1990] 2 S.C.R. 217 at 224 - 227. The primary objective of exercising the civil contempt power is to secure compliance with the order. As Kellock, J. said in **Poje** at 517, in the case of civil contempt, "... the requirements of the situation from the standpoint of enforcement of the rights of the opposite party constitute the criterion upon which the court acts." (See also **Sunnyside Shopping Plaza v. Sunnyside Transmission** (1981), 46 N.S.R. (2d) 156 (S.C.T.D.) at § 16 and **Leger v. Dunbar Estate**, [1983] N.S.J. No. 209 (S.C.T.D.) at § 31).

[14] Criminal contempt, by contrast, involves not simply breaches of an order, but public defiance of the court's authority: **United Nurses**, at 931. In the

United Nurses case, McLachlin, J. (as she then was) defined the elements of criminal contempt as being public disobedience of a court order with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the Court. The prime objectives of the court's exercise of its criminal contempt power are to affirm the court's authority and to deter others from flouting it: see Robert J. Sharpe, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at para 6.60.

[15] The intention to depreciate the court's authority is thus an element of criminal but not of civil contempt. Some of the authorities to which we have been referred blur this distinction. This is the case, for example, in the passage from Jeffery Miller, *The Law of Contempt in Canada* (1997) at 85 - 86 relied on by the chambers judge and in **Campbell v. Cartmell**, [1999] O.J. No. 3553 (S.C.) (Q.L.); 104 O.T.C. 349 at § 70 - 76.

[16] The second difficulty in the authorities arises from the use of terms such as "intent" and "intentional" in different senses. In some cases, it is clear that the intention required for civil contempt is the intention to commit an act which is, in fact, prohibited (see, for example, **Re Sheppard v. Sheppard** (1975), 62 D.L.R. (3d) 35 (Ont. C.A.) at 595. In other cases, the language appears to suggest that the required intention is that the alleged contemnor meant to disobey it in the sense that he or she knew the act was prohibited and deliberately chose to do it anyway: see, for example, **Morrow, Power v. Newfoundland Telephone Co. et al.** (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. S.C.A.D.) at § 19. In my view, civil contempt requires intention in the former but not the latter sense of the word.

[17] It may be helpful to remember that, in criminal law, generally speaking, the required intent relates to the accused's desire to commit an act, not to the accused's knowledge that the act is prohibited by law. For example, a person who intentionally kills another is (absent excuse or justification) guilty of murder even if unaware that intentional killing is unlawful. In other words, a person acts with criminal intent if he or she desires to commit the act and does so. (It is not necessary for this case to decide how far beyond desired acts intention may extend. The act, of course, may be an omission to do an act required by law.) Similarly, in civil contempt, it is important to distinguish between an intentional act and knowledge that the act is prohibited. The core elements of civil contempt are knowledge of the order and the intentional commission of an act which is in fact prohibited by it. The required intention relates to the act itself, not to the disobedience; in

other words, the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order, is not an essential element of civil contempt.

[18] It is not necessary, for present purposes, to discuss the issues that may arise in the case of a vague or ambiguous order: see for example **Skipper Fisheries Ltd. v. Thorbourne**, (1997), 157 N.S.R. (2d) 241 (C.A.) or the sort of notice of the order which is sufficient to make an individual liable for its breach: see, for example **Re Tilco Plastics Ltd. v. Skurjat et al.** (1966), 57 D.L.R. (2d) 596 (Ont. H.Ct.); aff'd 61 D.L.R. (2d) 664 n (C.A.); application for leave to appeal dismissed [1966] S.C.R. vii.; **MacMillan Bloedel Ltd. v. Simpson**, [1996] 2 S.C.R. 1048 and **Bhatnager, supra**. Here, the order was in the standard form of execution order which, among other things, warns that failure to obey it may be punished by contempt and it was served on Clarke.

[19] There is a long line of authority for the view that intention to disobey is not an element of civil contempt. I will briefly review what, to my mind, are the four leading cases.

[20] The first is **Stancomb v. Trowbridge Urban District Council**, [1910] 2 Ch. 190. The key facts were that the defendant council had been enjoined from allowing sewage to pass through a stream on the plaintiffs' land. The plaintiffs applied to find the defendant in contempt and for a writ of sequestration. The rules of court required that the defendant's disobedience be wilful before the injunction could be enforced by sequestration. In answer to the defendant's submission that its conduct was not wilful disobedience, Warrington, J. said at 194:

> ... if a person or a corporation is restrained by injunction from doing a particular act, <u>that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order.</u> (emphasis added)

[21] Warrington, J. refers to the fact that an act is not wilful if it is "casual or accidental and unintentional". It is clear from the context, however, that in describing the act as "accidental and unintentional", the lack of intention refers to the commission of the act, not to the absence of intention of disobey the order. This is particularly clear from his reference to **Attorney-General v. Walthamstow Urban Council** (1895), 11 Times L.R. 533 in which

Chitty, J. noted that intention to disobey is not an essential element of civil contempt.

[22] Warrington, J.'s description of the elements of civil contempt was adopted and applied by the House of Lords in **Heatons Transport (St. Helens) Ltd. v. Transport and General Workers Union**, [1973] A.C. 15 at 108 - 109. Lord Wilberforce, for the House, noted that in the cases before him, there was "... no question ... of contumacious or insulting behaviour ... . There has been simply disobedience to the court's injunction ..." (at 108). He then quoted and approved the passage from **Stancomb** which I set out earlier and added that Warrington, J.'s view in that case had acquired high authority. Lord Wilberforce noted that his approach was also a reasonable view because "... the party in whose favour an order has been made is entitled to have it enforced ..." (at 109).

[23] The House of Lords again approved Warrington, J.'s view in **Stancomb** in **Director General of Fair Trading v. Pioneer Concrete (U.K.) Ltd.**, [1995] 1 A.C. 456 (H.L.) at 477 - 480. Lord Nolan concluded his speech by stating that " ... liability for contempt does not require any direct intention on the part of the employer to disobey the order ... "(at 481).

[24] In both **Heatons** and **Pioneer Concrete,** as in **Stancomb**, reference is made to acts which are casual or accidental and unintentional. But as in **Stancomb**, it is clear from the whole of the decisions that the intention relates to the doing of the act, not to the intention to disobey the order.

[25] As was pointed out during argument, both the regulatory and factual contexts of **Pioneer Concrete** are readily distinguishable from the case before us. But that is beside the point. That case, along with **Heatons** and **Stancomb**, provide highly persuasive authority for the view that intention to disobey the court's order is not a necessary element of civil contempt. It was suggested for the first time during oral argument that this conclusion would offend the **Canadian Charter of Rights and Freedoms**. No such argument was advanced before the Chambers judge or in the factums in this Court and I do not think the issue is properly before us or that it would be wise to address it in the absence of full argument.

[26] The last case that I will discuss in detail is **Re Sheppard v. Sheppard, supra**. The issue was whether the appellant was in contempt of court as a result of having rerented premises with respect to which he was enjoined from "leasing or renewing leases". The appellant entered into an agreement to lease the premises to a new tenant but when served with the contempt

application, cancelled the agreement. His position was that he did not realize that he was enjoined from rerenting the premises and did not intend to disobey the order. He was found in contempt and appealed.

[27] On appeal, it was argued that the contempt had not been proved because the evidence did not establish an intention on the part of the appellant to disobey the order. The Court of Appeal agreed that the existence of a deliberate intention on the part of the appellant to disobey the order had not been proved beyond a reasonable doubt, but concluded that was not necessary. The Court stated at 595 - 6:

> ... in order to constitute a contempt it is not necessary to prove that the defendant intended to disobey or flout the order of the Court. The offence consists of the intentional doing of an act which is in fact prohibited by the order. The absence of contumacious intent is a mitigating but not an exculpatory circumstance." (emphasis added)

[28] The Court went on to add that "... the appellant's misinterpretation of the order cannot afford an excuse for its breach" and cited a passage from **Re Witten**, **an Infant** (1887), 4 T.L.R. 36 at 37 to the effect that carelessness in failing to know the terms of the order was not an excuse for breaching it. : at 596. Both **Heatons** and **Stancomb** were cited with approval. The appeal was dismissed.

[29] **Sheppard** is firmly rooted in the English authorities which I have discussed. It has been referred to with approval by the British Columbia Court of Appeal in **Ebrahim v Ebrahim**, [2000] B.C.J. No. 1265 (Q.L.); 139 B.C.A.C. 307 and the Supreme Court of Canada in **Canada (Human Rights Commission) v. Taylor**, [1990] 3 S.C.R. 892 at para 72. Robert J. Sharpe, *Injunctions and Specific Performance*, **supra** at § 6.190 refers to **Sheppard** as a leading case. While Sharpe's discussion deals with breach of injunctions, it is conceded by the respondent that the same principles apply to civil contempt generally. I would respectfully adopt the following passage from Sharpe as a correct statement of the relevant law:

> To constitute contempt, the act or omission which contravenes the injunction must have been intentional but not necessarily deliberately contumacious. It is well established that "it is no answer to say that the act was not contumacious in the sense that, in doing it, there was not direct intention to disobey the order". The requirement of intention excludes only "casual or accidental" acts. In other words, the party seeking a finding of contempt must prove no more than that

> the defendant intentionally did the forbidden act or consciously omitted to do what was required. This reasoning has been employed especially in cases where the defence asserts that intention to contravene the order has not been proved beyond a reasonable doubt. In a leading Ontario case (**Sheppard v. Sheppard** (1975), 62 D.L.R. (3d) 35), counsel for the defendant in a matrimonial proceeding argued that the order was truncated and ambiguous and that there was doubt as to whether the breach had been deliberate. The Court of Appeal answered that it was enough to prove the doing of the act and upheld the contempt conviction although it agreed that a deliberate intention to disobey the order had not been established. Thus, the defendant's own carelessness in failing to acquire information as to the precise requirements of the order provides no excuse. It is necessary, however, to prove personal service or actual personal knowledge of the court's order. ... (emphasis added)

[30] It was submitted by the respondent that **Sheppard** is inconsistent with the later decision of the same court in **Kist International Inc v. Hayman**, [1988] O.J. No 1958 (C.A.)(Q.L.). I do not agree. The Court could not have intended to depart from its own previous decision in **Sheppard** by way of a brief oral judgment which does not refer to it. Moreover, the language in the final paragraph of **Kist** is in fact consistent with **Sheppard** if the word "intentionally" is understood as it was in **Sheppard**. It would appear in **Kist** that the issue was whether the conduct was in fact in breach of the order.

[31] There is authority for the view that contempt should not be found where the defendant has exercised due diligence and done everything possible to comply with the terms of the order: see e.g. **Morrow, Power v. Newfoundland Telephone Co. et al., supra** at § 20. While I am attracted by this view, which, if adopted, might provide an answer to a **Charter** challenge to the civil contempt power, there is no evidence of such diligence on the respondent's part in the record. I would prefer to leave this question open for fuller consideration in a case which raises the issue concretely. I have no doubt, however, that the diligence of the alleged contemnor's attempts to comply is relevant to the discretion of the court in making an order after a finding of contempt.

[32] In holding that Clarke could only be found guilty of civil contempt if TG proved that Clarke intended to disobey the execution order, the learned chambers judge erred in law. Unfortunately, the most relevant authorities on

the point were not drawn to his attention. In reaching this conclusion, I do not intend to depart in any way from the general principles that the elements of contempt must be proved beyond a reasonable doubt and that the contempt power should be used cautiously and with great restraint. I also recognize that there are numerous subtleties in the relevant law, particularly relating to the relevance to the issue of contempt of the clarity of the order and of the alleged contemnor's reasonable efforts to comply with it. However, it is not necessary to address them further in this case.

[33] The third source of difficulty in the cases is the failure to distinguish between the finding of contempt and the imposition of a sanction. This point is related to the second error made by the learned Chambers judge in this case and so I will turn to discuss that aspect of the appeal.

[34] As noted, the chambers judge held that the "... Civil Procedure Rules do not confer upon the court the authority to transform a fine into a compensatory payment to a third party who is affected by the non-compliance of the Order." (at para. 12 of his reasons) With respect, this is an oversimplification which, in the circumstances of this case, constituted reversible error.

[35] In civil contempt, the primary purpose of the sanction is to coerce compliance with the order: see. e.g. Sharpe, **supra** at § 6.100 and **Skipper, supra** at § 73. So, for example, contempt based on disobedience to an order may, in the Court's discretion, be purged by subsequent compliance with it. 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.

[36] This was the effect of the judgment of this Court in **MacNeil v. MacNeil** (1975), 14 N.S.R. (2d) 398. Mr. MacNeil had been ordered to pay his former wife a lump sum of $50,000 "forthwith". Six months later the amount had not been paid and Mr. MacNeil had removed securities in excess of that value from his bank in Sydney and placed them in a bank in Virginia in what he claimed was a form of trust for his two younger children. It was found that Mr. MacNeil was in contempt of the court (in that case it was criminal contempt) for concealing and removing assets from the jurisdiction to avoid execution. The sanction imposed was to commit Mr. MacNeil until he purged his contempt by paying the amount due under the original order to the sheriff or until Mrs. MacNeil acknowledged that those amounts had been paid to her. (see also **Brennan v. Myers** (1977) 26 N.S.R. (2d) 131

(S.C.T.D.) at 138 - 139 and **Salter v. Tibbetts**, 1991 Carswell N.S. 662 (S.C.T.D.) at para 17.)

[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: see Sharpe at § 6.70. Where there have been substantial and proper measures taken by the alleged contemnor to comply, the contempt may be excused or the imposition of any sanction postponed to allow those measures to continue: see e.g. **Attorney General v. Walthamstow Urban District Council** (1895) 11 T.L.R. 533.

[38] It was within the judge's discretion in this case, if persuaded that it was appropriate and in the interests of justice in all of the circumstances to do so, to fashion an order whose object was to secure for TG what Clarke ought to have paid to the sheriff in compliance with the execution order. The discretion is a broad one. Without in any way attempting to be exhaustive (and assuming without deciding that contempt is established here), there are several relevant considerations. These include the diligence of the alleged contemnor in attempting to comply with the order, whether there was room for reasonable disagreement about what the order required, the fact that the alleged contemnor did not benefit from the breach of the order, the extent of the resulting prejudice to the appellant and, of course, the importance of execution orders being taken seriously by all affected by them.

[39] The appeal must be allowed. I would, reluctantly, order a new hearing of the contempt application in Supreme Court chambers so that counsel may develop the factual record in light of the relevant law which has been researched in connection with this appeal and so that the presiding judge may exercise his or her discretion in light of it.

[40] There should be no costs of the hearing before Wright, J. but the appellant should have its costs in this Court in the reduced amount of $750 plus disbursements.

[41] I should refer to two other points before concluding. The first is that the **Civil Procedure Rules** in this province specifically provide for the enforcement of orders to pay money and to pay money into court by way of a contempt order: see **Rule 52.01(1)(c)** and **52.01(2)(b)**. I note this because the practice in some other jurisdictions does not permit this method of enforcement. I would emphasize, however, that inability to pay, absent fault giving rise to that inability, does not constitute civil contempt. The second point is that, in my view, nothing relevant to the issue of the necessary intent

for civil contempt turns on the use of the word “neglect” in **Rule 52.03(1)(a)**.

III. Disposition:

[42] As stated earlier, I would allow the appeal from Hamilton, J.’s order and vary it by inserting operative paragraphs dismissing Clarke’s application to strike the statement of claim and dismissing TG’s application for summary judgment. There should be no costs before Hamilton, J. or on appeal. I would also allow the appeal from Wright, J.’s order, set it aside and direct a new hearing of the contempt application in Supreme Court chambers. There should be no costs before Wright, J. but TG should recover costs in this Court fixed at $750 plus disbursements.

Cromwell, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.