Court File No. CV-20-00646729-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

PILLAR CAPITAL CORP.

Applicant

– and –

TURUSS (CANADA) INDUSTRY CO., LTD.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED

BRIEF OF AUTHORITIES

(motion returnable January 11, 2021)

January 7, 2021

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I N D E X

INDEX

TAB 1

2014 ONCA 574
Ontario Court of Appeal

Boily v. Carleton Condominium Corp. 145

2014 CarswellOnt 10591, 2014 ONCA 574, [2014] O.J. No. 3625, 116 W.C.B. (2d) 26, 121 O.R. (3d) 670, 242 A.C.W.S. (3d) 555, 322 O.A.C. 261, 376 D.L.R. (4th) 60

Danielle Boily, Juan Escudero, Lisa Backa-Demers, Kanta Marwah, Doug Cummings and Richard Maurel, Applicant (Respondent) and Carleton Condominium Corporation 145, Dan Litchinsky, Avis Miller, Jean-Guy Bourgeois and Carol Smale, Respondents (Appellants)

Gloria Epstein, P. Lauwers, G. Pardu JJ.A.

Heard: December 9, 2013
Judgment: August 6, 2014
Docket: CA C56885

Proceedings: additional reasons to *Boily v. Carleton Condominium Corp. 145* (2013), 2013 CarswellOnt 5192, 2013 ONSC 2352, Robert N. Beaudoin J. (Ont. S.C.J.)

Counsel: Janice B. Payne, for Appellants, Dan Litchinsky, Avis Miller, Jean-Guy Bourgeois and Carol Smale
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Subject: Civil Practice and Procedure; Property
Related Abridgment Classifications
Judges and courts
XX Contempt of court
XX.6 Practice and procedure
XX.6.h Appeals
XX.6.h.ii Practice on appeal
Judges and courts
XX Contempt of court
XX.7 Punishment for contempt
XX.7.c Remedies available to court
XX.7.c.iii Fine or costs

Headnote

Judges and courts --- Contempt of court — Punishment for contempt — Remedies available to court — Fine or costs
Board of directors of condominium corporation proposed new landscaping design with different features after extensive repairs to property — Several owners objected and dispute lead to litigation and court order that landscaping be restored to original design — Directors, in defiance of order, authorized installation of landscaping containing elements of design they selected — Condominium corporation and directors were found in contempt — Motion judge ordered area to be restored to original design and ordered directors to personally bear costs of restoration — Condominium corporation and directors appealed contempt finding and, in alternative, penalty — Appeal of contempt order dismissed; appeal with respect to penalty allowed — Although motion judge's determination of appropriate penalty must be given considerable deference, motion judge erred in failing to bifurcate the proceedings, thereby reducing degree of deference owed — Directors' contemptuous conduct not motivated by personal gain, vengeance or any reason other than they felt they knew best — No evidence directors previously denied any court order, but they failed to seek legal advice until they were

told about pending motion for contempt — Another aggravating factor was unremitting intransigence in conducting themselves in defiance of endorsement — Most important object of contempt penalty is deterrence — Directors were volunteer board members of not-for-profit corporation — Penalty should not be so onerous it deters unit owners from serving on condominium boards — Reasonable penalty that would achieve necessary degree of deterrence would be imposition of fine on each director of $7,500.

Judges and courts --- Contempt of court — Practice and procedure — Appeals — Practice on appeal

Board of directors of condominium corporation proposed new landscaping design with different features after extensive repairs to property — Several owners objected and dispute lead to litigation and court order that landscaping be restored to original design — Directors, in defiance of order, authorized installation of landscaping containing elements of design they selected — Condominium corporation and directors were found in contempt — Motion judge ordered area to be restored to original design and ordered directors to personally bear costs of restoration — Condominium corporation and directors appealed contempt finding and, in alternative, penalty — Appeal of contempt order dismissed; appeal with respect to penalty allowed — Requirement that "the Courtyard be restored to the Original Design", in context of entire endorsement, not unclear — In authorizing certain aspects of restoration that deviated from original design, directors undermined purpose of endorsement — Dispute always concerned entire property and at no point did parties distinguish between courtyard and surrounding vegetation — Suggestion that endorsement might reasonably be interpreted as limiting restoration obligations to certain portion of complex not supported by record and not logical — Although motion judge's determination of appropriate penalty must be given considerable deference, motion judge erred in failing to bifurcate the proceedings, thereby reducing degree of deference owed — Directors' contemptuous conduct not motivated by personal gain, vengeance or any reason other than they felt they knew best — No evidence directors previously denied any court order but they failed to seek legal advice until they were told about pending motion for contempt — Another aggravating factor was unremitting intransigence in conducting themselves in defiance of endorsement — Most important object of contempt penalty is deterrence — Directors were volunteer board members of not-for-profit corporation — Penalty should not be so onerous it deters unit owners from serving on condominium boards — Reasonable penalty that would achieve necessary degree of deterrence would be imposition of fine on each director of $7,500.

The appellants were directors of a condominium corporation, who proposed a new landscape design for the aging building. The respondents were condominium owners who opposed the directors' proposal and wanted the condominium restored to its original design. The owners were successful in obtaining a court order in favour of their position, but the directors did not follow the order and instead installed a design that had elements of their proposal and the original design. The owners were successful in having the directors found in contempt of court. The directors appealed from this finding.

Held: The appeal was allowed in part.

Per Epstein J.A. (Lauwers J.A. concurring); The finding of contempt against the directors was reasonable and should be upheld. The conduct of the directors initially indicated that they understood the order, but their actions after the order was made were in violation of the order, The directors did not claim that they did not understand the order, but instead they attempted to justify their conduct by claiming it was necessary. As well, the directors claimed that they could not fulfill the order, in which case they should have appealed from this order. As the order was clear, the finding of contempt was proper. The directors could not claim that their breach was not deliberate, or that there was not a reasonable doubt as to their contempt.

However, the penalty of requiring the directors to pay the full costs of restoration was not appropriate. The directors' actions, while in contempt of court, were not motivated by personal gain or animosity but rather out of a sense that what they were doing was right. The penalty set out in the contempt order would have the effect of discouraging other volunteer condominium residents from serving on condominium boards. Given other cases where contempt was punishable with a more modest fine, this penalty was appropriate in all the circumstances. The individual directors were each fined $7,500.

Per Pardu J.A. (dissenting) The appeal should be allowed in full. The key term of "reinstate" was not properly defined, and all parties agreed that it should not be taken to mean that the original design should be fully restored. As the terms were not clear, the owners should have requested clarification instead of proceeding to a contempt hearing. As well, there was no individualized analysis of each director's alleged wrongdoing, even though they were required to pay for

full restoration costs as a group. Some directors were not even mentioned by name in the judgment. so it was unclear as to their level of wrongdoing, if any. Finally, the area of the "courtyard" which was to be renovated was not properly defined, and should have been considered to be the "podium" area. As these ambiguities remained, a finding of contempt could not be supported.

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Condominium Act, 1998, S.O. 1998, c. 19

Generally — referred to

s. 17 — referred to

s. 17(1) — considered

s. 37 — referred to

s. 37(1) — considered

s. 37(3)(b) — considered

s. 38 — considered

s. 45(4) — referred to

s. 46(1) — referred to

s. 97 — referred to

s. 97(1) — considered

s. 97(2)(b) — considered

s. 97(4) — considered

s. 97(5) — considered

s. 97(6) — considered

Statutes considered by *G. Pardu J.A.* (dissenting):

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Rules considered *Gloria Epstein J.A.*:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 59.03(1) — referred to

R. 60.11(5) — referred to

R. 60.11(6) — considered

Authorities considered:

Miller, Jeffrey, *The Law of Contempt in Canada* (Toronto: Carswell, 1997)

APPEAL by condominium directors from judgment reported at, *Boily v. Carleton Condominium Corp. 145* (2013), 2013 ONSC 1467, 2013 CarswellOnt 2523 (Ont. S.C.J.) finding directors in contempt of court.

***Gloria Epstein J.A.*:**

Introduction

1 Directors of a condominium corporation may believe they know the best course of action for the corporation. However, as reasonable as that belief may be, it does not give them the right to act in defiance of a court order. The central issue in this appeal is the appropriate sanction for a condominium corporation and its well-intentioned, but ultimately contemptuous, board members.

2 In 2011, as a result of having to perform extensive garage repairs, the landscaping outside a condominium complex that was built in the mid-1970s, required restoration. The board of directors of the condominium corporation proposed a new landscaping design with features different than the design in place prior to the garage repairs. Several condominium owners opposed the suggested new design. They wanted the area restored to the way it was before the garage was repaired. A dispute arose. The dispute lead to litigation and a court order that the landscaping be restored to its original design. In

defiance of the order, the directors authorized the installation of landscaping containing some elements of the previous design and some elements of the design they had selected. As a result of the violation of the court order, the condominium corporation and directors were found in contempt of court. In sanctioning the contempt, the motion judge ordered that the area be restored to the original design and also ordered the directors to personally bear the substantial costs of the restoration.

3 The condominium corporation and the directors appeal the finding of contempt (the "Contempt Order"). In the alternative, the directors appeal from the penalty the motion judge imposed and, in particular, the order that they personally bear the costs of the restoration.

4 For the reasons that follow, I would dismiss the appeal from the finding of contempt and the order that the landscaping be restored as it was immediately prior to the garage repairs. I would, however, allow the portion of the sanction in which the motion judge ordered the directors to pay the costs of restoration. I would set aside that part of the sentence and replace it with a fine to be paid by each director to the condominium corporation.

The Factual Background

5 The appellants are the four members of the board of directors at the material time (the "Individual Appellants") and the condominium corporation, Carleton Condominium Corporation 145 ("CCC 145") - collectively, "the Appellants". The respondent is sole remaining member of the group of owners who opposed the Appellants' recommended design. I will refer to the respondent in the plural, (the "Respondents") in order to be consistent with the history of this proceeding.

6 The condominium development consists of two multi-toned red and brown brick towers that house a total of 144 residential condominium units. As originally designed and built, the exterior of the condominium buildings, known to the residents as the "Podium", provided a barrier that shielded the residences from the two busy streets fronting the complex.

7 The Podium has two parts. The inner area, referred to by the residents as the "Courtyard", was enclosed by multi-level planters and contained a traffic circle with planters in the centre. Numerous planters, made of aggregate concrete with a ceramic red and brown brick finish, filled with flowers and various forms of mature trees and shrubs, formed a significant part of the barrier the Podium provided between the streets and the complex.

8 As a result of slight modifications and the maturing of vegetation, the original landscaping changed somewhat in the 30 years from when the complex was first completed. However, the essentials of the original design remained. I will therefore refer to the landscape design in place immediately prior to the start of the garage repairs, as the "Original Design".

9 By 2007, it became clear that the nine-storey garage below the complex required extensive repairs. The repair work was carried out in 2010 and 2011 at a cost of over $2 million. In order to conduct the repairs, the Podium landscaping had to be removed. The Appellants retained an architectural firm, Artistic Landscape Design, to develop a landscape design and planting plan. Artistic Landscape Design prepared a report for the Appellants (the "Artistic Design") that contemplated changes from the Original Design including additional parking spaces, less vegetation, a modified traffic circle, differently designed planters and address sign, and grey limestone veneer courtyard walls in place of the previous multi-toned red and brown brick. In addition to being somewhat different aesthetically, the Artistic Design was less costly to install and maintain than the Original Design.

10 To inform the owners of the proposed new design and solicit feedback, the Appellants put the Artistic Design plan and site drawings on display in the lobby of the condominium complex from early March through late April 2011. On May 4, 2011, in order to respond to owner feedback, the Appellants held an information session to allow the owners to meet with the design consultants.

11 At the information session, the Respondents expressed opposition to the Artistic Design and took the position that its implementation would constitute a "substantial change" to the common elements. In order to make a substantial

change, in accordance with s. 97(4) (5) and (6) of the *Condominium Act 1998*, S.O. 1998, c. 19 (the "Act"), the corporation must have the approval of 66 and 2/3 percent of the owners at a meeting called for the purpose of voting on the proposed change.

12 The Individual Appellants did not view the landscaping restoration as a substantial change. They were of the view that the necessary landscaping work amounted to repairs and maintenance and therefore, under s. 97(1) of the Act, they could proceed with the Artistic Design without notice to the owners.

13 However, in an attempt to further address the Respondents' concerns, the Individual Appellants put on display in the lobby a selection of three of the materials the consultants proposed to use for the planters. The Appellants also sent out a notice that, pursuant to s. 46(1) of the Act, if 15% of the owners requisitioned a meeting, the Artistic Plan would be put to a majority vote of owners before being implemented.

14 The Respondents tried to work with the Individual Appellants to resolve the dispute. The group ultimately attempted to requisition a "Special Owners Meeting" [1] at which to submit the Artistic Design to a 66 and 2/3 percent vote. Concerned that delays would lead to increased costs and potentially damage the repairs that had been completed, the Individual Appellants ignored this requisition and authorized the start of the landscaping work in accordance with the Artistic Design. The Individual Appellants also called a meeting under s. 45(4) of the Act that allows the board of directors to call a meeting for the transaction of any business, to be held on June 22, 2011. The stated purpose of the meeting was to submit the Artistic Design to a simple majority vote of the condominium owners who attended the meeting.

15 These actions prompted the Respondents to bring an application, issued June 22, 2011, coupled with an urgent motion for an order enjoining the Appellants from authorizing any work and from holding the owners' meeting scheduled for that evening.

16 That day, the motion judge, Beaudoin J., granted an order enjoining the Appellants from holding its proposed meeting and from proceeding with any landscaping until further order. The balance of the application for relief, including a determination of whether the changes to the "courtyard/podium" constituted a "substantial change", was adjourned to the following week.

17 Later that day, (June 22, 2011), the parties came to an agreement resolving all issues raised in the application, with the exception of costs. This agreement, incorporated into Minutes of Settlement, provided, among other things, that "the question of whether to keep the existing hard landscape configuration or go with the Artistic Design will be put to a 66 2/3% of all owners vote."

18 In accordance with the Minutes of Settlement, a meeting was held that night. The Artistic Design received the support of 60.5% of the condominium owners - 11 votes short of the number needed for approval.

19 After the vote, the Individual Appellants challenged the Minutes of Settlement, arguing that as neither design had received the requisite 66 and 2/3 percent support of the owners, the parties were not bound by the agreement. The Individual Appellants sought to have the Artistic Design approved on a simple majority vote.

20 The Respondents moved to enforce the Minutes of Settlement.

21 In his endorsement of June 29, 2011, the motion judge, again, Beaudoin J., ruled that the terms of the Minutes of Settlement were clear and, given the outcome of the vote, ordered the Appellants to "reinstate the Courtyard as it existed after the repairs to the garage." The motion judge also provided that "[i]f the parties require supplemental reasons, they are to contact me". I will refer to this decision as the "2011 Endorsement" because, for reasons that will later be explained, no order reflecting this endorsement was issued and entered.

22 In subsequent reasons, the motion judge awarded the Respondents their costs fixed on a substantial indemnity basis in the amount of $32,515.84. The motion judge ordered the Individual Appellants to personally pay $12,000, being his assessment of the portion of the costs related to the motion to enforce the settlement.

23 The restoration of the Podium proceeded. However, various aspects of the work differed from the Original Design. In September 2011, one of the Respondents wrote to the Individual Appellants reminding them of the Appellants' court-ordered obligation to restore the Podium to the Original Design.

24 The restoration work that resumed in the spring of 2012 revealed additional deviations from the Original Design. These changes included features found in the Artistic Design, including a new street sign, a differently designed traffic circle containing a new lamp post, and a round instead of hexagonal centre planter area. The Respondents again complained but the Individual Appellants continued to forge ahead with work that, in various ways, reflected their own views (incorporating some components of the Artistic Design) of how the Podium should be restored. For example, different pavers were used in the traffic circle, different planters were installed and different types of vegetation were planted.

25 The Respondents retained counsel who approached the Appellants about a possible resolution of the dispute. The Individual Appellants resisted, prompting counsel for the Respondents to advise the Appellants, by letter dated June 8, 2012, that he had instructions to proceed with a motion for contempt. It was at this point that the Appellants sought legal advice.

26 On July 4, 2012, counsel for the Appellants wrote to counsel for the Respondents and attempted to justify the deviations from the Original Design. For example, counsel for the Appellants explained that the alterations to the turning circle were necessary to comply with municipal by-laws, the differences in the planter boxes were necessary to prevent water damage to the parking garage and exterior walls, and the newly designed address sign was necessary as the old sign had been damaged in the construction work and the new design was more visible from the street.

27 The Respondents proceeded with their motion for contempt and, to that end, sought to issue and enter the order arising out of the 2011 Endorsement. The Appellants refused to approve the draft order on the basis that it was "'impossible' for CCC 145 to 'reinstate the courtyard landscape ... to the configuration and appearance that existed prior to the commencement of the repairs to the garage once such repairs have been completed". Counsel for the Appellants requested that counsel for the Respondents seek an appointment with Beaudoin J. to "discuss[] and resolve[]" the impossibility of his order. Counsel for the Respondents took the position that it was "too late for [the Appellants] to attempt to retroactively tweak the language of the order in order to cure [their] obvious breach".

28 The Respondents moved, again before Beaudoin J., to settle the terms of the order, for an order holding the Appellants in contempt of the June 2011 Endorsement, and for related relief.

The Reasons

(1) Preliminary Argument as to Jurisdiction

29 The motion judge rejected the Appellants' initial technical argument that since no order had been taken out to give effect to his 2011 Endorsement, there was no basis upon which to find contempt and therefore the motion could not proceed. The motion judge held, relying on rule 59.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and Jeffrey Miller, *The Law of Contempt in Canada* (Toronto: Carswell, 1997) ("Miller"), at p. 88, that an order exists from the time it is made and therefore conduct in violation of an order is contempt whether the order is issued and entered or not. The motion judge also noted that the Appellants were responsible for the fact that the order had not been issued and entered.

(2) Contempt - Liability

30 After reviewing the history of the matter, of which he was, for obvious reasons, well-aware, the motion judge observed that the Appellants' failure to rebuild the Podium as directed in his 2011 Endorsement, was not seriously in dispute.

31 The motion judge, at para. 13, referred to the photographs filed as exhibits, acknowledged that "new planting materials cannot be expected to replace the mature vegetation that existed prior to reconstruction", and found the following changes to be "evident":

> **The traffic circle**
>
> The prior traffic circle consisted of seven modular hexagonal-shaped concrete planters, made of exposed aggregate concrete. The new traffic circle is different in terms of shape, size and colour and its facade consists of limestone veneer. A lamp post was installed in the center of the courtyard where none ever existed before. The Artistic Design provided for the replacement of the hexagonal-shaped traffic circle with a round one, covered with lime stone veneer, similar to what has been installed.
>
> **The removal of trapezoidal-shaped planters and significant reduction of the vegetation**
>
> The previous configuration presented three distinct transitional levels of vegetation around the property (at street level, in trapezoidal-shaped planters and in the brick planters). The former trapezoidal-shaped peripheral concrete planters had been replaced with different, much smaller rectangular standalone planters. They are different in shape and size and hold significantly less vegetation. There is no longer any vegetation at the street level, and there is significantly more interlock pavement on Queen and Albert Streets. These changes are the most dramatic in terms of the appearance of the courtyard and podium. The vegetation differs substantially in colour, shape, quantity, size and species from the prior design. This new configuration resembles the Artistic Design.
>
> **The address sign**
>
> The prior address sign was a copper-on-black metal and glass neon sign that sat above the brick wall. It was featured in the Corporation's letterhead. The new sign is a white-on-black sandstone sign that is embedded into the brick wall. This was also an element of the Artistic Design".

32 The motion judge then analyzed whether the Respondents had proven each element of the three-part test for civil contempt; namely, that (a) the order that is said to have been breached must be clear and unequivocal; (b) the party who is alleged to have breached the order must be found to have done so deliberately; and (c) the evidence must prove contempt beyond a reasonable doubt: *G. (N.) c. Services aux enfants & adultes de Prescott-Russell* (2006), 82 O.R. (3d) 686 (Ont. C.A.).

33 The motion judge first considered the Appellants' argument that the Respondents could not satisfy the first part of the test as the 2011 Endorsement was unclear in two respects - whether it applied only to the Courtyard or to the entire Podium area and whether it applied only to "hard landscaping" - meaning the construction materials used in landscape design, or to "soft landscaping", meaning vegetation, as well. Relying on *Sweda Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 3650 (Ont. S.C.J.), affirmed, 2012 ONCA 337 (Ont. C.A.), leave denied, [2012] S.C.C.A. No. 291 [2012 CarswellOnt 13939 (S.C.C.)], and *Power v. Jackman*, 2008 NSSC 389, 278 N.S.R. (2d) 31 (N.S. S.C.), the motion judge allowed that the interpretation of a court order should be approached contextually with a view to achieving the order's objective.

34 With this approach in mind, the motion judge noted that at all times, both before and after the commencement of litigation, the parties had treated the issue as being over the design, including the vegetation, of the entire exterior - the Podium. The motion judge observed that the wording in various documents attributable to the Individual Appellants - such as the notice of the June 22, 2011 "Special Owners Meeting", the proxy on the proposed Podium reinstatement

plan, Mr. Litchinsky's evidence in his cross-examination and the contents of the condominium's newsletter of September 7, 2011, describe the dispute as involving the design of the Podium.

35 The motion judge also observed that he had provided in his 2011 Endorsement that if the parties needed clarification, they should contact him. The Appellants had plenty of time, including during the costs hearing, to seek clarification if they genuinely believed the decision was unclear. The Appellants did not avail themselves of that opportunity.

36 Against this background, the motion judge concluded at para. 31:

> The parties' obligations pursuant to the Decision were clear and unequivocal: submit the podium configuration to a vote and, absent a 2/3 vote in support of the Artistic Design, the podium was to remain in its prior configuration and appearance. The [Appellants] lost that vote and tried to avoid the enforcement of the Minutes of Settlement. Having lost that decision when I addressed the issue of costs on February 24, 2012, the parties made no distinctions between the inner courtyard and the podium. The [Appellants] knew what [they] had to do.

37 The motion judge then turned to the second part of the test for contempt and held that the Appellants had breached the 2011 Endorsement wilfully and deliberately. He found the evidence of the wilfulness of the breach to be strong - the Individual Appellants had, in fact, admitted that their actions were deliberate when they offered various explanations for why they deviated from the Original Design - explanations such as those contained in the affidavit sworn by Mr. Litchinsky, the president of the Board of Directors of CCC 145, in his affidavit of October 4, 2012.

- The access ramp part of the Courtyard needed to be widened to conform to accessibility regulations. He explained that the old turning circle had been damaged in a fire at the off-site storage facility where it was housed during the repairs, requiring creation of a new turning circle. The new turning circle had to conform to zoning bylaws, resulting in a somewhat different design.

- The planter design had to be modified to prevent water damage to the Podium, and to dissuade homeless people from entering the courtyard and sleeping in plant material at street level.

- The lighting arrangement in the Courtyard had to be modified to improve visibility and security for those entering and exiting the condominium complex.

38 The motion judge rejected the Appellants' arguments that restoring the Podium to the Original Design was impossible and/or ill-advised. He accepted the evidence of the Respondents' experts, which was not contradicted by any other expert evidence.

39 In any event, relying on authorities such as *Sussex Group Ltd. v. 3933938 Canada Inc.* (2003), 124 A.C.W.S. (3d) 274 (Ont. S.C.J. [Commercial List]) [2003 CarswellOnt 2789 (Ont. S.C.J. [Commercial List])] *("Sussex")*, *Garley v. Gabai-Maiato*, 2006 ONCJ 28 (Ont. C.J.), the motion judge held that in circumstances in which the underlying order is considered "ineffective", the appropriate course of action is not disobedience. The appropriate course of action is either to move for directions as soon as the problem becomes apparent, as the motion judge had expressly invited the parties to do, or appeal. The Appellants did neither.

40 The motion judge also rejected the Individual Appellants' independent arguments in defence of the contempt finding against them. These arguments were based on s. 37, 97 and 17 of the Act, which set out some of the powers and duties of condominium corporation directors. Section 17(1) empowers the corporation to "manage the property and assets...on behalf of the owners". Section 37(1) requires a director, while carrying out his or her responsibility pursuant to s. 17(1), to act honestly and in good faith and exercise the care diligence and skill of a prudent person in like circumstances. Section 37(3)(b) excuses a director from liability for breach of a duty if the breach arises as a result of the director's reliance in good faith on a professional opinion. Section 97(2)(b) establishes that the board may make alterations to the common elements without notice to the owners where necessary to ensure the safety or security of persons using the property.

41 The Individual Appellants argued that they had conducted themselves honestly and in good faith and exercised the care diligence and skill of a prudent person in like circumstances.

42 The motion judge disagreed. He summarized the Appellants' conduct in para. 48 of his reasons, as follows:

> I conclude that the [Appellants] acted neither honestly and in good faith, nor as a reasonably prudent person. In the spring of 2011, the parties disagreed as to whether the proposed Artistic Design constituted a substantial change requiring a 66 2/3 percent vote from the owners. When faced with an injunction that stopped them from proceeding with their meeting and from demolishing the podium, the [Appellants] entered into Minutes of Settlement by way of which they would submit the question of the reinstatement of the entire [P]odium to a 66 2/3 percent vote of approval by the owners. When the [Appellants] lost the vote, they immediately denied there was an agreement forcing the [Respondents] to bring a motion to enforce the Minutes of Settlement. The [Appellants] lost that motion and I ordered that the vote to reinstate the existing podium be respected. When, according to the [Appellants] themselves, it became apparent that the parties disagreed as to what needed to be reinstated, the [Appellants] chose not to communicate with the [Respondents] or with their lawyer, nor to seek directions from the court despite my invitation to do so. The [Appellants] adopted a narrow and self-serving interpretation of my order and chose to reinstate elements that they preferred, despite the decision of this Court.

43 The motion judge concluded that the fact that experts had prepared the Artistic Design did not afford the Appellants with a defence pursuant to s. 37(3)(b). The conduct in issue was the breach of the court order, not the merit of the Artistic Design. There was no expert upon whom the Appellants relied to inform their decision to disobey the 2011 Endorsement.

44 The motion judge also held that the Appellants could not rely on s. 97(2)(b) of the Act as the record did not support a finding that safety or security issues justified any of the deviations from the Original Design.

45 Finally, the motion judge concluded that, since the impugned decisions involved violation of a court order, the Individual Appellants' conduct was not authorized by s. 17(1). As the motion judge observed, at para. 55, "[t]o grant the deference sought by the [Individual Appellants] would be to allow Boards to disregard court orders, regulations and legislation."

46 The motion judge therefore found the Appellants to be in contempt of his 2011 Endorsement.

(3) The Remedy

47 After concluding that the Respondents had proven beyond a reasonable doubt that the Appellants were in contempt of the 2011 Endorsement, the motion judge turned to the issue of remedy. He acknowledged the wide range of remedies available under rule 60.11(5) of the *Rules of Civil Procedure* and noted that rule 60.11(6) expressly provides that: "[w]here a corporation is in contempt, the judge may also make an order under subrule (5) against any officer or director of the corporation..."

48 The motion judge held that, given the nature of the Individual Appellants' conduct that caused CCC 145 to be in contempt of the 2011 Endorsement, an order pursuant to rule 60.11(6) was appropriate. He stated, at para. 56 of his reasons, that the Individual Appellants took "a narrow and self-serving view of the court's order, and [failed] to seek advice from their counsel or further direction from the court before going ahead with their reinstatement plan". The motion judge, relying on Sussex, at paras. 56-57, concluded that the Individual Appellants were personally in contempt.

49 The remedy the motion judge imposed on the Appellants was compliance with his 2011 Endorsement to the extent that it ordered them to restore the Podium to the Original Design. The motion judge went further and set out the specific steps necessary to give effect to this part of the endorsement.

50 The motion judge then dealt with the financial impact of the contemptuous conduct. He singled out the Individual Appellants to personally bear the costs of restoring the Podium to the Original Design, reasoning at para. 56, as follows:

> If the [Individual Appellants] were not held accountable for their contempt, the result would be to impose on all of the owners, through their common element fees, all of the costs of the work to be redone. Section 37(1) of the Act is of limited application. Directors of a Condominium Board of Directors can be held personally liable for their actions when they do not act honestly or in good faith, or when they fail to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. I have already concluded that the [Individual Appellants] did not act in good faith and by taking a narrow and self-serving view of the court's order, and by failing to seek advice from their counsel or further direction from the court before going ahead with their reinstatement plan, the [Individual Appellants] did not exercise the care, diligence and skill of a reasonable person.

Issues

51 The Appellants raise the following issues in this appeal:

> (i) The motion judge erred by concluding that the terms of his 2011 Endorsement were sufficiently clear and unequivocal to justify a finding of contempt.
>
> (ii) The terms of the Contempt Order are overbroad because they order the Appellants to undertake repairs that go beyond the scope of repairs required in the 2011 Endorsement.
>
> (iii) The terms of the Contempt Order are incapable of performance.

52 The Individual Appellants also separately appeal the sanction. They submit that the motion judge erred by ordering them to personally pay the cost of restoring the Podium to the Original Design.

Analysis

A. Liability

(1) Did the motion judge err in concluding that the terms of his 2011 Endorsement were clear and unequivocal?

53 For the first part of the test for contempt to be satisfied, the parties must clearly understand what has to be done to comply with the order: *Bell ExpressVu Ltd. Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614 (Ont. C.A.), at para 22.

54 A review of the jurisprudence reveals that courts tend to find an order unclear on one of three possible bases.

> 1. The order is missing an essential term about where, when or to whom the order applies.
>
> 2. The order employs unclear or overly broad language.
>
> 3. The external circumstances obscure the meaning of the order.

See, for example: *Sabourin v. Laiken*, 2013 ONCA 530, 367 D.L.R. (4th) 415 (Ont. C.A.), at para. 48; *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463 (Sask. C.A.), at para. 21.

55 The Appellants argue before this court, as they did before the motion judge, that the order that they "reinstate the Courtyard as it existed after the repairs to the garage" incorporates unclear language and is therefore ambiguous. The problem was created by the motion judge's use of the words "Courtyard" and "landscaping".

56 The Appellants contend that their interpretation of the endorsement was reasonable. They interpreted the word "Courtyard" as encompassing just the inner courtyard not the entire Podium, and legitimately believed that the motion judge's reference to "hard landscaping" excluded soft landscaping.

57 The Appellants further submit that the motion judge himself acknowledged a degree of uncertainty about the clarity of his reasons by suggesting the parties may need to return to him for further elucidation and by resorting to parole evidence to explain his 2011 Endorsement.

58 I find no merit in this ground of appeal. In my view, by submitting that the 2011 Endorsement is unclear, the Appellants are attempting to do what Lauwers J. refused to allow the contemnor to do in Sweda Farms, quoting from Beaudouin J.A. in *Zhang c. Chau* (2003), 229 D.L.R. (4th) 298 (C.A. Que.) at para. 32 - to 'hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and of the administration of justice."

59 I start by noting an unusual factor in this case - that the contempt in issue is defiance of a directive contained in an endorsement rather than one that has been formalized through an issued court order. In my view, since the conduct in issue took place during a period of time when no order had been taken out in relation to the 2011 Endorsement, this court must assess the clarity of the term in issue (that the Courtyard be restored to the Original Design) in the context of the entire endorsement. I find support for this proposition in the authorities that have arisen out of situations in which allegedly contemptuous conduct takes place after reasons have been released but before a formal court order is issued. One such case is *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.*, [1983] 2 S.C.R. 388 (S.C.C.) in which, at p. 8, Dickson J. held that "[o]nce reasons for decision have been released, any action which would defeat the purpose of the anticipated injunction undermines that which has already been given judicial approval. Any such action subverts the processes of the Court and may amount to contempt of court."

60 In authorizing certain aspects of the restoration that deviated from the Original Design, the Appellants undermined the purpose of the 2011 Endorsement - to force the Appellants to restore the exterior of the condominium complex to its Original Design.

61 From beginning to end, the dispute, as the motion judge observed, concerned the entire property, including the vegetation. As the motion judge noted "[t]hat is why there was an issue of whether the proposed reinstatement plan constituted a 'substantial change'."

62 The record reveals that the parties at no point distinguished between the Podium and the Courtyard. The motion that gave rise to the 2011 Endorsement was brought to enforce the Minutes of Settlement that required the Artistic Design to be subject to the approval of a 66 and 2/3 percent vote of all owners. The Artistic Design covered the entire outdoor area and included both hard and soft landscaping. Moreover, the minutes of the owners' meeting that took place further to the settlement demonstrate that everyone treated the matter as an all or nothing situation - either the entire exterior would be returned to the Original Design or the Artistic Design would be implemented. Mr. Litchinsky himself, in his affidavit in response to the motion to enforce the Minutes of Settlement, described the owners meeting of June 22, 2011, as "necessary to determine the podium hard and soft landscaping".

63 The only reasonable interpretation of the provision in issue that the Appellants "reinstate the Courtyard as it existed after the repairs to the garage," is that the Appellants were required to restore the Podium landscaping, both hard and soft, to its state prior to the garage repairs. To suggest that the 2011 Endorsement might reasonably be interpreted as limiting the Appellants' restoration obligations to a certain limited part of the exterior of the complex -the courtyard- and to a certain type of landscaping, is, in my view, not supported by the record and not logical.

64 While interpreting the restoration provision in the context of the 2011 Endorsement as a whole is sufficient to satisfy me that the obligations it imposed on the Appellants are clear and unambiguous, I add the following.

65 Until the Appellants were advised that the Respondents were bringing a motion for contempt, the Appellants conducted themselves as though they had no difficulty understanding the 2011 Endorsement. As the motion judge noted, the Appellants did not seek clarification of the decision - neither during the subsequent costs hearing nor at any other time, despite his explicit offer that the parties could return to him in the event they had any questions.

66 Furthermore, when challenged about their deviations from the Original Design, the Appellants' initial response was not to express confusion over what the 2011 Endorsement required of them but to attempt to justify the changes they had authorized.

67 Finally, in refusing to approve the draft order arising from the 2011 Endorsement, the Appellants did not take the position that the decision was unclear. Rather, they took the position that it was not possible to reinstate the landscape to its appearance prior to the garage repairs.

68 In any event, it is important to note that even on the basis of the Appellants' narrow interpretation of the 2011 Endorsement, they admit to having authorized work in violation of that decision. I refer to changes that were to hard landscaping inside the Courtyard, such as those made to the traffic circle.

69 The record supports the motion judge's finding that the Appellants clearly understood the obligations imposed on them by the 2011 Endorsement - to restore the entire exterior, including both hard and soft landscaping, to the Original Design. In his words, in assessing the clarity of his decision arising out of circumstances in which he was involved, he held that the Appellants "knew what they had to do".

70 The motion judge's interpretation of his own decision is entitled to considerable deference. I see no reason to interfere with the motion judge's conclusion that his 2011 Endorsement was clear and unambiguous.

(2) Did the Motion Judge err in finding that the remaining parts of the test for contempt were met?

71 The Appellants also challenge the motion judge's conclusion that the Respondents met the two remaining parts of the test for contempt - that the party who is alleged to have breached the order must be found to have done so deliberately; and that the evidence must prove contempt beyond a reasonable doubt.

72 I do not find it necessary to address these submissions as they are premised on a finding that the 2011 Endorsement is ambiguous - a premise I have rejected.

73 In my view the motion judge's finding that the Appellants wilfully violated the clear obligations imposed on them under the terms of the 2011 Endorsement is unassailable.

(3) Notwithstanding the 2011 Endorsement did the Appellants have authority under the Act to deviate from the Original Design?

74 The Individual Appellants submit that the motion judge erred by failing to take into account various powers they, collectively as the Board, had under the Act. Specifically, the Individual Appellants argue that their statutory authority under s. 97 of the Act to make non-substantial changes and repairs to the common elements, cannot be displaced by court order. They contend that they respected the 2011 Endorsement by not implementing the Artistic Design. Beyond that, the Individual Appellants maintain that, as a Board, they had authority to authorize deviations from the Original Design - such as adding a lamppost, installing a different entrance sign, altering the turning circle by using limestone instead of concrete pavers, installing rectangular instead of trapezoidal planters, and planting different vegetation - as these items did not individually amount to substantial changes to the common elements.

75 I would not give effect to this argument essentially for the reasons set out above. I have concluded that the 2011 Endorsement mandated the restoration of the exterior of the complex to its Original Design. While the Individual Appellants' authority, as a Board, to manage the common elements in accordance with the Act was otherwise unfettered, they had to comply with the 2011 Endorsement. That decision was clear. It obligated the Appellants to restore the Podium to the Original Design.

B. Penalty

76 The motion judge, at para 57, found the Appellants to be in contempt of his 2011 Endorsement. There are two parts to that decision. First, the motion judge explicitly ordered the Appellants to restore the Podium to the Original Design. Second, since the motion judge made no mention of the financial obligations associated with the restoration costs, it was implicit in the endorsement that the costs would be borne by the condominium owners.

77 The sanction the motion judge imposed in his Contempt Order focused on securing performance of his 2011 Endorsement. The motion judge ordered the Appellants to return the landscape of the complex to the configuration and appearance in place prior to the 2011 demolition and provided details of what that would entail. He also ordered the Individual Appellants to personally bear the costs.

78 The motion judge's determination of the appropriate penalty for contempt must be given considerable deference. The role of an appellate court in reviewing a sentence for contempt should be limited to intervening only where there has been an error in principle in arriving at the sentence or the sentence is clearly unfit. See: *British Columbia Forest Products Ltd. v. Lawson*, [1988] B.C.J. No. 1619 (B.C. C.A.), per McLachlin J.A..

79 The purpose of a penalty for civil contempt is to enforce compliance with a court order and to ensure societal respect for the courts: *Vidéotron ltée c. Industries Microlec produits électroniques inc.*, [1992] 2 S.C.R. 1065 (S.C.C.), at 1075. The remedy for civil contempt is designed not only to enforce the rights of a private party (See: *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 S.C.R. 516 (S.C.C.), at 517; *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534, 91 O.R. (3d) 1 (Ont. C.A.), at para. 37), but also to enforce the efficacy of the process of the court itself. Justice McLachlin powerfully expressed this broader purpose in *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.), at 931, stating:

> [t]he rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12 th century have exercised the power to punish for contempt of court.

80 It is in the light of these two objectives - enforcing the rights of parties and respecting and preserving the process of the court, that I turn to the issue of remedy in the circumstances of this case.

(1) The Order that the Appellants Restore the Podium to the Original Design

81 First, I observe that the order requiring the Appellants to restore the Podium to the Original Design was actually not necessary. The motion judge had mandated that in his 2011 Endorsement and that decision was not appealed.

82 The only arguments the Appellants advance in relation to this aspect of the remedy are as follows.

83 First, they submit that the motion judge exceeded his jurisdiction in his Contempt Order by ordering completion of restoration work that was outside the scope of the 2011 Endorsement since the Order directed work to be performed that went beyond the "hard landscaping" and "Courtyard" referred to in the decision.

84 The primary reason why, in my view, this argument must fail is that I have concluded that the 2011 Endorsement covers the entire Podium and includes both hard and soft landscaping.

85 Moreover, the Appellants, in their response to the contempt motion, asked the motion judge to provide "very specific directions about the steps [they were] required to take to correct the situation." The motion judge did exactly that. And he had the jurisdiction under rule 60.11 (5) to do so.

86 Second, the Appellants argue that the Contempt Order includes a requirement that the motion judge explicitly acknowledged was incapable of performance. The Appellants refer to the order that they "[r]einstate the three-levelled [sic] vegetation, using the same kind, species, size and quantity on multiple level, including the grade-level vegetation which has now been replaced with interlocking pavement, as it existed prior to the 2011 demolition." The difficulty, the

Appellants submit, arises out of the motion judge's recognition, at para. 13 of his reasons, that "it is obvious that new planting materials cannot be expected to replace the mature vegetation that existed prior to the reconstruction". The Appellants take this statement as an acknowledgement of the impossibility of reinstating the vegetation to its precise form in the Original Design.

87 I reject this argument. No one realistically expected that compliance with the 2011 Endorsement would require restoring the exterior of the complex to the identical state it was in just prior to the commencement of the garage repairs. Everyone understood that the decision required the Appellants to use judgment and common sense and, to the extent reasonably feasible, restore the landscaping to the Original Design. I note that the motion judge, both in his 2011 Endorsement and in his contempt reasons, referred to the Appellants' awareness that restoring the Podium to the Original Design would involve using materials that were "the closest match".

88 In my view, the Contempt Order did not mandate the Appellants to perform the impossible. And, as previously indicated, in circumstances in which compliance with an order is impossible, the remedy is to appeal, not ignore the order.

89 As previously noted, rule 60.11(5), which expressly permits the court to make any order "as is just", gives the court broad powers in responding to a finding of contempt. The motion judge had authority to order the Podium to be restored to the Original Design. I see no reason to interfere with this aspect of the remedy.

(2) A Fit Sentence

90 The following are the factors relevant to a determination of an appropriate sentence for civil contempt:

a) the proportionality of the sentence to the wrongdoing;

b) the presence of mitigating factors;

c) the presence of aggravating factors;

d) deterrence and denunciation;

e) the similarity of sentences in like circumstances; and

f) the reasonableness of a fine or incarceration.

Echostar Communications Corp. v. Rodgers, 2010 ONSC 2164 (Ont. S.C.J. [Commercial List]); *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348, [2003] O.T.C. 781 (Ont. S.C.J.) at para. 67; *Builders Energy Services Ltd. v. Paddock*, 2009 ABCA 153 (Alta. C.A.), at para. 13. Megill, at pp. 7-8.

(i) Proportionality

91 The principle of proportionality requires that the punishment fit the wrongdoing: *York (Regional Municipality) v. Schmidt*, [2008] O.J. No. 4915 (Ont. S.C.J.), at para. 16. As Jeffrey Miller wrote in his leading textbook *The Law of Contempt in Canada* (Toronto: Carswell, 1997), at p. 131: "[t]he fundamental principle in all sentencing, including sentencing for contempt, is that the sentence must be commensurate with or 'fitted to' the gravity of the offence."

92 In order to put the Individual Appellants' conduct into context it is important to recall how this dispute began. The Podium needed to be restored once the garage repairs had been completed. A landscape architect was retained to provide expert assistance. The Appellants received a proposal, the Artistic Design, and, for legitimate reasons, preferred it.

93 As previously set out, the Appellants took appropriate steps to give the condominium owners full opportunity to examine, and provide feedback, on the Artistic Design.

94 The proposal was not embraced by all owners. The Respondents took a stand in favour of restoring the Podium to the Original Design. The settlement the parties entered into soon after the dispute arose demonstrates that, at least to that point, the Individual Appellants were prepared to cooperate. The Individual Appellants did not give in happily. That much is clear. But they did agree to proceed on the basis proposed by the Respondents.

95 When the Artistic Design did not receive the support of 66 and 2/3rds percent of the owners, the Individual Appellants started to veer off course. In my view they were ill-advised to question the settlement. As a result, they found themselves faced with the 2011 Endorsement.

96 At this point the Individual Appellants' conduct went from ill-advised to contemptuous. They authorized landscaping work in deliberate defiance of the clear intent of the 2011 Endorsement. The Individual Appellants ignored communication from the Respondents reminding them of their court-ordered obligations. Stubbornly, they continued to try to have their own way. Recklessly, they continued to add aspects of the Artistic Design to the newly-created Podium. Even after Respondents' counsel contacted the Individual Appellants with a view to persuading them to honour their obligations under the endorsement, they persisted in their contemptuous conduct.

97 Clearly, the Individual Appellants thought they knew what was best for CCC 145. Before the motion judge and this court they attempt to justify their conduct by pointing to evidence that their decisions were made in the best interests of the owners. They say that there is less risk that the new planters will leak. The driving circle is more manoeuvrable. The street sign is more visible. The costs of installation and maintenance of the landscaping, in general, are less.

98 The evidence may support these arguments. However, the law does not. As well-intentioned as the Individual Appellants may have been, demonstrating that their contemptuous conduct is in the best interests of CCC 145 is no defence. See, for example *1984 Enterprises Inc. v. Strider Resources Ltd.*, 2013 MBCA 100, 25 C.L.R. (4th) 219 (Man. C.A.), at para. 54.

99 I summarize my view of the gravity of the Individual Appellants' conduct as follows.

100 After having obtained and accepted a recommendation by experts as to the optimal landscaping design, the Individual Appellants simply could not accept being put in a position in which they had to implement a design they believed was not optimal for the condominium owners. They therefore took matters into their own hands and, albeit for reasons they considered valid, defied a court order. The Individual Appellants' arrogance led them to reckless and ultimately unlawful conduct.

101 Any contempt is serious. This is no exception. However, in my view, the Individual Appellants' contemptuous conduct must be considered in the light of the fact that there is no evidence that it was motivated by personal gain, vengeance or any reason other than that they felt they knew best.

(ii) Mitigating and Aggravating factors

102 In terms of mitigating factors, I note that there is no evidence that the Individual Appellants had previously defied any court order.

103 I consider as aggravating the Individual Appellants' unremitting intransigence in conducting themselves in defiance of the 2011 Endorsement. They were simply unable to understand that their belief in the wisdom of following the Artistic Design and then their belief that they could get away with acting on that conviction would put them in breach of court-imposed and statutory obligations.

104 In addition, I consider the Individual Appellants' failure to seek legal advice until they were told about a pending motion for contempt, as an aggravating factor. They could and should have retained counsel as soon as the Individual Appellants opposed the Artistic Design.

(iii) Deterrence

105 As set out above, deterrence, specific and general, is the most important objective of a contempt penalty. Justice Quinn, in Niagara (Municipality), expressed the purpose of sentencing in contempt proceedings as follows:

> The primary purpose of sentencing in contempt proceedings is deterrence: both general and specific. The punishment for contempt should serve as a disincentive to those who might be inclined to breach court orders. Our legal system is wounded when court orders are ignored. The sentence must be one that will repair the wound and denounce the conduct.

See also: *Cornwall Public Inquiry Commissioner v. Dunlop* (2008), 290 D.L.R. (4th) 699 (Ont. Div. Ct.) at para. 48; *Ontario (Attorney General) v. Clark* (1966), 57 D.L.R. (2d) 596 (Ont. H.C.), affirmed (1966), [1967] 1 O.R. 609 (note) (Ont. C.A.), leave to appeal to S.C.C. refused (1966), [1967] 1 O.R. 609 (note) (Ont. C.A.).

106 In considering the issue of deterrence in the unique circumstances of this case, context is of particular importance. This case engages the broader issue of the governance needs of condominium corporations.

107 The Individual Appellants are volunteer board members of a not-for-profit corporation. It is clear that the penalty imposed in response to conduct that defies the authority of the court must be sufficient to deter those involved and other similarly situated individuals from like conduct. However, in the condominium context, the penalty should not be so onerous that it deters unit owners from serving on condominium boards. Owners who voluntarily assume the often onerous and thankless duties as directors of condominium corporations are essential to the functioning of a growing residential population - those who live in condominiums.

(iv) Range of Sentences

108 The Individual Appellants correctly point out in their factum that, in general, awards for civil contempt in Canada range between $1,500 and $5,000. In *Korea Data Systems Co. v. Chiang*, [2007] O.J. No. 1409 (Ont. S.C.J.); partially rev'd on other grounds 2009 ONCA 3 (Ont. C.A.), at para. 20, this court observed that custodial sentences are rare and that Canadian courts tend to be lenient in their contempt sentences. Even in cases where contempt has involved the loss or misuse of substantial amounts of money, the fines imposed on individuals have remained low. See, for example *Chicago Blower Corp. v. 141209 Canada Ltd.* (1987), 44 Man. R. (2d) 241 (Man. C.A.); *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.*, [1987] 2 F.C. 557 (Fed. C.A.).

109 The few instances in which fines have been imposed at $100,000 or higher have been against unions with large membership (See: *Health Employers Assn. of British Columbia v. Facilities Subsector Bargaining Assn.*, 2004 BCSC 762 (B.C. S.C.); *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.)) or against large corporations in egregious circumstances (*Apotex Fermentation Inc. v. Novopharm Ltd.*). It should be noted that in *Apotex*, the corporate entity of Novopharm had its fine reduced to $100,000 on appeal and no individual contemnor (the officers of the corporation) was fined more than $10,000.

110 Significant fines have been imposed only in particularly egregious cases and/or where the contemptuous conduct was motivated by personal gain (See, for example: *IMAX Corp. v. Trotum Systems Inc.*, 2013 ONSC 743 (Ont. S.C.J.) at paras. 12-14 (fine of $50,000).)

111 However, I also note the observation of Brown J. in *Mercedes-Benz Financial v. Kovacevic*, [2009] O.J. No. 888 (Ont. S.C.J.), that some recent decisions in this province have shown a willingness to impose more substantial penalties for contempt, particularly in cases in which there has been a lengthy course of disobedience and where the contemnors have not purged their contempt.

112 In the end, the sentence imposed must be reasonable.

(3) The Fitness of the Order made

113 Before addressing the merits of the financial penalty imposed by the motion judge's sanction, I will first deal with two preliminary matters: 1) the Individual Appellants' motion to adduce fresh evidence, and 2) issues resulting from the procedure followed at the contempt hearing.

(i) The Fresh Evidence Motion

114 The Individual Appellants' proposed fresh evidence provides specific information about the financial burden that paying the restoration costs would impose on each of them. The proposed evidence estimates the cost of restoring the Podium from the state it was in at the time of the contempt hearing back to the Original Design to be in excess of $350,000.

115 The criteria for the admission of fresh evidence on appeal are well-established. The evidence: 1) should not be admitted if, by due diligence, it could have been adduced at trial; 2) must be relevant in that it bears upon a decisive or potentially decisive issue; 3) must be credible in that it is reasonably capable of belief; and 4) must be such that if believed, it could reasonably be expected to have affected the result: *R. v. Palmer* (1979), 50 C.C.C. (2d) 193 (S.C.C.) at p. 205.

116 I find it unnecessary to deal with the first three *Palmer* criteria, as, in my view, the motion fails on the fourth ground.

117 The cost of restoring the Podium to the Original Design is relevant to the penalty part of the Contempt Order. It puts the financial impact on the Individual Appellants in sharp focus. However, the motion judge did not order the Individual Appellants to pay the restoration costs, unaware of the magnitude of the burden of his order. In the course of the hearing of the contempt motion, it was understood that the restoration costs would be in the range of several hundred thousand dollars. I do not accept the Individual Appellants' argument that had the motion judge "known the size of the financial penalty... [he] would never have made the order he did". In my view, the detailed estimates the Individual Appellants now seek to put before this court add nothing but specific evidentiary support for information of which the motion judge was aware when he made the order he did.

118 It follows that, in my view, the proposed fresh evidence could not reasonably be expected to have altered the motion judge's decision to order the Individual Appellants to pay the restoration costs.

119 I would therefore dismiss the motion to adduce this fresh evidence.

(ii) The Conduct of the Contempt Hearing

120 I make several observations about the procedure followed at the hearing.

121 There is no formally mandated process for contempt proceedings. The procedure followed may vary. However, contempt proceedings typically have two stages - the liability hearing and a subsequent hearing to determine penalty: *College of Optometrists (Ontario) v. SHS Optical Ltd.*, 2008 ONCA 685, 93 O.R. (3d) 139 (Ont. C.A.) [hereinafter *Great Glasses*] at paras. 73-75, per Watt J.A.; *Echostar Communications Corp. v. Rodgers*, 2010 ONSC 2164 (Ont. S.C.J. [Commercial List]), at paras. 34-36. If a contempt finding is made, the matter is adjourned to provide the contemnor an opportunity to purge the contempt and prepare for the sentencing portion of the process. Any action undertaken by a contemnor to purge his or her contempt may serve as a mitigating factor in sentencing: *Echostar*, at para. 35.

122 There is good reason to bifurcate contempt hearings. As in criminal prosecutions, in contempt hearings, liability and penalty are discrete issues. In a hearing in which liability and penalty are dealt with together, there is a risk that evidence relevant, material and admissible to liability, will be improperly applied to penalty or vice versa. *R. v. B.E.S.T. Plating Shoppe Ltd.* (1987), 59 O.R. (2d) 145 (Ont. C.A.).

123 In this case, liability and penalty were combined into a single hearing.

124 I agree with the comments of Watt J.A. in *Great Glasses* where he said, at para. 74, that: "a proceeding that considers both liability and penalty in the same hearing, may cause unfairness or be infected with legal error to such an extent to require a new hearing." I also agree with his comments at para. 76, that the extent to which fairness is affected varies from case to case.

125 In my view, contempt proceedings should be bifurcated for the simple reason that bifurcation avoids risking the need for a new hearing.

126 I have come to the conclusion that in this case the motion judge's failure to bifurcate caused or contributed to unfairness as; a) the evidence relevant to liability appears to have been considered in the penalty phase, b) the Appellants had no opportunity to take steps to attempt to purge their contempt, steps that may have been relevant to mitigation. *Great Glasses*, at para. 102, and c) the parties had no opportunity to prepare for the sentence hearing.

127 But, as Watt J.A. pointed out in *Great Glasses*, this error is not necessarily fatal. In this case, I would not interfere with the financial aspect of the remedy on this basis alone. I say this as there is no evidence that the Individual Appellants requested a bifurcated hearing or, at any time during the process, drew the problems associated with a combined hearing to the motion judge's attention. Moreover, the failure to bifurcate was not advanced as a ground of appeal.

128 It does, however, affect the degree of deference that this court should pay to the financial penalty the motion judge imposed.

(iii) The Fitness of the Financial Penalty

129 In civil contempt, it is critical that the penalty respond to the conduct being sanctioned. The relevant conduct is the wilful disregard of the authority of the court. The court must assess the seriousness of the disrespect of the court, not the severity of any resulting harm.

130 Civil contempt proceedings do not have "and must not appear to have the function of a civil action in tort or for breach of contract": *Royal Bank v. Yates Holdings Inc.* (2007), 33 C.B.R. (5th) 268, [2007] O.J. No. 2529 (Ont. S.C.J. [Commercial List]), at para. 19. As MacKay J. stated in *Merck & Co. v. Apotex Inc.*, 2001 FCT 589 (Fed. T.D.), var'd 2003 FCA 234, 227 D.L.R. (4th) 106 (Fed. C.A.), at para. 11, "[a]ny concern of the plaintiffs about injury to them caused by those activities ought to be recoverable in damages or profits claimed. The concern of the Court, in a case of civil contempt such as this is, must be the failure to respect the Court's process."

131 I begin with the purpose behind the motion judge's order that the Individual Appellants pay the costs of restoration.

132 The reasoning behind the motion judge's decision to order the Individual Appellants to pay the restoration costs is found in para. 56, set out above. As I read that paragraph, the motion judge imposed this sanction on the basis of his view that it would be unfair to make the condominium owners bear the costs of the Appellants' contempt of the 2011 Endorsement. The motion judge sought to prevent the unit owners from having to bear the expense associated with the incremental costs of changing the Podium from the amalgam of the Original Design and the Artistic Design, to the Original Design. In effect, the motion judge, in sanctioning the Individual Appellants the way he did, focused on the costs that his restoration order would impose on the unit owners rather than on deterrence. With respect, I am of the view that in doing so, he erred in principle.

133 Furthermore, the jurisprudence has established factors to be taking into account in deciding upon a fit sentence for civil contempt. One such factor is the particular contemnor's ability to pay lest the amount either be trivial or unduly punitive: *Niagara Regional Police Services Board v. Curran* (2002), 57 O.R. (3d) 631 (Ont. S.C.J.), at para. 36. Where fines are imposed above an amount necessary to reflect the public interest in the matter, an appellate court will be justified in intervening to reduce the amount: *Apotex Fermentation Inc. v. Novopharm Ltd.* (1998), 162 D.L.R. (4th) 111 (Man. C.A.), at paras. 319-321.

134 Here, each Individual Appellant was fined approximately $100,000 without evidence that would have enabled the motion judge to assess the impact of having to pay such a significant amount of money. The lack of evidence on this important factor severely interfered with the motion judge's ability to assess the fitness of the sentence he imposed.

135 In the result, I conclude that the financial penalty imposed on the Individual Appellants was unfit and must be set aside, leaving it to this court to determine an appropriate penalty for the Individual Appellants' contempt.

(iv) A Fit Sentence

136 Based on my assessment of the gravity of the Individual Appellants' contemptuous conduct and the mitigating and aggravating circumstances, set out above, a reasonable penalty that would achieve the necessary degree of deterrence, in the unique circumstances of this case, would be the imposition of a fine on each Individual Appellant of $7,500 to be paid to CCC 145.

(v) Indemnification

137 The Individual Directors submit that, pursuant to s. 38 of the Act, CCC 145 ought to indemnify them for any financial penalty imposed. Section 38 allows a condominium corporation to indemnify a director unless the director "is adjudged to be in breach of the duty to act honestly and in good faith". The Individual Appellants, relying on *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198 (Ont. C.A.), argue that the motion judge erred in concluding that they were not entitled to be indemnified.

138 I do not agree.

139 First, in *Bennett*, this court dealt with the issue of indemnification in an entirely different context - proceedings before the Ontario Securities Commission to which entirely different statutory language applied. *Bennett* has no application to this case.

140 Second, the motion judge's adjudication that the Individual Appellants failed to act in good faith is unassailable. How could their deliberate violation of a clear court order be accurately described other than as a failure to act in good faith?

Conclusion

141 This is a particularly unfortunate case. I say this because if the Appellants had sought legal advice at the first sign of a dispute, needless consumption of time and money and needless acrimony could have been avoided. Certainly, the use of the blunt instrument of contempt would not have been necessary.

142 The Individual Appellants, well-intentioned as they were, made the mistake not only of failing to retain counsel until it was too late but also of over-stepping their bounds. They appeared not to appreciate that in doing so they breached their obligations to act in the best interests of CCC 145.

143 Of more significance, they appeared not to appreciate the serious implications of breaching a court order. These implications have been forcefully described many times. The rule of law requires that courts maintain their dignity and respect. Simply put, it comes to this. To maintain respect, courts must enforce their process. If court orders can be ignored, our system of justice, the foundation of our society, breaks down.

Disposition

144 For these reasons, I would dismiss the appeal from the contempt finding.

145 I would allow, in part, the appeal as to penalty. I would not interfere with the order that the Podium be restored to the Original Design but would set aside the order that the Individual Appellants pay the costs of the restoration and replace it with an order that each Individual Appellant pay a fine in the amount of $7,500 to the credit of CCC 145.

146 This disposition would result in the following. The order that the Appellants restore the Podium to the Original Design would remain in effect. The current board of directors must guide CCC 145's compliance with that directive. CCC 145 has $30,000 to apply toward the costs of compliance.

147 With the flow of time, the movement of owners in and out of the condominium, the extended opportunity to live with the amalgam of the Original Design and the Artistic Design, the maturing landscaping, and the changed composition of the board of directors, the circumstances are different. I remind the parties that at any stage of the proceedings, even in the face of an outstanding finding of civil contempt, they have the power to settle their differences on their own terms.

148 I would order CCC 145 to pay the costs of the motion before Cronk J.A. to the Respondents, fixed in the amount of $2,500 including disbursements and HST.

149 Given the divided success, I would make no order as to costs of the appeal. If the parties wish to make submissions concerning the costs of the contempt motion, they may do so in submissions not to exceed eight pages. Any such submissions must be submitted to Mr. John Kromkamp within 14 days of the release of these reasons.

***P. Lauwers J.A.*:**

I agree

***G. Pardu J.A.* (dissenting):**

150 I would allow the appeal and set aside the motion judge's contempt finding. A finding of contempt can be justified only if the order alleged to have been breached was "clear and unequivocal": *Bell ExpressVu Ltd. Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614 (Ont. C.A.), at para. 21. The motion judge's hand written endorsement, which was never embodied in an issued order, included a sentence, "the Board is required to reinstate the Courtyard as it existed after the repairs to the garage". This was neither clear nor unequivocal.

Contempt is a quasi-criminal matter

151 A finding of contempt is a quasi-criminal matter. A conviction for contempt places an individual's physical liberty in jeopardy. Contempt proceedings thus engage rights and interests protected by the *Canadian Charter of Rights and Freedoms*.

152 This is why the elements of contempt must be proven beyond a reasonable doubt. This is why it is not permissible in this context to rely on the factual matrix of an order to try and repair an order that "incorporates overly broad and unclear language" (*Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463 (Sask. C.A.)) or that creates "too much scope for confusion" (*Bell ExpressVu*, at para. 28).

153 When individual liberties are at stake, it is not enough to say that the non-compliant person ought to have known what the judge meant, according to the background and context of the dispute.

154 Applying the test for contempt in this way does not give contemnors room to "finesse" their way out of court orders. *Sweda Farms Ltd. v. Ontario Egg Producers*, 2012 ONCA 337 (Ont. C.A.), illustrates how this court has addressed such "finessing" without diluting the principle that an order should be clear and unequivocal before a contempt order may be made.

155 In *Sweda Farms*, the appellant was ordered to transfer to a supervising solicitor "any and all other evidence or documents in his possession". The appellant retained copies of documents he transferred to the solicitor, and claimed that this did not demonstrate contempt because the order did not prohibit him from retaining copies. This court noted, at para. 3, that the appellant's actions were contrary to the plain language of the order: "[i]n our view, the copies that the appellant retained are clearly caught within the language in the order: 'any and all other evidence or documents'."

156 It was unnecessary to look to the purpose of the order, the factual matrix underlying the order, or any extrinsic evidence to show contempt - the order was clear and unequivocal, the appellant had performed an intentional act that was contrary to that order, and contempt had been proven beyond a reasonable doubt.

"Reinstate"

157 The first reason I must disagree with the motion judge is because it was not clear what the motion judge meant by "reinstate". All the parties and the motion judge accepted that this word should not be interpreted literally - that it could not have meant that the courtyard had to be reinstated exactly as it was before the construction.

158 For example, the motion judge acknowledged that the pre-existing mature vegetation could not be reinstated in its former arrangement.

159 All parties acknowledged that an access ramp had to be widened because of new regulatory requirements, and that some of the original bricks were no longer available.

160 The Respondents acknowledged in argument that the order did not contemplate that the pre-existing arrangement would be exactly replicated: that 30 year old concrete was not to be replaced with 30 year old concrete, and that since materials had changed over the intervening years, the Appellants would of necessity have to choose new materials, and exercise some judgment as to what was to be substituted.

161 Some of the pre-existing outside structures had caused damage to the garage, because their configuration led to leaking into the garage. When these were removed, it was discovered that the turning circle had depressed the surface asphalt, and was one of the causes of water penetration into the garage. The planters outside the courtyard walls had been installed without a back, and abutted brick cladding on the exterior of the courtyard walls. They did not have any waterproofing that separated the garage ceiling from the elements, and were a major factor in the water infiltration into the garage. The motion judge could not have contemplated that the structures that caused leakage into the garage were to be re-constructed in their defective form.

162 The Respondents submit that the order should have been interpreted so as to require construction of the entire exterior in a way that resembled the appearance and configuration of the previous exterior except for less mature vegetation, even if different materials were used.

163 In *Bell ExpressVu*, at para. 28, this court adopted the following observation by Cullity J. in *Jaskhs Enterprises Inc. v. Indus Corp.*, [2004] O.T.C. 859 (Ont. S.C.J.), at para. 40: "a failure to comply with an order of the court will not be contempt if there are genuine, unresolved issues between the parties with respect to the manner in which it is to be carried into operation."

164 It seems to me that there were genuine, unresolved issues between the parties as to how the courtyard was to be "reinstated" to its former state. The motion judge placed the Board in the position of having to make judgment calls as to how to implement this very general instruction. The Appellants and Respondents could reasonably disagree over the merits of these judgment calls.

165 For that reason, the appropriate course for the Respondents was to ask the motion judge to vary his order to clarify the Board's obligations - not to skip straight to contempt proceedings.

The "Board"

166 Secondly, I note that the endorsement directed the "Board" to reinstate the courtyard. The Individual Appellants were found guilty of contempt because they were board members.

167 As noted above, an individual not named in an order "could still be found in contempt if he, with knowledge of its existence, contravened its terms": *Baxter*, at pp. 396-97. I would adopt the following summary of the law of contempt as it applies to directors and officers of corporations, set out in *Telus Mobility v. T.W.U.*, 2002 FCT 656, 220 F.T.R. 291 (Fed. T.D.), at p. 295:

> [I]ndividuals, as officers and directors of a company which has been held in contempt, may not be held in contempt merely because they hold such positions, but rather there must be either an aiding and abetting, a standing idly by, or a failure to take steps which failure was causative of the breach. Conversely, where an officer or a director does what she or he can to avoid the breach, yet the breach occurred without fault on the part of the officer or director, there can be no individual liability for contempt.

168 The motion judge did not undertake any individualized assessment of what each of the Individual Appellants did or did not do that made these individuals guilty of contempt. Three of the individuals he convicted are not mentioned by name at all in his judgment, outside of the title of proceedings.

169 This is not enough in a quasi-criminal context.

"Courtyard"

170 Finally, the motion judge did not make clear in his initial order what he meant by "Courtyard". On the contempt motion, the motion judge indicated that he meant the "Courtyard" to "encompass the entire podium, including vegetation". By "Podium" he meant the entire area outside of the residential tower, including the area outside the actual courtyard walls, up to the property boundary abutting the sidewalk.

171 There is some ambiguity as to what the "Courtyard" included in the initial order. On the one hand, the Oxford English Dictionary defines "courtyard" as "an unroofed area that is completely or partially enclosed by walls or buildings": OED 2nd ed. revised (Oxford University Press, 2005). Based on this definition, the "Courtyard" would not include the Podium. On the other hand, the motion judge's discussion of the Podium and Minutes of Settlement that addressed the podium might have indicated to a reasonable person that the "Courtyard" extended to the Podium.

172 To resolve this ambiguity, the motion judge drew from the factual matrix giving rise to the order to show that, when he said "Courtyard", he was referring to the "Podium". In doing so, he relied on principles of contract law. An examination of objective evidence of the context in which an agreement is made is an integral part of interpretation of a contract. (*Dumbrell v. Regional Group of Cos.* (2007), 85 O.R. (3d) 616 (Ont. C.A.)) Different considerations apply to interpretation of an order for the purposes of contempt proceedings.

173 As Goudge J.A. noted in *Seaworld Parks & Entertainment LLC v. Marineland of Canada Inc.*, 2011 ONCA 616, 282 O.A.C. 339 (Ont. C.A.), at para. 16:

> [W]here the words of a contract are clear and unambiguous, extrinsic evidence cannot be used to alter their meaning. Ambiguity is required before that is permitted. ... This factual matrix is relevant not to alter the meaning of clear and unambiguous language but to assist the court "to determine the meaning of the contract against its objective contextual scene".

174 And, as noted in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at para. 50, "it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face."

175 If the order was clear and unequivocal, it would not have been necessary for the motion judge to refer to extrinsic evidence to show what it meant. The fact that he had to rely on this evidence, in my view, indicates that his order was not clear and unequivocal. This is not to say that context is irrelevant to the interpretation of an order for the purposes of contempt proceedings. Given the quasi-criminal nature of the proceedings, any doubt should be resolved in favour of the alleged contemnor.

176 There is a principled reason not to rely on extrinsic evidence, or the subjective intentions of the parties named in the order, in determining whether an order is clear and unequivocal. Unlike a contract, which is generally binding only on the parties to that contract, a court order is binding on everyone, even those without knowledge of the facts and circumstances that gave rise to that order. It has been held that anyone "with knowledge of [the] existence" of an order, who "contravene[s] its terms", can be convicted of civil contempt: *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.*, [1983] 2 S.C.R. 388 (S.C.C.), at pp. 396-97.

177 This holding is tenable only if, as a prerequisite to conviction, it is necessary that the text of the order, read in light of its reasons, be sufficiently clear and unequivocal that anyone with knowledge of that order would understand how to act in accordance with that order, regardless of how much or how little that person knows about the background facts giving rise to that order.

178 For this reason, I conclude that the motion judge erred in turning to the factual matrix underlying his order to show what that order meant. In doing so, he implicitly accepted that his order was not "clear and unambiguous". He implicitly accepted that there is a real risk that an individual reading his order would not have been able to understand it in the way he felt it should have been understood without having access to additional information regarding the background to the litigation.

179 I note that there are other contexts where the factual matrix underlying an order may be useful. For instance, if the Respondents had asked the court to vary the motion judge's 2011 order in order to clarify the obligations imposed on the Board, it would have been appropriate for the motion judge to refer to this factual matrix in carrying out this task: see *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at para. 81. Such clarification would have ensured that, moving forward, it would be manifestly clear to everyone what conduct would be necessary to avoid a conviction for civil contempt.

Conclusion

180 The contempt power "is one to be used cautiously and only as a last resort. Implicit in its proper exercise is the principle of least intrusive means": *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81 (Ont. C.A.), at para. 41 (*per* Sharpe J.A.); see also *Clements, Re* (1877), 46 L.J. Ch. 375 (Eng. C.A.); *R. v. Cohn* (1984), 48 O.R. (2d) 65 (Ont. C.A.); *Centre commercial Les Rivières ltée c. Jean bleu inc.*, 2012 QCCA 1663 (C.A. Que.), at para. 7; *Rocca Dickson Andreis Inc. v. Andreis*, 2013 ONSC 5508 (Ont. Div. Ct.), at para. 37; Law Reform Commission of Canada, *Contempt of Court: Working Paper No. 20* (Ottawa: Ministry of Supply and Services, 1977), at p. 49.

181 Where an order is open to more than one reasonable interpretation, contempt proceedings are not the least restrictive means of ensuring parties comply with the purpose and spirit of that order. To the contrary, the Supreme Court of Canada has noted that a less restrictive means of achieving this goal would be to vary the order so as to make its terms clearer: *Doucet-Boudreau*, at para. 81.

182 This is one of the reasons why our law requires that an order be "clear and unequivocal" before a court can exercise its power to convict persons for civil contempt.

183 In my view, the motion judge committed a palpable and overriding error in concluding that his endorsement was clear and unequivocal. The order contained no details giving any guidance as to the many different decisions which would have to be made in the course of reconstruction of the exterior landscaping and structures.

184 As noted above, the Respondents had another, less drastic means of achieving their goal: seeking an order varying the judge's initial order so as to state more clearly what the Appellants were obligated to do.

185 For these reasons, a Contempt Order is not justified here, and I would set aside the finding of contempt.

186 Given my conclusion that the Contempt Order must be set aside, it is not necessary for me to address the other issues addressed by the majority.

Appeal allowed in part.

Footnotes

1 The term "Special Owners Meeting" has been used by the parties in their correspondence, and in submissions to this court and the court below. However, the Act, pursuant to s. 45, does not create specific types of meetings. Accordingly, I refer exclusively to "meetings".

TAB 2

2015 SCC 17, 2015 CSC 17
Supreme Court of Canada

Carey v. Laiken

2015 CarswellOnt 5237, 2015 CarswellOnt 5238, 2015 SCC 17, 2015 CSC 17, [2015] 2 S.C.R. 79, [2015] A.C.S. No. 17, [2015] S.C.J. No. 17, 133 O.R. (3d) 80 (note), 251 A.C.W.S. (3d) 242, 332 O.A.C. 142, 382 D.L.R. (4th) 577, 470 N.R. 89, 66 C.P.C. (7th) 1, J.E. 2015-660

Peter W. G. Carey, Appellant and Judith Laiken, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 10, 2014
Judgment: April 16, 2015
Docket: 35597

Proceedings: affirming *Laiken v. Carey* (2013), 116 O.R. (3d) 641, 52 C.P.C. (7th) 144, 367 D.L.R. (4th) 415, 310 O.A.C. 209, 2013 CarswellOnt 11824, 2013 ONCA 530, E.E. Gillese J.A., M. Rosenberg J.A., Robert J. Sharpe J.A. (Ont. C.A.); reversing *Laiken v. Carey* (2012), [2012] O.J. No. 6596, 2012 CarswellOnt 17537, 2012 ONSC 7252, L.B. Roberts J. (Ont. S.C.J.)

Counsel: Patricia D.S. Jackson, Rachael Saab, for Appellant
Kevin Toyne, John Philpott, for Respondent

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Judges and courts
XX Contempt of court
XX.1 Nature of offence
Judges and courts
XX Contempt of court
XX.4 Forms of contempt
XX.4.c Disobedience of court
XX.4.c.i Injunctions
XX.4.c.i.E Liability of third persons
Judges and courts
XX Contempt of court
XX.4 Forms of contempt
XX.4.c Disobedience of court
XX.4.c.i Injunctions
XX.4.c.i.F Miscellaneous
Judges and courts
XX Contempt of court
XX.6 Practice and procedure
XX.6.a General principles
Headnote
Judges and courts --- Contempt of court — Nature of offence
In course of litigation, L obtained broad ex parte Mareva injunction restraining client's assets — Solicitor obeyed client's instructions to return funds to client that he had earlier paid into solicitor's trust account — L's motion for order finding

solicitor in contempt of injunction was granted — Solicitor's motion to re-open contempt hearing and set aside contempt finding was granted — Motions judge found that solicitor's new evidence raised reasonable doubt that his interpretation of Mareva injunction was deliberately and willfully blind — L's appeal was allowed and contempt finding was restored — Court of Appeal accepted that solicitor did not knowingly choose to disobey injunction, but found that it was unnecessary to establish this to find solicitor liable for civil contempt — Solicitor appealed — Appeal dismissed — Proof beyond reasonable doubt of intentional act or omission that was in breach of clear order of which alleged contemnor had notice was required to establish civil contempt — Contumacy, being intent to interfere with administration of justice, was not element of civil contempt and lack of contumacy was not defence — Heightened fault requirement should not apply to individuals who cannot purge their contempt, to lawyers and to third parties — Existing discretion not to enter contempt finding and defence of impossibility of compliance provided better answers than heightened degree of fault where party was unable to purge his or her contempt — Motions judge erred in law to extent that she found that contumacious intent was required.

Judges and courts --- Contempt of court — Forms of contempt — Disobedience of court — Injunctions — Miscellaneous

In course of litigation, L obtained broad ex parte Mareva injunction restraining client's assets — Solicitor obeyed client's instructions to return funds to client that he had earlier paid into solicitor's trust account — L's motion for order finding solicitor in contempt of injunction was granted — Solicitor's motion to re-open contempt hearing and set aside contempt finding was granted — L's appeal was allowed and contempt finding was restored — Court of Appeal held that motions judge had erred in setting aside contempt finding — Court of Appeal accepted that solicitor did not knowingly choose to disobey injunction, but found that it was unnecessary to establish this to find solicitor liable for civil contempt, as he committed act that violated clear court order that he knew of — Solicitor appealed — Appeal dismissed — It would be illogical to interpret court order as allowing trustees of assets held for client's benefit to freely transfer those assets between accounts and even between jurisdictions, putting those assets beyond reach of court, so long as client retained beneficial ownership of assets — Such interpretation would run counter to plain language of order specifically prohibiting those with knowledge of it from "dealing with" client's assets — Solicitor's characterization of $500,000 in his trust account as "overpayment" of "reasonable legal fees" was artificial — Solicitor's other conduct showed that he understood that order was in full force and was binding on him.

Judges and courts --- Contempt of court — Forms of contempt — Disobedience of court — Injunctions — Liability of third persons

In course of litigation, L obtained broad ex parte Mareva injunction restraining client's assets — Solicitor obeyed client's instructions to return funds to client that he had earlier paid into solicitor's trust account — L's motion for order finding solicitor in contempt of injunction was granted — Solicitor's motion to re-open contempt hearing and set aside contempt finding was granted — L's appeal was allowed and contempt finding was restored — Court of Appeal held that motions judge had erred in setting aside contempt finding — Solicitor appealed — Appeal dismissed — There was not true conflict between order and solicitor's professional duties such that he had no option but to transfer trust funds back to client — Solicitor's assumed duty to guard solicitor-client privilege did not conflict with his duty to comply with order, as he only had to leave funds in his trust account, or he could have sought other appropriate avenues — There was no legal or ethical duty that compelled solicitor to breach injunction by transferring trust funds back to client or that conflicted with obeying order.

Judges and courts --- Contempt of court — Practice and procedure — General principles

In course of litigation, L obtained broad ex parte Mareva injunction restraining client's assets — Solicitor obeyed client's instructions to return funds to client that he had earlier paid into solicitor's trust account — L's motion for order finding solicitor in contempt of injunction was granted — Solicitor's motion to re-open contempt hearing and set aside contempt finding was granted — L's appeal was allowed and contempt finding was restored — Court of Appeal held that motions judge had erred in setting aside contempt finding — Court of Appeal held that solicitor had inappropriately used second stage of contempt proceedings to attack motion judge's earlier findings, based on evidence he ought to have filed at first hearing — Solicitor appealed — Appeal dismissed — Neither Rules of Civil Procedure nor case law contemplated procedure motions judge followed — It was inappropriate for solicitor to use second stage of contempt proceedings to attack motions judge's findings and declaration of contempt — Once finding of contempt had been made at first stage of bifurcated proceeding, that finding was usually final, unless contemnor had subsequently purged contempt or new

evidence was brought to light that was not available at initial hearing — Motions judge erred in exercising her discretion to permit solicitor to re-litigate initial contempt finding and erred in setting that finding aside.

Juges et tribunaux --- Outrage au tribunal — Nature de l'infraction

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client — Avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie — Requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée — Requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée — Juge des requêtes a conclu que la nouvelle preuve introduite par l'avocat soulevait un doute raisonnable que son interprétation de l'injonction de type Mareva équivalait à un aveuglement volontaire et délibéré — Appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie — Cour d'appel a convenu que l'avocat n'avait pas consciemment choisi de contrevenir à l'injonction, mais a conclu qu'il n'était pas nécessaire pour arriver à ce résultat de rendre l'avocat coupable d'outrage civil — Avocat a formé un pourvoi — Pourvoi rejeté — Pour établir l'outrage civil, il était nécessaire de prouver hors de tout doute raisonnable que l'auteur présumé d'un outrage a intentionnellement commis un acte, ou omis d'agir, en violation d'une ordonnance claire dont il avait connaissance — Désobéissance, soit l'intention d'entraver l'administration de la justice, n'était pas un élément constitutif de l'outrage civil, et l'absence d'intention de désobéir ne pouvait pas être invoquée comme moyen de défense — Exigence plus rigoureuse en matière de faute ne devrait pas s'appliquer aux individus qui ne peuvent pas faire amende honorable pour l'outrage, aux avocats et aux tiers — Pouvoir discrétionnaire actuel de ne pas tirer une conclusion d'outrage ainsi que le moyen de défense fondé sur l'impossibilité de se conformer conviennent davantage qu'un degré plus élevé de faute ne le ferait quand une personne n'est pas en mesure de faire amende honorable pour outrage — Juge des requêtes a commis une erreur de droit dans la mesure où elle a conclu que l'intention de désobéir était requise.

Juges et tribunaux --- Outrage au tribunal — Formes d'outrage — Désobéissance à un ordre du tribunal — Injonctions — Divers

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client — Avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie — Requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée — Requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée — Appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie — Cour d'appel a estimé que la juge des requêtes avait commis une erreur en annulant l'ordonnance d'outrage — Cour d'appel a convenu que l'avocat n'avait pas consciemment choisi de contrevenir à l'injonction, mais a conclu qu'il n'était pas nécessaire pour arriver à ce résultat de rendre l'avocat coupable d'outrage civil, puisqu'il a posé un geste qui contrevenait à une ordonnance formelle du tribunal et dont il avait connaissance — Avocat a formé un pourvoi — Pourvoi rejeté — Il ne serait pas logique d'interpréter l'ordonnance du tribunal de manière à permettre aux fiduciaires des actifs détenus au bénéfice du client de les transférer librement d'un compte à un autre et même d'un lieu à un autre, et à ainsi les mettre hors de portée du tribunal advenant une procédure d'exécution, et ce, tant et aussi longtemps que le client en conservait la propriété effective — Telle interprétation irait à l'encontre du libellé clair de l'ordonnance interdisant précisément ceux en ayant connaissance d'« utiliser » les actifs du client — Avocat a qualifié le montant de 500 000 $ détenu dans son compte en fiducie de « versement excédentaire d'honoraires raisonnables », ce qui était artificiel — Autres agissements de l'avocat indiquaient qu'il comprenait que l'ordonnance était en vigueur et qu'il était lié par elle.

Juges et tribunaux --- Outrage au tribunal — Formes d'outrage — Désobéissance à un ordre du tribunal — Injonctions — Responsabilité d'une tierce personne

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client — Avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie — Requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée — Requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée — Appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie — Cour d'appel a estimé que la juge des requêtes avait commis une erreur en annulant l'ordonnance d'outrage — Avocat a formé un pourvoi — Pourvoi rejeté — Il n'y avait pas de véritable conflit

entre l'ordonnance et les obligations professionnelles de l'avocat, de sorte qu'il n'avait d'autre choix que de remettre les fonds détenus en fiducie à son client — Obligation qu'a assumée l'avocat relativement au secret professionnel n'était pas incompatible avec son obligation de respecter l'ordonnance puisqu'il n'avait qu'à laisser les fonds dans son compte en fiducie ou recourir à d'autres solutions appropriées — Il n'y avait aucune obligation légale ou éthique qui l'obligeait à violer l'injonction en remettant les fonds en fiducie à son client ou qui était incompatible avec le respect de l'ordonnance.
Juges et tribunaux --- Outrage au tribunal — Procédure — Principes généraux
Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client — Avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie — Requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée — Requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée — Appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie — Cour d'appel a estimé que la juge des requêtes avait commis une erreur en annulant l'ordonnance d'outrage — Cour d'appel a estimé que l'avocat avait utilisé de manière inappropriée la deuxième étape de la procédure pour outrage pour contester les conclusions tirées précédemment par la juge des requêtes, à partir de la preuve qu'il aurait dû déposer lors de la première audition — Avocat a formé un pourvoi — Pourvoi rejeté — Ni les Règles de procédure civile ni la jurisprudence ne prévoient le recours à la procédure suivie par la juge des requêtes — Il n'était pas approprié de la part de l'avocat d'utiliser la deuxième étape de la procédure pour outrage pour contester les conclusions de la juge des requêtes et la déclaration d'outrage — Une fois qu'une conclusion d'outrage a été tirée à la première étape d'une procédure scindée, cette conclusion est habituellement définitive à moins que l'auteur de l'outrage n'ait par la suite fait amende honorable pour outrage ou qu'une nouvelle preuve qui n'était pas connue à l'occasion de l'audition initiale n'ait été introduite — Juge des requêtes a commis une erreur en exerçant sa discrétion pour autoriser l'avocat à remettre en cause la conclusion initiale et en annulant cette conclusion.
In the course of litigation, L obtained a broad ex parte Mareva injunction restraining the client's assets. The solicitor obeyed the client's instructions to return funds to the client that he had earlier paid into the solicitor's trust account.
L's motion for an order finding the solicitor in contempt of the injunction was granted.
The solicitor's motion to re-open the contempt hearing and set aside the contempt finding was granted. The motions judge found that the solicitor's new evidence raised a reasonable doubt that his interpretation of the Mareva injunction was deliberately and willfully blind.
L's appeal was allowed and the contempt finding was restored. The Court of Appeal held that the motions judge had erred in setting aside the contempt finding. The Court of Appeal held that the solicitor had inappropriately used the second stage of the contempt proceedings to attack the motion judge's earlier findings, based on evidence he ought to have filed at the first hearing. The Court of Appeal accepted that the solicitor did not knowingly choose to disobey the injunction, but found that it was unnecessary to establish this to find the solicitor liable for civil contempt, as he committed an act that violated a clear court order that he knew of.
The solicitor appealed.
Held: The appeal was dismissed.
Per Cromwell J. (McLachlin C.J.C., Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. concurring): Proof beyond a reasonable doubt of an intentional act or omission that was in breach of a clear order of which the alleged contemnor had notice was required to establish civil contempt. Contumacy, being the intent to interfere with the administration of justice, was not an element of civil contempt and lack of contumacy was not a defence. A heightened fault requirement should not apply to individuals who cannot purge their contempt, to lawyers and to third parties. The existing discretion not to enter a contempt finding and the defence of impossibility of compliance provided better answers than a heightened degree of fault where a party was unable to purge his or her contempt. The motions judge erred in law to the extent that she found that contumacious intent was required.
It would be illogical to interpret the court order as allowing trustees of assets held for the client's benefit to freely transfer those assets between accounts and even between jurisdictions, putting those assets beyond the reach of the court, so long as the client retained beneficial ownership of the assets. Such an interpretation would run counter to the plain language of the order specifically prohibiting those with knowledge of it from "dealing with" the client's assets. The solicitor's

characterization of the $500,000 in his trust account as an "overpayment" of "reasonable legal fees" was artificial. The solicitor's other conduct showed that he understood that the order was in full force and was binding on him.

There was not a true conflict between the order and the solicitor's professional duties such that he had no option but to transfer the trust funds back to the client. The solicitor's assumed duty to guard solicitor-client privilege did not conflict with his duty to comply with the order, as he only had to leave the funds in his trust account, or he could have sought other appropriate avenues. There was no legal or ethical duty that compelled the solicitor to breach the injunction by transferring trust funds back to the client or that conflicted with obeying the order.

Neither the Rules of Civil Procedure nor case law contemplated the procedure the motions judge followed. It was inappropriate for the solicitor to use the second stage of contempt proceedings to attack the motions judge's findings and declaration of contempt. Once a finding of contempt had been made at the first stage of the bifurcated proceeding, that finding was usually final, unless the contemnor had subsequently purged the contempt or new evidence was brought to light that was not available at the initial hearing. The motions judge erred in exercising her discretion to permit the solicitor to re-litigate the initial contempt finding and erred in setting that finding aside.

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client. L'avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie.

La requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée.

La requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée. La juge des requêtes a conclu que la nouvelle preuve introduite par l'avocat soulevait un doute raisonnable que son interprétation de l'injonction de type Mareva équivalait à un aveuglement volontaire et délibéré.

L'appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie. La Cour d'appel a estimé que la juge des requêtes avait commis une erreur en annulant l'ordonnance d'outrage. La Cour d'appel a estimé que l'avocat avait utilisé de manière inappropriée la deuxième étape de la procédure pour outrage pour contester les conclusions tirées précédemment par la juge des requêtes, à partir de la preuve qu'il aurait dû déposer lors de la première audition. La Cour d'appel a convenu que l'avocat n'avait pas consciemment choisi de contrevenir à l'injonction, mais a conclu qu'il n'était pas nécessaire pour arriver à ce résultat de rendre l'avocat coupable d'outrage civil, puisqu'il a posé un geste qui contrevenait à une ordonnance formelle du tribunal et dont il avait connaissance.

L'avocat a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Cromwell, J. (McLachlin, J.C.C., Abella, Rothstein, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) :

Pour établir l'outrage civil, il suffit de prouver hors de tout doute raisonnable que l'auteur présumé d'un outrage a intentionnellement commis un acte, ou omis d'agir, en violation d'une ordonnance claire dont il avait connaissance. La désobéissance, soit l'intention d'entraver l'administration de la justice, n'était pas un élément constitutif de l'outrage civil et, par conséquent, l'absence d'intention de désobéir ne pouvait pas être invoquée comme moyen de défense. Une exigence plus rigoureuse en matière de faute ne devrait pas s'appliquer aux individus qui ne peuvent pas faire amende honorable pour l'outrage, aux avocats et aux tiers. Le pouvoir discrétionnaire actuel de ne pas tirer une conclusion d'outrage ainsi que le moyen de défense fondé sur l'impossibilité de se conformer conviennent davantage qu'un degré plus élevé de faute ne le ferait quand une personne n'est pas en mesure de faire amende honorable pour outrage. La juge des requêtes a commis une erreur de droit dans la mesure où elle a conclu que l'intention de désobéir était requise.

Il ne serait pas logique d'interpréter l'ordonnance du tribunal de manière à permettre aux fiduciaires des actifs détenus au bénéfice du client de les transférer librement d'un compte à un autre et même d'un lieu à un autre, et à ainsi les mettre hors de portée du tribunal advenant une procédure d'exécution, et ce, tant et aussi longtemps que le client en conservait la propriété effective. Une telle interprétation irait à l'encontre du libellé clair de l'ordonnance interdisant précisément ceux en ayant connaissance d'« utiliser » les actifs du client. L'avocat a qualifié le montant de 500 000 $ détenu dans son compte en fiducie de « versement excédentaire d'honoraires raisonnables », ce qui était artificiel. Les autres agissements de l'avocat indiquaient qu'il comprenait que l'ordonnance était en vigueur et qu'il était lié par elle.

Il n'y avait pas de véritable conflit entre l'ordonnance et les obligations professionnelles de l'avocat, de sorte qu'il n'avait d'autre choix que de remettre les fonds détenus en fiducie à son client. L'obligation qu'a assumée l'avocat relativement au

secret professionnel n'était pas incompatible avec son obligation de respecter l'ordonnance puisqu'il n'avait qu'à laisser les fonds dans son compte en fiducie ou recourir à d'autres solutions appropriées. Il n'y avait aucune obligation légale ou éthique qui l'obligeait à violer l'injonction en remettant les fonds en fiducie à son client ou qui était incompatible avec le respect de l'ordonnance.

Ni les Règles de procédure civile ni la jurisprudence ne prévoient le recours à la procédure suivie par la juge des requêtes. Il n'était pas approprié de la part de l'avocat d'utiliser la deuxième étape de la procédure pour outrage pour contester les conclusions de la juge des requêtes et la déclaration d'outrage. Une fois qu'une conclusion d'outrage a été tirée à la première étape d'une procédure scindée, cette conclusion est habituellement définitive à moins que l'auteur de l'outrage n'ait par la suite fait amende honorable pour outrage ou qu'une nouvelle preuve qui n'était pas connue à l'occasion de l'audition initiale n'ait été introduite. La juge des requêtes a commis une erreur en exerçant sa discrétion pour autoriser l'avocat à remettre en cause la conclusion initiale et en annulant cette conclusion.

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APPEAL by defendant solicitor from judgment reported at *Laiken v. Carey* (2013), 2013 ONCA 530, 2013 CarswellOnt 11824, 116 O.R. (3d) 641, 310 O.A.C. 209, 367 D.L.R. (4th) 415, 52 C.P.C. (7th) 144 (Ont. C.A.), allowing plaintiff's appeal from judgment setting aside finding of contempt of court against solicitor.

POURVOI formé par un avocat défendeur à l'encontre d'une décision publiée à *Laiken v. Carey* (2013), 2013 ONCA 530, 2013 CarswellOnt 11824, 116 O.R. (3d) 641, 310 O.A.C. 209, 367 D.L.R. (4th) 415, 52 C.P.C. (7th) 144 (Ont. C.A.), ayant accueilli l'appel interjeté par le demandeur à l'encontre d'un jugement ayant annulé une ordonnance d'outrage au tribunal prononcée à l'encontre de l'avocat.

***Cromwell J.* (McLachlin C.J.C. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 Contempt of court proceedings against lawyers are rare; so are situations in which judges reverse their own previous findings. But this case, which gives the Court the opportunity to clarify some aspects of the common law of civil contempt of court, has both of these unusual elements.

2 The appellant, Peter Carey, is a lawyer who was the object of contempt proceedings for allegedly breaching the terms of an injunction. He was initially found in contempt by a judge of the Ontario Superior Court of Justice, but the judge revisited that finding and reversed it when the matter came back before her for consideration of the appropriate penalty. The Court of Appeal set the judge's second decision aside and found Mr. Carey in contempt. He now appeals to this Court, raising three questions:

1. To have committed contempt, did Mr. Carey have to intend to interfere with the administration of justice?

2. Was Mr. Carey in Contempt?

3. Was it open to the judge to set aside her initial finding of contempt?

3 I conclude that the Court of Appeal for Ontario was correct to answer the first and third questions in the negative and the second in the affirmative: to be in contempt, Mr. Carey did not need to intend to interfere with the administration of justice; Mr. Carey was in contempt and his obligations to his client did not justify or excuse his breaching the injunction; and it was not open to the judge to set aside her initial finding of contempt. I would therefore dismiss the appeal with costs.

4 The factual and procedural context in which these issues arise is complicated and I will turn to that before getting into the legal analysis that has led me to these conclusions.

II. Background

A. Overview

5 The appeal arises out of Mr. Carey's alleged breach of a so-called *Mareva* injunction that enjoined any person with knowledge of the order from "disposing of, or otherwise dealing with" any assets of various parties, including Peter Sabourin for whom Mr. Carey acted. The injunction was issued in the course of litigation between the respondent, Judith Laiken, and Mr. Sabourin and related parties. Ultimately, Ms. Laiken obtained a judgment against Mr. Sabourin and his companies for roughly one million dollars and costs.

6 Following the conclusion of this litigation, Ms. Laiken brought contempt proceedings against Mr. Carey, who unquestionably had knowledge of the injunction. She alleged he had breached its terms by returning to Mr. Sabourin over $400,000 that Mr. Carey was holding in trust for him. These contempt proceedings have led to the appeal before this Court.

B. The Litigation Leading to the Injunction

7 Ms. Laiken retained Mr. Sabourin and his group of companies to conduct off-shore security trades on her behalf. To this end, she transferred approximately $885,000 to various bank accounts he and his businesses held. Ultimately, these funds were lost and, unsurprisingly, the business relationship between Ms. Laiken and Mr. Sabourin soured. In 2000, he sued her for $364,000, alleging a deficit in her margin account. She counterclaimed for over $800,000, alleging that he had defrauded her. Mr. Carey represented Mr. Sabourin and his business entities in these proceedings.

8 Ms. Laiken obtained an *ex parte Mareva* injunction from the Ontario Superior Court of Justice freezing the assets of the defendants to her counterclaim, including Mr. Sabourin. The injunction had broad terms. It prohibited, among other things, Mr. Sabourin and any person with knowledge of the order from "disposing of, or otherwise dealing with" any of Mr. Sabourin's assets: Order of May 4, 2006, by Campbell J. (see A.R., vol. I, at p. 2). The injunction also directed any person with knowledge of it to "take immediate steps to prevent the ... transfer" of the assets, including those held in "trust accounts" in that person's power, possession or control (*ibid.*). The Superior Court of Justice continued the injunction on multiple occasions with the understanding that the parties needed to work out between themselves variations to it to allow for payment of legal fees and living expenses. However, the injunction was never formally amended.

9 A few months after the initial order had been made Mr. Sabourin sent Mr. Carey a cheque for $500,000. No instructions accompanied the cheque and Mr. Carey could not reach Mr. Sabourin to obtain instructions. Pursuant to Law Society of Upper Canada by-law requirements, Mr. Carey deposited the cheque in his trust account, applying some of the money towards Mr. Sabourin's outstanding legal fees, since the parties had agreed that the injunction did not prohibit the payment of reasonable legal fees.

10 Mr. Sabourin later called Mr. Carey and told him to use the rest of the funds to settle the claims of creditors represented by Bill Brown, who had invested in the Sabourin entities. Mr. Carey advised Mr. Sabourin that he could not do that because making a payment to a third-party creditor would breach the injunction. Mr. Sabourin then instructed Mr. Carey to attempt to negotiate a settlement with Ms. Laiken.

11 A few days later, during a conference call with Messrs. Brown and Carey, Mr. Sabourin advised that Mr. Carey was holding some $500,000 in trust. The money, he said, was intended for Mr. Brown, but the injunction prohibited Mr. Carey from paying it to him.

12 Mr. Carey could not reach a settlement with Ms. Laiken's lawyers. At no point did he reveal to them the existence of the trust money. After the failed settlement negotiations, Mr. Sabourin instructed Mr. Carey to return the balance of the funds to him, which Mr. Carey did after deducting an amount to cover future legal fees. Mr. Carey transferred a total of $440,000 back to Mr. Sabourin in October and November 2006.

13 Early in 2007, Mr. Sabourin called Mr. Carey and terminated his retainer and instructed him to take no further steps until he had retained new counsel. Shortly after this call, Mr. Sabourin went out of business and vanished. Mr. Carey never received a notice of change of lawyers and remained counsel of record in the Laiken-Sabourin litigation.

14 Later that year, Mr. Brown obtained judgment against Mr. Sabourin and receivership over his assets and those of his companies. Advised of the trust funds that Mr. Carey had held for Mr. Sabourin, the receiver demanded that Mr. Carey provide a full accounting of these funds. Mr. Carey replied that he had received $500,000 from Mr. Sabourin, returned $440,000 and that just over $6,000 remained in the trust account. Mr. Carey indicated that he felt he could provide this information without violating any solicitor-client privilege, but he refused to provide additional information or documents that he thought might be privileged. A further court order required Mr. Carey to give a "full accounting of all funds" from Mr. Sabourin, which he provided.

15 In November 2007, Ms. Laiken obtained summary judgment dismissing Mr. Sabourin's claim against her and granting her over $1 million in damages and costs on her counterclaim for fraud.

C. The Contempt Proceedings

16 Ms. Laiken applied to have Mr. Carey found in contempt. She alleged that he breached the *Mareva* injunction by returning the $440,000 in his trust account to Mr. Sabourin. The series of decisions related to this motion led ultimately to the appeal before us.

17 In Ontario, civil contempt proceedings are governed by Rule 60.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Under this Rule, a party may move to obtain a contempt order: Rule 60.11(1). A judge, in dealing with such a motion, can "make such order as is just" and, following "a finding" of contempt, he or she may order the contemnor to be imprisoned, pay a fine, do or refrain from doing an act, pay just costs, and comply with any other order the judge considers necessary: Rule 60.11(5). Upon motion, "a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) ... and may grant such other relief and make such other order as is just": Rule 60.11(8).

18 The *Rules* do not prescribe the form of contempt proceedings. However, as a general rule, proceedings are bifurcated into a liability phase — where the case on liability proceeds and a defence is offered — and, if liability is established, a penalty phase. In contempt proceedings, liability and penalty are discrete issues: *College of Optometrists (Ontario) v. SHS Optical Ltd.*, 2008 ONCA 685, 241 O.A.C. 225 (Ont. C.A.), at paras. 72-75.

19 It is within this procedural framework that the Ontario courts considered Ms. Laiken's motion to find Mr. Carey in contempt of the *Mareva* injunction.

(1) The First Contempt Decision: Ontario Superior Court of Justice (Roberts J., 2011 ONSC 5892 (Ont. S.C.J.)

20 The motions judge found Mr. Carey in contempt and issued an order to that effect. She was satisfied beyond a reasonable doubt that the *Mareva* order was clear and that Mr. Carey "knowingly and deliberately breached" it by transferring the funds from his trust account to Mr. Sabourin (para. 42 (CanLII)). The motions judge ordered the parties to appear before her at a later date for another hearing. She stated she would take into account any further evidence and testimony the parties submitted in making any order under Rules 60.11(5) and 60.11(8).

(2) The Stay Application Decision: Court of Appeal for Ontario (Sharpe J.A., 2011 ONCA 757, 286 O.A.C. 273 (Ont. C.A. [In Chambers])

21 A judge of the Court of Appeal dismissed Mr. Carey's motion for a stay of the motions judge's order and any further proceedings pending appeal of that order. The court held that the contempt proceedings were not yet completed and that until they were, the Court of Appeal would not know relevant information, including whether the judge considered the contempt to be trivial or serious.

(3) The Second Contempt Decision: Ontario Superior Court of Justice (Roberts J., 2012 ONSC 7252, [2012] O.J. No. 6596 (Ont. S.C.J.)

22 When the matter resumed before the motions judge, Mr. Carey moved to reopen the contempt hearing. He filed new evidence, including an affidavit sworn by Alan Lenczner, Q.C., stating that by returning the money in excess of that required to cover legal fees, Mr. Carey had acted in a manner consistent with the practice of counsel generally. Mr. Carey also proffered his own testimony about what he perceived to be his professional obligations and his motivations in dealing with the trust funds.

23 The motions judge set aside her previous finding of contempt. Based on the new evidence, she doubted whether the terms of the order were clear and whether Mr. Carey's interpretation of it was deliberately and wilfully blind.

(4) The Appeal Decision: Court of Appeal for Ontario (Sharpe J.A. (Rosenberg and Gillese JJ.A. concurring), 2013 ONCA 530, 367 D.L.R. (4th) 415 (Ont. C.A.)

24 The Court of Appeal unanimously allowed the appeal and restored the initial contempt finding. The motions judge had erred, the Court of Appeal found, in setting it aside. Mr. Carey had inappropriately used the second stage of the

contempt proceedings to attack the motions judge's earlier findings and based this attack on evidence he ought to have filed at the first hearing. While the appeal could have been resolved on these procedural grounds, the court went on to hold that the motions judge erred in finding Mr. Carey was not in contempt.

25 The Court of Appeal accepted that Mr. Carey did not desire or knowingly choose to disobey the order, but found that it is unnecessary to establish this in order to find him liable for civil contempt. Mr. Carey knew of a clear court order and he committed an act that violated it. This was sufficient to constitute civil contempt.

III. Analysis

A. First Issue: To Have Committed Contempt, Did Mr. Carey Have to Intend to Interfere With the Administration of Justice?

(1) Overview

26 At the initial contempt hearing, Roberts J. stated, in my view correctly, that "civil contempt consists of the intentional doing of an act which is in fact prohibited by the order": 2011 ONSC 5892 (Ont. S.C.J.), at para. 24 (CanLII). However, she subsequently set aside her earlier finding of contempt. She held:

> Based on Mr. Carey's oral evidence, because of the protracted history between Mr. Carey's clients and the plaintiff and the way that Mr. Carey viewed the merits of the plaintiffs claim, the unusual form of the May 4, 2006 Mareva Order, and the variations discussed and agreed upon between counsel, which were not set out in one document by formal amendment, I have a reasonable doubt as to whether the terms of the May 4, 2006 Mareva Order were completely clear to Mr. Carey, and I am not satisfied beyond a reasonable doubt that Mr. Carey's interpretation of the May 4, 2006 Mareva Order was deliberately and willfully blind.
>
> [Emphasis added; 2012 ONSC 7252 (Ont. S.C.J.), at para. 36.]

27 The Court of Appeal, however, held that it was an error of law to conclude that Mr. Carey could not be found in contempt because he did not deliberately breach the order. Ms. Laiken did not have to prove that Mr. Carey had "deliberately" breached the order or, as the court put it elsewhere in its reasons, to establish "contumacious intent": 2013 ONCA 530 (Ont. C.A.), at paras. 65, 62. The order clearly prohibited dealing in trust funds belonging to Mr. Sabourin, yet Mr. Carey knew of the order and he intentionally transferred the funds, an act that was contrary to the order. This is all that is required to establish the elements of civil contempt.

28 Before this Court, the parties devoted a substantial portion of their written submissions to the mental element of civil contempt. Mr. Carey's position is that in various circumstances — namely, where the alleged contemnor cannot "purge" his contempt, is a lawyer or is a third party to an order — proof of an intention to interfere with the administration of justice is required. In other words, in these circumstances contumacy or intent to breach the order is an element of the offence. Ms. Laiken frames the issue slightly differently. Rather than viewing the question as one turning on the elements of civil contempt, she submits that lack of contumacious intent is not a defence in civil contempt proceedings, regardless of the alleged contemnor's circumstances.

29 However framed, the issue boils down to the required intent for a finding of civil contempt. Canadian jurisprudence clearly sets out the requirements for establishing civil contempt, of which I provide an overview below. Contumacy — the intent to interfere with the administration of justice — is not an element of civil contempt and lack of contumacy is therefore not a defence. I do not accept Mr. Carey's position that a different rule should apply to individuals who cannot purge their contempt, to lawyers and to third parties.

(2) The Canadian Common Law of Civil Contempt

30 Contempt of court "rest[s] on the power of the court to uphold its dignity and process .... The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect": *U.N.A. v. Alberta*

(Attorney General), [1992] 1 S.C.R. 901 (S.C.C.), at p. 931. It is well-established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order": *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 (S.C.C.), at para. 35, cited in *Bell ExpressVu Ltd. Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614 (Ont. C.A.), at para. 20.

31 The common law has developed to recognize two forms of contempt of court: criminal contempt and civil contempt. The distinction, which the parties to this appeal accept, rests on the element of public defiance accompanying criminal contempt: see, e.g., *United Nurses*, at p. 931; *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 S.C.R. 516 (S.C.C.), at p. 522. With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive": R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (looseleaf)), at ¶6.100. However, one purpose of sentencing for civil contempt is punishment for breaching a court order: *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 305 D.L.R. (4th) 655 (Ont. C.A.), at para. 117. Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct: Sharpe, at ¶6.100.

32 Civil contempt has three elements which must be established beyond a reasonable doubt: *G. (N.) c. Services aux enfants & adultes de Prescott-Russell* (2006), 82 O.R. (3d) 686 (Ont. C.A.), at para. 27; *College of Optometrists*, at para. 71; *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.), at pp. 224-25; *Jackson v. Honey*, 2009 BCCA 112, 267 B.C.A.C. 210 (B.C. C.A.), at paras. 12-13; *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35 (N.S. C.A.), at paras. 17 and 32; *Godin v. Godin*, 2012 NSCA 54, 317 N.S.R. (2d) 204 (N.S. C.A.), at para. 47; *Gaudet v. Soper*, 2011 NSCA 11, 298 N.S.R. (2d) 303 (N.S. C.A.), at para. 23. These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases: *Bell ExpressVu*, at para. 22; *Chiang*, at paras. 10-11.

33 The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Prescott-Russell*, at para. 27; *Bell ExpressVu*, at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.* [2004 CarswellOnt 4036 (Ont. S.C.J.)] 2004 CanLII 32262, at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing*, at para. 24; *Bell ExpressVu*, at para. 22. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463 (Sask. C.A.), at para. 21.

34 The second element is that the party alleged to have breached the order must have had actual knowledge of it: *Bhatnager*, at p. 226; *College of Optometrists*, at para. 71. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine (*ibid.*).

35 Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Sheppard, Re* (1976), 12 O.R. (2d) 4 (Ont. C.A.). at p. 8. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily.

36 The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: see, e.g., *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65 (Ont. C.A.), at para. 3. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect": *Centre commercial Les Rivières ltée c. Jean bleu inc.*, 2012 QCCA 1663 (C.A. Que.), at para. 7. As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments": *Vidéotron ltée c. Industries Microlec produits électroniques inc.*, [1992] 2 S.C.R. 1065 (S.C.C.), at p. 1078, citing *Daigle c. St-Gabriel de Brandon (Paroisse)*[1991] R.D.J. 249 (C.A. Que.). Rather, it should be used "cautiously and with great restraint": *TG Industries*, at para. 32. It is an enforcement power of last rather than first resort: *Hefkey*, at para. 3; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81 (Ont. C.A.), at paras. 41-43; *Centre commercial Les Rivières ltée*, at para. 64.

37 For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt: see, e.g., *Morrow, Power v. Newfoundland Telephone Co.* (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.), at para. 20; *TG Industries*, at para. 31. While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.

(3) The Required "Intent"

38 It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice: *Prescott-Russell*, at para. 27; *College of Optometrists*, at para. 71; *Sheppard*, at p. 8; *TG Industries*, at paras. 17 and 32; *Bhatnager*, at pp. 224-25, Sharpe, at ¶ 6.190. The Court of Appeal followed this approach. As it noted, to require a contemnor to have intended to disobey the order would put the test "too high" and result in "mistakes of law [becoming] a defence to an allegation of civil contempt but not to a murder charge" (2013 ONCA 530 (Ont. C.A.), at para. 59). Instead, contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt: para. 62; see also *Sheppard* and Sharpe, at ¶6.200.

39 The appellant submits, however, that in situations in which the alleged contemnor cannot "purge" the contempt, is a lawyer or is a third party to the order, the intent to interfere with the administration of justice must be proved. I understand this to mean that "the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order" must be established: *TG Industries*, at para. 17. This is sometimes also referred to as "contumacious" intent.

40 The appellant submits that the mental element of civil contempt must address at least one of the two goals of civil contempt: securing compliance with court orders or protecting the integrity of the administration of justice. Finding a party in contempt where he or she cannot purge (either because the act that constituted the contempt cannot be undone or because a conflicting legal duty prevents compliance with the order) furthers neither of these goals absent some heightened mental element for contempt. Only if the person is shown to have had the intent to interfere with the administration of justice would one of these purposes — protecting the integrity of the administration of justice — be served.

41 I cannot accept this position. There is no principled reason to depart from the established elements of civil contempt in situations in which compliance has become impossible for either of the reasons referred to by the appellant. Where, as here, the person's own actions contrary to the terms of a court order make future compliance impossible, I fail to see the logic or justice of requiring proof of some higher degree of fault in order to establish contempt. The appellant's submission also overlooks the point that one of the purposes of the contempt power is to deter violations of court orders, thereby encouraging respect for the administration of justice. It undermines that purpose to treat with special charity people whose acts in violation of an order make subsequent compliance impossible. It seems to me that the existing discretion not to enter a contempt finding and the defence of impossibility of compliance provide better answers than a heightened degree of fault where a party is unable to purge his or her contempt for the reasons the appellant outlines: *Jackson* at para. 14; *Sussex Group Ltd. v. Fangeat* (2003), 42 C.P.C. (5th) 274 (Ont. S.C.J.), at para. 56.

42 The appellant correctly notes that civil contempt is quasi-criminal in nature, which he says justifies a higher fault element where contempt cannot be purged. But civil contempt is always quasi-criminal, so this provides no justification for carving out a distinct mental element for particular types of civil contempt cases. As I have already discussed, requiring contumacious intent would open the door to mistakes of law providing a defence to an allegation of civil contempt. It could also permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders.

43 Further, adopting the appellant's proposal would in effect make the required mental element dependent on the nature of the order alleged to have been breached. Those who breach a prohibitory order would benefit from this heightened mental element disproportionately, due to subsequent impossibility of compliance, as compared to those who breach a mandatory order, with which the alleged contemnor will be able to subsequently comply absent a conflicting legal duty. I see no principled basis for creating this distinction.

44 The appellant also submits that lawyers should benefit from a heightened fault requirement, but I do not agree. As the Court of Appeal recognized, reliance on legal advice does not shield a party from a finding of contempt: para. 61, citing *Mileage Conference Group of the Tyre Manufacturers' Conference, Re*, [1966] 2 All E.R. 849 (Eng. Restrictive Practices Ct.), at p. 862; *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 48 D.L.R. (3d) 641 (Ont. H.C.), at p. 661, aff'd (1975), 65 D.L.R. (3d) 231 (Ont. C.A.). Still less should the law permit lawyers to escape a finding of contempt because they have, in effect, relied on their own legal advice.

45 As for third parties, the appellant points to some authority in the United Kingdom and Australia to the effect that intent to interfere with the administration of justice is a prerequisite for finding a third party in contempt: e.g., *Customs & Excise Commissioners v. Barclays Bank Plc*, [2006] UKHL 28, [2007] 1 A.C. 181 (Eng. H.L.), at para. 29; *Attorney General v. Punch Ltd.*, [2002] UKHL 50, [2003] 1 A.C. 1046 (U.K. H.L.), at para. 87; *Z Ltd. v. A.*, [1982] 2 W.L.R. 288 (Eng. C.A.), at p. 305; *Baker v. Paul*, [2013] NSWCA 426 (New South Wales S.C.), at para. 19. It has also been noted that "[i]t would appear that a higher degree of intention is required to make a non-party liable for contempt": Sharpe, at ¶6.210.

46 The short answer to this point is that, even accepting this line of authority, Mr. Carey is not in the same category as the third parties discussed in this line of authority. I would respectfully adopt as my own the following excerpt on this point from the reasons of Sharpe J.A. in the Court of Appeal:

> The solicitor-client bond creates a community of interest between Carey and Sabourin that is plainly distinguishable from the situation of a stranger to the litigation who is apprised of the court order. As an officer of the court, a solicitor of record is duty-bound to take scrupulous care to ensure respect for court orders. ... [A]s the solicitor of record in the case, Carey should be held to the same standard of compliance as his client who was a party. [para. 64]

(4) Conclusion

47 I conclude that "contumacious" intent was not required in this case, and to the extent that the judge at first instance found otherwise in overturning her earlier finding of contempt, she erred in law.

B. Second Issue: Was Mr. Carey in Contempt?

48 Mr. Carey submits that he was not in contempt, making two main points. He submits first that the payment of funds from his trust account to Mr. Sabourin was not a "transfer" within the meaning of the order, either because beneficial ownership of the funds did not change or because it amounted to a permissible return of an overpayment of legal fees that informal variations to the order permitted. Second, he also says that his conduct complied with his solicitor-client obligations and that such compliance cannot be considered to have been in breach of the *Mareva* injunction. The existence of Mr. Sabourin's funds in his trust account attracted solicitor-client privilege and, as such, Mr. Carey was bound not to disclose that the funds were in his account. But, he submits, leaving the funds where they were and maintaining the privilege would have sheltered them from execution. He maintains that his only option that was consistent with both his professional obligations to his client and to the court was to return the funds to Mr. Sabourin as he did. The privileged nature of the funds precluded him from seeking advice about the proper course of action from the court.

49 Respectfully, neither of these points withstands careful scrutiny.

(1) The "Transfer"

50 Mr. Carey contends that there was no transfer of funds within the meaning of the order because there was no change in beneficial ownership when he returned them to Mr. Sabourin. As the Court of Appeal pointed out, the purpose of the order was to prevent dealings with Mr. Sabourin's assets that would defeat the court's process (para. 50). Mr. Carey's position, if accepted, would mean the order actually permitted trustees of assets held for Mr. Sabourin's benefit to freely transfer those assets between accounts and even between jurisdictions, putting those assets beyond the reach of the court in the event of execution, so long as Mr. Sabourin retained beneficial ownership of the assets. An interpretation of the order that permitted this would be illogical: it would clearly defeat the purpose of the order and would also run counter to the plain language of the order specifically prohibiting those with knowledge of it from "dealing with" Mr. Sabourin's assets. For these reasons, I cannot accept Mr. Carey's position.

51 Mr. Carey also submits that the return of the funds to Mr. Sabourin did not constitute a "transfer" within the meaning of the injunction because it amounted simply to returning an overpayment of reasonable legal fees, the payment of which was permitted by the informal variations to the order agreed to by counsel. Mr. Carey also contends that returning the overpayment was consistent with the standard of practice of the profession at the time. Moreover, if moving funds from the trust account to Mr. Sabourin did constitute a "transfer", then it actually corrected a violation of the order that would have occurred when Mr. Sabourin originally transferred funds to Mr. Carey and he deposited them in his trust account.

52 Mr. Carey's characterization of the $500,000 in his trust account as an "overpayment" of "reasonable legal fees" in the circumstances of this case is artificial in the extreme. Moreover, even if I were to accept that characterization (and I do not), the clear terms of this order still prohibited any transfer of those "excess" funds. Further, while the question of whether Mr. Sabourin's initial transfer of the funds to Mr. Carey breached the order is not before us, I reject Mr. Carey's submission that if it were a breach, this justifies a subsequent violation of the order by returning the money to Mr. Sabourin.

53 In my view, Mr. Carey's submissions on this issue rely on alleged uncertainty where none in fact exists. The order clearly prohibited, as the Court of Appeal held at para. 49, dealing with money held in trust. Mr. Carey's other conduct showed that he understood that, even taking into account the variations informally agreed to by counsel to permit payment of legal and ordinary living expenses, the order was in full force and was binding on him. He unsuccessfully tried to vary the order to permit payments to third party creditors and he rightly declined, on the basis of the order, to carry out Mr. Sabourin's instructions to use the trust money to settle the Brown claims.

(2) Solicitor-Client Privilege

54 I am not persuaded by Mr. Carey's arguments before this Court that there was a true conflict between the order and his professional duties such that he had no option but to transfer the trust funds back to Mr. Sabourin.

55 I will assume, but not decide, that the existence of the funds was privileged at the time of the transfer. There are certainly arguments to be considered that the privilege never attached in the first place, or that it was waived by Mr. Sabourin's disclosure of the funds' existence to a third party adverse in interest, as Ms. Laiken submits was the case. Moreover, Mr. Carey's claim in this litigation that the funds' existence was privileged is undermined by his disclosure of that fact in response to a request from the receiver in the unrelated litigation for a full accounting of trust funds, a disclosure which he indicated he believed could be made without even any danger of violating any privilege. Mr. Carey wrote:

> ... I believe I can provide you with the following information without danger of violating any privilege: on September 21, 2006 our firm was provided with a cheque for $500,000.00 from Peter Sabourin. Subsequently, on October 25, 2006, at the request of Mr. Sabourin, we returned $400,000.00, by way of four (4) Bank Drafts, payable to Mr. Sabourin. On November 30, 2006 we returned another $40,000.00 to Peter Sabourin. The balance of the monies

> were kept in the Trust account and used to pay legal fees resulting in the balance that is currently in our account. [Emphasis added; Letter from Mr. Carey to receiver, November 1, 2007; A.R., vol. IV, at p. 145.]

56 Be that as it may, Mr. Carey's assumed duty to guard solicitor-client privilege did not conflict with his duty to comply with the order. To fulfill both, he needed only to leave the funds in his trust account once they had been deposited there. In doing so, he would have respected any obligations arising from solicitor-client privilege to maintain the confidentiality of the funds and he would have abided by the terms of the *Mareva* order not to transfer funds held in trust for Mr. Sabourin.

57 In my view, leaving the funds in his trust account would not have conflicted with other asserted professional obligations. Mr. Carey expressed concern that if he left the funds where they were, he would be assisting in shielding them from execution in the event that Ms. Laiken succeeded in her action against Mr. Sabourin. This position is not only illogical, but ironic in view of the fact that returning them certainly had that effect. It is true that had Mr. Carey retained the funds, a conflict might have developed at the point when Ms. Laiken obtained judgment against Mr. Sabourin. Then Mr. Carey might have had an ethical dilemma on his hands: how would he comply with any solicitor-client privilege obligations (assuming the existence of the funds in trust was privileged), with the *Mareva* order and with any duty to avoid assisting his client in evading execution arising from the judgment? But it is not an answer for Mr. Carey to say that he breached the order so that he would avoid the possibility of a future ethical dilemma.

58 Accepting that Mr. Carey believed — albeit mistakenly — that there was a true conflict, there were other appropriate avenues open to him other than making a unilateral decision to breach the order. The unilateral approach that he adopted gave no weight to the important principle that "a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed": *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599. See also *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 6 O.R. (3d) 188 (Ont. C.A.), at p. 192: "It is elementary that so long as ... an order of the court remains in force it must be obeyed."

59 For one thing, Mr. Carey could have obtained a determination about whether the existence of the funds in trust was covered by solicitor-client privilege. Only if it was would a true conflict potentially exist. He himself at one point thought that information about the funds' existence could be released without any danger of violating solicitor-client privilege. He could have asked his client to waive any privilege over the existence of the funds. Had his client agreed, that would have put an end to any potential future conflict. Mr. Carey also could have sought a variation of the order or direction from the court on an *ex parte* and *in camera* basis. But there is no evidence that Mr. Carey took or even considered taking any of these steps.

60 In any event, we do not need to make any final pronouncements on what Mr. Carey should have done instead of unilaterally deciding to give the money back. One thing is crystal clear: there was no legal or ethical duty that compelled Mr. Carey to breach the injunction by transferring the trust funds back to Mr. Sabourin or that conflicted with obeying the order. Although I accept that Mr. Carey did not breach the order maliciously or with the intent to interfere with the administration of justice, the law does not require that he have done so in order to satisfy the elements of civil contempt.

C. Third Issue: Was It Open to the Motions Judge to Set Aside Her Initial Contempt Finding?

61 The Court of Appeal held that the motions judge erred in setting aside her initial contempt finding. Neither the *Rules* nor the case law contemplates the procedure the motions judge followed. The interests of justice are best served when the principle of finality is respected. Mr. Carey used the second stage of the proceedings to attack the motions judge's findings and declaration of contempt. This was inappropriate. (paras. 30-2)

62 The court identified two qualifications to the general rule that a contempt finding at the first hearing is final. First, Rule 60.11 contemplates that a judge may set aside a finding of contempt if the contemnor purges the contempt, since the contempt proceedings have secured compliance with the court order. Second, contempt proceedings are subject to the

standard principles that allow parties to reopen findings in exceptional circumstances to permit consideration of fresh evidence or new facts that were not before the court at the first hearing.

63 The appellant submits that the Court of Appeal was wrong for two principal reasons: Rule 60.11(8) grants the court discretion to set aside a contempt finding and the quasi-criminal nature of civil contempt proceedings demands that judges retain discretion to set aside a finding on the basis of new material evidence. The appellant submits that the motions judge properly exercised her discretion to set aside the contempt finding in this case.

64 I do not accept these submissions and I agree with the Court of Appeal, for substantially the reasons it gave.

65 The starting point is that, in civil contempt proceedings, once a finding of contempt has been made at the first stage of a bifurcated proceeding, that finding is usually final. As the Court of Appeal stated, "[a] party faced with a contempt motion is not entitled to present a partial defence [at the liability stage] and then, if the initial gambit fails, have a second 'bite at the cherry'" at the penalty stage (para. 32). This would defeat the purpose of the first hearing. This is what the judge at first instance erroneously permitted Mr. Carey to do.

66 Without exhaustively outlining the circumstances in which a judge may properly revisit an initial contempt finding, I agree with the Court of Appeal that he or she may do so where the contemnor subsequently complies with the order or otherwise purges his or her contempt or, in exceptional circumstances, where new facts or evidence have come to light after the contempt finding was made.

67 Although the motions judge was concerned that refusing to consider the new evidence would lead to a miscarriage of justice, I agree that neither Rule 60.11 nor the case law permitted her to revisit her earlier finding in the circumstances of this case. Rule 60.11(8) allows a judge, on motion, to "discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and ... grant such other relief and make such other order as is just". Relying on the Court of Appeal's comments in its stay decision, the motions judge thought that there was no need to "reopen" Ms. Laiken's motion for contempt, as it was not yet completed: 2012 ONSC 7252 (Ont. S.C.J.), at para. 8. I agree with the Court of Appeal that the motions judge misinterpreted this aspect of the stay decision. The Court of Appeal correctly held that in these circumstances, the motions judge erred in exercising her discretion to permit Mr. Carey to relitigate the initial contempt finding and erred in setting that finding aside.

IV. Disposition

68 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

End of Document

TAB 3

1990 CarswellNat 73
Supreme Court of Canada

Bhatnager v. Canada (Minister of Employment & Immigration),

1990 CarswellNat 737, 1990 CarswellNat 73, [1990] 2 S.C.R. 217, [1990] S.C.J. No. 62, 111 N.R. 185, 12 Imm. L.R. (2d) 81, 21 A.C.W.S. (3d) 1143, 36 F.T.R. 91 (note), 43 C.P.C. (2d) 213, 44 Admin. L.R. 1, 71 D.L.R. (4th) 84, J.E. 90-975, EYB 1990-67238

CANADA (MINISTER OF EMPLOYMENT & IMMIGRATION) et al. v. BHATNAGER

Dickson C.J.C., Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

Heard: May 19, 1990
Judgment: June 21, 1990
Docket: No. 20771

Counsel: *Harold W. Veale*, Q.C. and *Eric A. Bowie*, Q.C., for appellants.
Clayton Ruby, and *Michael Cade*, for respondent.

Subject: Immigration; Public; Civil Practice and Procedure; Family

Related Abridgment Classifications

Judges and courts
XX Contempt of court
XX.4 Forms of contempt
XX.4.c Disobedience of court
XX.4.c.iii Order for production of documents

Judges and courts
XX Contempt of court
XX.7 Punishment for contempt
XX.7.d Privileges and exemptions

Headnote

Judges and Courts --- Contempt of court — Forms of contempt — Disobedience of court — Order for production of documents

Contempt of Court — Court order served on Minister's solicitor not complied with — Personal knowledge of order by Minister necessary for finding of contempt.

Judges and courts — Contempt of court — Practice — Ministers of Crown failing to comply with Federal Court's order to produce file within specified time — Order served on Minister's solicitor not on Minister personally — No evidence of Minister knowing of order — Minister not liable for contempt either by inference or vicariously — Federal Court Rules, Rr.

308, 311, 355.

The Trial Division required the appellant Ministers to direct their officials to produce a file within a certain time. The order was made in open Court in the presence of the appellants' counsel, and a few days later the order was served on the appellants' solicitor. There was no evidence that the appellants knew of the order. The appellants submitted that, since there was no evidence of knowledge of the order, they could not be held in contempt for not obeying the order; the burden of proof was on the respondent, and the respondent had not discharged it. The respondent argued that delivery to the solicitor gave rise to a rebuttable presumption of actual knowledge and, in the alternative, the doctrine of vicarious liability applied.

Held:

The appeal was allowed.

Contempt of court is a criminal (or quasi-criminal) offence and the burden of proof is the criminal standard: beyond a reasonable doubt. As there was no evidence of knowledge, the appellants were not to be held in contempt. Especially where the situation involves a Minister of the Crown who administers large departments and manifold proceedings, knowledge by the Minister's solicitor of an order does not fix the Minister with that knowledge. Inference of knowledge is available only when facts supporting the inference are proved.

Further, the *Federal Court Rules*, which allow service of an order of the court on a solicitor, cannot be interpreted as fixing the appellants with knowledge. The Rules define what constitutes effective service for expeditious litigation but cannot be used for criminal or quasi-criminal matters. Vicarious liability has no application in contempt proceedings because that type of liability is not known to criminal law. As well, the principle of delegation only applies when the delegator is under a statutory duty that was contravened by the delegatee. Third, the theory of identification, according to which a corporation can be held responsible for the acts of the directing mind, is not applicable to natural persons.

Table of Authorities

Cases considered:

Allen v. Whitehead, [1930] 1 K.B. 211, [1929] All E.R. 13 — *considered*

Avery v. Andrews (1882), 51 L.J. Ch. 414, 30 W.R. 564 — *considered*

Bank of British North America v. St. John & Quebec Railway Co. (1920), 47 N.B.R. 367, 52 D.L.R. 557 (C.A.) , aff'd (1921), 62 S.C.R. 346, 67 D.L.R. 650 — *referred to*

Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd., [1983] 2 S.C.R. 388, 36 C.P.C. 305, 1 C.I.P.R. 46, 75 C.P.R. (2d) 1, 2 D.L.R. (4th) 621, 50 N.R. 1, [1983] R.D.J. 481 — *applied*

Botiuk and Collision, Re (1979), 26 O.R. (2d) 580, 11 R.P.R. 39, 103 D.L.R. (3d) 322 (C.A.) — *referred to*

Bramblevale Ltd., Re, [1970] Ch. 128, [1969] 3 All E.R. 1062 (C.A.) — *applied*

Canadian Dredge & Dock Co. v. R., [1985] 1 S.C.R. 662, 45 C.R. (3d) 289, 19 C.C.C. (3d) 1, 59 N.R. 241, 9 O.A.C. 321 — *applied*

Kimpton v. Eve (1813), 35 E.R. 352 (Ch. D.) — *applied*

Langley Ex parte (1879), 13 Ch. D. 110 (C.A.) — *applied*

MacKay (G.) Ltd. and Dominion Rubber Co., Re., [1946] O.W.N. 506, [1946] 3 D.L.R. 422 (C.A.) — *applied*

Motor Vehicle Act (British Columbia), Re, [1985] 2 S.C.R. 486, 69 B.C.L.R. 145, 48 C.R. (3d) 289, [1986] 1 W.W.R. 481, 23 C.C.C. (3d) 289, 18 C.R.R. 30, [1986] D.L.Q. 90, 24 D.L.R. (4th) 536, 63 N.R. 266 — *referred to*

National Trust Co. v. Bouckhuyt, Re (1987), 38 B.L.R. 77, 21 C.P.C. (2d) 226, 7 P.P.S.A.C. 273, 46 R.P.R. 221, 43 D.L.R. (4th) 543, 23 O.A.C. 40 (C.A.) — *referred to*

Poje v. British Columbia (Attorney General), [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, 53 C.L.L.C. 15,055, [1953] 2 D.L.R. 785 — *applied*

R. v. Burt, 60 C.R. (3d) 372, 7 M.V.R. (2d) 146, [1988] 1 W.W.R. 385, 38 C.C.C. (3d) 299, 60 Sask. R. 100 (C.A.) — *referred to*

R. v. Stevanovich (1983), 43 O.R. (2d) 266, 36 C.R. (3d) 174, 7 C.C.C. (3d) 307, 1 D.L.R. (4th) 688 (C.A.) — *considered*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canadian Act 1982 (U.K.), 1982, c. 11 —

s. 7*referred to*

s. 11(d)*referred to*

Federal Court Act/Loi sur la Cour fédérale, R.S.C. 1970, c. 10 [now R.S.C. 1985, c. F-7] —

s. 46*considered*

s. 52*referred to*

Rules considered:

Federal Court Rules —

R. 308

R. 311

R. 355

Words and phrases considered:

CRIMINAL LIABILITY

. . . liability in contempt is essentially criminal liability . . .

PRINCIPLE OF DELEGATION

. . . the principle of delegation, according to which an individual may be held criminally liable for the acts of his or her delegate, has long been understood to apply, if at all, to cases in which the delegator is under a specific statutory duty that has been contravened by the delegate: see Alan W. Mewett and Morris Manning Criminal Law, 2d ed. (Toronto: Butterworths, 1985), at p. 64; [*Allen v. Whitehead*, [1930] 1 K.B. 211 (U.K.)] per Lord Hewart C.J. at p. 220 [K.B.]; and *R. v. Stevanovich* (1983), 43 O.R. (2d) 266 . . . (C.A.), per Dubin J.A. (as he then was) . . . this [is an] apparent departure from the general rule against vicarious liability in the criminal law . . .

THEORY OF IDENTIFICATION

. . . the theory of identification, according to which a corporation may be held criminally liable for the acts of the directing mind of the corporation, is uniquely inapplicable to natural persons. As Estey J. explained in [*R. v. McNamara (No. 1)*, [1985] 1 S.C.R. 662] at p. 693, the theory of identification "is a court-adopted principle put in place for the purpose of

including the corporation in the pattern of criminal law in a rational relationship to that of the natural person." Since a corporate entity cannot have a mind of its own, it was necessary to select some responsible official (the directing mind) whose mind was identified as that of the corporation.

APPEAL from a judgment of the Federal Court of Appeal (reported at [1988] 1 F.C. 171 (C.A.)) reversing a judgment of the Federal Court, Trial Division (reported at [1986] 2 F.C. 3)

The judgment of the Court was delivered by *Sopinka J.*:

1 This appeal is from the decision of the Federal Court of Appeal [reported at [1988] 1 F.C. 171], which reversed the judgment of the Trial Division [reported at (1985), [1986] 2 F.C. 3] and found the appellant Ministers guilty of contempt of court for disobeying an order of the Federal Court. The principal issue is whether acceptance of service of the order by the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt.

The Facts

2 The respondent, Bhatnager, a Canadian citizen living in Canada, filed a notice of motion in the Federal Court of Canada on June 5, 1985, seeking a writ of mandamus to compel the appellant Minister of Employment & Immigration to order her officers to process the application for permanent residence in Canada of the respondent's husband, an Indian citizen living in India. There had, to that time, been a delay of almost 5 years in the processing of the respondent's husband's application.

3 Prior to the hearing of the respondent's motion, an affidavit of Mr. Lou Ditosto, an immigration officer, was filed on behalf of the Minister. On July 11, 1985, in the course of cross-examination on that affidavit, counsel for the Minister agreed to produce the Ministry's New Delhi file concerning Mr. Bhatnager's application for admission for the purposes of cross-examination. The hearing of the respondent's mandamus application was adjourned to September 3, 1985.

4 Several telexes were sent by Ministry officials to the New Delhi office requesting the file, but over a month passed with no sign of it. The respondent brought two motions: first, for an order that the Secretary of State for External Affairs be added as a party respondent to her application for mandamus, because overseas visa officers are his employees; and second, for an order for production of the New Delhi file. Associate Chief Justice Jerome, of the Federal Court, Trial Division, acceded to both motions, and issued an order on August 15, 1985, in open Court and in the presence of counsel for the appellants. The relevant part of the formal order reads as follows:

> THAT the [appellants] direct their officials to produce the file or a copy of the file relating to the [respondent], Debora Bhatnager and her husband, Ajay Kant Bhatnager, from the Canadian High Commission in New Delhi, India to Lou Ditosto, an Immigration Officer of the [appellants], so that the [respondent] may complete cross-examination on the affidavits filed herein, forthwith and in time for the scheduled hearing of this matter of September 3, 1985.

On August 20, 1985, a copy of the order of August 15 was served on the appellants' solicitor by the respondent's solicitor. There is, however, no evidence that the order was served on either of the appellants, or that they were ever informed of its existence.

5 On August 26, 1985, counsel for the parties agreed to continue the cross-examination of the appellants' representative on August 29, on the assumption that the file or a copy of it would be available by that date. Counsel for the respondent received what purported to be a copy of the file on August 27, but in the course of the cross-examination it was discovered that several relevant documents were missing. In the meantime, the original file had arrived in Ottawa by diplomatic bag on August 28. For some reasons, which were not explained in evidence, the file did not arrive in Toronto until the morning of Friday, August 30, 1985 — the last business day before the hearing of the respondent's application for mandamus.

6 The respondent's application for mandamus was heard by Strayer J. commencing on September 3, 1985. During the hearing of the application, counsel for the respondent argued that a show cause order ought to issue against the appellants in

relation to their alleged failure to comply with the order of August 15. Strayer J. agreed, and the show cause order issued on October 4, 1985. Shortly thereafter, Strayer J. granted the order of mandamus with reasons dated October 15, 1985. The show cause hearing commenced on December 5, 1985, and in reasons dated December 20, 1985, Strayer J. held that the allegations of contempt against the appellants had not been made out.

The Judgments Below

7 Strayer J. held first that, in his view, the spirit of the order of August 15 had not been obeyed by the responsible officials in the two departments involved. He was of the view that the order required that effective directions be given to ensure that the file arrive in Toronto at least by the beginning of the week preceding September 3, 1985.

8 On the question of the appellants' personal responsibility for the failure to comply with the August 15 order, Strayer J. held that the common law requires actual personal knowledge of the order. Such knowledge could be proved by evidence of personal service or of the acquisition of knowledge by some other means. There was nothing in this case showing that the appellants ever had personal knowledge of the order and therefore they could not be personally responsible for having failed to carry out the order. Strayer J. rejected the argument that the provisions in the *Federal Court Rules* that permit service of an order of the court on a party's solicitor of record operate to fix a party with knowledge of the order for the purposes of grounding a finding of contempt.

9 Strayer J. concluded by rejecting the present respondent's arguments that the appellants are vicariously liable for the contempt of court committed by their employees. Strayer J. took the view that no analogy could be drawn between the appellants and a "corporation sole", and that the more appropriate analogy was the situation of a Minister of the Crown whose employee commits a tort: such a Minister is not vicariously liable for the tort.

10 The Federal Court of Appeal unanimously allowed the present respondent's appeal from the judgment of Strayer J. Urie J., speaking for the Court, held that Strayer J. had erred in considering common law principles on the requirements for a finding of contempt in the face of clear provisions in the *Federal Court Rules*. Urie J. took the view that the Rules are "a comprehensive code for the manner in which notice of court orders is to be effected." Urie J. stated, at p. 185 [F.C.]:

> On the evidence there can be no doubt that those Rules were fully complied with in this case so that both the pronouncement of the order in open court in the presence of the duly authorized representative of the [appellants], and its subsequent service on him, constituted notice to them as surely as if they had been personally present and served therewith.

11 Urie J. proceeded to consider whether the allegation of contempt had been substantiated. Exercising the power granted by s. 52 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10 (now R.S.C. 1985, c. F-7), to the Federal Court of Appeal to render the decision which the Trial Division ought to have given, the Court held that Strayer J.'s findings of fact amply established that the acts for which the appellants were to be held responsible were contumacious in character.

12 The matter was remitted to Strayer J. for the assessment of penalty. In an order dated March 30, 1988, Strayer J. imposed no penalty upon the appellants apart from an award of costs to the respondent on a solicitor and client basis.

The Issues

13 The parties have raised the following issues:

1. whether the appellants can be found guilty of contempt of court based on their alleged failure to comply with the Associate Chief Justice's order where there is no evidence that they had actual knowledge of the order but the order was served on the solicitor for the appellants;

2. whether the *Federal Court Rules* are to be interpreted so as to fix the appellants with personal knowledge of the order of the Associate Chief Justice by reason of service of it on the solicitor for the appellants;

3. whether the doctrine of vicarious liability applies in proceedings for contempt of court brought against an individual, and whether the appellant Ministers of the Crown are vicariously liable for the contumacious conduct of their officials; and

4. whether the principle of vicarious liability or, in the event of an affirmative answer to issue 2, the *Federal Court Rules* are inconsistent with ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

I find that it is necessary to deal only with issues 1, 2 and 3.

Actual Knowledge

14 It is well to remember at the outset that an allegation of contempt of court is a matter of criminal (or at least quasi-criminal) dimension: see *Poje v. British Columbia (Attorney General)*, [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, 53 C.L.L.C. 15,055, [1953] 2 D.L.R. 785, at pp. 517-518 [S.C.R.]; and *Re Bramblevale Ltd.*, [1970] Ch. 128, [1969] 3 All E.R. 1062 (C.A.), at 137 [Ch.]. In the present case, a finding of guilt could have subjected the appellants to a fine of as much as $5,000 and the possibility of imprisonment to a maximum of 1 year (see: R. 355(2)). It is necessary, therefore, that the constituent elements of contempt be proved against the appellants, and proved beyond a reasonable doubt.

15 The element at issue in the present case is the common law re quirement of knowledge of the order alleged to have been breached. The appellants contend that since there was no evidence that they had been informed of the existence or content of the order of August 15, they could not, as a matter of law, be held liable in contempt for disobedience of the order. The onus of proof is on the party alleging contempt, and that onus has not been discharged. The respondent, on the other hand, contends that service of the order on the appellants' solicitor gives rise to a rebuttable presumption of actual knowledge, or at least shifts the evidentiary burden to the appellants — on the footing that the natural inference to be drawn from service on a party's solicitor is that the solicitor will have informed the party of the order. The appellants led no evidence concerning their knowledge or lack of knowledge, and so, the argument goes, the presumption created by service operates to fix them with knowledge.

16 On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. Almost 2 centuries ago, in *Kimpton v. Eve* (1813), 35 E.R. 352 (Ch. D.), Lord Chancellor Eldon held that a party could not be held liable in contempt in the face of uncontradicted evidence that he or she had no knowledge of the order. In *Ex parte Langley* (1879), 13 Ch. D. 110 (C.A.) at 119, Thesiger L.J. stated the principle as follows:

> [T]he question in each case, and depending upon the particular circumstances of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which had been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.

More recently, this Court adverted to the knowledge requirement in contempt in *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.*, [1983] 2 S.C.R. 388, 36 C.P.C. 305, 1 C.I.P.R. 46, 75 C.P.R. (2d) 1, 2 D.L.R. (4th) 621, 50 N.R. 1, [1983] R.D.J. 481, at 396-397 [S.C.R.], per Dickson J. (as he then was).

17 This lengthy history of a strict requirement at common law that the party alleging contempt must prove actual knowledge on the part of the alleged contemnor is inconsistent with the submission that a rebuttable presumption arises in every case upon service of the order on the solicitor. In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely, to their attention. In order to infer knowledge in such a case, there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister. Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases the inference of knowledge will always be available where facts capable of supporting the inference are proved (see: *Avery v. Andrews* (1882), 51 L.J. Ch. 414, 30 W.R. 564.

18 This does not mean that Ministers will be able to hide behind their lawyers so as to flout orders of the court. Any instructions to the effect that the Minister is to be kept ignorant may attract liability on the basis of the doctrine of wilful blindness. Furthermore, the fact that a Minister cannot be confident in any given case that the inference will not be drawn will serve as a sufficient incentive to see to it that officials are impressed with the importance of complying with court orders.

19 Applying the foregoing to this case, it is plain that Strayer J. did not infer knowledge on the part of the Ministers in the circumstances; nor did the Court of Appeal. Indeed, for reasons which I shall address shortly, Urie J. imputed the requisite knowledge to the appellants in such a way that even conclusive proof of an absence of knowledge on their part would not have availed. There is, therefore, no finding of fact on the record that the appellants had knowledge of the order of August 15. Neither is one warranted. Accordingly, at common law they cannot be held liable in contempt.

The Federal Court Rules

20 The relevant portions of the *Federal Court Rules* read as follows:

> Rule 308. A document that by virtue of these Rules is required to be served on any person need not be served personally unless the document is one that, by a provision of these Rules or by order of the Court, is expressly required to be so served.
>
> . . . . .
>
> Rule 311.(1) Service of a document, not being a document that is required to be served personally, may be effected
>
> > (a) by leaving a copy of the document at the address for service of the person to be served;
>
> . . . . .
>
> (2) For the purposes of paragraph (1) if, at the time when service is effected, the person on whom a document is to be served has no 'address for service', as that expression is defined by Rule 2(1), his address for service shall be deemed to be one of the following:
>
> > (a) in any case, the business address of the attorney or solicitor, if any, who is acting for him in the proceeding in connection with which service of the document in question is to be effected;. ...

21 The respondent, supporting Urie J.'s judgment, claims that these Rules provide a comprehensive code for effecting notice of court orders. Urie J. held that the service of the order on the appellants' counsel created a "presumption of proper notice" that could be rebutted only if the appellants led evidence to show that their counsel acted without authority in accepting service. The appellants reject this interpretation of the Rules and, taking the matter one step further, argue that if the Rules were interpreted to have this effect they would be ultra vires the rule-making power granted to the Judges of the Federal Court by s. 46 of the *Federal Court Act*.

22 With respect to Urie J., I cannot interpret the *Federal Court Rules* as having the effect he ascribed to them, apart altogether from any *Charter* considerations that might have come into play if I had held otherwise. While it is true that there are provisions in the Rules for personal service (e.g. R. 355(4)), it does not follow that the permission in R. 308 to effect service other than personally is determinative of the issue of knowledge in a contempt of court proceeding. The relevant Rules define what is effective service for the purposes of the expeditious conduct of litigation in the Federal Court, but they do not purport to detract from the elements necessary to establish contempt. It seems to me that a crucial requirement for the proof of a serious offence such as contempt of court could not be implicitly abrogated by a provision in subordinate legislation; such an alteration of the general law would require explicit language. As Hogg J.A. stated in *Re MacKay (G.) Ltd. and Dominion Rubber Co.*, [1946] O.W.N 506, [1946] 3 D.L.R. 422 (C.A.) at 425 [D.L.R.]:

> The common law rights of the subject are not to be taken away or affected except only to such extent as may be necessary to give effect to the intention of Parliament when clearly expressed or when such result must follow by necessary implication, and if the rights of persons are encroached upon, this intention must be made manifest by the language of the statute, if not by express words then by clear implication and beyond reasonable doubt.

23 It cannot be doubted that the knowledge of a solicitor is the knowledge of the client for some purposes, particularly in civil cases in which an individual's knowledge of the status of a commercial transaction is at issue: see *Bank of British North America v. St. John & Quebec Railway Co.* (1920), 47 N.B.R. 367, 52 D.L.R. 557 (C.A.), aff'd (1921), 62 S.C.R. 346, 67 D.L.R. 650; *Re Botiuk and Collision* (1979), 26 O.R. (2d) 580, 11 R.P.R. 39, 103 D.L.R. (3d) 322 (C.A.), at 589 [O.R.] per Wilson J.A. (as she then was); and *Re National Trust Co. and Bouckhuyt* (1987), 61 O.R. (2d) 640, 38 B.L.R. 77, 21 C.P.C. (2d) 226, 7 P.P.S.A.C. 273, 46 R.P.R. 221, 43 D.L.R. (4th) 543, 23 O.A.C. 40 (C.A.), at 643-644 [O.R.], per Cory J.A. (as he then was). While this principle of imputation of knowledge is a necessary feature of our adversary system of civil litigation, in which representation by counsel is the rule rather than the exception, it ought not to apply in the criminal or quasi-criminal context of a contempt prosecution in the absence of express legislative language to the contrary. As the *Federal Court Rules* do not contain such language, it is unnecessary to deal with the argument that the Rules are ultra vires.

Vicarious Liability

24 Counsel for the respondent presented this Court with elaborate arguments in support of the proposition that the appellants ought to be held liable in contempt in the absence of knowledge of the breached order, on the basis of some form of vicarious liability, variously referred to as the principle of delegation and the theory of identification. Counsel sought to analogize the appellants to licensees and corporations in relation to which these principles have been applied in the past (see, e.g.: *Allen v. Whitehead*, [1930] 1 K.B. 211, [1929] All E.R. 13; and *Canadian Dredge & Dock Co. v. R.*, [1985] 1 S.C.R. 662, 45 C.R. (3d) 289, 19 C.C.C. (3d) 1, 59 N.R. 241, 9 O.A.C. 321).

25 Given the premise that liability in contempt is essentially criminal liability, the respondent's main hurdle on this issue is that, in general, vicarious liability is unknown to the criminal law. As Estey J. stated in *Canadian Dredge & Dock Co.*, supra, at p. 692 [S.C.R.]:

> In the criminal law, a natural person is responsible only for those crimes in which he is the primary actor either actually or by express or implied authorization. There is no vicarious liability in the pure sense in the case of the natural person.

However, the respondent, while conceding that the doctrine of respondent superior does not apply, urges that either or both of the sub-doctrines of delegation and identification ought to ground the appellants' liability in contempt. There are, to my mind, at least two fatal objections to the respondent's position on this issue.

26 First, the principle of delegation, according to which an individual may be held criminally liable for the acts of his or her delegate, has long been understood to apply, if at all, to cases in which the delegator is under a specific statutory duty that has been contravened by the delegate: see Alan W. Mewett and Morris Manning, *Criminal Law*, 2d ed. (Toronto: Butterworths, 1985), at p. 64; *Allen*, supra, per Lord Hewart C.J. at p. 220 [K.B.]; and *R. v. Stevanovich* (1983), 43 O.R. (2d) 266, 36 C.R. (3d) 174, 7 C.C.C. (3d) 307, 1 D.L.R. (4th) 688 (C.A.), at 315 [C.C.C.], per Dubin J.A. (as he then was). It is not necessary to express a view on the correctness of this apparent departure from the general rule against vicarious liability in the criminal law, since it is sufficient to observe that in the circumstances of the present case the appellants are under no analogous duty.

27 Second, the theory of identification, according to which a corporation may be held criminally liable for the acts of the directing mind of the corporation, is uniquely inapplicable to natural persons. As Estey J. explained in *Canadian Dredge & Dock Co.* at p. 693, the theory of identification "is a court-adopted principle put in place for the purpose of including the corporation in the pattern of criminal law in a rational relationship to that of the natural person." Since a corporate entity cannot have a mind of its own, it was necessary to select some responsible official (the directing mind) whose mind was identified as that of the corporation. To now apply the theory of identification to natural persons would be to turn the principle on its head. It would be, in my view, a manifestly unjust application to an individual of simple vicarious liability under another name.

28 In light of these conclusions, it is unnecessary to consider whether a contrary interpretation of the Federal Court Rules or a finding of vicarious criminal liability would constitute a violation of ss. 7 and 11(d) of the *Charter*; though it seems clear that any argument in favour of such liability would have grave difficulty overcoming the decision of this Court in *Re Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 69 B.C.L.R. 145, 48 C.R. (3d) 289, [1986] 1 W.W.R. 481, 23 C.C.C.

(3d) 289, 18 C.R.R. 30, [1986] D.L.Q. 90, 24 D.L.R. (4th) 536, 63 N.R. 266. (See also: *R. v. Burt*, 60 C.R. (3d) 372, 7 M.V.R. (2d) 146, [1988] 1 W.W.R. 385, 38 C.C.C. (3d) 299, 60 Sask. R. 100 (C.A.), per Bayda C.J.S.)

Disposition

29 In view of the foregoing, the appellants ought not to have been found liable in contempt. I would therefore allow the appeal and restore the decision of Strayer J. of December 20, 1985. In accordance with the terms upon which leave was granted, the respondent shall have her costs throughout on a solicitor-and-client basis.

Appeal allowed.

Court File No: **CV-20-00646729-00CL**

PILLAR CAPITAL CORP. Applicant	- and -	**TURUSS (CANADA) INDUSTRY CO., LTD** Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES

(motion returnable January 11, 2021)

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