

Case Name:

Free (Estate) v. Jones

Between

Estate of Bruce Claude Free, applicant, and
Helena Jones, Daniel Sullivan, and Aliesha Jones,
respondents

[2004] A.J. No. 1180

2004 ABQB 486

Dockets: 0303 19719, 0303 10461

**Alberta Court of Queen's Bench
Judicial District of Edmonton
Veit J.**

Heard: June 16 and 21, 2004.

Judgment: July 16, 2004.

(46 paras.)

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Contempt — What constitutes contempt — Judgments and orders — Disobedience or non-compliance with — Defences — Particular defences — Acting on legal advice — Inability to comply with court order — Punishment.

Application by the Free Estate for an order of contempt of court against the respondents, Jones, Sullivan and Jones, for failing to obey a court order requiring them to vacate lands owned by the Estate. Jones argued that she could not find alternative accommodation and was relying on her lawyer's advice to document her attempts to find accommodation.

HELD: Application allowed. It was not necessary to sanction the respondents. The Estate had alternative remedies available to it to obtain vacant possession of the land. The respondents were in contempt of the order. It was not a defence to say that they had made their best effort to vacate the land. The respondents were not claiming that they had relied on legal advice suggesting that they stay on the land. Even if they were, this would not be a defence to the finding of contempt.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rules 703(1)(a), 704(1), 704(2), 704(3), 704(5).

Mobile Home Sites Tenancies Act, R.S.A. 2000, c. M-20.

Residential Tenancies Act, R.S.A. 2000, c. R-17.

Counsel:

QUICKLAW

Andrew L. Zebak for the Estate of Bruce Free

Lynne Butler for H. Jones, D. Sullivan, and A. Jones

MEMORANDUM OF DECISION

VEIT J.:-

Summary

¶ 1 The Free Estate cites Ms. Jones and her co-respondents in civil contempt for failing to obey an order of the court requiring Ms. Jones to vacate lands owned by the Free Estate.

¶ 2 Relying on R. 703(1)(a), Ms. Jones contends that the respondents are not in contempt because, despite her best efforts, Ms. Jones could not find alternative accommodation at a price she could afford. Neither of Ms. Jones' co-respondents, Mr. Sullivan and Aliessa Jones, filed any evidence.

¶ 3 Ms. Jones and her co-respondents are in contempt of this court's order. "Best efforts" is not, in the circumstances here, a defence to contempt: it was completely within Ms. Jones' capacity to leave the property. Impecuniosity, even if made out, is not a defence to contempt in the circumstances here. Even if Ms. Jones had been able to establish that she did not have the financial capacity to obtain new accommodation, that would not have excused a breach of the court's order: she should have quit the property and accessed the support network provided by the state. Property owners are not obliged to provide charity to impecunious tenants. In the event, however, Ms. Jones' evidence fell far short of establishing that she was unable to find new accommodation either because she did not have access to sufficient funds or because there were no properties available.

¶ 4 Ms. Jones swears that her lawyer told her to keep a record of the efforts she made to obtain alternative accommodation; that is not the equivalent of invoking a defence of reliance on legal advice. Because that defence is not advanced, and because there is an alternate remedy available to the Free Estate, the court does not have to decide on this application whether, in Canada, reliance on legal advice can provide complete mitigation for contempt.

¶ 5 Ms. Jones' co-respondents, Mr. Sullivan and Aliessa Jones, advanced no defence whatever to the citation in contempt against them, nor is there any basis on the submissions made during the course of the hearing to shield them from a finding of contempt.

¶ 6 Despite the contumacious behaviour of the co-respondents, because the contempt here is civil contempt - which does not threaten the proper administration of justice in the same way as does criminal contempt - and because, as between the parties, the Free Estate has the capacity to effect its objective of removing Ms. Jones and her co-respondents from the land without invoking the contempt power, the court declines to exercise its jurisdiction to sanction the contempt of Ms. Jones and her co-respondents. The court's contempt powers must be exercised with restraint to achieve a proper balance between ensuring respect for court orders and needless "piling on" of remedies.

¶ 7 Although the Free Estate is unsuccessful in obtaining a sanction for contempt, it has proved

contempt. Therefore, it is entitled to costs of the two appearances before this court.

¶ 8 However, there will be no order that the costs relative to this hearing be paid as a condition of allowing the Jones group to proceed with the main action. Such an order might have the effect of depriving the Jones group of their claim without a hearing on the merits of the claim and is excessive in the circumstances.

Cases and authority cited

¶ 9 By the applicant, Free Estate: L&B Electric Ltd. v. Oickle [2004] N.S.J. No. 108 (C.A.); Baxter Travenol Laboratories of Canada, Limited v. Cutter (Canada) Ltd. [1986] 1 F.C. 497 (T.D.); Dell Chemical & Marketing Ltd. v. Aquasol International Inc. [2000] A.J. No. 1025 (Q.B.); Zadegan v. Zadegan [2003] O.J. No. 5282 (Fam. Ct.); MacMillan Bloedel v. Simpson (1994) 113 D.L.R. (4th) 368 (C.A.), affirmed 130 D.L.R. (4th) 385.

¶ 10 By the court: On the reliance on legal advice as a defence to contempt: In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement [1966] 1 W.L.R. 1137 (Restr. Pract Ct.); Coflexip SA v. Stolt Comex Seaway MS Ltd. [1999] E.W.J. No. 7360 (Ch. Div.); Canada Metal Co. v. CBC (No. 2) (1975) 4 O.R. (2d) 585 at 605 (H.C.), affirmed (1976) 11 O.R. (2d) 167 (C.A.); Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd. [1987] 2 F.C. 557 (C.A.); J. Miller, *The Law of Contempt in Canada*, Toronto, Carswell, 1997, c. 12;

¶ 11 On the difference in policy considerations relating to civil contempt and criminal contempt: International Forest Products Ltd. v. Kern [2000] B.C.J. No. 2086 (C.A.); MacMillan Bloedel Ltd. v. Simpson [1996] 2 S.C.R. 1048; United Nurses of Alberta v. Alberta (A.G.) [1992] 1 S.C.R. 901;

¶ 12 On the unavailability of necessity as a defence: MacMillan Bloedel v. Karwczyk (1994), 43 B.C.A.C. 136, leave denied 55 BCAC 320 (S.C.C.);

¶ 13 On the unavailability of impecuniosity as a defence: Manis v. Manis (2001) 13 C.P.C. (5th) 234 (Ont. C.A.);

¶ 14 On the "adequate excuse" or "due diligence" defence to contempt: Michel v. Lafrentz [1998] A.J. No. 1489 (C.A.); T.G. Industries Inc. v. Clarke Inc. 2001 NSCA 105; Glazer v. Union Contractors Ltd. (1960) 26 D.L.R. (2d) 349 (B.C.C.A.); Broda v. Broda 2004 ABCA 73; Salloum v. Salloum (1994) 154 A.R. 65 (Q.B.); Morrow, Power v. Newfoundland Telephone Co. [1994] N.J. No. 197 (C.A.); Metaxas v. Galaxias (The) [1989] 1 F.C. 386 (T.D.)

¶ 15 On the inappropriateness of sanctioning for contempt where a writ of possession is effective to achieve the requested objective: Bell (Trustee in Bankruptcy) v. Tuohy [2002] E.W.J. No. 1435 (C.A. (Civil Div.)); Danchevsky v. Danchevsky [1974] 3 All E.R. 934; Begg v. East Hants (Municipal District) and Nova Scotia (Director of Assessment) (1988) 85 N.S.R. (2d) 304 (C.A.); Dy-Reyes v. Carina Holdings Ltd. (2000) 267 A.R. 235 (Q.B.); West Coast Ry. v. Pacific Tours [1982] B.C.J. No. 395 (Sup.Ct.);

¶ 16 On the ongoing access to justice by contemnors: Arrow Nominees Inc. v. Blackledge [1999] E.W.J. No. 7349 (Ch.)

¶ 17 On availability of orders to vacate property: Mobile Home Sites Tenancies Act, R.S.A. 2000, c. M-20; Residential Tenancies Act, R.S.A. 2000, c. R-17

1. Background

¶ 18 At the conclusion of a hearing held on April 7, 2004, the court ordered Helena Jones and her co-respondents to give up possession of the land to the Free Estate by May 30, 2004, which deadline the court subsequently extended to June 15, 2004. On June 16, 2004, the respondents had still not given up possession of the land. On the contrary, it was suggested that three 6 foot white crosses had been planted on the land; the respondents deny any knowledge of any such crosses.

¶ 19 The Free Estate then cited the respondents in contempt.

¶ 20 In answer to the citation, Helena Jones presented an unsworn affidavit in which she stated:

- she and her co-respondents own seven horses, two llamas, one sheep, one dog and four cats, all of which animals she wished to keep;
- she had spoken with a realtor to ask him to help her find a suitable piece of land, that is land that would accommodate herself, her co-respondents and her animals, as well as the chattels of all the co-respondents. Ms. Jones indicated that she would prefer to rent the land first and then purchase it in the future. (No date is given for this conversation.);
- she had spoken with another realtor who informed her that he did not have anything suitable at the time, but that he would let her know if anything comes up. (No date is given for this conversation.);
- she had checked advertisements in the local newspaper for properties of a minimum of 15 acres. The price per acre ranges from \$4,508 to \$11,000. These parcels of land are unserviced and unfenced. Ms. Jones states that the cost of purchasing land, and servicing and fencing it are beyond her financial means;
- when she moved her trailer onto her uncle's land, Ms. Jones did the fencing and worked on the installation of services, but she is physically unable to do heavy lifting at this time;
- she telephoned the Country Style Trailer Court and was told that there is a waiting list of about 3 years;
- she had obtained information from a boarding facility to the effect that it would cost between \$1,700 and \$2,400 per month to board Ms. Jones' horses, but that the facility did not, at that time, have room for all 7 horses;
- she expects some inheritance - including land and money - from her mother's estate, but

she has challenged her mother's will and that litigation may take years to resolve;

- "I am advised by my lawyer that I must document the efforts I have made to find a new place to reside".

¶ 21 The proceedings were adjourned to June 21, 2004, to avoid the necessity of issuing a warrant for the arrest of the respondents.

¶ 22 On June 21, Helena Jones's affidavit was sworn but un-filed as a result of a technical problem.

¶ 23 On June 21, 2004, Helena Jones and her co-respondents had taken themselves off the property, but had not removed any of the structures they had placed on the land and had not removed their trailer from the Free land.

¶ 24 At the June 21, 2004 hearing, the Free Estate filed an affidavit in which Bruce Rezewski, plant operator, swore, on information and belief, that the respondent Daniel Sullivan has been employed for at least the last 6 months, that he is paid \$20 per hour, and that he has frequent access to overtime. The affidavit also attaches recent printouts from the Western Review, the local paper in Drayton Valley which is the area where the land is located, which lists many homes that could be rented and many pieces of land that could be purchased, as well as many MLS real estate listings for the area.

2. The "Due Diligence" defence to contempt

¶ 25 The Alberta Rules of Court contain the following provisions relating to contempt:

703 (1) Every person is in civil contempt who

- (a) fails, without adequate excuse; to obey any order of the court, other than an order for the payment of money, or...

...

- (3) Nothing in this Part prevents, or is to be construed as preventing, the Court, as a superior court, from exercising its inherent power to punish and cite in contempt those who disobey the lawful orders of the Court, or who otherwise display contempt for its process . . .

704(1) Every person in civil contempt is liable to any one or more of the following:

- (a) imprisonment until he has purged his contempt;
- (b) imprisonment for not more than 2 years;

- (c) a fine and in default of paying the fine to imprisonment for not more than 2 years;
- (d) if a party to an action or proceeding
 - (i) to have his pleadings or part thereof struck out;
 - (ii) to have his action or proceeding stayed;
 - (iii) to have his action dismissed or judgment entered against him;
 - (iv) to be prohibited from introducing in evidence designated documents, or things or testimony
- (2) The court may also order any person in civil contempt to pay any other person such costs and expenses as may be considered proper.
- (3) The court may waive the imposition of any sanction or suspend any punishment where a person held in civil contempt has purged his contempt.
- (5) An appeal lies to the Court of Appeal in respect of an order holding any person in civil contempt and in respect of the penalty imposed therefor.

(Emphasis added)

¶ 26 The phrase "without adequate excuse" has been interpreted by our Court of Appeal in Michel where Cote J.A. stated:

It must not be thought that contempt of court always requires an intent to disobey the court, or even an intent to do an act which is in fact forbidden. Where someone is ordered by the court to do something, he or she must use a sufficient degree of diligence to perform, or to have the act performed.

¶ 27 This decision makes it clear on the one hand, that the intent to flout the court's order is not a necessary element of civil contempt, and on the other that a person to whom a court order is directed must use diligence to perform that act.

¶ 28 In order to get practical guidance as to the import of the phrase "sufficient degree of diligence" it is useful to review court decisions which have relieved respondents of liability for contempt. In Michel itself, the court noted that where a person is ordered to provide records, an accidental fire which destroyed the records or an accident which incapacitated the business' accountant "would excuse some delay, and

maybe some temporary incompleteness"; that illustrates the degree of diligence which must be expended in order not to be found in contempt. Another type of example is found in *Metaxas* where the court had ordered the respondent to produce a deletion certificate. However, the respondent was able to satisfy the court that the Minister of Merchant Marine had the sole authority to produce a deletion certificate and the respondent did not have the power to compel the production of the certificate from the Minister. Similar examples abound. These decisions are reflective of the weight of the case law: unless something beyond a respondent's control prevents compliance with an order, a respondent will be expected to exhaust its ability to comply with a court order. What does not abound in the case law are examples of clear orders to quit possession of land which were not obeyed and where the impecuniosity of the respondent was accepted as a limit on due diligence. This absence of case law in support of the respondents' position is not surprising: otherwise, every tenant who was ordered off property for non-payment of rent could plead their poverty as a reason for not quitting the premises. Due diligence requires a respondent to do everything within its power to comply with a court order.

¶ 29 In this case, the court ordered Ms. Jones and her co-respondents to get themselves, their animals and their structures off the Free land. Time was given to the respondents to comply; at their request, that period of time was even extended. It was clearly possible for the respondents to get off the land, even though at some cost to themselves. They were not sufficiently diligent in obeying the court order.

3. The necessity defence to contempt

¶ 30 Not only is there no case law which supports the position of the respondents at this hearing, case law establishes that where an order for possession requires an individual to deliver up possession of a particular property on or before a particular date, an individual who fails to comply with the order may be guilty of contempt: *Tuohy*.

¶ 31 Equally, Canadian jurisprudence holds that there is no defence of necessity to contempt: *Krawczyk*

4. The "reliance on legal advice" defence to contempt

¶ 32 Although there is a statement in *Helena Jones'* affidavit to the effect that her lawyer told her to keep a list of the calls she had made to find alternative accommodation, that is not the equivalent of stating that she was remaining on the land on the basis of her lawyer's advice. In any event, the standard view is that acting on legal advice is not a defence: *Home Office, McLaughlin*. As *Laddie J.* put it in *Colfexip SA*:

26. A defendant who has been held to infringe a valid patent but wants to stay, without further infringing the patentee's rights, in the same line of business using a similar but non-infringing product or process is presented with two choices, assuming that he does not take the path of least resistance and just give up. If he is advised by his lawyers that his new product or process is non-infringing, he can just re-enter the market. However he does so at considerable risk. If his lawyers' assessment is wrong he will still be in contempt. The error of judgment in the legal advice he received goes only to mitigation: see *Re the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137 and, more generally, *A.G. v. Times Newspapers Ltd.* [1992] 1 AC 191 at 217-8 per Lord

Oliver. In fact he would be in contempt even if the original injunction in force at the time of his new venture is discharged on appeal: see *Wardle Fabrics v. Myristis Ltd.* [1984] FSR 263, followed by Scott J. as he then was, in *Columbia Pictures Inc. v. Robinson* [1987] 1 Ch. 38. See also *Multiform Displays Ltd. v. Whitmarley Displays Ltd.* [1957] RPC 401. The risk of being held in contempt and the adverse publicity likely to be generated by being accused of being in contempt will put all but the most determined off taking this course.

¶ 33 The substantive decision issued by Laddie J. may well have been reviewed and even overturned in the extensive *Coflexip* litigation, but his comment about the reliance that can be made on legal advice in relation to contempt issues appears to correctly reflect the formal state of the law in England.

¶ 34 Although Laddie J. has outlined the formal state of the law, it is worth noting that the decisions which are so frequently summarized in the same manner as done by Laddie J. are not so strongly worded in the original. For example, in *Tyre Manufacturers*, the court said the following:

If it was wrong, it would be a breach of undertakings in a matter affecting the public interest. In such circumstances, parties, even though acting on legal advice, are playing with fire, and they ought to realise that they are playing with fire, and all the more so when it is the public interest which is involved.

That is no novel conception. It was clearly expressed by this court in a judgment, delivered by Diplock J. on July 28, 1961, in *In re National Federated Electrical Associations Agreement*, where these words were used:

As it appears :from the evidence that the association has been considering ways of obtaining precisely the same results as those obtained under the agreement, it is desirable to say that the effect of a breach of an undertaking is as serious as a breach of an injunction. If persons try to get round the provisions of the Restrictive Trade Practices Act, 1956, they must understand that they are playing with fire and, if they are unsuccessful, the results can be serious.

The court, in *In re Newspaper Proprietors' Association Ltd.'s and National Federation of Retail Newsagents', Booksellers' and Stationers' Agreement*, in a judgment which was also delivered by Diplock J., went further. In relation to the special facts of that case, the court said:

We also desire to make it crystal clear, since the object of the scheme is plain, that the court will not regard as a mitigating circumstance the fact that any such person has acted on the advice of lawyers, whether solicitors or counsel, and that, if the advice which they have received is wrong and they are in fact in breach of the injunction, the fact that they were wrongly advised that their attempt to evade the provisions of the Act was lawful will

not be regarded as a mitigating circumstance.

While this statement does not, of course, mean that bona fide legal advice, can never be a mitigating circumstance, it lends force to the view which we hold that reliance on legal advice certainly cannot be relied upon, as a matter of course, as complete mitigation.

4. Restraint in the use of civil contempt where alternative remedy exist

¶ 35 Although the case law establishes the lengths to which a respondent must go in order to comply with an order of the court, the case law also establishes that, in the narrow situation of an order to vacate land "contempt procedure should be invoked very rarely in such a context", ie. where there is an order for possession of land: Tuohy. As Lord Denning MR said in Danchevsky: "Whenever there is a reasonable alternative available instead of committal to prison, that alternative must be taken."

¶ 36 Such decisions stand in the general line of authority which hold that contempt proceedings should be used sparingly in matters of civil contempt where there is another remedy within the reach of the parties.

¶ 37 While the Supreme Court of Canada has made it clear that civil contempt proceedings do not need to be shelved merely because criminal proceedings could be taken by the state for conduct which specifically affects individual persons: Simpson that is a limited gloss on the general principle.

5. Applying the law to the facts here

a) Are the respondents in contempt?

¶ 38 It has been proved beyond a reasonable doubt that, having full knowledge of the order of this court that they give up possession of the land on which they had placed certain structures, the respondents deliberately and intentionally stayed on the land owned by the Free Estate and refused to move off that land. Their deliberate and intentional acts constitute contempt of the court's order, even in the absence of evidence that they intended to flout the court's order.

b) Should the respondents be sanctioned for their contempt?

¶ 39 Despite their contempt of the order of the court requiring them to deliver up possession of the land, the respondents should not be sanctioned for that contempt. The Free estate is able to achieve its objective through a writ of possession which is available under Alberta legislation: see citations above.

¶ 40 Moreover, in the circumstances here, the refusal by the respondents to comply with an order of the court does not seriously affect the administration of justice. Even if it could be proved that the respondents had been responsible for the erection of crosses on the property which they wrongfully continued to occupy, that could be seen merely as a permissible, albeit inflammatory, expression of disagreement with the finding of the court rather than a public campaign to flout the court's order.

¶ 41 Finally, in the circumstances here, there has only been the one, although ongoing, breach of the order. The respondents have therefore not demonstrated the obduracy that would justify the imposition of a sanction for contempt.

6. Costs

a) Entitlement to costs

¶ 42 Although the applicant Estate has not been successful in its motion to have the court sanction the respondents for contempt, it has been successful in establishing that the respondents were in deliberate contempt of the order of the court. Therefore, the applicant is entitled to its costs of this proceeding.

¶ 43 The amount of costs is governed by the tariff: there have been two opposed motions, costs for which total \$1,000.

b) Should the payment of costs be made a pre-requisite to the taking of the next step in the proceedings?

¶ 44 As annoying as the conduct of the respondents may have been to the Free Estate, this is not a situation where the order of costs should include a direction that the respondents are restricted in taking any further steps to advance their claim unless and until they pay the costs.

¶ 45 The following extract from the reasons of Evans-Lombe J. in *Arrow Nominees Inc.* illustrates the modern approach to access to justice, even in circumstances of contempt:

It follows that a plaintiff with a strong claim or a defendant with a good defence could be prevented from pursuing his rights or defending his actions as a punishment for being in contempt. This might well concentrate the contemners' mind but in some cases it would amount to a punishment far in excess of any fine or other financial penalty which the Court would normally impose for breach of its orders. More than that, it means that the Court would be prepared to contemplate a miscarriage of justice for the purpose of punishing those who breach its orders. This is an un-appealing way in which to exercise the Court's power over litigants and the proceedings before it. Two wrongs do not make a right. For reasons set out below it appears to me that *Romer LJ*'s views, and the passage taken out context from *Jokai*, do not represent the modern attitude in this area.

¶ 46 Without in any way suggesting that the Jones group have a strong claim to the Free land, and without intending to comment in any way on the right of the Free Estate to bring an application for security for costs in the main action, I am of the view that it is not necessary to make payment of the within costs order a condition of the right of the Jones group to advance that action.

VEIT J.

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