PARTIES	ROGERSON, Andrew Gordon v TCHIA, Adolpho TCHIA NOMINEES PTY LTD SKYKYM PTY LTD
TITLE OF COURT:	COURT OF APPEAL (NT)
JURISDICTION:	DARWIN
FILE NO:	CA of 1992
DELIVERED:	17 MARCH 1995
HEARING DATES:	23 AND 24 MARCH 1993
JUDGMENT OF:	MARTIN CJ, KEARNEY AND THOMAS JJ

CATCHWORDS:

Practice and Procedure - Enforcement of judgments and orders - Personal service - Amelioration of strict application - Notice -

Supreme Court Rules (NT), O.66, r66, r66.10(3)(b), r66.10(5) & (6)

Von Doussa v Owens (No.2) (1982) 30 SASR 367, referred to.

Practice and Procedure - Failure to comply with rules - Irregularity - Proceeding not a nullity - Approach - Discretion -

Supreme Court Rules (NT), r2.01, r2.03 & r2.04.

Hubbard Association of Scientologists International v Anderson and Just (No.2) (1972) VR 577, referred to.
ASC v MacLeod (1993) 113 ALR 525, referred to.

Practice and Procedure - Service - Evidence - Documents left with person to be served - Personal service unnecessary - Notice - Nature of documents -

Pino v Prosser [1967] VR 835, distinguished.
Hope v Hope (1854) 4 De GM and G 328, referred to.
Ditford v Temby (1990) 97 ALR 409, considered.

Practice and Procedure - Contempt - Summons must specify contempt charged - Non-compliance - Leave -

Supreme Court Rules (NT), O.75, r75.06(3) & (4)

Doyle v The Commonwealth (1985) 156 CLR 510, distinguished.

Coward v Stapleton (1953) CLR 573, followed.

Practice and Procedure - Unconditional Notice of Appearance - Amounts to waiver of irregularity -

Supreme Court Rules (NT) r8.07

Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529, followed.

Practice and Procedure - Contempt proceedings - Criminal character - Prison - Fine - Approach - Judiciary discretion -

Hinch v The AG (Victoria) (No.2) (1987) 164 CLR 15, referred to.
Day v Niddrie and Others (1991) 74 NTR 1, referred to.
Clifford v Middleton (1974) VR 737, referred to.
The Commissioner of Water Resources v Federated Engine Drivers and the Firemens Association of Australasia Queensland Branch (1988) 2 QR 385, referred to.
Drummoyne Municipal Council v Lewis (1974) 1 NSWLR 655 referred to.
Australian Securities Commission v MacLeod & Others (1993) 113 ALR 525, referred to.
House v The King (1936) 55 CLR 499, followed.

Practice and Procedure - Contempt proceedings - Standard of proof - Criminal - Beyond reasonable doubt -

Consolidated Press Ltd v McRae (1955) 93 CLR 325, referred to.
The Commissioner of Water Resources v Federated Engine Drivers and the Firemens Association of Australasia Queensland Branch (1988) 2 QR 385, referred to.
Hinch v The AG (Victoria) (No.2) (1987) 164 CLR 15, referred to.
Sun Newspapers Pty Ltd v Brisbane TV (1989) 92 ALR 555, referred to.
O'Reilly v Law Society of New South Wales (1991) 24 NSWLR 204, referred to.

Appeal - Jurisdiction - Contempt proceedings - Rehearing of trial Judge's decision - Question of fact - Considerations - Evidence inconsistent with facts - Glaringly improbable -

Devries v Australian National Railways Commission (1993) 177 CLR 472, followed.
Brunskill v Sovereign Marine & General Insurance Co Ltd (1985) 59 ALJR 842, referred to.
Jones v Hyde (1989) 63 ALJR 349, referred to.
Abalos v Australian Postal Commission (1990) 171 CLR 167, referred to.
SS Hontestroom v SS Sagaporack (1927) AC 37, applied.
Coghlan v Cumberland (1989) 1 Ch 704, followed.

Practice and Procedure - Contempt - Question of penalty - Appellant not heard - Remitted to trial Judge for proper determination.

REPRESENTATION:

Counsel:

Appellant: Mr McCormack
Respondents: Mr Tiffin (Amicus Curiae)

Solicitors:

Appellant: Mr Carter
Respondents: Solicitor for NT

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP of 1992

BETWEEN:

ANDREW GORDON ROGERSON
Appellant

AND:

ADOLPHO TCHIA
TCHIA NOMINEES PTY LTD
SKYKYM PTY LTD
Respondents

CORAM: MARTIN CJ., KEARNEY & THOMAS JJ.

REASONS FOR JUDGMENT

(Delivered 17 March 1995)

MARTIN CJ.

This is an appeal from orders made on 9 October 1992 by Angel J., (1) that the appellant, a solicitor, be adjudged to be guilty of contempt of Court, in that on 2 September 1992 he had breached an order of the Court, made the previous day, when, by his agent, Raymond Riley, he contacted the plaintiffs Adolpho Tchia and Skykym Pty Ltd other than through certain named solicitors; (2) dispensing with compliance with Rules of Court in relation to the procedure leading to the hearing of the application for the order for contempt; (3) that, as a consequence of the contempt, he pay the Sheriff of the Court a fine of $5,000; and (4) as to costs.

BACKGROUND

The evidence before his Honour was that Mr Tchia was a director of the two respondent companies, and in about July 1991 he had instructed the appellant to assist him with certain aspects of development on land in Darwin. He said that Mr Rogerson became interested in the project and sought to take up an interest on terms which, according to Mr Tchia, were unacceptable to him. He did, however, instruct Mr Rogerson's legal firm to prepare contracts relating to the sale and leasing of the units in the proposed development.

Circumstances arose whereby Mr Tchia believed that he should terminate the retainer to those solicitors and he so informed Mr Rogerson's firm on 19 August 1992. Mr Tchia deposed that thereafter the appellant placed pressure on him in a variety of ways with a view to being again instructed to act in relation to the conveyancing transactions and threatened to sue him. On 24 August the appellant lodged a caveat claiming an interest in the property, and other pressure was exerted upon Mr Tchia by the appellant thereafter. Mr Tchia deposed that on 28 August 1992 the appellant contacted him and said that unless he agreed to sell an interest in the property upon the terms the appellant required he would (a) write a letter on 31 August to all the proposed purchasers telling them that there were problems with the property and that they should not proceed with the purchase of any of the units; (b) write to banks with a view to persuading them not to provide finance;

and (c) that if he was not again instructed to act in relation to conveyancing transactions, the Tchia interests would be sued for a substantial sum. Mr Tchia deposed that on the evening of 31 August 1992 the appellant telephoned him continuing to exert pressure on him with a view to having the conveyancing work returned to his firm. It was in those circumstances that Mr Tchia approached his solicitors on the morning of 1 September.

On 1 September 1992 upon an ex parte application made by the plaintiffs, his Honour made certain orders with injunction and those orders, as authenticated, were in the following terms:

> "1. Until 9.00 am on Thursday 3 September 1992, the intended defendant, Andrew Gordon Rogerson, be restrained and an injunction is hereby granted restraining him from:
>
> (a) contacting or seeming[sic] to contact, whether by himself his servants or agents or otherwise howsoever, and whether by personal attendance, telephone, mail, facsimile or any other method, the plaintiffs or any of them other than through Mr W K Parish of Messrs Mildrens or Mr R Henschke of Messrs Halfpennys;
>
> (b) sending or causing to be sent letters or making any other written or oral contact or communication whatsoever with any real estate agent, any proposed financier, purchaser, prospective purchaser or solicitor for such purchaser or prospective purchaser of units in a proposed property development situated at Lot 1743 Finniss Street, Darwin.
>
> 2. The intended Defendant, Andrew Gordon Rogerson, attend before the Court on Thursday 3 September 1992 at 9.00 a.m. to show cause why, pursuant to Section 191(iv) of the Real Property Act, Caveat No 269966 should not be removed.

3. Pursuant to order 45.05(2)(b) of the Supreme Court Rules, the intended plaintiffs be authorised to commence these proceedings by Originating Motion.

4. The intended plaintiffs serve the intended defendant with such Originating Motion, a Summons and any supporting affidavits.

5. The intended plaintiffs serve a copy of this order on the intended defendant, such service to take place as soon as practicable.

6. The application be adjourned for further consideration at 9.00 a.m. on Thursday 3 September 1992.

7. There be liberty to any party to apply.

8. The question of costs be reserved."

The question of whether or not the order, together with the motion, summons and affidavit in support of the application for the injunction were served upon the appellant was in dispute. His Honour found they had been personally served. The order was not endorsed with the penal endorsement, as required by r66.10(3) and an order was made dispensing with compliance. To further compound that procedural irregularity the respondents applied for the order for contempt against the appellant without having filed and served the summons specifying the contempt with which the appellant was charged, in accordance with r75.06, prior to having the matter of the application for contempt listed for hearing. They were armed only with an affidavit of Mr Tchia in which he deposed to events which had taken place that morning, which, on the face of them, were in breach of the orders made the previous day.

The solicitors for the respondents had sent a message to the appellant that he should be in Court at 2pm and he turned

up at that time along with a Mr Riley. As will be later shown, the appellant first sought to have any proceedings against him adjourned, protesting that he had not been served with the order restraining his contact with the respondents and that he had not had an opportunity to obtain legal representation. He was at that time, and had been for some time previously, a solicitor practising in Darwin and had appeared as counsel in the Courts. The disputes in this case between him and the respondents arose partly, at least, from their solicitor and client relationship. Nevertheless, within a short while the appellant was insisting that his Honour hear evidence from Mr Riley which he, the appellant, was certain would clear up any problems and, impliedly, the matter would be over and done with quickly and without any further ado. In fact a hearing was embarked upon which took about three days. On 3 September and thereafter the respondent was represented at all times by counsel. After considering the matter his Honour declared himself satisfied that the appellant was in contempt of the restraining order made on the evening of 1 September and made the orders the subject of this appeal.

This brief outline suffices to provide a background against which the grounds of appeal, signed by the appellant, might be considered.

GROUNDS OF APPEAL

The numerous grounds of appeal set out hereunder have been rearranged from the order in which they appear in the Notice of Appeal, but grouped together under what seems to be a convenient way of approaching the various forms of objection raised. Some may fit under one or more of the headings. My consideration of each of the groups follows it.

(a) *The Restraining Order*

The learned Judge erred in fact in deciding that the order made by him on 1 September 1992 was one and the same as that drawn, settled and sealed and the subject of attempted service on the appellant.

There is a typographical error in the order as authenticated. The word "seeming" in paragraph 1(a) should obviously be "seeking" as to which see the orders sought as outlined in the originating motion and summons. The juxtaposition between the letters "m" and "k" on the keyboard show how easy it might be to make an accidental slip, and r36.07 shows that such a slip may be corrected at any time. There is no merit in this ground of appeal.

(b) *Lack of endorsement under r66.10(3)*

(i) That the learned Judge was wrong in ordering that

in all the circumstances the respondents should be permitted, pursuant to O 66.10(5) of the rules of Court, to dispense with the endorsement on the service copy of the injunction granted in this matter on 1 September 1992.

(ii) By virtue of the failure of the service copy to bear the endorsement pursuant 0 66.10(3) of the rules the order was unenforceable by contempt proceedings.

(iii) The learned Judge erred in law in deciding that in the circumstances no prejudice was caused to the appellant by the failure of the service copy of the order to be endorsed in the manner required by O 66.10(3) and ordering that compliance be dispensed with in the circumstances.

(iv) The learned Judge erred in law in his interpretation of the meaning and effect of the judgment concerning dispensation with strict application of the rules of Court concerning contempt proceedings in: Drummoyne Municipal Council v Lewis (1974) 1 NSWLR 655 and Von Doussa v Owens (No 2) (1982) 30 SASR 391.

(v) *That the learned Judge was wrong in his interpretation of O 66.10(3) and O 6.10 of the Rules of Court as they were capable of being applied to the contempt action.*

Order 66 contains the rules concerning enforcement of judgments and orders, and in r66.10 it is provided that judgment shall not be enforced by committal or sequestration unless a copy of it is served personally on the person bound. Relevantly, a copy of a judgment served under the rule shall be endorsed with a notice, naming the person served, that the person served is liable to imprisonment or to sequestration of property if the person disobeys the judgment (r66.10(3)(b)). The strict application of the rule is ameliorated by the provisions of subrules 66.10(5) and (6) which provide that a judgment requiring a person to abstain from doing an act may be enforced notwithstanding that service has not been effected under the rule if the person against whom the judgment is to be enforced has notice of the judgment by, for example, being notified of the terms of the judgment whether by telephone, telegram or otherwise, and the Court may dispense with service altogether. Clearly if a judgment is served by any means, but is not endorsed with the required notice, it is not served in accordance with the rule. Notwithstanding, it may nevertheless be enforced if the person against whom the judgment is to be enforced has notice of the judgment (not necessarily of the warning of the consequences for disobedience required by r66.10(3)). Furthermore, reference should be made to r2.01 which provides that a failure to comply with the rules, including those in question, is an irregularity;

it does not render a proceedings or a step taken, or a document, judgment or order, in the proceeding a nullity and the Court is empowered to exercise a discretion as to the consequences which might flow from non-compliance. Rule 2.03 provides that the Court shall not set aside a proceeding or a step taken in a proceedings, or a document, judgment or order in a proceeding, on the ground of a failure to which rule 2.01, applies on the application of a party, unless the application is made within a reasonable time, and before the applicant has taken a fresh step, after becoming aware of the irregularity. The Court may dispense with compliance with the requirement of the rules, either before or after the occasion for compliance arises (r2.04).

These rules, taken individually or in combination, invest the Court with a wide discretion to deal with irregularities in procedure, which should be exercised according to the justice of the particular case (*Hubbard Assoc of Scientologists International v Anderson and Just (No 2)* (1972) VR 577 at 580), but where the proceedings involve the liberty of the subject, as here, the power to relieve a party, such as the respondents, from the consequence of non-compliance with the rules should not be exercised without bearing those possible consequences in mind. (See the later reference to cases regarding that discretion). His Honour recognised the discretion available to him, drew attention to the fact that the

appellant was a legal practitioner and officer of the Court and as such he knew or could be taken to have known the potential consequences of not abiding by orders of the Court. Although the order as served was not endorsed in the manner required, his Honour held there could be no possible prejudice to the appellant from that failure and ordered that the compliance with r66.10(3) be dispensed with. He referred to what was said by Mitchell J. in *Von Doussa v Owens (No 2)* (1982) 30 SASR 367 at 397-398. Apart from what might be reasonably inferred as to the appellant's knowledge of the consequences of breach of an injunction, there is a clear indication given by him during the course of his discussions with his Honour, when he first appeared, that, as an officer of the Court, it was his duty to come before the Court and present himself, he being anxious that any suggestion of his being in breach of an ex parte order be refuted or put to rest.

As to this question of failure to have the prescribed endorsement on the order and the discretion to dispense with it see the recent case, *ASC v MacLeod* (1993) 113 ALR 525.

(c) *Lack of service of restraining order and other documents*

(i) The learned Judge erred in law in deciding that the attempts to serve a sealed copy of the order to found an application for contempt came within the operations of O 6.10 of the rules of Court.

(ii) If the attempts came within the operation of the O 6.10 no application was made for an order by this court pursuant to it.

(iii) The learned Judge erred in law in deciding beyond a reasonable doubt that in the circumstances deposed to in the evidence of the witness Price personal service of the said order was effected on the appellant in accordance with O 6.03(1).

(iv) The learned Judge erred in law in his interpretation of the decision in Taylor v Melon 1962 VR 302 and Clifford v Middleton 1974 VR 737 and in particular that they decided that, the appellant, because he was a legal practitioner, justified the court in exercising its discretion adversely for him under O 6.10.

(v) The learned Judge erred in law in his interpretation of the effect in the Northern Territory concerning service or proper notice of process of the decision in Rudd v John Griffiths Cycle Co Ltd (1897) 23 VLR 350, Pino v Prosser 1967 VR 835 at 839, Drifford v Temby (1990) 97 ALR 409, re Ditford ex parte DCT (1988) 83 ALR 265, Irving v Carbines [1982] VR 861, Foley v Herald Sun TV Ltd (1981) VR 315, Times Newspaper v Brisbane TV Ltd (1989) 92 ALR 555.

(vi) *The learned Judge erred in law in finding contempt proved against the appellant without proof, to the requisite standard, of service of the order upon him and without proof of the appellant's intent to interfere with or obstruct the course of justice.*

(vii) *That the learned Judge was wrong in his interpretation of O 66.10(3) and O 6.10 of the rules of Court as they were capable of being applied to the contempt action.*

His Honour carefully reviewed the evidence, both on affidavit and given viva voce before him, as to the service of the order incorporating the injunction, the originating motion, the summons thereon and affidavit in support, upon the appellant on the evening of 1 September. The documents were accompanied by a letter from the solicitors for the respondents drawing specific attention to the nature of those documents. A clerk in the office of those solicitors went to the professional offices of the appellant and spoke to an employee of his at those offices. The clerk informed the employee that she was there to effect personal service of Supreme Court documents on the appellant and the employee was prevailed upon to inform the appellant of the circumstances. The appellant declined to make himself available for service, and after receiving further instructions from her employer, the clerk handed the

documents to the employee and left the office. His Honour found on the evidence, including that of the appellant's employee, that she took the documents into his office and handed them to him, that the appellant physically held them and, in the words of the employee, glanced at the covering letter for "probably about ten seconds". The appellant's evidence was equivocal as to whether he had taken the documents into his hand, but he recalled seeing the letterhead on the letter from the solicitors for the respondents on the top of the bundle and said that it was as a result of his anger at the time that he ordered that the letter and documents be returned to them. His Honour had no doubt that the appellant physically took hold of the documents and read sufficient of the letter to know that it involved him personally, that personal service of Supreme Court documents was sought to be effected upon him by the plaintiff's solicitors and that in particular those documents included an order of the Court involving him. His Honour added that the appellant also knew, no doubt because of his position as a practising solicitor, that the injunction would be enforced in the event that he did not comply with it.

Rule 6.03 makes provision as to personal service and, relevantly, provides for it to be effected by leaving a copy of the document with the person to be served. It does not matter how it comes about that documents to be served are left with the person to be served or who does

it. Clearly it is better, if service becomes an issue, for it to have been effected by a person instructed by those seeking to have the documents served, and upon whom they can rely, to be available and to give truthful evidence as to service. What is important is that the documents to be served are left with the person to be served. It does not matter if they are first handed to some other person at an intermediate stage of the transmission of the documents from the person wishing to serve them to the person upon whom they are to be served.

There is nothing in the Rules of Court which expressly or impliedly require that personal service of a document be effected by the plaintiff or applicant or his agent nor is there any requirement, as once existed in this and other jurisdictions, that service be effected by leaving a copy of the document with the person to be served and showing him the original. All that needs to be proved is that a copy of the document is left with the person to be served. McInerney J had occasion to consider circumstances similar to this in *Pino v Prosser* (1967) VR 835. The former rules of the Supreme Court of Victoria were operating at that time. A process server instructed to serve a writ went to the home of one of the defendants and on being informed by his wife that the defendant was at work left a copy of the writ with the wife. There was no evidence that the process server showed the original writ to her or that she asked to see it, but that is of

no consequence in this case. Later that night when the defendant returned from work his wife handed him the copy writ, a fact deposed to by both the defendant and his wife. His Honour had occasion to review many of the authorities to do with personal service and at p839, applying the general principle enunciated in some of those cases, declared himself satisfied that the writ, although left with the defendant's wife, came into the possession of the defendant on the same day and was satisfied that that was good personal service. With respect, that conclusion seems unassailable. Although in this case the appellant does not acknowledge that the copy of the documents were left with him, his Honour has found that his employee did just that and there is no reason to disturb that finding. During the course of his reasons McInerney J. referred to what was said by the Lord Chancellor in *Hope v Hope* (1854) 4 De G.M. & G. 328 at 342:

> "The object of all service is of course only to give notice to the party to whom it is made so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done so that the court may feel perfectly confident that service has reached him, everything has been done that is required".

What was urged upon this Court was that his Honour had resiled from the views expressed in *Pino v Prosser* in *Irving v Carbines* (1982) VR 861 at 869. What his Honour was there discussing was a different point altogether. *Irving's case* had nothing to do with the personal service. There

is support for what his Honour held in *Pino v Prosser* in the decision of Beaumont J. in *Ditfort v Temby* (1990) 97 ALR 409 at 414-415. It should be noted that the evidence of Ms Naismith, given viva voce, as to her leaving the documents with the appellant was not the subject of cross-examination.

Cases relating to personal service, or notice, of the granting of injunction where there is no evidence that documents came into the hands of the person served or where they were contained in envelopes and the contents of the envelope not clearly pointed out, are clearly distinguishable from the facts deposed to and found by his Honour in this case.

As to the requirement that the person served be told the nature of the document, it is unclear whether it applies where documents have been left with that person or only in the event that he or she does not accept them and the documents are put down in his or her presence. On the assumption that that additional requirement applies in a case where personal service is effected, his Honour correctly held that "telling" is not confined to the spoken word and that the respondents' solicitors letters to the appellant informing him of the nature of the documents served therewith was sufficient compliance with the rule.

It is not suggested in any of the cases, digests or texts

that have been referred to the Court in this matter, or followed up in further research, that it is necessary for good personal service to be effected upon a person that he know other than the nature of the document served upon him or her. It is not necessary that the contents of the document be made known. It follows that once a person has been properly served he or she is taken to know the contents of the document and will not be permitted to assert to the contrary. If the law were otherwise a person properly served could simply avoid the consequences of such service, and any further proceedings taken upon the document served, by asserting that it had not been read.

His Honour's observation that although it was not proven that the appellant knew of the terms of the injunction he knew that an injunction had been granted against him personally and he acted recklessly, as to whether or not it constituted disobedience to the injunction, is largely immaterial. It is not necessary to prove that the appellant knew of the terms of the injunction, it is sufficient to have proved that he was personally served with an order incorporating the terms of the injunction. The reference to recklessness simply imputes that the appellant was utterly careless of the consequences of his action and not that he did what he did without knowledge that an injunction had been made against him. The phrase was simply descriptive and was not in any way essential to the findings which were made.

Much reliance was placed upon a decision of *Doyle v The Commonwealth* (1985) 156 CLR 510. Although this case is a useful confirmation of the principles of law that ought to be applied when considering an application that a person be punished for contempt, its own facts are distinguishable from those in this case. The order of the Court, that the trespassers occupying the Commonwealth building be restrained from continued occupation, was informally served, but that was not the issue. Later an application was made ex parte for an order for committal or for leave to issue a writ of attachment and no attempt was made to name or identify any of the occupiers of the land. Pursuant to the order granted, ten of the occupiers were arrested and taken to prison. They were the circumstances in which the Court made its comments that:

> "Speaking generally, the notice of motion for committal must be served personally on the person sought to be committed, the charge must be distinctly stated in the notice of motion or other application and the person sought to be committed must be given a proper opportunity to answer the charge" at p516.

His Honour's findings as to personal service upon the appellant were made not only upon the basis of the evidence given on behalf of the respondents in that regard, but also upon his rejection of the evidence of the appellant. His rejection of the evidence of the appellant was partly, at least, upon the basis of his view of the appellant's

credibility. Some of the appellant's evidence in respect of this matter he found to be "fanciful".

As to the grounds of appeal alleging error on his Honour's part in making an order pursuant to r6.10 that the documents be taken to have been served at the time the appellant was handed the documents by his employee, may simply be dismissed upon the basis that no such order was made. All his Honour did was to indicate that if it came to the point he would have no difficulty in making such an order in the circumstances.

(d) *Absence of summons specifying the contempt*

The learned Judge erred in law in permitting the contempt action to proceed before the respondents had furnished an application for contempt pursuant to the rules of Court.

In *Doyle v The Commonwealth* (1985) 156 CLR 510 the Court, at p516, affirmed some aspects of the general principles relating to proceedings which may lead to committal as formulated by Williams ACJ, Kitto and Taylor JJ. in *Coward v Stapleton* (1953) 90 CLR 573 at pages 579 - 580 as follows:

> "It is a well recognised principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him; in *re Pollard* (1868) L.R. 2 P.C. 106 at 120; *R v Foster ex parte Isaacs* (1941) VLR 77 at 81. The gist of the accusation must be made clear to the person charged, though it is not always necessary

> to formulated the charge in the series of specific allegations; *Chang Hang Kiu v Piggott* (1909) A.C. 312 at 315. The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.
>
> Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon."

The complaint in this case is that there was no application made by summons in relation to the contempt alleged, r75.06(3). It is required by subrule (4) that the summons specify the contempt with which the respondent is charged and is to be served personally on the respondent to the summons together with a copy of every affidavit in support, unless the Court otherwise orders.

There are no special dispensing powers in relation to these rules, but those set out in O.2, to which reference has already been made, apply. Although r2.03 is of general application to the grounds of appeal, based upon alleged errors in the exercise of his Honour's discretion in procedural matters, it has special relevance to this aspect of the case. It is necessary to go into some detail as to what transpired. Following upon certain events in the early morning of 2 September, Mr Tchia obviously contacted his solicitor who prepared and had him swear an affidavit as to those happenings, which could be seen as being in

contempt of the injunction order made by his Honour the previous afternoon, and which the solicitor had reason to think had been properly served upon the appellant. The affidavit was filed in court and the solicitor was able to prevail upon the Registry staff to arrange for the matter to be brought before his Honour at two o'clock on that day. No summons was filed. Because, as will be shown, the absence of that summons was not a real issue before his Honour, and his Honour's order for leave to file such a summons out of time was consented to, his Honour did not deal with the notice which the appellant had of the allegations made against him in his reasons. A perusal of the evidence, however, shows that when Mr Walker, an articled clerk in the employ of the solicitors for the respondent, went to the office of the appellant at 1.30pm on 2 September and attempted to deliver personally to the appellant a number of documents, (including those which had been served the night before and returned to the office of the respondent's solicitors that morning), the office was locked. He knocked on the door, but there was no response, so he slid the documents underneath it. Amongst those documents was a copy of the affidavit of Mr Tchia, sworn 2 September, which went into considerable detail as to the events of that morning involving the discussion he had with Mr Riley and the documents which he was handed or saw at that time and which had emanated from the appellant. A facsimile message was sent to the appellant's office informing him that the matter would

be before the Court at 2pm. The appellant appeared in person at that time and immediately sought to address his Honour on what he called "some preliminary matters". He claimed not to have been served with the documents which his Honour later found had been served on him the night before. He said he had heard some hearsay evidence about the injunction having been made. He acknowledged that he had seen a facsimile telling him he was required to be at Court at 2pm "to be apparently dealt with for breach of injunction". There was some discussion between his Honour and the appellant about the events of the evening before in relation to service, and the appellant requested an adjournment until the following day so that he could seek independent legal representation. Immediately thereafter he said that he understood some form of sanction was sought against him for an apparent breach of an order not to approach Mr Tchia and that he could adduce oral evidence from Mr Riley who was then in Court. It was then that the appellant said that as an officer of the Court it was his duty to come and at least present himself to the Court, and he indicated his anxiety that any suggestion of his being in breach of an ex parte order be dealt with. He gave three undertakings to the Court; that he would be available at three o'clock that day to accept service of any documents, that he would not approach Mr Tchia or contact him, and that he would not contact any of Mr Tchia's clients or any person connected with the subject land as a proposed purchaser. In the course of giving those

undertakings he said he understood that the matter was due back before the Court the following day "in regard to the lifting of the caveat" which he had placed on the property. It was part of the order made by his Honour on 1 September that the appellant attend before the Court on Thursday 3 September at 9am to show cause why the caveat should not be removed and there is no explanation as to how the appellant was aware of that fact other than by having read the order, which at that stage of the proceedings he had denied having seen. Discussion took place between his Honour, the appellant and counsel for the respondents regarding the fact that his office was closed during lunch time and documents had been slid under his door. The appellant again requested an adjournment saying he had not had time to consider any of the matters and that if he was represented he was sure the matter could proceed much more smoothly. At no stage did his Honour decline any request for an adjournment and there is no ground of appeal relating to any error in that regard. There was a free flowing discussion between his Honour, the appellant and counsel for the respondents concerning various features of the proceedings thus far and the appellant then requested an adjournment for five minutes so that he could discuss the matter with counsel for the respondents as to "how the matter is to proceed this afternoon". At the same time he made it clear that his primary submission was that further hearing should be adjourned until he had representation.

His Honour acceded to the request for the short adjournment and after some further exchange suggested to the appellant that he ascertain from his office just what documents were there. He warned the appellant that he would require further explanation as to the circumstances of his having returned documents to the solicitors for the respondents and pointed to the seriousness of the allegations made against him. Immediately before adjourning his Honour said: "You will be given an opportunity to be heard and put your side fully. You will also have an opportunity if you want it for legal representation. You won't be steamrolled in my Court, but on the other hand there are very serious allegations in this matter and they require a clear answer and explanation". His Honour then adjourned. Upon his return the appellant informed him that discussions had failed to resolve the matter. He protested that he still had not seen the order that had been made against him the day before (in respect of which his Honour later held he had been properly served). He then sought to immediately call Mr Riley, asserting that once Mr Riley had been heard his Honour would no longer be concerned: "With your Honour's leave I call Raymond Thomas Riley". A further short exchange took place between his Honour and the appellant regarding the question of service, during which his Honour said that he did not want to hear evidence from the bar table from the appellant: "You plainly need legal representation". The appellant

persisted in his resolve to call Mr Riley to give evidence immediately and his Honour expressed some doubt that that was an appropriate course, but the appellant continued to urge that Mr Riley's evidence be heard. He quite expressly desired that his Honour deal with the alleged breach of the restraining order immediately. His Honour indicated that while no doubt Mr Riley's version of events would be relevant, it seemed to him that he should give the appellant the opportunity to be represented and to at least file answering affidavits. The appellant rejected that opportunity insisting that it was most important to him that the cause of his concern be resolved immediately. His Honour said that he wanted to protect everybody involved, the appellant, the then plaintiffs and Mr Riley, saying he thought Mr Riley might be well advised to get separate and independent legal advise. He addressed Mr Riley suggesting he might like to adopt that course, to which Mr Riley responded, having been warned at some length by his Honour as to the possible risks that he ran, that he was prepared to tell the Court what had happened and he thanked his Honour for trying to help. The appellant then said that Mr Riley's evidence would be short, it would indicate the opposite to what was alleged, "If your Honour pleases, I do call Raymond Thomas Riley".

Notwithstanding the rather unusual way in which the appellant wished to conduct his case, counsel for the

respondents did not object, saying that the appellant could take his own course. The appellant then called Mr Riley, who gave his evidence, and denied that he had been asked by the appellant to contact Mr Tchia. The general tenor of the evidence was that he, Riley, had an interest in seeing the difficulties which had arisen between Mr Tchia and the appellant resolved and that he was intervening on his own account. The appellant, who led Mr Riley's examination-in-chief, went straight to the issues which were the matter of complaint by Mr Tchia and deposed to in his affidavit giving rise to the contempt proceedings. His Honour had never refused an application for adjournment, but rather had given every indication that he accepted that the appellant should seek legal representation. The appellant, for reasons best known to himself, did not take up the opportunities available to him and insisted on his Honour hearing from Mr Riley straight away.

It might be thought that what the appellant had in mind was that upon his Honour hearing from Mr Riley he would accept what he had to say and that the question of contempt would then become a non-issue. In accordance with his earlier undertakings, the appellant would then be available to be served with the documents, including the order, and the case would then go along in a proper and ordered manner, the alleged contempt having been disposed of. At the close of Mr Riley's evidence the appellant

said that that was all he would seek to put before the Court that afternoon, that he clearly could not represent himself in regard to other matters, but that he was anxious to have the alleged breach of the ex parte order resolved there and then. He then asked that the matter be stood over to enable him to notify his insurer and seek representation. Discussion took place as to the future conduct of the proceedings. Towards the end of the discussion on that day his Honour noted that the appellant had a number of documents with him at the bar table. The appellant said they were the originating motion, the affidavits going to service of documents, the order of 1 September and the affidavits of Mr Tchia of 1 September, upon which the ex parte order was made, and of 2 September going to the alleged breach.

Given the events of that afternoon, there can be no doubt that the appellant knew the contents of that latter affidavit before calling Mr Riley to the witness box.

The next morning the appellant was represented by counsel and an undertaking was offered to replace the terms of the injunction restraining any contact between the appellant and the respondents. He consented to the caveat being removed. He said that he understood from his instructions that the question of contempt was not a live issue, but that if it was he may need to get further instructions, "and have the issue shaped in the form of

allegations". After further submissions his Honour made orders as to the continuation of the restraint upon the appellant, the removal of the caveat, as to costs and indicated that there was then remaining the question of whether the interim injunction previously ordered was breached. As to that counsel for the appellant said that he would be seeking to have struck out some of the affidavit material that had been filed and that he would argue as a matter of law that unless there was proof that a sealed copy of the order was served upon his client, there could not be any contempt by way of breach of the order. Nothing was said at that stage as to the lack of the prescribed endorsement upon the order. His Honour heard submissions as to the striking out of certain portions of the affidavits which went to the question of service on 1 September and made rulings which are not the subject of appeal.

Turning to the affidavit of Mr Tchia of 2 September, counsel for the appellant said that he would like to give further consideration to that material, the impression he gave being that he had not had the opportunity to consider it fully, and he enquired through the Court, of counsel for the respondent as to whether he could give an assurance that all the matters that he alleged constituted the contempt were embodied in the affidavit, "then I at least know where I stand". Counsel for the respondents did not directly give such an assurance, but said he planned to adduce some additional evidence from

Mr Tchia, if he were cross-examined, arising out of the evidence of Mr Riley of the previous day. He certainly did not contend that there were any other facts alleged going to the contempt issue. Discussion proceeded with further contributions by counsel from both sides and his Honour as to the procedure that might be followed. An application was made by counsel for the appellant that publication of the appellant's name be suppressed. It was only after all those steps had been taken by the appellant in person and his counsel that counsel drew his Honour's attention to O.75 and the absence of the summons. Counsel for the respondents unsuccessfully argued that such a summons was not necessary. His Honour held that there should be a summons, but "because of the nature of this matter and the expedition with which it should be dealt with, I am willing to give you leave to file a summons which will be an interlocutory summons, within these proceedings, specifying the contempt, and I will treat the affidavit material and the evidence before me now as in furtherance and support of that summons. Would you oppose my doing that Mr McCormack?" Mr McCormack, counsel for the appellant, replied: "No, Your Honour, I don't".

In those circumstances, it is not surprising that the late filing of the summons was not objected to, and did not become an issue at any subsequent time in the proceedings. The appellant was clearly aware from the affidavit of Mr Tchia of 2 September as to the nature of the allegation

of contempt which was made against him and in fact went into evidence on his own insistence to respond to what he understood the charge to be. The amended summons, when filed, gave rise to no allegations beyond that which were disclosed in that affidavit and neither its form nor substance was the subject of any adverse comments by the appellant's counsel. The remainder of the day was taken up with the usual run of proceedings and evidence. At the commencement of the proceedings the following day Mr Tchia was sworn, and was cross-examined extensively by counsel for the appellant, after which counsel for the respondents was given leave to file in Court the summons and amended summons relating to the contempt and copies were handed to counsel for the appellant. His Honour ordered that the amended summons be nunc pro tunc to 2 September and after counsel for the appellant acknowledged being handed copies of both summonses his Honour said: "Well, that regularises that" and there was no dissent. The appellant was then called to give his evidence which continued until late on the afternoon of 4 September when further hearing of the proceedings was adjourned until 9 September. At the commencement of the proceedings on that day, counsel for the appellant sought and was given leave to file in Court an affidavit and the cross-examination of the appellant continued, after which the appellant's counsel closed "the case for the defence". Counsel for the appellant addressed first and went immediately to the summons reiterating that it had been

issued on 4 September and subsequently amended "and your Honour made appropriate orders to amend the original summons in terms of the amended summons and made a nunc pro tunc order, so that the document which was a foundation of this application was that summons". He then went on to refer to the allegations contained in the summons and to address in respect of them. The matter was adjourned for consideration.

It is not a ground of appeal that the summons was not served upon the appellant personally. There was no application at any stage to reopen the appellant's case before his Honour either after he had the affidavit of Mr Tchia of 2 September in his possession in open Court, or after the summons was issued and filed and copies delivered to his counsel in open court. The particulars going to the alleged contempt contained in the summons did not depart from the evidence contained in Mr Tchia's affidavit and which outlined those particulars. No application was made to recall Mr Riley, and Mr Rogerson was not called to give his evidence until after the summons had been filed and copies delivered to counsel for the appellant. Admittedly his Honour called upon the appellant to commence giving his evidence immediately after the summons was filed and copies so delivered, but the luncheon adjournment followed not long after that. Although cross-examination had been commenced on that day, 4 September, the case was adjourned thereafter until 9 September and it was never suggested

to his Honour that the appellant was in any way prejudiced by the summons not having been filed and personally served, nor by there being insufficient time to enable the appellant to prepare his case.

In the light of the findings made by his Honour as to service of the order and other documents, and bearing in mind that when the appellant came to Court at 2 o'clock on 1 September he had with him the very man who could give evidence on the matters alleged to constitute the contempt and called him to give evidence on that subject, the suggestion in submissions to this Court that the appellant only thought that he was coming to Court to deal with some minor matter is not sustainable.

On 22 September the appellant filed an unconditional notice of appearance. It is provided in r8.07 that a defendant may file an appearance at any time. "As a general rule an unconditional appearance amounts to a submission to the jurisdiction of the Court and to a waiver of irregularity" per Gibbs J. in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 539. (See also the other cases cited in Williams Civil Procedure Victoria as to an unconditional appearance amounting to a submission to jurisdiction and a waiver of irregularity at p2588).

His Honour's directions as to the exercise of discretion in relation to irregularity

During the course of his reasons his Honour expressed himself to be not unmindful that contempt proceedings are of a criminal character involving as they did the prospect of committal to prison or a fine or both in the case of a natural person. He referred to *Hinch v The Attorney-General (Victoria) (No 2)* (1987) 164 CLR 15 at 50 and *Day v Niddrie & Ors* (1991) 74 NTR 1, and said that the liberty of the subject being at stake the utmost strictness in both procedure and proof was required, referring to *Clifford v Middleton* (1974) VR 737, *The Commissioner of Water Resources v Federated Engine Drivers and the Firemens Association of Australasia Queensland Branch* (1988) 2 QR 385 and *Drummoyne Municipal Council v Lewis* (1974) 1 NSWLR 655. As is always the case, in the exercise of a discretion, the Court must pay due regard to the relevant circumstances of the case and exercise the power judicially, and, in a case involving the consequences which might flow from a finding of contempt of Court, bearing in mind those possible consequences so as to avoid any real prospect of injustice being caused to the person alleged to have committed the contempt. For a recent decision concerning dispensation with the specific rules of procedure in regard to an application that a person be committed for contempt see *Australian Securities Commission v MacLeod & Ors* (1993) 113 ALR 525 at 528 - 531.

In so far as the appellant seeks to have set aside

the exercise of a discretion exercised by his Honour, then the principles to be applied by this Court are clear and of long standing.

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or effect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary Judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."
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> *House v The King* (1936) 55 CLR 499 at 504 - 505.

No error has been demonstrated in the exercise of any such discretion and it is not shown that the result is unreasonable or plainly unjust.

(e) *Standard of proof*

(i) That the evidence was of such a nature that it was not open to the learned Judge to be satisfied to the requisite degree that the appellant was served with the said order of 1 September 1992.

(ii) The evidence was of such a nature that it was not open to the learned Judge to be satisfied to the requisite degree that the appellant was guilty of contempt.

It is not clear whether these grounds of appeal are directed to the failure on the part of his Honour to apply the appropriate test as to the standard of proof required, or whether it is simply suggested that on the evidence his Honour could not have been satisfied of the required standard. If it be the first, then his Honour made it absolutely clear in his judgment that on an application for contempt the plaintiff bears the criminal onus of proof, that is, proof beyond reasonable doubt and cited *Consolidated Press Ltd v McRae* (1955) 93 CLR 325 at 333; *The Commissioner for Water Resources v Federated Engine Drivers and Firemens Association of Australasia Queensland Branch (supra)* at 392 and 393; *Hinch v Attorney-General Victoria (No 2) (supra)* at 50; *Sun Newspapers Pty Ltd v Brisbane TV (supra)* at 541. Indeed, his Honour's finding that the appellant had deliberately attempted to mislead the Court and given false evidence was expressly said to have been reached beyond reasonable doubt, after a careful consideration of the evidence and steadily bearing in mind that the conclusion was not to be reached lightly, citing *O'Reilly v Law Society of New South Wales* (1991) 24 NSWLR 204 at 230. He expressly found beyond reasonable doubt that the appellant instigated the meeting between Riley

and Tchia and knew when the meeting was taking place. As to the finding of fact, see below.

(f) *Findings of fact*

(i) That the learned Judge was wrong in ordering that the appellant be adjudged to be guilty of contempt of court in that at or about 10.30am on 2 September 1992, in breach of an order of the Supreme Court of the Northern Territory of Australia made on 1 September 1992 not to do so, the defendant, by his agent Raymond Thomas Riley, contacted the plaintiffs Adolpho Tchia and Skykym Pty Ltd other than through Mr W K Parish of Messrs Mildrens or Mr R Henschke of Messrs Halfpennys.

(ii) The learned Judge erred in fact in deciding that where there was conflict in that evidence of the witness Naismith with that of the appellant that of Naismith was to be accepted as true beyond a reasonable doubt.

(iii) The learned Judge erred in fact in deciding on the evidence and beyond a reasonable doubt that the evidence of the appellant was consciously evasive and misleading and that the appellant deliberately attempted to mislead the court and gave false evidence.

(iv) The learned Judge erred in fact in deciding on the evidence and beyond a reasonable doubt that on or about 4.50pm on 1 September 1992 the appellant read sufficient of the respondents' solicitor's letter to know that it had attached to it a court order involving him personally and which could be enforced in the event of non compliance.

(v) The learned Judge erred in fact in deciding that when the evidence of the witness Riley conflicted with that of the plaintiff Tchia that of the witness Tchia was to be preferred beyond any reasonable doubt.

(vi) The learned Judge erred in fact in giving no weight to the evidence of the witness Tchia that on 2 September 1992 he was unaware of the terms of the said order insofar as it prohibited the appellant from contacting him.

(vii) *The learned Judge in all the circumstances erred in fact in deciding beyond a reasonable doubt that Riley's contact with Tchia constituted a breach by the appellant of the said order.*

The latest binding decision in respect of the duties on an appellate court entrusted with jurisdiction to entertain an appeal by way of rehearing from the decision

of a trial judge on questions of fact is *Devries v Australian National Railways Commission* (1993) 177 CLR 472. Deane and Dawson JJ. said at p479 that the appellate court must set aside a challenged finding of fact made by a trial Judge which is shown to be wrong:

> "When such a finding is wholly or partly based on the trial judge's assessment of the trustworthiness of witnesses who have given oral testimony, allowance must be made for the advantage which the trial judge has enjoyed in seeing and hearing the witnesses give their evidence. The "value and importance" of that advantage "will vary according to the class of case and ..... (the circumstances of) the individual case". (*Watt or Thomas v Thomas* (1947) AC 484 per Lord Thankerton at p488). "If the challenged finding is affected by identified error of principle or demonstrated mistake or misapprehension about relevant facts, the advantage may, depending on the circumstances, be of little significance or even irrelevant. If the finding is unaffected by such error or mistake, it will be necessary for the appellate court to assess the extent to which it was based on the trial Judge's conclusions about the credibility of witnesses and the extent to which those conclusions were themselves based on observation of the witnesses as they gave their evidence as distinct from a consideration of the content of their evidence".

At p9 Brennan, Gaudron and McHugh JJ. observed that more than once in recent years:

> "this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact"

(*Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842; *Jones v Hyde* (1989) 63 ALJR 349; *Abalos*

v Australian Postal Commission (1990) 171 CLR 167). If the trial Judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial Judge "has failed to use or has palpably misused his (or her) advantage", *SS Hontestroom v SS Sagaporack* (1927) AC 37 at p47, or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable", *Brunskill* at p844. His Honour cast no doubt upon the evidence of any of the witnesses called in the applicant's case and indeed some of the evidence was by way of affidavit which was not contested. As to the evidence of the appellant, he said: "I do not accept the defendant's evidence of what occurred in his office or as to his state of mind at the time", referring to the question of service of the documents; he rejected the evidence of Mr Riley that Mr Tchia had sought to initiate the meeting which gave rise to the charge of contempt, finding it implausible in all the circumstances; he said he was unable to accept the evidence of the appellant that he had no knowledge of the injunction until some time later on 2 September expressing his reasons for that finding by reference to the circumstances as demonstrated by the other evidence; he found that the appellant was deliberately evasive about the issue concerning the locking of the doors to his office during the course of the morning of 2 September, giving as his reasons his answers to question posed by his Honour and

in cross-examination. He made an express finding that the defendant had deliberately attempted to mislead the Court and given false evidence on some issues. Those findings were made upon the basis of what was said by the appellant to his Honour in the course of discussion between bench and bar and upon the sworn evidence of the appellant, after taking into account other evidence before him. Those were findings going to the credibility of the appellant, but they are not expressed to be based upon observations of the appellant, but rather on the content of his evidence. In each case his Honour referred to other evidence, which he accepted, which led him to disbelieve what had been said by the appellant, and that view of the appellant's credibility, together with the other evidence, led his Honour to the critical finding that he had disobeyed the restraining order by using Mr Riley as his agent to contact Mr Tchia other than in the manner permitted by the order.

These grounds of appeal turn on questions of fact. Bearing in mind the authority of *Coghlan v Cumberland* (1898) 1 Ch 704 at 704-705, approved by Deane and Dawson JJ. in *Devries* at p2, I have reconsidered the material before his Honour and made up my own mind, not disregarding the judgment appealed from, but carefully weighing and considering it and not shrinking from over ruling it if on full consideration I should come to the conclusion that the judgment was wrong. I am far from that conclusion

on any finding of fact. There was evidence to support every such finding and it was not argued that that was not the case.

(g) *Penalty*

(i) That the learned Judge was wrong in ordering that in relation to that contempt the appellant do pay to the Sheriff of the Supreme Court, within 28 days, a fine in the sum of $5000.00.

(ii) If the appellant was guilty of contempt the imposition of a monetary penalty was not justified in all the circumstances.

(iii) The learned Judge denied the appellant the opportunity of making submissions on penalty after his decision that the appellant was in contempt of court.

At the conclusion of his address to his Honour, counsel for the respondents said that the issue of penalty was a matter for his Honour and passed on to make submissions as to costs, seeking them on an indemnity basis. In reply, counsel for the appellant asked that the question of costs be stood over pending the decision on the application. After drawing his Honour's attention to some typographical errors in his case list, he was asked by his Honour if

he had any further submissions in reply, and he replied in the negative. Unlike his reply on the question of costs he did not ask that the question of penalty be adjourned nor otherwise refer to it. It may well be that his Honour did not afford the appellant the opportunity of making submissions in relation to penalty after his decision that he was in contempt of Court, but that opportunity was available to counsel for the appellant prior to the decision being made and not availed. However, the fleeting reference by counsel for the respondents to the question of penalty at the close of his address may not have been heard by or impressed itself upon counsel for the appellant. It would have been preferable for his Honour, having determined the question of guilt, not to have proceeded to impose any penalty without having heard from the appellant, and in that regard the appeal should be allowed and the question remitted to his Honour for proper determination.

(h) *Costs*

That the learned Judge was wrong in ordering that the appellant do pay the respondents' costs of and incidental to the contempt proceedings, such costs to be taxed upon a solicitor and own client basis.

No argument was directed to this Court on the

question of the orders for costs made by his Honour.

CONCLUSION

I would dismiss all grounds of appeal except that related to penalty and remit that issue to his Honour to be dealt with according to law.

KEARNEY J

I have had the benefit of reading the opinion of Martin CJ and Thomas J. They have set out the events and matters giving rise to this appeal; I need not repeat them. I respectfully agree with the reasons and conclusions of the Chief Justice on the issues raised in the appeal, and with the order he proposes. I add some observations on the following aspects: first, on the major ground of appeal stemming from the failure to institute contempt proceedings on 2 September by summons under r75.06(2); second, on the standard of proof applicable; and third, on the question of a fine as penalty.

(1) The failure to observe r75.06(2)

Contempt proceedings are the ultimate enforcement mechanism for intentional disobedience to a Court order. They are designed to serve a triple purpose; to ensure compliance with the order, punish those who disobey it, and protect the effective administration of justice generally by making it clear that Court orders cannot be ignored with impunity. They are quasi-criminal in nature. Accordingly, an alleged contemnor is entitled to many of the basic safeguards associated with a criminal trial. It follows that procedural rules applicable to contempt proceedings must be quite strictly adhered to since, though they take the form of civil process, a finding adverse to the alleged contemnor may result in a penal sanction.

The relevant procedural rules are contained in O.75 of the Supreme Court Rules, set out by Thomas J. Its purpose is to ensure that an alleged contemnor is made aware of the

precise conduct on his part alleged to constitute disobedience to the order of the Court. This reflects a fundamental principle of the common law. In general, O.75 concretizes one of the rules of natural justice applicable in the case of an alleged contemnor; the others are his right to have the case against him for disobedience fully proved, and to have an adequate opportunity to answer the charge. Together, the observance of these three rights constitute his basic protection; see *Doyle v The Commonwealth of Australia* (1985) 60 ALR 567 at p571.

The contempt proceedings should have been instituted on 2 September by the issue by the respondents of a summons under r75.06(2). I agree with Thomas J that the failure by the respondents to do so was a serious flaw; failure to comply with procedural requirements is a matter of substance, in contempt proceedings. The appellant appeared in Court at 2.06pm on 2 September, because he had received a fax message from the respondents' solicitors sent at 1.15pm stating: "Urgent. You are required in court before Angel J at 2pm, letter follows." This was wrong; no compulsory process requiring his presence had issued from the Court. Obviously, the respondents' solicitor was not then aware of the requirements of O.75; he had simply requested that the Court sit, pursuant to leave to apply reserved the previous day. Angel J was not made aware of the purpose for which the Court had been asked to sit. The Chief Justice and Thomas J have described the disjointed course of events which then ensued on 2 September; it is sufficient to say that, taken alone, the

proceedings on that day involved fundamental breaches of the rules of natural justice to which I have referred. However, when Angel J was eventually made aware of what was alleged against the appellant, he sought to protect his interests. His Honour stressed the need for the appellant to have the legal representation which he had earlier sought; ironically, the appellant then insisted on calling Mr Riley on 2 September in order as he put it (transcript p37) "to have the question of alleged breach of the ex parte order resolved this afternoon."

When O.75 was eventually raised on 3 September by Mr McCormack who then appeared for the appellant, his Honour considered (rightly, with respect) that its requirements had to be met. He proposed a course of action designed to do so, in the circumstances of the case; importantly, in a passage set out by Thomas J, counsel for the appellant said at the time that he did not oppose that course. The reason I think is clear: to the extent that his Honour's proposal did not accord with the procedure in r75.06, the special circumstances of the case - the allegations against the appellant had already been made clear, in sufficiently explicit terms - justified the degree of non-compliance involved; see *Drummoyne Municipal Council v Lewis* (supra) at p658.

The summons was eventually served by the respondents on 4 September, immediately after they had called all their evidence relating to the alleged contempt. His Honour directed that the summons be treated as having been filed on 2 September,

when it should have been filed. This 'nunc pro tunc' order could not properly be made, in my opinion, or treated as having any effect, in view of the quasi-criminal nature of contempt proceedings and the concomitant importance of quite strict compliance with r75.06(2). However, the summons was a formal implementation of the course of action proposed the previous day and not opposed.

His Honour had obviously been concerned throughout to see that the appellant was treated justly, in the particular circumstances of the case. He was hindered in that task on 2 September by the plaintiff's solicitor's misapprehension as to how contempt proceedings are to be instituted, and by the defendant's insistence on calling Mr Riley that day. Justice required that the appellant be made aware of the specific conduct on his part alleged to constitute contempt; that is, he had to be supplied with sufficient particulars of what was alleged against him to enable him adequately to defend himself. No objection was taken on 4 September to the content of the summons. In my opinion the reason for this is clear: from 2 September the appellant had been very well aware from the affidavit of Mr Tchia of 2 September and the injunction of 1 September, of the precise allegation against him, as the Chief Justice has pointed out. The gist of the allegations had already been made clear to him, in sufficiently explicit terms, as I earlier observed. Accordingly, I cannot accept that, as Mr McCormack put it, the appellant was "fighting phantoms" until he saw the precise charge in the summons. Far from it; he well knew exactly

what he was facing, as evidenced by his calling Mr Riley.

The appellant was also entitled to be afforded reasonable time to answer the charge in the summons. The applicant's counsel did not press for an adjournment to prepare the defence, when his Honour expressed his wish to "get on with it" when the summons was served; cf. the factual situation in *Williams v Fawcett* [1985] 1 All E R 787 at p791. The reason, I consider, is that set out above - the appellant was in fact well aware of the precise charge against him and was as ready as he would ever be to answer it.

I consider it is clear in all the circumstances of the case that the appellant knowingly waived the irregularity of the late service of the summons required by r75.06(2). Further, his doing so did not result in his not being afforded natural justice: he was well aware of the specific allegations against him before he was required to answer them, and he had a proper opportunity to make his answer.

(2) <u>The standard of proof applicable</u>

Cases such as this, contempts in procedure, were classified as 'civil contempts' until the High Court in *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 abolished the distinction between 'civil' and 'criminal' contempts in such cases; see at pp107-9. See generally *Australian Consolidated Press Ltd. v Morgan* (1965) 112 CLR 483; and *Comet Products UK Ltd v Hawkex*

Plastics Ltd [1971] 1 All ER 1141 at p1143 per Lord Denning MR. Disobedience to a Court order is not as such a crime. His Honour applied to the case against the appellant the criminal standard of proof beyond reasonable doubt, and was satisfied to that standard; the evidence was such as to enable him to be so satisfied, in my opinion. The appellant cannot and does not complain that the case was required to be proved against him to such a high standard. It was conceded before us that the reasonable doubt standard was the correct standard or proof.

The authorities differ as to whether such a high standard of proof is in fact required in Australia in cases of this type, although the more recent authorities favour it. Apart from those cited by his Honour see, for example, *Sahari and Sahari* (1976) FLC 90-086 at p75,406; *Sunibrite Products (Aust) Pty Ltd v Jabuna Pty Ltd* (1980) 47 FLR 73 at p771; *Jendell Australia Pty Ltd v Kesby* [1983] 1 NSWLR 127 at p136-7 where McLelland J considered that in the case of a "wholly civil contempt the civil standard of proof applies but that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved"; *Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd* (1985) 59 ALR 247 at p262, where Wilcox J considered that it fell "little short of proof beyond reasonable doubt"; *Ellendale Pty. Ltd. v Graham Matthews Pty Ltd* (1986) 65 ALR 275 at p281, per Forster J to the same effect; *Windsurfing International Inc v Sailboards Australia Pty Ltd* (1986) 69 ALR 534 at pp540-1,

per Burchett J to the same effect; *New South Wales Egg Corporation v Peek* (1987) 10 NSWLR 72 at pp81-3, where the Court of Appeal considered that the necessary facts should "be proved to our reasonable satisfaction consistently with their nature and consequence"; *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union of Australia (No.2)* (1987) 72 ALR 415 at pp435-6, where Wilcox J said that when disobedience of a Court order involved both a civil and criminal contempt the criminal standard of proof was applicable; *Madeira v Roggette Pty Ltd* [1990] 2 Qd.R 357, where de Jersey J held that the requisite standard of proof of knowledge of the Court order was the reasonable doubt standard; *R v Eades (No.1)* (1991) 6 WAR 402, where Ipp J held that the reasonable doubt standard applied; and *CCOM Pty Ltd v Jiejing Pty Ltd* (1992) 36 FCR 524 at p532, where Drummond J held that where the contempt was constituted by breach of an undertaking proof beyond reasonable doubt was required.

(3) Imposing a fine as penalty

Until quite recently, a fine was not considered to be an appropriate sanction for a civil contempt, see E. Harnon: 'Civil and criminal contempts of Court' (1962) 25 M.L.R. 179 and the jurisdictional doubts expressed in *Australian Consolidated Press Ltd. v Morgan* (supra). A fine was imposed in *Superstar Australia Pty Ltd v Coonan & Denlay Pty Ltd (No.2)* (1982) 65 FLR 432. It is now clear from *Australasian Meat Industry Employees' Assn. v Mudginberri Station Pty Ltd* (supra) that a fine may be imposed. This power appears in r75.11(1).

THOMAS J.

This is an appeal from the orders of Angel J given at Darwin on 9 October 1992.

On that date His Honour made the following orders:

> "1. Leave be granted to the plaintiffs dispensing with compliance with Order 66.10(3) of the Rules of the Supreme Court.
>
> 2. The defendant be adjudged to be guilty of contempt of court in that on or about 1.30 am on 2 September 1992, in breach of an order of the Supreme Court of the Northern Territory of Australia made on 1 September 1992 not to do so, the defendant, by his agent Raymond Thomas Reilly, contacted the plaintiffs Adolpho Tchia and Skykym Pty Ltd other than through Mr W.K. Parish of Messrs Mildrens or Mr R Henschke of Messrs Halfpennys.
>
> 3. In relation to that contempt, the defendant pay to the Sheriff of the Supreme Court, within 28 days, a fine in the sum of $5,000.00.
>
> 4. The defendant pay the plaintiffs' costs of and incidental to the contempt proceedings, such costs to be taxed upon a solicitor and own client basis."

At the commencement of the hearing of the appeal Mr Silvester, counsel for the respondent, indicated he had instructions to seek leave to withdraw as his client had no interest in the outcome of the appeal. This leave was granted. Mr Tiffin sought and was granted leave to appear on behalf of the Attorney-General as amicus curiae to assist the court.

It is relevant to set out the history of the proceedings.

On 1 September 1992, His Honour heard an ex parte oral application from the plaintiffs supported by an affidavit of the plaintiff Adolpho Tchia also dated 1 September 1992.

His Honour made an order that the defendant be restrained and an injunction was granted to restrain the defendant from contacting the plaintiffs at all except through particular solicitors named in the order.

The granting of the order was subject to the usual order for damages and on the plaintiffs undertaking to file an originating motion by 4.00 pm on the same date.

The application was adjourned to 9.00 am on 3 September and an order made that the defendant attend court at that time to show cause why, pursuant to section 191(iv) of the *Real Property Act*, caveat number 269966 should not be removed.

Further orders were made authorising the proceedings to commence by originating motion, that the intended plaintiff serve the intended defendant with such originating motion, a summons and any supporting affidavits as soon as practicable.

An originating motion and summons duly issued on 1 September seeking an interim and permanent injunction to restrain the defendant from contacting the plaintiff except through nominated solicitors and seeking an order pursuant to section 191(iv) of the *Real Property Act* that caveat 269966 be removed from title to Lot 17, 43 Finniss Street, Darwin being the land contained in Register Book Certificate of Title Volume 97 Folio 161. The originating motion sought further orders for damages for professional negligence and for entering a caveat without reasonable cause and for costs.

An affidavit dated 2 September 1992 sworn by Heather Joy Price deposes to the attempts made by the deponent to serve certain Supreme Court documents (the exact nature of the documents is not specified) on the defendant at 4.50 pm on 1 September 1992.

An affidavit dated 2 September 1992 sworn by Coralie Ellen Waters deposes to the attempts made by the deponent at 11.13 am on 2 September 1992 to send by facsimile transmission to Messrs Loftus & Cameron an originating motion between the parties, a summons on originating motion, affidavit of Adolpho Tchia sworn 1 September 1992, an order of the Supreme Court and other documents. During transmission the facsimile stopped transmitting and transmission connection was lost.

An affidavit dated 2 September 1992 sworn by Thomas Alexander Walker deposed to the fact that at 10.30 am on 2 September the deponent attempted to serve the defendant at the office of Loftus & Cameron with the originating motion between the parties, summons, order by Justice Angel dated 1 September 1992, affidavit of Adolpho Tchia sworn 1 September 1992 and other documents. The main door into the reception area of Loftus & Cameron was locked, he was unable to obtain entry and was informed by a woman at the front door that Mr Rogerson was not available and she could not allow Mr Walker entry into the office.

The matter again came before His Honour at 2.00 pm on 2 September 1992. At that time Mr Rogerson appeared stating that he had information from Mr Riley, who was also present at court, that an ex parte order had been made against Mr Rogerson the previous morning. Mr Rogerson stated to the court that some documents were left with him at 5.00 pm the previous evening. However, he stated he had not read the

documents and had sent them back to the office of Mildrens. Mr Rogerson undertook to make himself available for service of the documents at 3.00 pm at his office that afternoon. Mr Rogerson's explanation to the court for returning documents he had not read was that he knew they pertained to the dispute between himself and Mr Tchia whom he was due to meet at 5.00 pm the previous evening and Mr Rogerson had decided not to read the documents but to await Mr Tchia's arrival. Mr Tchia did not attend to keep the appointment.

Mr Rogerson asked His Honour for an adjournment to the following day to seek independent legal representation and stating "I clearly can't defend myself on this matter" (Appeal Book p. 106). He advised the court that he had been instructed by Mr Silvester (solicitor for the plaintiff) "that some form of sanction is sought against me for apparent breach of an order not to approach Mr Tchia, who is present in court". Mr Rogerson then proceeded to say "I can adduce oral evidence from Mr Riley who has spoken to Mr Tchia this morning, not on my instructions, and has conveyed my views to Mr Tchia". (Appeal Book p. 107).

Mr Rogerson expressed his concern about the suggestion he was in breach of an ex parte order.

Mr Rogerson then offered his undertaking to the court not to approach Mr Tchia or contact him until further order. He then sought the matter be stood over until the following day when he would have counsel in attendance.

Mr Rogerson offered the following three undertakings:

1) To be available at 3.00 pm at his office to accept service of all the documents.

2) Not to approach Mr Tchia or contact him.

3) Not to contact any of Mr Tchia's clients or any person connected with the subject land as a proposed purchaser.

Mr Rogerson stated the undertakings should suffice until the following morning when he would be able to obtain the documents and legal representation.

Mr Silvester then addressed the court in relation to the service of the documents on Mr Rogerson and the difficulties encountered because Mr Rogerson's office had been locked.

Mr Rogerson again sought an adjournment but stated that if the court were not prepared to consider an adjournment the matter be stood down for five minutes so that he could discuss with Mr Silvester how the matter was to proceed (p.109 Appeal Book). There followed a further exchange in which His Honour expressed his concern about the nature of the allegations and Mr Rogerson's conduct.

His Honour then adjourned the court indicating he would read the affidavit's filed in court and would resume at 20 to 3.

Upon resumption of the court Mr Rogerson advised the court he had been informed by Mr Henschke as to the terms of the ex parte order made against him not to approach Mr Tchia. Mr Rogerson stated that he still had not seen a copy of the ex parte order. He indicated that he was not in a position at that time to cross examine Mr Tchia on Mr Tchia's affidavit dated 2 September 1992 (Court of Appeal papers p. 31). This affidavit details the allegations made by Mr Tchia that Mr Rogerson had, through his agent Charlie Riley, breached the ex parte order made by the court the previous day. Mr Rogerson

did seek to call Mr Riley "and simply explain the matter to your Honour." (p.112 Appeal Papers).

His Honour then addressed some questions to Mr Rogerson concerning service of the documents and whether or not Mr Rogerson had read such documents.

His Honour stated "yes well I don't want to hear evidence from the bar table about this. Mr Rogerson you plainly need legal advice." (Court of Appeal papers p. 112).

Mr Rogerson insisted he wanted to call Mr Riley immediately to resolve the question of the alleged breach of the ex parte order.

His Honour also spoke with Mr Riley and urged Mr Riley to seek independent legal advice pointing out that Mr Riley himself could be found guilty of contempt and explaining how this could occur and suggesting Mr Riley have independent legal advice to protect his own interests before going into the witness box.

Despite His Honour's very strong advice to the contrary, Mr Riley insisted he wanted to give evidence.

Mr Riley then gave evidence and was cross examined upon that evidence. During the course of cross examination the court adjourned for a short period to enable Mr Riley to travel to his office to obtain a letter which Mr Riley stated he had read to Mr Tchia at a meeting with him that morning.

When Mr Riley returned to the witness box he had the letter with him which was tendered and marked Exhibit P1. The letter is on the letterhead of Loftus & Cameron and on the evidence of Mr Riley was a letter Mr Rogerson had given him at their meeting at 5.00 pm on 1 September 1992 indicating this was the letter Mr Rogerson would send out to his clients who were

the prospective purchasers of home units owned by the plaintiff.

At the conclusion of Mr Riley's evidence the matter was adjourned to 10.30 am the following day 3 September 1992.

Prior to adjourning, Mr Silvester raised the question of service of the documents upon Mr Rogerson. His Honour indicated he did not propose to decide the issue of service at that time but noted that Mr Rogerson had a number of documents with him at the bar table. His Honour requested Mr Rogerson to enumerate those documents which Mr Rogerson proceeded to do. The documents in his possession included the originating motion between the parties filed 1 September 1992 and supporting documentation including the ex parte order made by His Honour dated 1 September 1992. Mr Rogerson confirmed that he had read and understood the terms of the ex parte order.

At 10.30 am on 3 September 1992 the matter resumed. Mr McCormack of counsel appeared for Mr Rogerson. Mr McCormack indicated his client was prepared to consent to orders that he be restrained from contacting Mr Tchia until further order.

Mr McCormack then turned to address His Honour on the issue relating to the removal of the caveat. Mr McCormack stated his client was prepared to consent to the removal of the caveat but did not concede the allegations made by Mr Tchia in his affidavits. Mr McCormack further submitted that the claim for damages for professional negligence and for entering the caveat without reasonable cause should be the subject of separate proceedings and could not be dealt with on the originating motion between the parties.

Mr McCormack also indicated that it was his understanding that following the evidence given by Mr Riley the previous day the allegation that Mr Rogerson had breached a court order

was no longer a live issue.

Mr McCormack was informed that in fact the allegation relating to breach of a court order was still a live issue.

His Honour then made the following orders by consent:

1) That until further order the injunctions previously ordered be continued;

2) The removal of the caveat placed by the defendant on the title to Lot 17, 43 Finniss Street, Darwin; and

3) The defendant to pay the plaintiff's costs for the application to be taxed or agreed.

His Honour then explained to Mr McCormack that the outstanding matter was the question of whether the interim injunction previously ordered was breached by the defendant.

Mr McCormack indicated he was not clear as to exactly what the contempt of court was that was alleged to have occurred in relation to the breach of a court order.

Mr McCormack indicated he was only in a position to put submissions relating to certain parts of the affidavit material filed by the plaintiff that he would be applying to strike out.

Submissions were then made on that aspect and His Honour made certain rulings on the affidavit material.

Mr McCormack again indicated his difficulties because there was no transcript available of the evidence given the previous day by Mr Riley before Mr McCormack was instructed

to represent Mr Rogerson.

Mr McCormack then indicated the affidavit material prepared by the plaintiff's witness on which he wished to cross examine.

His Honour advised arrangements would be made for transcript of the previous days proceedings to be made available to Mr McCormack.

Mr McCormack submitted that the appropriate procedure in respect of the allegation of contempt was that a summons be issued under rule 75.06 (p. 156 of Appeal Book).

Mr Silvester made submissions to the effect that the summons that had already issued would be sufficient.

His Honour then made the following ruling (p. 160 Appeal Book):

> "This isn't contempt in the face of the court and the nature of the contempt alleged here does fall within Rule 75.06. And as to your argument that the present summons covers it; no, it doesn't. By virtue of subsection (4) the summons must specify the contempt and I think a summons here is necessary - within these proceedings.
>
> But because of the nature of this matter and the expedition with which it should be dealt, I'm willing to give you leave to file a summons which will be an interlocutory summons within these proceedings, specifying the contempt. And I'll treat the affidavit material and the evidence before me now is in furtherance and support of that summons.
>
> Would you oppose my doing that, Mr McCormack?
>
> MR McCORMACK: No, Your Honour, I don't.
>
> HIS HONOUR: So there will have to be a summons filed.
>
> MR SILVESTER: Well I will certainly proceed to that, virtually immediately, Your Honour."

The court then proceeded to hear evidence from Thomas

Alexander Walker relating to delivery of documents at the office of Loftus & Cameron. Evidence was also heard from Melinda Naismith relating to documents delivered to her by a Ms Heather Price from the office of Mildrens and that Ms Naismith took into the office of Mr Rogerson. Her evidence was to the effect that Mr Rogerson glanced at the covering letter that was on top of the documents and handed them back to Ms Naismith telling her to give them back to the girl from Mildrens. The girl from Mildrens had left and the documents were given to the rounds clerk for Loftus & Cameron to return to Mildrens' office. The rounds clerk left with the documents and returned with the documents stating that Mildrens' office was closed for the day. The rounds clerk was entrusted to hold the documents and deliver them to Mildrens the following day. Ms Naismith gave further evidence relating to the instructions from Mr Rogerson at about 10.30 am the following morning to lock the doors of the office of Loftus & Cameron to stop someone from Mildrens coming to serve documents. Ms Naismith stated Mr Rogerson locked the office doors which were opened again somewhere between 12.30 pm and 1.30 pm.

The hearing of the matter was then adjourned to the following day 4 September 1992 at 10.00 am.

On 4 September 1992, Mr Tchia was cross examined. At the conclusion of Mr Tchia's evidence, Mr Silvester advised that he had issued a summons under Order 75.06. This summons had not yet been served on Mr Rogerson. Mr Silvester further advised His Honour that it was his intention to issue an amended summons. His Honour granted leave to file an amended summons and the amended summons was to be substituted for the summons filed on 3 September 1992. The amended summons was by order nunc pro tunc back to 2 September 1992 that being the date of the alleged breach. This then concluded the plaintiff's case. Mr McCormack indicated he had just received a copy of both of the summonses and as it was close to 12.30 pm sought time to study them. The matter resumed

on the afternoon of 4 September. Mr Rogerson gave evidence and was cross examined. The cross examination was concluded on 9 September 1992 at the completion of which both counsel addressed His Honour.

On 9 October 1992 His Honour handed down reasons for judgment. In the course of his reasons for judgment His Honour stated (p. 347 Court of Appeal Book):

> " The defendant has deliberately attempted to mislead the court and has given false evidence. I have reached this regrettable conclusion beyond reasonable doubt and after a careful consideration of the evidence, and I have steadily borne in mind that such a conclusion is not to be reached lightly."

His Honour further stated in his reasons for judgment (p. 349 Court of Appeal Book):

> " ..... The defendant's actions constituted disobedience of the injunction. Although it is not proven he knew of the terms of the injunction, he knew that an injunction had been granted against him personally and he acted recklessly as to whether or not his actions constituted disobedience of that injunction.
>
> The plaintiffs have made out their case of contempt.
>
> It should also be mentioned that ex facie the defendant's demands of Tchia were extortionate and grossly excessive: cf *Re Veron; Ex Parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136 at 144, and that the caveat was without merit and lodged by the defendant for an ulterior motive, namely to bring added pressure to bear upon Tchia to comply with the defendant's demands. When the plaintiffs' application to remove the caveat came on for hearing, the defendant's counsel readily and properly offered to consent to an order for removal being made, frankly acknowledging that the caveat was - unarguable - insupportable in law or equity."

His Honour then proceeded to the question of penalty and imposed a fine of $5000 on the defendant.

Included in the orders made were the following two orders at p. 351 of the Appeal Book:

"2) Order that the defendant be adjudged to be guilty of contempt of court in that at or about 10.30 am on 2 September 1992, in breach of an order of the Supreme Court of the Northern Territory of Australia made on 1 September 1992 not to do so, the defendant, by his agent Raymond Thomas Reilly, contacted the plaintiffs Adolpho Tchia and Skykym Pty Ltd other than through Mr W K Parish of Messrs Mildrens or Mr R Henschke of Messrs Halfpennys.

3) Order that in relation to that contempt the defendant do pay to the sheriff of the Supreme Court, within 28 days, a fine in the sum of $5000."

The defendant lodged an appeal against this decision. One of the grounds of appeal as set out in the Notice of Appeal on p. 358 of the Appeal Book:

"15. The learned Judge erred in law in his interpretation of the meaning - effect of the judgment concerning dispensation with strict application of the rules of court concerning contempt proceedings in: Drummoyne Municipal Council v Lewis (1974) 1 NSWLR 655 and Von Doussa v Owens (No 2) (1982) 30 SASR 391."

At the hearing of the appeal counsel for the appellant provided the court with a summary of appellant's submissions. The first two submissions being:

"1. Contempt proceedings are quasi criminal in their nature and hence strict procedural compliance is required.

2. While a court has undoubted power to make "Nunc Pro Tunc" order an Applicant for such indulgence bears the onus of satisfying the court that justice requires his default be overlooked and usually this means proffering some excuse or explanation for his neglect of the rules (Morres V Papuan and Rubber Trading Coy Ltd (914) 14 SR NSW 141 @ 144) here no explanation was given for the neglect, dispensation is more readily applied in cases where non compliance has caused little or no prejudice to the opposing party. Here it is submitted the

contrary is the case. The Appellant was not aware of the grounds relied upon until almost the close of the case and just before putting the Applicant in the witness box."

In considering these submissions it is necessary to refer to Order 75.06 of the Supreme Court Rules which states:

"75.06 PROCEDURE

(1) Application for punishment for the contempt shall be by summons or originating motion in accordance with this rule.

(2) Where the contempt is committed by a party in relation to a proceeding in the court, the application shall be made by summons in the proceedings.

(3) Where subrule (2) does not apply, the application shall be made by originating motion which -

(a) shall be entitled "The Queen v." the respondent, "on the application of" the applicant; and

(b) shall require the respondent to attend before a Judge.

(4) The summons or originating motion shall specify the contempt with which the respondent is charged.

(5) The summons or originating motion and a copy of every affidavit shall be served personally on the respondent, unless the court otherwise orders."

In this matter the rule was not complied with, neither was there any express agreement from the parties to waive the requirement for Order 75.06.

The defendant was served with the summons containing the contempt allegation shortly before 12.30 pm on Friday 4 September 1992.

By that time the hearing was well under way, the only evidence remaining was the evidence of the defendant himself. He gave evidence in the afternoon of 4 September 1992 and concluded this evidence on 9 September 1992.

Mr Rogerson first appeared in this matter at 2.00 pm on 2 September 1992 with Mr Riley. The defendant sought an adjournment until the following day so that he could have legal representation (p. 106 Appeal Book). At p. 107 His Honour indicated that he was not aware of the allegation made by the plaintiff. The defendant then gave certain undertakings and again sought an adjournment to the following day (p. 108 Appeal Book) so that he could obtain the necessary documents and seek legal representation. His Honour indicated he would take a 10 minute adjournment to enable the defendant to discuss the matter with counsel for the plaintiff.

Upon the court resuming the defendant told His Honour that he wanted to call Mr Riley to give evidence "to explain the circumstances". His Honour was clearly concerned about this procedure and indicated to the defendant and to Mr Riley that they both needed legal representation. His Honour had it appears read certain affidavits prepared on behalf of the plaintiff and was aware of the allegation contained in Mr Tchia's affidavit dated 2 September 1992 of contempt of a court order by Mr Rogerson.

Despite His Honour's indication to Mr Riley that in his own interests he should seek legal advice independently of Mr Rogerson, both Mr Rogerson and Mr Riley were adamant that Mr Riley give evidence at that time.

I set out the following exchange that took place between His Honour, Mr Rogerson, Mr Riley and Mr Silvester as it appears at pages 115-116 of the Appeal Book:

"HIS HONOUR: And I'm not advising you, I'm just saying that you would be well advised to seek independent legal advice. If you don't wish to pursue that, that's entirely up to you.

MR RILEY: Thanks for trying to help, Your Honour.

MR ROGERSON: Yes. Mr Riley is willing to - it's very short evidence, Your Honour. It would simply indicate quite the opposite of what is alleged. If Your Honour pleases, I do call Raymond Thomas Riley.

HIS HONOUR: Well I'll just hear from Mr Silvester. Mr Silvester, do you oppose this course? Mr Riley going into the witness box to give an explanation of the incident referred to in Mr Tchia's second affidavit?

MR SILVESTER: Your Honour, I have no objection to it.

HIS HONOUR: All right, well - - -

MR SILVESTER: I don't think it's a very wise course for my friend to adopt. I want it placed on the record that I - - -

HIS HONOUR: Yes, but it's not for you to judge the wisdom of what Mr Rogerson's doing, surely.

MR SILVESTER: There is the issue of service of the papers yesterday, which really is a prior issue to that of Mr Riley's involvement. But if Your Honour is prepared to hear Mr Riley and - - -

HIS HONOUR: Well I have the affidavit material before me that demonstrates there was service.

MR SILVESTER: Yes.

HIS HONOUR: It hasn't been contradicted yet.

MR SILVESTER: Well then Mr Rogerson may take his own course.

HIS HONOUR: Yes.

MR ROGERSON: Thank you, Your Honour. I call Raymond Thomas Riley."

I think it relevant to note that at this point neither Mr Rogerson nor Mr Silvester had given His Honour any assistance by referring His Honour to Order 75.06 of the Supreme Court Rules or addressing His Honour on the correct procedure the court should adopt in dealing with an allegation of contempt of a court order as distinct from an allegation of a contempt in the face of the court.

In my opinion there was a serious flaw in the procedure. Mr Rogerson had not been advised either orally or by summons the exact nature of the allegation of contempt. I do not consider it is sufficient when the defendant is to be dealt with on such a serious matter as contempt of court that it proceed on the basis that it could be inferred Mr Rogerson would know from a reading of Mr Tchia's affidavit, dated 2 September 1992, what the allegation of contempt was.

I recognise Mr Rogerson himself contributed to the problem by his insistence on calling Mr Riley then and there before any evidence had been called for the plaintiff and before being informed of the exact nature of the allegation.

The issue of the procedure in respect of contempt of court proceedings has been considered by the High Court in *Doyle v The Commonwealth* (1985) 156 CLR 510. I accept the principles set out in a joint judgment of Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ at p.516:

" Although disobedience of an injunction is not a criminal offence (*Australian Consolidated Press*

Ltd. v. Morgan) and a proceeding for the committal of a person who has wilfully disobeyed an order of the court is not a criminal proceeding (see *La Trobe University v. Robinson and Pola*) except possibly where the proceedings are grounded upon a contumacious or defiant contempt of the court (*Australian Consolidated Press Ltd. v. Morgan*), a proceeding for committal may result in a very serious interference with the liberty of the subject - indefinite confinement. Safeguards similar to those appropriate in criminal proceedings therefore apply. Speaking generally, the notice of motion for committal must be served personally on the person sought to be committed, the charge must be distinctly stated in the notice of motion or other application and the person sought to be committed must be given a proper opportunity to answer the charge. Some aspects of the general principle were mentioned in the judgment of Williams A.C.J., Kitto and Taylor JJ. in *Coward v. Stapleton* in the following passage:

> '..... it is a well-recognized principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him: *In re Pollard; R. v. Foster; Ex parte Isaacs*. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kiu v. Piggott*. The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.
>
> Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon.'"

The following morning, 3 September 1992, Mr Rogerson was represented by Mr McCormack of counsel.

Again no submission or guidance was given to His Honour either by Mr McCormack or Mr Silvester as to the correct procedure in dealing with an allegation of contempt of a court order.

Mr McCormack did state, at p. 147 of the Appeal Book, that he "was not clear as to exactly what the contempt is that is alleged." Discussion then ensued relating to a challenge to the admissibility of certain affidavit ordered.

At approximately 11.30 am that morning, p. 155 of the Appeal Book, Mr McCormack raised with His Honour the provisions of Order 75.06 and the requirement for a summons. Mr Silvester addressed His Honour in respect of the provision of Order 75.06.

There then followed the Ruling by His Honour and the interchange with Mr McCormack (p. 160 of the Appeal Book) and set out on page 59-60 of these reasons for decision.

With respect to His Honour and with the benefit of hindsight I do not agree with the necessity for the matter to proceed with expedition. The only remaining issue was the allegation of contempt by Mr Rogerson a most serious charge with severe consequences, particularly for Mr Rogerson, a reason that he be given proper time to prepare. There was, in my opinion, no necessity for the matter to proceed to immediate hearing.

His Honour then indicated the transcript of proceedings the previous day would be available for Mr McCormack to peruse at 2.30 pm.

During the afternoon, evidence was heard from Ms Naismith and Mr Thomas Walker relating to service of the injunction order upon Mr Rogerson and the matter adjourned to the following day to enable Mr McCormack to have an opportunity

to read through the transcript of the previous days proceedings.

On 4 September 1992 Mr Tchia, the plaintiff, gave evidence and was cross examined.

It was at the conclusion of Mr Tchia's evidence and shortly before the luncheon adjournment that Mr Silvester sought His Honour's leave to file an amended summons under Order 75.06 of the Supreme Court Rules. The original summons and amended summons were served on Mr McCormack. The amended summons outlined the alleged breach of a court order amounting to contempt of court. His Honour stated that the summons would be ordered nunc pro tunc back to 2 September 1992.

Following the luncheon adjournment Mr Rogerson gave evidence and was cross examined. The matter was then adjourned to 8.30 am on 9 September when Mr Rogerson's evidence was concluded and the court heard submissions from both counsel.

Service of the amended summons on Mr McCormack shortly before 12.30 on 4 September 1992, alleging contempt of court against Mr Rogerson was the first time the allegation of contempt had been specified either orally or in a summons.

By this time the hearing was well under way, in fact, the plaintiff's case had concluded.

I accept the principle set out in *Harmsworth v Harmsworth* (1987) 3 All ER 816 Nicholls J at 821:

> " So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed, they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the

> body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. As I read the rules of court and as I understand the decision in the *Chiltern* case the rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. A fortiori, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place."

In this particular case the allegation of contempt was confined to one incident and that was referred to in the affidavit of Mr Tchia dated 2 September 1992 which had been served on the defendant on 2 September 1992.

In all probability the defendant knew full well the allegation that was made against him. However, I do not think that is sufficient. When a person, whether a legal practitioner or anyone else, faces the very serious allegation of contempt of a court order, the correct procedure should be followed. Before the matter proceeded to evidence, the charge against Mr Rogerson should have been clearly specified so that there was no room for a misunderstanding as to the nature of the charge. Mr Rogerson should have been given a reasonable time to prepare his defence. The Appellate Court in this matter had the benefit of well prepared and well argued submissions on the law of contempt of a court order, from Mr McCormack appearing for the appellant and Mr Tiffin representing the Attorney-General. His Honour had no such assistance. Mr McCormack conceded his error in not opposing

the filing of a summons pursuant to Order 75.06 as an interlocutory summons in the proceedings. However, whatever may be the deficiencies of counsel on the day the court has the overriding responsibility to ensure in such a case as this that allegations are properly put and the defendant given time to meet the allegations.

For these reasons I would allow the appeal.