

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Wallace v. Swift*, 2025 NSSC 139

**Date:** 20250416

**Docket:** Hfx No. 461708

**Registry:** Halifax

**Between:**

David Carmichael Jonathan Wallace

*Plaintiff*

and

John Dale Swift (aka Dale John Swift), 3241573 Nova Scotia Limited, 3222742  
Nova Scotia Limited

*Defendants*

and

Tyrell Holland

*Third Party*

**DECISION**

**Judge:** The Honourable Justice C. Richard Coughlan

**Heard:** March 17, 2025, in Halifax, Nova Scotia

**Counsel:** Noah M. Entwisle, for the Plaintiff  
Eugene Tan, for the Defendants

**By the Court:**

[1] David Carmichael Jonathan Wallace moves for an order striking the Defendants' pleadings as an abuse of process. This is the second such motion to be brought by Mr. Wallace. In a judgment delivered May 16, 2024 I dismissed the first motion to strike the Defendants' pleadings. Although Mr. Wallace was unsuccessful on the motion, he was awarded costs of \$10,000.00 as the history of the proceeding showed continual unresponsiveness by defendants' counsel in not replying to Mr. Wallace's counsel's correspondence to which they had a professional responsibility to respond, consenting to orders on the eve of hearings at a time when Mr. Wallace would have completed all preparatory work for the hearing, not doing things agreed to be done in consent orders in the time agreed to do them. Unfortunately the conduct has continued.

**Facts**

[2] The facts are as follows:

[3] Mr. Wallace commenced this Action March 21, 2017 seeking, among other relief, a declaration that he holds title to property at 1820 Vernon Street, Halifax, Nova Scotia. The defendants filed a Defence, Counterclaim and a Third Party Claim against Carmichael James Alexander Wallace and Tyrell Holland on October 5, 2018.

[4] A partial chronology of the history of the proceeding after the defendants filed their Defence is as follows:

**October 30, 2018** – Mr. Wallace sent demands for particulars with respect to the Notice of Claim against the Third Party Carmichael James Alexander Wallace and Counterclaim to the Defendants' then counsel Duane Rhyno. Despite repeated requests for a reply, particulars were not provided before Mr. Rhyno's disbarment in April 2019.

**December 21, 2021** – Mr. Wallace's counsel determined Brian Church, Q.C. had custody of Mr. Rhyno's files and emailed Mr. Church to inquire whether he or some other counsel was representing Mr. Swift and his companies.

**May 3, 2022** – The defendant Swift informed Mr. Wallace’s counsel that Brian Church was representing the Defendants.

**May 19, 2022** – The defendants’ counsel Mr. Church agreed to provide responses to the Demands for Particulars delivered on October 30, 2018 by June 30, 2022.

**July 4, 2022** – Not having received responses to the Demands for Particulars, Mr. Wallace’s counsel wrote to Mr. Church demanding the response by July 8, 2022.

**August 3, 2022** – Not receiving the responses to the Demands for Particulars, an order following an Appearance Notice was issued requiring the Defendants provide responses to the Demands for Particulars by August 16, 2022.

**August 15, 2022** – The Defendants provided particulars of the Counterclaim but did not provide particulars of the Third Party Claim saying, “evidence needs to be retrieved and reviewed”.

**September 13, 2022** – Mr. Wallace moved to strike the Third Party Claim against Carmichael James Alexander Wallace on September 13, 2022 with a hearing scheduled for September 26, 2022. The Defendants did not file motion material within the deadlines provided by the *Civil Procedure Rules* but expressed an intention to contest the motion and requested an adjournment. By Order issued September 26, 2022 the motion was adjourned to October 18, 2022 with costs of \$500.00 against the Defendants for the adjournment payable forthwith.

**October 14, 2022** – Eugene Tan, a lawyer with Walker Dunlop, Mr. Church’s firm, emailed Mr. Wallace’s counsel saying he was reviewing the motion material and would be responding as soon as possible. Mr. Tan asked to be included in any correspondence. Subsequently Mr. Tan was copied on all correspondence from Mr. Wallace’s counsel.

**October 17, 2022** – The Honourable Justice Brothers inquired of counsel whether the motion to strike the Third Party Claim was proceeding as no submissions from the Defendants had been received. On the same day a consent order dismissing the Third Party Claim against Mr. Wallace was agreed to by the parties.

**January 5, 2023** – Mr. Wallace’s counsel gave Mr. Church and Mr. Tan notice that the Halifax Regional Municipality (HRM) had issued a Notice to sell the Vernon Street property, stating if he did not hear from counsel by the following Monday, Mr. Wallace would pay the tax arrears.

**January 11, 2023** – Notice was emailed to Mr. Church and Mr. Tan stating Mr. Wallace had paid the tax arrears to HRM and attaching a draft amended statement of claim claiming the tax arrears paid by Mr. Wallace. The Defendants did not provide their position as to whether they would consent to the proposed amendment despite repeated follow-ups from Mr. Wallace’s counsel.

**March 28, 2023** – Mr. Wallace provided his Affidavit Disclosing Documents to the Defendants.

**April 19, 2023** – Mr. Wallace’s counsel followed up with the Defendants to determine the status of the Defendants’ affidavit disclosing documents and asking whether the Defendants would consent to the draft amended statement of claim circulated on January 11, 2023. Mr. Wallace’s counsel stated they had instructions to move for an order setting a deadline for delivery of the Defendants’ affidavit disclosing documents and permitting the amendment.

**April 26, 2023** – Mr. Wallace’s counsel gave notice to the Defendants he was going to schedule a motion to set the deadline for delivery of the Defendants’ affidavit disclosing documents, permitting the amendment and asking counsel’s availability for the motion.

**May 1, 2023** – Mr. Wallace’s counsel followed up seeking the availability of defendants’ counsel stating if he did not hear from them by May 5 the motion would be scheduled for May 29.

**May 9, 2023** – Mr. Wallace’s counsel not hearing from defendants’ counsel, the motion was set down for May 29, 2023 and a copy of the Notice of Motion provided to defendants’ counsel.

**May 29, 2023** – An Order was issued granting leave for the amendment of the Notice of Action and Statement of Claim and ordering the Defendants to file their affidavit disclosing documents by August 31, 2023 and ordered the Defendants pay costs of \$750, payable forthwith.

**June 22, 2023** – Mr. Wallace’s counsel emailed defendants’ counsel stating he was waiting for payment of costs ordered in the May 29, 2023 Order and suggesting dates for discovery.

**July 13, 2023** – Mr. Wallace’s counsel emailed defendants’ counsel seeking payment of the costs from the May 29, 2023 Order and suggesting dates for discovery.

**August 1, 2023** – Mr. Wallace’s counsel emailed defendants’ counsel concerning non-payment of the costs ordered May 29, 2023 and attempted to schedule discoveries.

**August 31, 2023** – Mr. Wallace’s counsel emailed defendants’ counsel stating today was the deadline for the Defendants’ document disclosure pursuant to the May 29, 2023 Order and following up regarding the costs award and discovery dates.

**September 21, 2023** – Mr. Wallace’s counsel emailed defendants’ counsel an issued Notice of Motion to strike the Defendants’ pleadings scheduled to be heard January 4, 2024.

**December 14, 2023** – Mr. Wallace’s counsel filed his pre-hearing materials and delivered the material to the defendants’ counsel.

**January 2, 2024** – An unsworn affidavit disclosing documents was emailed to Mr. Wallace’s counsel by Mr. Tan.

**January 3, 2024** – Mr. Tan filed a brief for the hearing scheduled January 4, 2024 and an Affidavit of J. Brian Church, K.C. affirmed January 3, 2024 in which Mr. Church stated in May 2023 he began preparations for his retirement due to medical reasons, including reduction in short-term memory and this file was transferred to Mr. Tan on or about December 27, 2023.

**January 4, 2024** – The hearing of the motion to strike the Defendants’ Notice and Statement of Defence and Counterclaim was adjourned to January 25, 2025. Costs of the adjournment of \$1,000 were ordered to be paid by the Defendants forthwith.

**January 5, 2024** – Mr. Wallace’s counsel emailed Mr. Tan setting out problems with the unsworn affidavit disclosing documents provided by the Defendants on January 2, 2024.

**January 17, 2024** – Having received no response to the January 5, 2024 email, Mr. Wallace’s counsel gave Mr. Tan notice the motion to strike the Defendants’ pleadings would be proceeding on January 25, 2024.

**January 25, 2024** – The motion to strike the Defendants’ pleadings was further adjourned to April 3, 2024 on the following terms:

1. The Defendants shall file a Notice of New Counsel on or by January 29, 2024;
2. All presently outstanding costs awards in the proceeding shall be paid by the Defendants on or by January 29, 2024;
3. The Defendants shall produce to the Plaintiff a sworn (or affirmed) affidavit disclosing documents that complies with the *Civil Procedure Rules* on or by March 11, 2024;
4. The Plaintiff is awarded costs of \$1,000 in connection with the January 25, 2024 appearance.

A Consent Order concerning the adjournment was issued February 15, 2024.

**February 2024** – Mr. Wallace’s counsel received a Notice of Intention to sell real property from HRM concerning property at 150 Upper Governor Street. Mr. Wallace paid the tax arrears.

**March 11, 2024** – the Defendants produced a purported supplemental affidavit disclosing documents, contrary to the February 15, 2024 Order it was not sworn or affirmed.

**March 18, 2024** – Mr. Wallace filed a second supplemental brief setting out significant deficiencies which remained in the Defendants’ disclosure, including:

- (a) No documentation regarding rents collected by the Defendants in respect of the Vernon Street property;
- (b) No loan or mortgage documentation;
- (c) No contractual or tax documentation in respect of the Vernon Street property or any income generated therefrom.

**April 2, 2024** – The day before the rescheduled hearing the Defendants delivered a short Affidavit sworn by the Defendant Swift on April 2, 2024, a prehearing brief dated March 25, 2024, a second supplemental affidavit disclosing documents and affidavit disclosing documents and supplemental affidavit disclosing documents signed by the Defendant Swift. The affidavit disclosing documents and supplemental affidavit disclosing documents were not properly sworn. Neither specified the calendar date and purported to be sworn in December and March respectively when the original unsworn versions were produced. Mr. Swift paid the tax arrears on the Governor Street property and Mr. Wallace received a refund of the tax arrears he paid concerning the Governor Street property.

In the brief dated March 25, 2024, but delivered on April 2, 2024, the defendants' counsel asserted Mr. Swift did not maintain logs of rent collected in relation to the Vernon Street property and that the loan and mortgage documentation is a matter of public knowledge being available via property online.

**April 3, 2024** – The hearing was again adjourned until May 16, 2024. The parties consented to the terms of an Order issued April 23, 2024 which provided:

1. The Defendants shall file a Notice of new counsel by 1:30 p.m. on April 3, 2024;
2. The Plaintiff shall provide the Defendants with a particularized list of the deficiencies the Plaintiff has identified with regard to the Defendants' document disclosure on or by April 11, 2024;
3. The Defendants shall produce a sworn or affirmed affidavit disclosing documents that complies with the *Civil Procedure Rules* and a written response to the Plaintiff's aforesaid list of deficiencies on or by April 30, 2024;
4. The parties shall schedule and conduct discoveries of witnesses in accordance with the *Civil Procedure Rules* by no later than November 29, 2024;
5. The Plaintiff is awarded costs of \$1,000 in connection with the April 3, 2024 appearance;

6. All presently outstanding costs awards in this proceeding, including the costs awarded in connection with the April 3, 2024 appearance, shall be paid by the Defendants on or by May 10, 2024; and
7. Costs of the Plaintiff's aforesaid motion shall be determined by the Court at a later date.

**April 3, 2024** – Mr. Wallace's counsel sent the defendants' counsel a draft order, requested issued copies of the Defendants' motion materials delivered on April 2, 2024 and provided availability for discoveries asking defendants' counsel to do the same. The Defendants never replied. The order issued on April 23, 2024 was delivered to the defendants' counsel on April 29, 2024.

**April 11, 2024** – Mr. Wallace's counsel delivered to the Defendants a letter setting out the remaining deficiencies with the Defendants' disclosure as required by the April 23, 2024 Order.

The following deficiencies were identified in relation to the first affidavit disclosing documents:

- a. **It lacked any documents dated after September 27, 2017;**
- b. **It lacked lease documents regarding the property that is the main subject of this litigation, 1820 Vernon Street (the "Property");**
- c. **It lacked documentation regarding rents collected by the Defendants in respect of the Property;**
- d. **It lacked any loan or mortgage documentation in respect of the Property;**
- e. **It lacked contractual or tax documentation in respect of the Property or any income generated therefrom;**
- f. **It included representations at Schedule C and D that the Defendants are not currently seeking documents from other persons, and that there are no documents which the Defendants used to control but no longer have; and**
- g. **It only contains 36 documents compared to 500 documents in the Plaintiff's ADD.**

The second affidavit disclosing documents was described as:

The Second ADD includes 12 additional documents totalling 98 pages. The documents consist of four email chains, a copy of the Notice of Intention to

Sell for the Governor Street Property, six lease agreements in relation to the Vernon Street Property, and one lease agreement in relation to an unrelated property located at 6120 Lindon Street. Schedule C stated that the Defendants are seeking an occupancy permit from HRM, and Schedule D stated that there are no relevant documents which the Defendants once controlled but no longer have.

The third affidavit disclosing documents was described as still omitting at least the following items:

- a. Documentation regarding rents and income collected by the Defendants in respect of the Vernon Street Property;
- b. Loan documentation in respect of the Vernon Street Property and the Property located at 150 Upper Governor Street;
- c. Records of improvements and expenditures (including renovations, maintenance, and utility expenditures) for the Vernon Street Property after January 2018; and
- d. Records of such improvements and expenditures for the Governor Street Property.

**May 5, 2024** – The defendants’ counsel, Mr. Tan, sent two emails to Mr. Wallace’s counsel attaching additional loose documents. These emails did not comply with the April 23, 2024 Order. They were provided late. They were not in the form of a sworn or affirmed affidavit disclosing documents and there was no written response to the Plaintiff’s list of deficiencies sent April 11, 2024.

**May 10, 2024** – The Defendants did not pay the outstanding costs awards by May 10, 2024 as required by the April 23, 2024 Order.

**May 16, 2024** – After hearing from counsel, I gave an oral decision in which I found the conduct of the Defendants and their counsel did not meet the high bar to strike pleadings.

**July 4, 2024** – Although Mr. Wallace was unsuccessful and his motion to strike the Defendants’ pleadings was dismissed, Mr. Wallace was awarded costs in the amount of \$10,000 payable forthwith as the motion was made because of the actions of the Defendants and their counsel.

**July 26, 2024** – Mr. Wallace’s counsel emailed defendants’ counsel demanding payment of the \$12,000 in outstanding costs awards. The Defendants did not reply.

**August 1, 2024** – Mr. Wallace’s counsel emailed the defendants’ counsel to follow-up regarding the scheduling of discoveries and the payment of outstanding costs awards. The Defendants did not respond.

**August 26, 2024** – Mr. Wallace’s counsel emailed the defendants’ counsel to follow-up the scheduling of discoveries and payment of outstanding costs awards. Defendants’ counsel was advised Mr. Wallace intended to obtain discovery subpoenas to compel the Defendants’ participation in discoveries and asked for a response by August 30. The Defendants were also notified if Mr. Swift did not comply with a discovery subpoena, Mr. Wallace would likely instruct counsel to bring another motion to strike the Defendants’ pleadings. The Defendants did not respond.

**September 4, 2024** – Defendants’ counsel were informed by email from Mr. Wallace’s counsel the costs order would be registered for enforcement and they would be issuing a discovery subpoena for Mr. Swift. Mr. Wallace’s counsel also stated they would be proceeding on the basis the Defendants did not wish to discover the Plaintiff. The Defendants did not respond.

**September 6, 2024** – A discovery subpoena addressed to the Defendants c/o Mr. Tan was issued for a discovery to be held on October 31, 2024.

**September 9, 2024** – Mr. Wallace’s counsel emailed Mr. Tan a copy of the issued discovery subpoena for the Defendant Swift to be discovered on October 31, 2024.

**September 18, 2024** – Mr. Wallace’s counsel emailed the defendants’ counsel informing counsel the costs judgment had been registered against the Defendants. Mr. Wallace’s counsel also stated:

We look forward to Mr. Swift’s compliance with the below-referenced discovery subpoena, delivered to you on September 9. Be advised that if he does not show up, I anticipate we will be back in court on an abuse of process and/or contempt motion, and seeking solicitor-client costs.

The Defendants did not respond.

**September 20, 2024** – The discovery subpoena requiring the Defendant Swift to attend to be discovered on October 31, 2024 was sent by courier and mail to the Defendants c/o Mr. Tan. The Defendants did not respond to or acknowledge the subpoena.

**October 18, 2024** – Mr. Wallace’s counsel emailed Mr. Tan seeking confirmation that Mr. Swift would be attending the discovery on October 31, 2024 stating:

Please confirm whether your client will be attending on October 31, further to the subpoena. If the defendants have no intention of complying, we can probably still avoid a cancellation fee from the court reporter. If we continue not to receive any reply from your office and the defendants do not attend discovery, we will seek reimbursement of all associated costs.

**October 31, 2024** – Neither the Defendant Swift nor Mr. Tan attended the discovery. Neither the Defendant Swift nor Mr. Tan communicated with Mr. Wallace’s counsel in advance of October 31, 2024. As a result arrangements were made for the discovery including the retention of a court reporter.

Mr. Wallace’s counsel gave notice that Mr. Wallace would bring another motion to strike the Defendants’ Defence as an abuse of process. Mr. Wallace’s counsel, copying the defendants’ counsel, emailed the Court seeking dates to bring the motion to strike the Defendants’ pleadings in January, February or March 2025.

**November 6, 2024** – The only correspondence the Plaintiff’s counsel received from the Defendants since the Defendants filed costs submissions on June 26, 2024 was a copy of an email from Mr. Tan to the Court’s staff which read as follows:

I am sorry I am only getting caught up now. I was out of the office unexpectedly due to my father’s unexpected hospitalization last week in Ontario. I am in a trial in Annapolis today, and will [be] responding this evening and tomorrow to recent messages.

**November 7, 2024** – The Notice of Motion was emailed to the defendants’ counsel.

**November 13, 2024** – An issued copy of the Notice of Motion was emailed to the defendants’ counsel.

**March 12, 2025** – The defendants’ counsel filed their brief concerning the motion to strike the Defendants’ pleadings. The brief was due March 7, 2025.

### **Defendants’ Evidence**

[5] Mr. Tan stated in an affidavit he deposed on March 12, 2025 that he was out of the country from July 9 to July 22, 2024 on vacation. He says he was largely working out of the office for August. Mr. Tan deposed he did not receive the Discovery Subpoena even though it was sent by mail and courier. Mr. Tan stated his father was admitted to hospital on October 21, 2024 with stomach pain. He left for Guelph, Ontario on October 24, 2024. That day he learned his father’s surgery had been successful with a good prognosis. Mr. Tan returned to Halifax on the same day. He says he returned to his office on October 30, 2024. As of October 30, 2024, Mr. Tan says he thought he had left instructions for rescheduling the discovery. Mr. Tan received Mr. Mroz’s email of October 31, 2024.

[6] It is clear from Mr. Tan’s Affidavit he knew the discovery was scheduled for October 31, 2024. After receiving Mr. Mroz’s email of October 31, 2024, Mr. Tan did not contact Mr. Mroz and explain the circumstances of his missing the discovery. He continued the pattern of not communicating with Mr. Wallace’s counsel.

[7] In response to Mr. Tan’s Affidavit, Robert Mroz, counsel for Mr. Wallace, affirmed an affidavit on March 13, 2025 in which he stated:

7. Throughout this proceeding, the only email address I have ever used to communicate with Mr. Tan has been eugenetan@walkerdunlop.ca. Mr. Tan has never requested that I use a different email address to communicate with him.
8. I am advised by Mr. Entwisle and verily believe that Mr. Tan has always communicated with him using the email address eugenetan@walkerdunlop.ca, and that Mr. Tan has never requested that Mr. Entwisle use another email address to communicate with him.

[8] I accept Mr. Mroz’s evidence that at all relevant times Mr. Tan has the same email address which was the address used by Mr. Wallace’s counsel to communicate with Mr. Tan.

[9] Mr. Tan says he has confirmed with his client Mr. Swift his intention to proceed with this litigation and Mr. Swift confirmed his ability to attend a

discovery examination in person in Halifax within the next forty-five days. Given the history of this proceeding. I have no confidence in such assurances.

### **Analysis**

[10] Mr. Wallace moves for an order striking the Defendants' pleadings as an abuse of process.

[11] *Civil Procedure Rule 88* governs abuse of process. The scope of the Rule is set out in Rule 88.01:

- (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.
- (2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.
- (3) This Rule provides procedure for controlling abuse.

[12] The remedies available to a judge who finds an abuse of the process of the court has occurred are set out in Rule 88.02:

- (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:
  - (a) an order for dismissal or judgment;
  - (b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;
  - (c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;
  - (d) an order to indemnify each other party for losses resulting from the abuse;
  - (e) an order striking or amending a pleading;
  - (f) an order expunging an affidavit or other court document or requiring it to be sealed;
  - (g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;
  - (h) any other injunction that tends to prevent further abuse.
- (2) A person who wishes to make a motion under section 45B of the Judicature Act may do so by motion in an allegedly vexatious proceeding or a

proceeding allegedly conducted in a vexatious manner, or by application if there is no such outstanding proceeding.

[13] A defendant is responsible for the actions of its counsel where the counsel is acting with actual or apparent authority *Begg v. East Hants (Municipality) and Nova Scotia (Director of Assessment)*, (1987) 75 N.S.R. (2d) 431 (N.S.C.A. – A.D.) at para. 21.

[14] The threshold that must be met to strike a party’s pleadings is high *Werry v. van de Wiel*, 2005 NSCA 131 at paras. 17-19.

[15] In *Frank v. Purdy Estate* (1995), 142 N.S.R. (2d) 50 (CA), the Court held the remedy of dismissing the claim or defence has been used in only the most extreme cases as a last resort when the failure of a party to comply with the Rules is found to be “contumacious”. The Shorter Oxford English Dictionary 3<sup>rd</sup> edition defines contumacious as:

*Law:* wilful disobedience to the summons or order of a court.

[16] The issue of when it is appropriate to strike a pleading was addressed in *Advanced Farm Technologies-JA v. Yung Soon Farm Inc.*, 2021 ONCA 569 where Feldman, J.A., in giving the Court’s judgment stated at paras. 10 and 11:

[10] This court has recently had the opportunity to address the issue of when it is appropriate to strike a pleading under Rule 30.08(2) of the *Rules of Civil Procedure* for non-compliance with document disclosure obligations in *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310. In that case, the court summarized the applicable principles, at para. 57, as follows:

To summarize, several principles guide the exercise of a court’s discretion to strike out a party’s claim or defence under r. 30.08(2) for non-compliance with documentary disclosure and production obligations:

- The remedy is not restricted to “last resort” situations, in the sense that it must be preceded by a party breaching a series of earlier orders that compelled better disclosure or production. However, courts usually want to ensure that a party has a reasonable opportunity to cure its non-compliance before striking out its pleading;
- A court should consider a number of common sense factors including: (i) whether the party’s failure is deliberate or inadvertent; (ii) whether the failure is clear

and unequivocal; (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly; (iv) whether the substance of the default is material or minimal; (v) the extent to which the party remains in default at the time of the request to strike out its pleading; and (vi) the impact of the default on the ability of the court to do justice in the particular case;

- The merits of a party's claim or defence may play only a limited role where breaches of disclosure and production obligations are alleged as one would reasonably expect a party with a strong claim or defence to comply promptly with its disclosure and production obligations;
- In considering whether an order to strike out a pleading would constitute a proportional remedy in the circumstances, a court should consider:
  - o the extent to which the defaulting party's conduct has increased the non-defaulting party's costs of litigating the action, including the proportionality of those increased costs to the amount actually in dispute in the proceeding; and
  - o to what extent the defaulting party's failure to comply with its obligation to make automatic disclosure and production of documents has delayed the final adjudication of the case on its merits, taking into account the simplicity (or complexity) of the claim and the amount of money in dispute.

[11] Because the default in this case involved the appellant's failure to produce an affidavit of documents, the principles articulated by the court in *Falcon* are clearly relevant and should apply accordingly. In this case, the appellant also breached a court order, which adds significantly to the impugned conduct. In addition, counsel, on behalf of the appellant, failed to respond to normal communications from opposing counsel with no explanation.

[17] In reviewing the history of this proceeding the delay and unresponsiveness caused by the Defendants and their counsel is noticeable. From the commencement of the Action to April 2019 the Defendants were represented by counsel who was disbarred in April 2019. Mr. Swift confirmed Mr. Church was representing the Defendants on May 3, 2022. During the period from the commencement of the

Action to May 3, 2022 the Defendants were represented by counsel who was disbarred and then there was confusion as to who was representing the Defendants.

[18] Subsequent to May 3, 2022 the history shows both Mr. Church and Mr. Tan have been unresponsive: not providing an affidavit disclosing documents, not replying to opposite counsel to which they had a professional responsibility to respond, consenting to orders on the eve of hearing at a point when the moving party would have done all preparatory work – an example is the motion to dismiss the Third Party Claim against Carmichael James Alexander Wallace. I realize Mr. Church has retired from the practice of law and it is unknown what effect his health may have had on him. Since October 14, 2022 when Mr. Tan requested to be copied on all correspondence to Mr. Church, the conduct has continued.

[19] In this case the Defendants breached Court Orders:

- (a) They did not provide a written response to the Plaintiff's list of deficiencies by April 30, 2024 as ordered in the April 23, 2024 Order;
- (b) They did not take any steps to schedule and conduct discoveries of witnesses by November 29, 2024 as ordered in the April 23, 2024 Order;
- (c) They did not produce a sworn or affirmed affidavit disclosing documents as ordered in Orders dated May 29, 2023; February 15, 2024; and April 23, 2024;
- (d) They did not pay costs as ordered in Orders dated February 15, 2024; March 12, 2024; and July 26, 2024.

[20] In addition, counsel on behalf of the Defendants continually failed to respond to communications from the Plaintiff's counsel.

[21] This conduct by the Defendants and their counsel was deliberate, a pattern of behaviour which has continued over the whole course of this proceeding. Although the previous motion to strike was dismissed, the Defendants' conduct continued, they did not take the opportunity to adjust their behaviour. Given the history of this proceeding, the Defendants' promises of their future conduct has no credibility.

[22] The substance of the delay as a result of the Defendants' conduct is material. Although the Action was started March 21, 2017, disclosure of documents has not been resolved and discoveries held. The Defendants' conduct clearly prejudiced

the Plaintiff by increasing the cost of attempting to have the Defendants fulfill their obligations and participate in the litigation as required by the *Civil Procedure Rules*.

[23] I find the Defendants' conduct to be contumacious and amounts to a deliberate flouting of the law. The conduct is an abuse of the court's processes. This is a case in which the Defendants' conduct over a long period of time is such that it meets the high bar required to strike the Defendants' pleadings.

[24] The motion is granted. The Defendants' pleadings are struck.

### Costs

[25] Mr. Wallace submits costs on a solicitor-client basis should be awarded to him. The Defendants submit the Court should order a discovery of Mr. Swift to take place within 30 to 45 days at their cost; otherwise the parties should bear their own costs.

[26] The principles of solicitor-client costs were set out in *Liu v. Atlantic Composites Ltd.*, 2014 NSCA 58 in which Saunders, J.A. endorsed the following statement at para. 17:

...

76. The principles of solicitor-client costs are settled and well-expressed in **Smith's Field Manor Development Ltd. v. Campbell**, 2001 NSSC 44 [Smith's Field][Authorities, Tab 11]. Though lengthy, Justice Hood's comments are worthy of reproduction:

[479] It is not disputed that solicitor-client cost awards are made only in rare and exceptional circumstances. In *Coughlan et al. v. Westminster Canada Limited, et al* (1994), 127 N.S.R. (2d) 241, the Court of Appeal upheld the decision of Nunn, J., the trial judge, [1993] N.S.J. No. 129, with respect to costs. The Court of Appeal quoted from his decision at para. 170:

The plaintiffs in each of these actions are entitled to recover costs and on a solicitor client basis. The character of the allegations involved here, fraud and dishonesty, and the circumstances here of the length of time of the outstanding allegations, their national publicity, the length and extent of the pre-trial processes and the trial itself, the findings I have made regarding injury to reputations and the lack of any real proof of fraud or dishonesty all contribute to making this a proper situation to award costs on a solicitor client

basis as, in my opinion, this does constitute one of those 'rare and exceptional' cases wherein such awards are, and should, be made.

[480] In *The Law of Costs*, Orkin, 2nd Edition, the authors say at pp. 2-144-146:

An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional circumstances to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:

[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which make such costs desirable as a form of chastisement.

The Supreme Court of Canada has approved the following statement of principle:

Solicitor-and-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

...

At the same time, it has been said that an award of solicitor-and-client costs is not reserved for cases where the court wishes to show his disapproval of oppressive or contumelious conduct.

There is, as well, a factor frequently underlying such an award, although not necessarily expressed, namely, that the circumstances of the case may be such that the successful party ought not to be put to any expense for costs.... As well, an award of costs on the solicitor-and-client scale is an important device that the courts may use to discourage harassment of another party by the pursuit of fruitless litigation.

...

[484] In *Orkin*, the author says at para 219 beginning at p. 2-146:

The exercise of discretion must be based on relevant factors, for example, the conduct of the litigation, and not on otherwise unrelated conduct. Orders of this kind have been made where a litigant's conduct has been particularly blameworthy, for example, where there were allegations of criminality, arson; fraud or impropriety either unproven or abandoned at trial; particularly when the allegations are made against professional persons carrying out their professional duties; .... Solicitor-and-client costs were awarded where a party brought wanton and scandalous charges; or

allegations of perjury; ... or dishonesty; ... or deceit, conspiracy and breach of fiduciary duty; ....

[Emphasis in original]

See also *Brown v. Metropolitan Authority et al.* (1996), 150 N.S.R. (2d) 43 (C.A.) at paras 78-82.

[27] While the conduct by the Defendants was reprehensible it was not one of those rare and exceptional circumstances which attract solicitor-client costs.

[28] There is no evidence before me as to the legal fees and disbursements Mr. Wallace incurred in connection with this motion.

[29] *Civil Procedure Rule 77* governs costs and Tariff C to Rule 77 deals with costs of Chambers motions which provides:

### **TARIFF C**

#### **Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia**

For applications heard in Chambers the following guidelines shall apply:

- (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.
- (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.
- (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
- (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
  - (a) the complexity of the matter,
  - (b) the importance of the matter to the parties,
  - (c) the amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

<b>Length of Hearing Application</b>	<b>Range of Costs</b>
Less than 1 hour	\$250 - \$500
More than 1 hour but less than ½ day	\$750 - \$1,000
More than ½ day but less than 1 day	\$1,000 - \$2,000
1 day or more	\$2,000 per full day

[30] This motion was more than 1 hour but less than ½ day in length. It was determinative of the entire matter at issue in the proceeding. The Defendants' pleadings were struck. An extensive affidavit was prepared and filed on behalf of Mr. Wallace.

[31] Considering all the circumstances of this motion as set out above and to do justice between the parties, I take the basic costs of \$1,000 and multiply it by four times which results in costs of \$4,000.

[32] The Defendants are to pay costs to David Carmichael Jonathan Wallace in the amount of \$4,000, payable forthwith.

Coughlan, J.