To be argued by
RICHARD HARTZMAN

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of BRADFORD COMPANY and KAPLAN MARIN ASSOCIATES,

Petitioners-Respondents,

against

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant.

BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

page

PRELIMINARY STATEMENT. 1

STATEMENT OF QUESTIONS PRESENTED.. 2

STATEMENT OF THE NATURE OF THE CASE 3

STATEMENT OF THE FACTS.. 5

ARGUMENT

POINT I

THE LOWER COURT ERRED IN GRANTING THE PETITIONER'S MOTION TO PUNISH DHCR IN THAT DCHR DID NOT ACT WILLFULLY IN FAILING TO COMPLY WITH THE COURT ORDER, IN THAT THE COURT'S MANDATE, AS EFFECT-IVELY MODIFIED, WAS NOT UNAMBIGUOUS AND UNEQUIVOCAL, AND IN THAT THE APPLICANTS FAILED TO DEMONSTRATE THE REQUISITE PROOF OF PREJUDICE. 11

a. DHCR Acted in Good Faith in its Effort to Issue Orders. 13

b. The Respondents Failed to Show Prejudice.. 17

POINT II

DHCR WAS ENTITLED TO A HEARING BEFORE THE COURT ISSUED AN ORDER OF CONTEMPT. 19

POINT III

THE COURT BELOW ABUSED IT DISCRETION BY INCREASING THE PENALTY AGAINST DHCR AFTER ADMINISTRATIVE ORDERS WERE ISSUED RATHER THAN PURGING THE CONTEMPT. 22

CONCLUSION. 23

SUPREME COURT OF THE STATE OF NEW YORK

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BRADFORD COMPANY and KAPLAN MARIN ASSOCIATES,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,

- against -

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent-Appellant.

BRIEF OF RESPONDENT-APPELLANT

PRELIMINARY STATEMENT

This is an appeal by respondent-appellant, New York State Division of Housing and Community Renewal ("appellant" or "DHCR") from an order of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on July 18, 1989. The judgment of the Court below found that DHCR was guilty of contempt, fined the appellant $250.00, directed the appellant to pay the costs and expenses of the respondents (hereinafter "respondents"

or "owners"), and denied a motion to intervene.

The genesis of this appeal was a mandamus proceeding commenced by the respondents-owners seeking to compel the Division to issue determinations of pending proceedings to reclassify the subject buildings from hotels to apartment buildings, and to establish the value of hotel services and determine the lawful rents for the subject accommodations.

STATEMENT OF QUESTIONS PRESENTED

1) Did the Court below err in punishing DHCR for contempt for its failure to issue determinations in two pending administrative proceedings by the June 14, 1988 deadline established in a mandamus order (a) where DCHR immediately accelerated processing but further administrative steps had to be taken which could not be completed in the twenty-nine days allowed by the court; (b) where the judge who found DCHR guilty of contempt was not the judge who set the June 14, 1988 deadline, and where the latter judge had effectively modified that deadline during the contempt proceeding by establishing a further schedule for processing of the administrative proceeding; (c) where the Court itself, during the contempt proceeding, stayed processing of the administrative proceedings for two months; and (d) where the parties who sought the contempt finding did not suffer prejudice?

The Court below impliedly answered in the negative.

2) Did the Court below, which was inclined to find DHCR in contempt, improperly deny DHCR's request for a hearing as to whether the Court should issue an order of contempt, impose a fine and award attorney's fees where there were disputed issues of fact?

The Court below improperly answered in the negative.

3) Did the Court below err in modifying its decision to alter the contempt penalty in such a

manner as to increase the penalty after DHCR had complied with the court order and had in effect asked the Court to purge the contempt?

The Court below impliedly answered in the negative.

STATEMENT OF THE NATURE OF THE CASE

The issue presented in this case is whether the Court below properly granted the applicant's motion to punish the New York State Division of Housing and Community Renewal with contempt for its failure to issue an order determining two complex administrative proceedings on or before June 14, 1988 in accordance with the directive signed by Justice Cahn on May 16, 1988 and entered on June 2, 1988.

DHCR submits that it is not in contempt of court. It was faced with an impossible choice: render determinations within the twenty-nine days given by Justice Cahn in two complex proceedings, which determinations would set a precedent for a large group of buildings and tenants by arbitrarily setting values for certain hotel services; or take the additional time necessary to complete the steps needed to establish those values on a sound basis and provide the parties their due process rights. DHCR, in good faith, chose the latter alternative. Justice Cahn, who issued the original mandamus order, apparently recognized that DHCR was acting in good faith, when, during the contempt proceeding, he effectively modified that order by setting an interim schedule for further processing. DHCR met that schedule and was prepared to return to court for a status conference and the establishment of a final schedule to complete processing.

The only reasonable interpretation of Justice Cahn's modification, was that DHCR would not be held in contempt on the basis of the original mandamus order alone, absent DHCR's failure to

comply with the modification. Nevertheless, when the case was transferred to Justice Saxe, he acted in disregard of the direction set by Justice Cahn, first staying further agency processing for two months, and then failing to implement the status conference and further scheduling as directed by Justice Cahn. Justice Saxe ignored Justice Cahn's modification in its entirety.

Furthermore, the court's mandate to issue the orders was rendered ambiguous by the new schedule and the two month stay. In addition, the owners were not prejudiced by the additional time needed for processing. Indeed, they actively participated in the processing, submitting lengthy comment and asking for additional administrative hearings. Nor did they oppose the two month stay imposed by Justice Saxe.

There was no basis for the Justice Saxe's contempt finding. He erred, as a matter of law, in basing his finding solely on Justice Cahn's original mandamus order, rather than also considering Justice Cahn's subsequent order of October 12, 1988, which DHCR had complied with. Additionally, Justice Saxe improperly and unfairly modified his contempt decision, after DHCR had informed him that it had issued final administrative orders, so as to substantially increase the penalty imposed against DHCR rather than to purge the contempt, as, in effect, requested by DHCR.

Alternatively, DHCR maintains that, if Justice Saxe were inclined to make a finding of contempt, he was required to hold a hearing on disputed issues of fact before a finding of contempt could be made.

In sum, Justice Saxe, in reaching his finding of contempt, not only improperly abandoned the direction set by Justice Cahn, whose order was in question, but made unsubstantiated findings concerning disputed issues of fact, failed to accord DHCR the benefit of a hearing on those disputed issues of fact, and arbitrarily and unfairly modified his decision to increase the penalty against

DHCR after it had issued the final administrative orders, rather than nullifying the contempt, as there was no prejudice, or purging it. The finding of contempt should be vacated and the contempt order rendered null and void.

STATEMENT OF THE FACTS

The appeal originated as a mandamus proceeding commenced by the respondents-owners. (A10a)[1] On May 16, 1988, Justice Herman Cahn signed an Order and Judgment directing DHCR to determine an administrative proceeding on or before June 14, 1988. (A14) The proceeding concerned the reclassification of the subject properties from hotels to apartment buildings and the valuation of hotel services for purposes of determining lawful rents and overcharges imposed on complaining tenants. Under direction from the Court of Appeals in Berkley Kay Corp. v. New York City Conciliation and Appeals Board, 68 N.Y.2d 851, 508 N.Y.S.2d 407 (1986), DHCR was required to value a number of hotel services not provided to complaining tenants from June 30, 1982 to the date the building was reclassified. It should be noted that this was the first time that DHCR had to determine the value of hotel services.

Various administrative steps remained to be taken in order to develop the information needed to reach a determination and to insure the due process rights of all sides. DHCR immediately accelerated processing in response to the mandamus order of Justice Cahn. Initially, DHCR attempted to determine the value of hotel services through in-house staff. However, it quickly became apparent that, due to the magnitude of the work, the retention of an outside contractor would

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[1] Page references are to the Appendix and Supplemental Appendix.

be necessary.[2] (A44) By early August, 1988, budgetary approval had been obtained to retain a private consulting firm, Ernst & Whinney, and a methodology had been established to value the various hotel services and to establish rent reductions. (A37, A44, A152-53)

On August 8, 1988, DHCR notified the owners of the progress being made to comply with Justice Cahn's directive, including the status of the consultant's work. (A29) Nevertheless, the owners served DHCR with a demand for compliance dated September 7, 1988 (A30), and on September 16, 1988, the DHCR was served with an Order to Show Cause returnable on October 5, 1988, seeking to punish DHCR for contempt of court for not having complied with Justice Cahn's Order. (A17)

On the October 5, 1988 return date, Justice Cahn directed DHCR to produce in court a member of the consultant's firm and a member of DHCR's staff responsible for the owners' proceedings. They were produced on October 12, 1988. After discussion and argument off the record, Justice Cahn apparently recognized that the time frame set in his Order was unrealistic, given the complex nature of the administrative proceeding. Thus, he went on the record to establish a timetable for further processing by DHCR, holding the contempt motion in abeyance. (A183-87) The timetable was as follows (A185-86):

(1) DHCR's consultant was to have a final report completed by Thursday, October 20, 1988, but, if the report was not completed by that date, the parties were to appear before Justice Cahn on October 21, 1988.

(2) DHCR was to furnish copies of the consultant's report to the parties (the owners and their

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[2] This problem was particularly acute because the valuation of services in these proceedings would set a precedent for a whole group of hotel reclassification cases. DHCR thus had a high degree of concern that the valuation be done in an effective manner. The route chosen - use of an outside consultant - has previously been used by the rent agencies in determining the value of services on a generic basis.

tenants) within one week of receipt of the report.

(3) The parties (the owners and their tenants) were to be given until November 15, 1988 to submit comments on the report, with no further extensions without specific authorization by the court.

(4) The owners and DCHR were to appear in court on November 18, 1988 for a "status report and for further conferencing to arrange for an expeditious decision".

DHCR complied with this schedule. Ernst & Whinney submitted the final twenty-two page report (A64 et seq.) to DHCR on October 19, 1988.[3] Justice Cahn was notified of the completion of the report by letter on October 20, 1988 (A188), and on October 26, 1988, one week after receipt of the report, DHCR sent a notice to the owners and their tenants providing them with an opportunity to comment. (A63) On November 14, 1988, the owners mailed their twenty-one page response to DHCR. (A89 et seq.)

DHCR was prepared to appear before Justice Cahn on November 18, 1988, to set a further schedule for the completion of the administrative proceedings. However, his IAS part was reassigned to Justice David B. Saxe and the contempt motion was transferred to Justice Saxe. The first act of Justice Saxe, done in complete indifference to the prior history of the contempt proceeding, was to issue a stay enjoining DHCR from any further processing of the owners' administrative proceedings. In an Order to Show Cause signed on November 18, 1988, on request of proposed intervenors to the contempt proceeding, Justice Saxe ordered that:

> ... pending the hearing of this motion, the Respondent [DHCR] is enjoined and restrained from further processing, utilizing and/or considering any further information and evidence or using the "Hotel Service Valuation" (date of mailing October 26, 1988), in any way, and/or otherwise ruling on, granting, or determining appropriate rent

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[3] DHCR received a letter from Ernst & Whinney on October 21, 1988, clarifying one aspect of the report.

> reductions in any of the pending cases regarding hotel reclassification; and it is further
>
> ORDERED, that pending the hearing of this motion, the Respondent is enjoined an restrained from determining the amount of rent reductions or granting rent reductions in any of the pending cases regarding hotel reclassification...

(A115) The owners did not oppose the stay, nor did they make any application to the Court to have it lifted.

Justice Saxe's stay of all further processing of the administrative proceedings remained in effect for two months, until January 18, 1989, when the contempt motion was submitted to him for decision. (A8) At the time of submission, DHCR, in keeping with the direction set by Justice Cahn for achieving compliance with his Order and Judgment, set forth by affidavit a reasonable schedule for the resumption and completion of processing and issuance of the administrative determinations. (see, A134)

Justice Saxe requested that the parties appear in court on March 1, 1989, at which time he heard additional argument and announced his findings and decision (1) finding DHCR in contempt, (2) denying the motion to intervene, and (3) imposing a fine. (A149-76) He directed the parties to settle an order and attach the minutes of the proceeding to the proposed order. (A176) Justice Saxe made the following findings on the record:

> With respect to the hiring of Ernst & Whinney, DHCR's claim that the hiring of Ernst & Whinney was an act done in good faith, I think frankly is an absurd claim. This was done two months after the deadline date that was set by Judge Cahn's order. And it's astonishing to me that as the agency that is said by statute to be experts in this field, that DHCR turns to someone outside the agency to arrive at a decision in a case such as this one.
>
> Frankly, I think that DHCR has turned this case into something akin to an antitrust case, requesting and developing methodology, using a

firm as prestigious and well known, and probably as expensive, presumably at taxpayer expense, as Ernst & Whinney.

I think the issue here, as set out by the Court of Appeals in the case that set this whole thing in motion, is that there are two issues, reclassification and preservation, and that the Court of Appeals held they should be dealt with separately.

Certainly, the consultant's report is not relevant, in my mind, to the issue of reclassification. I can only conclude that DHCR has ignored the orders of the Supreme Court.

I find their claim of good faith -- well, I don't accept their contentions that they were acting in good faith. I think it's belied by the facts in the case. I think the rights of the petitioners are clearly impaired.

I also find that the stay obtained by the intervenors does not affect DHCR's ability to process and determine the question of reclassification.

Accordingly, I find that DHCR is in contempt of the order of the Supreme Court of May 16th, 1988 and entered June 2nd, 1988. The petitioner is directed to settle order on notice, providing for a decretal paragraph providing for and including a fine of $250 a day until such time as the respondent has complied with the order of the Court. That is the decision of the Court.

Is there anything further you want to add?

MR. SCHWADEL: Does the finding commence with the June 14th date that was ordered, or as of today's date or the date that it was settled?

THE COURT: It will commence with the date that order was signed, signed and served on the DHCR.

The application brought on by order to show cause for leave to intervene is denied.

(A162-64)

At the March 1, 1989 court appearance, DHCR requested a hearing on the disputed facts

concerning the question of it's good faith efforts to comply with the Judge Cahn's Order and Judgment. (A154, A159) Justice Saxe did not grant the request.

Both the owners and DHCR submitted proposed orders for settlement on March 30, 1989. (A189, A196)

On April 3 and April 5, 1989, within seventy-seven days after Justice Saxe's stay of the administrative proceedings had lifted, well in advance of the schedule proposed by DHCR by affidavit in January, 1989 (A134), and before Justice Saxe had signed a contempt order, DHCR issued final determinations in the proceedings. (A202, et seq.)

Justice Saxe was immediately informed of the issuance of the orders by letter dated April 5, 1989, in which DHCR stated that the imposition of a fine was moot; in effect requesting that the Court find the contempt a nullity or purge the contempt finding.[4] (A201)

On April 12, 1989, the owners' attorneys sent a letter to Justice Saxe, indicating that they had been informed by the Legal Support Office of Supreme Court that the amount of the fine imposed by the Court was "unacceptable as contrary to statute". They also argued that the imposition of a fine was not moot, and suggested a total fine of $250.00 with a separate award for damages, costs and expenses. (A228-30) DHCR responded by letter to Justice Saxe dated April 19, 1989, again arguing that the imposition of a fine was moot. (A231)

On May 4, 1989, Justice Saxe issued a decision modifying his earlier decision in a manner which effectively increased the actual penalty against DHCR rather than eliminating or purging the contempt as requested by DHCR:

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[4] By the terms of Justice Saxe's decision, in which the fine was not to commence until service of a signed court order, there would be no fine against DHCR, as it issued the administrative orders before a court order was even signed.

> The decision of this court dictated on the record on March 1, 1989 is modified so as to limit to a total of $250.00 the fine to be imposed on respondent DHCR pursuant to the contempt of adjudication (see Judiciary Law Section 773), and so as to add a provision ordering a hearing for the determination of petitioners' costs and expenses under Judiciary Law Section 773.

(A179)

Justice Saxe signed a contempt order and judgment on June 20, 1989, based upon his modified decision (A8-10), after which this appeal ensued.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN GRANTING THE PETITIONER'S MOTION TO PUNISH DHCR IN THAT DCHR DID NOT ACT WILLFULLY IN FAILING TO COMPLY WITH THE COURT ORDER, IN THAT THE COURT'S MANDATE, AS EFFECTIVELY MODIFIED, WAS NOT UNAMBIGUOUS AND UNEQUIVOCAL, AND IN THAT THE APPLICANTS FAILED TO DEMONSTRATE THE REQUISITE PROOF OF PREJUDICE.

A civil contempt is one where the rights of a party have been harmed by the contemnor's failure to obey a court order. People ex rel Munsell v. Court of Oyer & Terminer, 101 N.Y. 245, 4 N.E. 259. Any penalty imposed for civil contempt is designed either to compensate the injured party or to coerce compliance with the court's mandate, or both. Penalties for civil contempt, in contrast to those for criminal contempt, are not designed to punish. State of New York v. Unique Ideas, 44 N.Y.2d 345, 405 N.Y.S.2d 656, 376 N.E.2d 1301 (1978).

In order to establish a civil contempt for an alleged violation of a court order, a number of

elements must be present:

(1) The rights of a party must have been prejudiced. Judi-ciary Law Section 753; Matter of McCormick v. Axelrod, 58 N.Y.2d 574, 466 N.Y.S.2d 279, 453 N.E.2d 508 (1983);

(2) It is necessary that the court order clearly expressed an unequivocal and unambiguous mandate. Dept. of Environmental Protection v. Dept. of Envir. Conservation, 70 N.Y.2d 233, 519 N.Y.S.2d 539, 513 N.E.2d 706 (1987);

(3) It must appear with reasonable certainty that the order has been disobeyed. Pereira v. Pereira, 35 N.Y.2d 301, 361 N.Y.S.2d 148, 319 N.E.2d 413; and

(4) the alleged contemnor must have had knowledge of the court's order. Matter of McCormick v. Axelrod, supra.

In addition, willfulness is implicitly an element for a finding of civil contempt, though the degree of willfulness is less than that required for a finding of criminal contempt. In Dept. of Environmental Protection v. Dept. of Envir. Conservation, supra, 519 N.Y.S.2d at 542, the Court of Appeals stated that:

> A key distinguishing element between civil and criminal contempt is the degree of willfulness of the subject conduct. To be found guilty of criminal contempt, the contemnor usually must be shown to have violated the order with a higher degree of willfulness than is required in a civil contempt proceeding. (emphasis added)

See also, McCormick v. Axelrod, supra, 466 N.Y.S.2d at 283 ("the element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out").

This Court, in the case of In re Hildreth, 28 A.D.2d 290, 284 N.Y.S.2d 755 (1st Dept. 1967), recognized that a party's good faith endeavors to comply with a court mandate and his inability to comply therewith are factors to be considered in the exercise of the court's discretion in deciding

whether to find the party in contempt. The Court also stated that:

> Generally, however, upon an application for a contempt adjudication, the court should exercise its judicial discretion broadly to accomplish justice on the basis of all facts and circumstances bearing upon the nature and willfulness of the respondent's conduct.

a. DHCR Acted in Good Faith in its Effort to Issue Orders.

In the case at bar, DHCR should not have been found guilty of contempt. It immediately accelerated its processing of the administrative matters in response to Justice Cahn's initial order, and made a good faith effort to issue orders as soon as was practically feasible within the constraints of its regulatory responsibilities. The agency was faced with what might theoretically be considered a choice: (1) Render determinations by June 14, 1988, as directed by Justice Cahn, i.e., within 29 days, by willy-nilly assigning values to hotel services and accepting the likelihood that the determinations would be remanded to the agency for further proceedings because they had no rational basis; or (2) take the time necessary to develop a sound basis for its decision which could withstand judicial scrutiny. Theoretically, DHCR could take the first course; practically, and as a matter of its regulatory responsibility, it could not.

DHCR, under instructions from the Court of Appeals, pursuant to the decision in Berkley Kay Corp. v. New York City Conciliation and Appeals Board, 68 N.Y.2d 851, 508 N.Y.S.2d 407 (1986), had to establish the dollar value of a number of hotel services so that lawful rents could be set in the reclassification proceedings. Not only was this the first time the rent agency had to establish such values, but DHCR's determination would affect a substantial group of other pending hotel reclassification proceedings, and hence a large group of tenants. The outcome of the two proceedings subject to Justice Cahn's mandamus order would thus have broad ramifications.

Considering the complexity of the administrative proceedings; the fact that DHCR had to determine in generic fashion the value of a number of hotel services for a whole series of cases of which the owners' were only the first two, and the need to accord the parties to the proceedings their due process rights, DHCR could not have reasonably completed processing of both administrative matters within the twenty-nine days after Justice Cahn signed his mandamus order, or even within the sixty days after he rendered his decision. The delay in responding to the Justice Cahn's order was not because DHCR ignored his order, but because of the complex nature of the proceedings and the Division's effort to fully and properly process the matters and afford the parties to the proceedings their right to due process.

Initially, DHCR attempted to determine the value of hotel services through in-house staff. However, it quickly became apparent that, due to the magnitude of the work, the retention of an outside contractor would be necessary. (A44) Steps were immediately undertaken to retain an outside contractor, to develop a methodology for determining values, and to obtain the budgetary approvals required by state law so that the contractor could be formally hired. DHCR, in its effort to respond in good faith to Justice Cahn's order, advised the owners in June, 1988, and again in August, 1988 of the steps being taken to hire a consultant and undertake the services valuation study.

Justice's Saxe based his unwarranted finding that DHCR was not acting in good faith, in part on his conclusory finding that Ernst & Whinney was not hired until "two months after the deadline date set by Judge Cahn's order." (A162) In reaching this conclusion, Justice Saxe not only ignored the detailed methodological report prepared by Ernst & Whinney within that two month period (A37-42), as well as the numerous steps undertaken by DHCR so that the formal hiring could occur, but also ignored Justice Cahn's acceptance of DHCR's conduct and the use of an outside consultant.

Justice Cahn apparently recognized that DHCR was acting in good faith and clearly understood that the time frame he originally established in his mandamus order was unrealistic when he effectively modified his initial mandamus order on October 12, 1988, by setting an interim schedule for additional processing - a schedule which was met by DHCR - and a date for a "status conference" and further scheduling to complete processing. Justice Cahn presumably would have continued to set a further schedule as long as DHCR's proposals were reasonable, and as long as DHCR continued to meet that schedule. The only reasonable interpretation of Justice Cahn's modification, was that DHCR would not be held in contempt on the basis of the original mandamus order alone, absent DHCR's failure to comply with the modification.

Nevertheless, Justice Saxe, when he assumed responsibility for handling the contempt proceeding, abandoned, without any justification, the approach taken by Justice Cahn. This was an error of law. He improperly based his contempt finding solely on Justice Cahn's original mandamus order without giving any consideration to the subsequent modification made by Justice Cahn, under which DHCR had been in compliance. He totally ignored the manner in which Justice Cahn had proceeded, and indeed, by imposing a two month stay against DHCR, acted to defeat the purpose of the contempt motion. Later, when he found DHCR in contempt, Justice Saxe treated the matter as though nothing had occurred during the court proceedings between the initial mandamus order and his contempt decision.

Once Justice Cahn had effectively modified his original order by directing an interim schedule for agency processing, and once Justice Saxe had stayed the administrative proceedings, it could no longer be said that there was an unequivocal and unambiguous mandate from the court on the basis of the original mandamus order. The finding by Justice Saxe was thus improper because

an essential element for a finding of contempt was absent.

The equivocal and ambiguous nature of the situation is particularly acute in relation to the stay imposed by Justice Saxe. He, in part, based his contempt decision on a finding that his two month stay did "not affect DHCR's ability to process and determine the question of reclassification." (A163-64) This finding in turn was based on other findings: (1) that there were two issues, "reclassification and preservation" which "should be dealt with separately"; (2) that the Court of Appeals held that they should be dealt with separately; and (3) that the consultant's report was not relevant to the issue of reclassification. These findings were baseless. The proceedings were remanded proceedings each of which originally had been the subject of one order dealing with both issues. There would be no basis, without explicit direction, to now issue two separate orders as to each proceeding. Justice Saxe gave no indication at the time he imposed the stay that he expected DHCR to bifurcate the proceedings and deal with the two issues of reclassification and the valuation of hotel services separately.[5] There was no clear mandate from the Court. Thus, it was patently unfair to later make this a basis for his contempt finding.

Moreover, owners' argument that the administrative proceedings could be bifurcated was only an afterthought. It was not even raised until after the contempt motion had been transferred from Justice Cahn to Justice Saxe, in the November 17, 1988 affidavit of owners' attorney (A54 et seq.), and thus not until after Justice Cahn had set his interim schedule for compliance. Justice Cahn, in setting a schedule for compliance, plainly did not believe that his mandamus order required DHCR to bifurcate the proceedings and issue separate administrative orders on the issues to be resolved.

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[5] Presumably, Justice Saxe had the service valuation issue in mind when he said "preservation".

His original order makes no reference to separate determinations; his October 12, 1988 directive makes no such reference; nor does the owners' initial papers in support of their contempt motion.

In addition, Justice Saxe was overreaching in concluding that the issues could be decided separately and that the Court of Appeals held that they should be so decided. It is not at all clear that the Court of Appeals in Berkley Kay wanted DHCR to issue separate orders with separate findings in a fashion contrary to the standard agency practice of issuing one final order in an administrative proceeding. Justice Saxe improperly based his contempt finding on his own idiosyncratic interpretation of the Berkley Kay decision.

In sum, Justice Saxe, when he assumed responsibility for ruling on the contempt motion, no longer had a clear and unequivocal court mandate before him. Despite this, and despite the fact that he further muddied the waters with his stay, he found DHCR guilty of contempt. His decision had no justification and should not be allowed to stand.

b. The Respondents Failed to Show Prejudice.

Justice Saxe erred in reaching the unsubstantiated finding that "the rights of the petitioners [owners] are clearly impaired". In fact, the owners failed to prove any prejudice resulting from the delay in issuance of the administrative order.[6] Justice Saxe took no notice of the fact that the owners themselves, not only actively participated in the administrative steps as scheduled by Justice Cahn, but requested additional administrative hearings (see, A153-54) which, if they had been held, would have substantially added to the time to complete processing. Furthermore, after the submission of

[6] The only allegations which respondents made as to injuries concerned the payment of rents by their tenants. But, the respondents also alleged that the amounts in question were held in escrow accounts, presumably interest bearing. With the money thus protected, there would be little or no actual injury.

their initial twenty-one pages of comments on the Ernst & Whinney report, a supplement was prepared to that report. The owners then continued to participate in the proceedings by submitting additional comments in response to the supplement. (A204-06) Clearly, the owners took the proceedings seriously, and DHCR took the owners' comments seriously. Justice Saxe arbitrarily ignored these facts in concluding, without explanation, that the owners' rights had been impaired.

What would have been absurd, in contrast to Justice Saxe's conclusions, and what would have compromised the owners' rights, was not the hiring of an outside consultant and the consequent additional processing time, but the arbitrary setting of values for hotel services within the twenty-nine day period set in the original mandamus order.

If anything, by virtue of the owners having asked for additional administrative hearings, which they well knew would prolong the administrative proceedings even further, the owners conceded that their rights would be better protected by additional processing. Indeed, in their substantive Article 78 challenge to the final orders issued by DHCR (N.Y. Co. Index No. 11654/89), the owners make numerous allegations which claim that additional steps in the processing should have undertaken by DHCR. They apparently want it both ways. In this contempt proceeding, the owners claim that DHCR impaired their rights because the orders were not issued within the 29 day period initially directed by Justice Cahn. However, in their substantive Article 78 challenge, they claim that they were denied due process rights because DHCR did not engage in procedures which would have taken far more than those 29 days to complete. Whatever may have been the motivation for the owners continued pursuit of their contempt motion, it appears from their actions that they were far more concerned about having their say in the administrative proceedings, or possibly in managing to have DHCR held in contempt for their own purposes, rather than in having the

administrative orders issued by June 14, 1988.

It should also be noted that the owners did not oppose the imposition of the stay by Justice Saxe, nor did they seek to have it lifted at any time prior to its automatic expiration two months after it went into effect. DHCR issued orders in about two and one half months (seventy-seven days) after the lifting of Justice Saxe's two month stay. Had that stay not been arbitrarily imposed, those orders would have been issued in a period of time barely longer than the period in which the stay remained in effect. The owners acquiesced in the further delay caused by the Court's stay, and thus negated any claim that the delay had an adverse effect on their rights.

The owners were not prejudiced by the additional time needed for administrative processing. Hence, DHCR was improperly found to be in contempt.

POINT II

DHCR WAS ENTITLED TO A HEARING BEFORE THE COURT ISSUED AN ORDER OF CONTEMPT

Justice Saxe erred in finding DHCR in contempt. But, given that he was inclined to rule as he did, DHCR was first entitled to a hearing on disputed issues of fact. It is well settled that before an order for contempt may be issued, a hearing must be held where a factual dispute exists or where a party opposing a motion for contempt offers an excuse for non-compliance. In Quantum Heating Services v. Austern, 100 A.D. 2d 843, 474 N.Y.S 2d 81, 83 (2nd Dept. 1984), in which the party opposing a motion for contempt offered false and evasive responses, the Court concluded that a hearing was required. The court held as follows:

> Nonetheless, the issue should not have been summarily determined

> as appellants have purported to offer an explanation for their evasion (citation omitted) and therefore, were entitled to a hearing (citation omitted)

This Court, in Pinto v Pinto, 120 A.D. 2d 337, 501 N.Y.S. 2d 835 (1st Dept. 1986), said:

> Contempt is a drastic remedy which should not be granted absent a clear right to the relief. When the papers on a motion for contempt raise any factual dispute not capable of resolution on the papers, a hearing must be held before a party can be adjudicated in contempt. (citation omitted)

See also: Kluge v Cooke, 112 A.D. 2d 230, 491 N.Y.S. 2d 446 (2nd Dept. 1985)

In the case at bar, Justice Saxe made findings concerning a number of disputed facts without a hearing. He rejected DHCR's claim that it was acting in good faith, stating that:

> With respect to the hiring of Ernst & Whinney, DHCR's claim that the hiring of Ernst & Whinney was an act done in good faith, I think frankly is an absurd claim. This was done two months after the deadline date that was set by Judge Cahn's order. And it's astonishing to me that as the agency that is said by statute to be experts in this field, that DHCR turns to someone outside the agency to arrive at a decision in a case such as this one.
>
> Frankly, I think that DHCR has turned this case into something akin to an antitrust case, requesting and developing methodology, using a firm as prestigious and well known, and probably as expensive, presumably at taxpayer expense, as Ernst & Whinney.

(A162-63) Had DHCR been given the opportunity to present evidence at a hearing, it would have shown that its turning to an outside consultant in these administrative proceedings for a generic valuation of certain services was in conformity with prior rent agency practices.[7] Justice Saxe only

[7] The rent agency has used outside consultants in the following situations: (1) to determine the value of electrical services in order to create a formula for adjusting rents in electrical conversion proceedings; (2) to design the Maximum Base Rent program under the Rent Control Law; (3) to triennially determine citywide vacancy rates; and (4) annually by the Rent Guidelines Boards to establish guidelines for rent increases under rent stabilization.

demonstrated his lack of knowledge in finding that "it's astonishing" that DHCR turned to an outside consultant, and comparing DHCR's handling of the proceedings as being "something akin to an antitrust case". At a hearing DHCR would have had the opportunity to show why outside assistance was necessary to establish the generic value of the hotel services in question.

Justice Saxe also erroneously reached the following conclusion without a hearing: "DHCR's claim that the hiring of Ernst & Whinney was an act done in good faith, I think frankly is an absurd claim. This was done two months after the deadline date that was set by Judge Cahn's order." A hearing was specifically requested on this question so that DHCR could show the steps leading up to the formal hiring of Ernst & Whinney in August, 1988. As DHCR's counsel stated in oral argument:

> Secondly, your Honor, with regard to the date which we first contacted our consultant, when the discussions began with regard to a contract, discussions regarding the development and methodology, that is the kind of matter that would require a hearing to get the full record, the full information before the Court, so you can make a determination as to whether or not we were ignoring the Court's order, as counsel would have it, or if in fact, we were making an effort to proceed and reach our determination on this matter.

(A158-59)

In addition, the disputed question as to whether DHCR could or should bifurcate the proceedings should have been the subject of a hearing.

POINT III

THE COURT BELOW ABUSED IT DISCRETION BY INCREASING THE PENALTY AGAINST DHCR AFTER ADMINISTRATIVE ORDERS WERE ISSUED RATHER THAN PURGING THE CONTEMPT

Justice Saxe erred in modifying his initial decision so as to increase the penalty against DHCR after it had complied with Justice Cahn's order, rather than in purging the contempt. To the extent that it could be argued that the Division was in contempt of court as a result of its delay in processing the application in question, any such alleged contempt was purged by the Division's issuance of orders on April 3 and 5, 1989.

This Court, in the case of In re Hildreth, 28 A.D.2d 290, 284 N.Y.S.2d 755 (1st Dept. 1967), in noting that court's have a large degree of discretion as to conditions on which contempt may be purged, stated that:

> Generally, however, upon an application for a contempt adjudication, the court should exercise its judicial discretion broadly to accomplish justice on the basis of all facts and circumstances bearing upon the nature and willfulness of the respondent's conduct.

Clearly upon consideration of all the facts and circumstances of this case, after DHCR rendered determinations, the Court below should have exercised its discretion to purge the contempt finding. DHCR immediately notified Justice Saxe of the issuance of the decisions and informed him that, under the terms of his decision, the imposition of a fine would be moot. (A201) This was so because the imposition of a $250.00 per day fine was not to begin until a signed order had been served upon DHCR. (A164) No damages or award of costs and expenses was imposed.

However, rather than purging the contempt as DHCR had in effect requested, Justice Saxe

modified his decision to impose a flat $250.00 fine and assess costs and expenses. DHCR would have had no fine or costs to pay under Justice Saxe's initial decision. But his modified decision, rendered after DHCR issued the administrative orders, if not reversed, will likely require DHCR to pay many thousands of dollars to the owners.[8] The modification by Justice Saxe is wholly without reason. The purpose of civil contempt is to obtain compliance, not punishment. See, Dept. of Environmental Protection v. Dept. of Envir. Conservation. Justice Saxe's modification can only be seen as an arbitrary attempt to punish DHCR after it had complied with Justice Cahn's order.

Furthermore, the owners, in both their motion for contempt and their April 12, 1989 letter to Justice Saxe, asked for damages as well as costs and expenses. It is well settled that where actual damages have been shown, the party seeking contempt is not entitled to costs and expenses. State of New York v. Unique Ideas, 44 N.Y.2d 345, 405 N.Y.S.2d 656, 376 N.E.2d 1301 (1978). Since the owners requested damages for alleged injuries, Justice Saxe, even if his modification were otherwise legitimate, erred in directing a hearing to prove costs and expenses rather than actual damages. Only had the owners not been able to establish actual damages, would they then be entitled to costs and expenses.

CONCLUSION

The contempt order of the Court below should be reversed and the respondents' contempt application dismissed in toto, or, in the alternative, the order should be vacated and the proceeding remanded for a hearing on disputed facts, and, if the Court below should find DHCR in contempt

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[8] The fact that the $250.00 per day fine imposed initially by Justice Saxe is contrary to law, does not negate the fact that his modified decision increased the penalty against DHCR.

after such hearing, this Court should direct the Court below to hold a hearing to allow respondents to establish actual damages.

Dated: Bronx, New York
July 9, 1990

Respectfully submitted,

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