IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. VM Agritech Limited,* 2024 BCSC 1017

Date: 20240612
Docket: S230800
Registry: Vancouver

Between:

Alan Gilbert Smith

Plaintiff

And

VM Agritech Limited (formerly Myco Sciences Limited) and Christopher J. Wightman

Defendants

Before: Associate Judge Muir

Reasons for Judgment

Counsel for the Plaintiff:	S. Lin
Counsel for the Defendants:	M. Ross N. Galanopoulos
Place and Date of Hearing:	Vancouver, B.C. May 13, 2024
Place and Date of Judgment:	Vancouver, B.C. June 12, 2024

Introduction

[1] This is an application by the defendants, VM Agritech Limited ("Agritech") and Christopher Wightman (together, the "defendants"), seeking the following orders:

1) to set aside a default judgment against them granted by me on February 6, 2024;

2) a declaration that they have not submitted to the court's jurisdiction by making this application; and

3) special costs payable forthwith in any event of the cause.

[2] The underlying action stems from dealings between Agritech, a company incorporated in the United Kingdom, and Voice Mobility International Inc. ("Voice"), a public company listed on the TSX Venture Exchange and headquartered in Vancouver.

[3] Mr. Wightman is Agritech's Chairman of the Board. He resides in the United Kingdom.

[4] The plaintiff, Alan Gilbert Smith, is a shareholder in Voice.

[5] In 2020, Agritech and Voice entered into an agreement or agreements with the intention of taking Agritech public via a proposed reverse take over transaction (the "proposed RTO"). In the notice of civil claim filed February 1, 2023, the plaintiff claims that Mr. Wightman caused Agritech to breach the proposed RTO and pursue a transaction with a different company in Canada, Bluewater Acquisition Corp.

[6] It is alleged that Mr. Wightman caused Agritech to retain the services of a Vancouver law firm, Cassels Brock & Blackwell LLP ("Cassels Brock"), to provide them with legal advice. It is also alleged that, pursuant to the agreement between Agritech and Voice, Agritech was responsible for paying the legal fees thereby incurred.

[7] Further, it is alleged that Agritech paid several of Cassels Brock's accounts although the invoices were nominally addressed to Voice. When the relationship

between Agritech and Voice ended, however, certain of these legal fees, in the amount of $24,155.91, remained unpaid.

[8] The plaintiff reached a compromise with Cassels Brock, whereby he paid $12,000 for an unreserved and complete assignment of their accounts. He then brought this action to recover the full amount of the accounts.

Background

[9] As noted, the notice of civil claim was filed February 1, 2023.

[10] The defendants filed a jurisdictional response to the claim on February 21, 2023. They then brought an application to set aside service of the notice of civil claim, which was granted on May 2, 2023.

[11] On May 9, 2023, the notice of civil claim was served again, by delivering the claim to the finance director of Agritech.

[12] The defendants filed a second jurisdictional response on June 26, 2023.

[13] The defendants then brought an application on August 2, 2023 to set aside the service of the notice of civil claim and to dismiss or stay the claim for want of jurisdiction. That application was brought five business days outside of the 30-day limitation in Rule 21-8 of the BC *Supreme Court Civil Rules*, and the defendants also sought an extension of that deadline.

[14] After a few adjournments, the defendants' August 2, 2023 application was heard by Justice Giaschi on November 7, 2023, with reasons for judgment given the same day (*Smith v. VM Agritech Limited* (7 November 2023), Vancouver S230800 (B.C.S.C.)) (the "Giaschi order").

[15] Apparently, an application to the Registrar was necessary to settle the terms of the Giaschi order. On January 17, 2024, The Giaschi order was settled in the following terms:

1. The plaintiff's service of his notice of civil claim was defective.

2. Paragraph 2 in the defendants' notice of application filed August 2, 2023 seeking an order under Rule 21-8(1)(b) dismissing or, alternatively, staying the proceeding on the ground that the court does not have jurisdiction over the defendants in respect of the claim made against them is declined.
3. Paragraph 3 in the defendants' notice of application filed August 2, 2023 seeking an order under Rules 21-8(4)(b) & (c) and 22-4(2) to extend the time to serve their notice of application from July 26 to August 2, 2023 is declined.
4. The defendants have attorned to the jurisdiction of the court and, consequently, the plaintiff does not need to re-serve the notice of civil claim in this matter.
5. There will be no costs on this application.

[16] The defendants brought an application for leave to appeal the Giaschi order, which was heard by our Court of Appeal on January 29, 2024 in chambers. In his reasons for judgment, *VM Agritech Limited v. Smith*, 2024 BCSC 39, Justice Hunter determined that an appeal as of right existed for orders numbered 2 and 4 above. He also granted leave to appeal order number 3 and determined that the appeals could be heard together.

[17] In the meantime, the plaintiff had brought an application for default judgment on July 27, 2023. That application was adjourned to allow the defendants time to bring their jurisdictional application.

[18] The plaintiff gave “courtesy notice” to the defendants that he intended to reset his July 27, 2023 default judgment application after the Giaschi order was made. The defendants advised that they intended to oppose the plaintiff’s application but were not available on the date of November 22, 2023 that the plaintiff proposed.

[19] The plaintiff took the position that he was not required to provide the defendants with any notice of the default judgment application, but advised on November 23 that he would proceed on November 24, 2023.

[20] Associate Judge Hughes heard that application and dismissed it, determining that the time for filing a response had not yet expired, as it would run from the date of the Giaschi order, *i.e*., November 7, 2023, and the defendants, being from outside

of Canada, had 49 days within which to file a response. The defendants advised that they were unaware of Hughes A.J.'s November 24, 2023 determination regarding the time for filing a response until after the default judgment had been granted by me on February 6, 2024 and after they obtained copies of the relevant transcripts.

[21] On January 22, 2024, the plaintiff again gave the defendants "courtesy notice" that he intended to bring an application in default on January 23, 2024 as no response to civil claim had been filed and no stay of the Giaschi order had been sought or obtained. That application was subsequently adjourned to January 25, 2024.

[22] The defendants took the position that the conditions for obtaining a default judgment had not been met, as the rules do not provide a deadline for filing a response to civil claim where a jurisdictional application has been dismissed. They took the position that the plaintiff must bring an application for a determination as to when that time limit expired. As noted, they were unaware of Hughes A.J.'s November 24, 2023 determination that the time for filing a response began to run on the pronouncement of the Giaschi order.

[23] The plaintiff's default application was heard by Hughes A.J. on January 25, 2024. The defendants took the position before me that in her reasons for judgment, Hughes A.J. determined that the defendants were entitled to notice of the application.

[24] That, however, is not precisely what was said. The transcript notes, at page 4, line 45, that, "[…] you may not be required to give notice --".

[25] Associate Judge Hughes was concerned, however, that the application was premature in the face of the leave to appeal hearing set for January 29, 2024. She indicated that she would adjourn the application until after that hearing. She also noted that the defendants had only been served with unfiled copies of the notice of application and affidavit. She required that the plaintiff serve filed copies of his materials along with advice that the application had been adjourned to February 1,

2024 (the “Hughes order”). Unfortunately, the plaintiff, in error, re-served unfiled copies of the materials.

[26] The defendants learned of the Hughes order and advised the plaintiff on January 30, 2024 that the plaintiff had failed to comply with the order regarding service.

[27] The plaintiff served the filed materials on January 30, 2024 and offered to adjourn the hearing to February 6. There was no response from the defendants. As a result, the plaintiff appeared before me and sought an adjournment of the default application to February 6, 2024.

[28] The defendants did not attend at the hearing before me on February 6, 2024. At that hearing, being satisfied that the plaintiff had provided the required documents for a default judgment order in his materials for the hearing set for February 1, 2024, that those materials had been served on the defendants (at the latest January 30, 2024) and they had not filed a response to the application, and confirming that no response to civil claim had been filed and no stay obtained, default judgment was granted.

Analysis and Conclusion

[29] Rule 3-8(1) provides:

> **Default in filing and serving a response to civil claim**
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> (1) A plaintiff may proceed against a defendant under this rule if
>
> > (a) that defendant has not filed and served a response to civil claim, and
> >
> > (b) the period for filing and serving the response to civil claim has expired.

[30] The considerations generally applied on an application to set aside a default judgment are set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.), confirmed on numerous occasions, including in the Court of Appeal decision *BCI Bulkhaul Carriers Inc. v. Aujila Trucking Inc*., 2015 BCCA 411, where the court noted:

> [2] Both parties accept that the trial judge properly instructed himself that the test to set aside a default judgment is set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.). That test is:
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> 1. That he did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
> 2. That he made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or gave an explanation for any delay in the application being brought;
> 3. That he has a meritorious defence or at least a defence worthy of investigation; and
> 4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant.
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> [3] The Miracle Feeds test has been repeatedly affirmed in this Court, but this Court has also stated that the test is not to be rigidly applied:
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> > [37] The factors set out in the *Miracle Feeds* decision are not meant to be applied inflexibly, nor are they immutable: see *H.M.T.Q. In Right Of The Province of British Columbia v. Ismail,* 2007 BCCA 55 at para. 11. The discussion by Mr. Justice Voith in *Director of Civil Forfeiture v. Doe,* 2010 BCSC 940 at para. 15 in the context of the R. 17(12) of the previous *Supreme Court Rules* is apt:
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> > > [15] ... [I]t does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in *Miracle Feeds* precludes them from being successful on an application under Rule 17(12) [the rule in the previous *Supreme Court Rules* that permitted a party to apply to set aside default judgment]. These requirements are not immutable. The failure or inability of a defendant to address a particular factor in *Miracle Feeds* is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion.
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> > *Nichol v. Nichol,* 2015 BCCA 278

[31] As noted, the defendants provided many reasons to the plaintiff why he should not proceed with an application for default judgment.

[32] The defendants initially took the position that until the Giaschi order, they were not required to file a response and that the rule prescribing the time for filing a response to civil claim did not cover the circumstances where a jurisdictional challenge was dismissed. Hence, it is the defendants' position that an application

must be made by the plaintiff to determine when the period for responding to the civil claim expired.

[33] Although the defendants were not aware of it, that deadline had already been determined by Hughes A.J. to be 49 days after the Giaschi order on November 7, 2023. That determination was not disputed nor was a different expiration period proposed in the hearing before me.

[34] That reasoning was advanced before me by the defendants as a rationale for not having filed a response to the civil claim. They argued that, in the absence of a determination of the date by which they were required to file a response to civil claim, they were not required to either file a response or seek a stay of the Giaschi order.

[35] I note, however, that the defendants did not, in their materials or in submissions before me (now that the time for filing a response has expired and default granted), indicate that it was their intention to file a response to civil claim or seek a stay of the Giaschi order.

[36] As to the other *Miracle Feed* factors, I am satisfied that the defendants applied to set aside the default judgment promptly and have satisfied the relatively low bar by showing through affidavit material that they have a defence worthy of investigation.

[37] In support of their application to set aside the default judgment, the defendants also advance what they say are defects in the default judgment application and the procedure leading to it.

[38] The defendants first assert that the default judgment application was an *ex parte* application and, as such, the plaintiff was required to fully disclose material issues of fact or law. The defendants referred, amongst others, to *British Columbia (Director of Civil Forfeiture) v. Qin*, 2019 BCCA 345, where the Court of Appeal noted:

> [29] The complicating issue in this case is what the chambers judge characterized as counsel's "misconduct" at the *ex parte* hearing and the role that conduct should have played in the exercise of the Court's discretion under s. 8(5) of the *Civil Forfeiture Act*. There can be no doubt that an applicant for an *ex parte* order must make "full and frank" disclosure to the Court. As I noted some time ago in *Kriegman v. Dill* 2018 BCCA 86, the seminal case in this province is a decision of Wilson J. (as he then was) in *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 216 (B.C.S.C.), ***aff'd*** (1960), 28 WWR 517. There Wilson J. stated:
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> > I find there is some divergence of judicial thought as to the grounds upon which an *ex parte* order ought, upon notice, to be discharged. The area of divergence does not include such generally accepted fundamental concepts as this: That the *ex parte* order is obtained *periculo petentis* so that if there has not been made to the Judge a full and frank disclosure of relevant facts, the order will be voided. Sheppard J.A. in *Kraupner v. Ruby* (1957), 1957 CanLII 236 (BC CA), 7 D.L.R. (2d) 383 at p. 391 cites Scrutton L.J. in *Lazard Bros. & Co. v. Banque Industrielle de Moscou*, [1932] 1 K.B. 617 at p. 637:
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> > > Persons applying *ex parte* to the Court must use the utmost good faith, and if they do not, they cannot keep the results of their application.
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> > [At 218; emphasis added [by Wilson J.]]
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> [30] Although some older cases seemed to restrict the duty to disclose only to all material *facts* (see for example, *Evans v. Umbrella Capital LLC* 2004 BCCA 149 at para. 33), the duty now extends to "any points of fact or law known to [the moving party] which favour the other side." (See *USA v. Friedland* [1996] O.J. No. 4399 (Ont. Gen. Div.) at para. 27 *per* Mr. Justice Sharpe, as he then was; and the cases cited at para. 40 of *Kriegman*.

[39] The defendants point out that the plaintiff asserted at the default judgment application that the defendants intended to apply for a stay but had never done so. They dispute this assertion.

[40] Further, the defendants argue that the plaintiff should have brought the defendants' position on the default judgment application to the attention of the court. Specifically, that they were resisting attending as they did not want to be seen as attorning to the jurisdiction of the court, and that, so far as they knew in any event, the time within which they were required to file a response to civil claim had yet to be determined.

[41] The plaintiff disputes that these are material omissions. He points out that the only material facts for a default judgment to go are whether a response to civil claim has been filed and that the time within which to file the response has expired. The latter having been resolved by the decision of Hughes A.J. that the reasons for the defendants not attending the default judgment application are irrelevant.

[42] Further, the plaintiff disputes that there was an obligation on him to make full and frank disclosure on the default application. He relies on *Wang v. Corsa Auto Gallery Ltd*., 2023 BCSC 382, as follows:

> [30] Rule 3-8 provides for the process by which a party may obtain default judgment. The plaintiff obtained default judgment against Mr. Wong, and then proceeded, pursuant to Rule 3-8(13) to apply to the court for an assessment of the damages. Such an assessment is not an *ex parte* hearing. A party who files a response to civil claim becomes a party of record, and is entitled to notice of an assessment hearing. A party who does not file a response does not become a party of record, and so is not entitled to notice of an assessment hearing. By wilfully failing to file a response to civil claim, or ensuring that one was filed on his behalf, Mr. Wong never became a party of record. His failure to do so does not make the assessment an *ex parte* hearing, for the same reasons set out by Justice Macaulay in the *Matthes v. Manufacturers Life Insurance Company*, 2008 BCSC 6 at paras. 52–58. For the same reasons, in these circumstances, the application for an assessment of damages was not equivalent to an *ex parte* hearing with the obligation for full and frank disclosure upon the applicant.
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> [Emphasis added.]

[43] The defendants also say that there were procedural errors made by the plaintiff, in that his notice of application stated reliance on Rule 8-1, but that service was not properly effected under that rule.

[44] The plaintiff argues that this was not an application for which notice was required. He points out that a) only a party of record is entitled to notice of applications, b) the defendants are not parties of record as defined by the rules, and c) the defendants were therefore not entitled to notice of the default application. The plaintiff relies on *Wang* as follows:

> [15] A defendant who has failed to file a response to civil claim is not entitled to service of subsequent applications: see *National Home Warranty Group Inc. v. Red Rose Appliances & Plumbing Ltd.,* 2018 BCSC 234 at para. 38 [*National Home Warranty*]; *Main Acquisitions Consultants Inc. v.*

> *Prior Properties Inc*., 2022 BCCA 102 at paras. 27–32. Mr. Wong was a party to the within proceeding, but he was not a party of record.
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> [16] Pursuant to Rule 8-1(7) of the *Rules*, the plaintiff was not required to serve Mr. Wong with the notice of application which resulted in either the Default Judgment or Damages Order. Mr. Wong has no standing to seek a reconsideration of the Damages Order pursuant to Rule 22-1(3), nor does he seek such a reconsideration.

[45] The defendants argue that they are parties of record by implication in that a jurisdictional response has been filed. That argument might have held more water prior to the determination by Giaschi J. that the defendants had attorned to the jurisdiction of this court.

[46] That point is made somewhat moot by the Hughes order, according to which filed copies of the application materials were to be served on the defendants by 4 p.m. that day.

[47] The plaintiff acknowledges that he erred and that was not done and he made attempts to cure that error by sending the defendants filed copies of the materials on January 30, 2024 and offering to adjourn the hearing to February 6, 2024. The defendants did not respond, but the plaintiff sought and obtained the adjournment of the default judgment hearing from February 1 to February 6 and notified the defendants of that fact.

[48] The defendants have had notice for almost a year that it was the plaintiff's intention to seek default judgment absent a response being filed in a timely way.

[49] I am not satisfied that the failure to comply precisely with the Hughes order rises to the level of mandating the default judgment be overturned.

[50] Of the *Miracle Feeds* factors, I am influenced by the clear willful failure of the defendants to file a response to civil claim.

[51] It is now four months after the leave to appeal hearing and seven months after the Giaschi order. There is no draft response to civil claim put forward, there is not even the assurance that the defendants intend to file a response if they are

successful, and there is no suggestion that an application for a stay will be made, again, if they are successful.

[52] As to the alleged misrepresentations or failures to disclose, the *Wang* decision is clear that there was no obligation on the plaintiff to make full and frank disclosure on a default application. Further, the facts allegedly misstated are irrelevant. The factors to be decided are clearly set out in Rule 3-8(1) of the *Rules*. The plaintiff established that the defendants had not filed a response to civil claim and that the time within which to do so had expired.

[53] The defendants' other positions—their reasoning that the time for response had not been established, answered as it was by the Hughes determination, and that they did not appear on the default application due to jurisdictional concerns—were irrelevant to my ordering default judgment.

[54] Thus, I cannot conclude that there was any failure to disclose fully and frankly the material issues of fact and law on the default application.

[55] This is a discretionary order. Obviously, the discretion must be exercised judicially. The *Miracle Feed* factors are not the only considerations. The court must also look at other relevant matters such as proportionality and the object of the *Rules*.

[56] A default judgment is clearly a very blunt instrument that deprives defendants of their day in court. There is a point, however, past which a plaintiff is not obliged to go. Based on the defendants' intentional failure to either file a response to civil claim or seek a stay of the Giaschi order, the length of time that this matter has been before the courts for what is a very minimal claim, and my rejection of the other arguments advanced by the defendants, I conclude that the application before me today should be dismissed. The default judgment will stand.

[57] As to the defendants' application for a declaration that they have not submitted to the jurisdiction of this court by making this application, in my view, given both the Giaschi order and the dismissal of today's application to overturn the default

judgment, that order is unnecessary and that aspect of the application is also dismissed.

Costs

[58] The plaintiff is entitled to his costs of this application, payable forthwith after assessment.

"Muir A.J."