# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Melco Resorts (Macau) Limited v. Huang,* 2023 BCSC 631

Date: 20230317
Docket: S222184
Registry: Vancouver

Between:

**Melco Resorts (Macau) Limited**

Plaintiff

And

**Gui Jun Huang**

Defendant

Before: Master Robertson

## Oral Reasons for Judgment

In Chambers

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| Counsel for the Plaintiff: | P. Bychawski |
| Counsel for the Defendant: | J. Un |
| Place and Date of Hearing: | Vancouver, B.C.<br>March 13, 2023 |
| Place and Date of Judgment: | Vancouver, B.C.<br>March 17, 2023 |

[1] **THE COURT:** The defendant brings this application to have a default judgment pronounced December 16, 2022, set aside on two grounds:

a) That the notice of civil claim was not personally served with no order for alternative service having been pronounced, which the defendant argues makes the default judgment a nullity, and the plaintiff relying on "common law service"; and

b) That the defendant meets the test in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. P 58, [1979] B.C.J. No. 1965 ("*Miracle Feeds"*).



**Background**

[2] The plaintiff's claim is framed as one in debt based upon a credit agreement dated May 10, 2019, whereby the plaintiff advanced the defendant credit for the purchase of chips for use in the plaintiff's casino up to a maximum amount of $3,000,000 Hong Kong dollars ("HKD"), with each individual draw being supported by a signed marker, which was then secured by a promissory note and letter of authority by which the plaintiff was authorized in its sole discretion to insert the final amount due and owing, and maturity date, on a final promissory note.

[3] It is further pled that the full amount of credit was drawn down by November 2, 2019, and that on December 1, 2019, a settlement sheet was signed netting the amount out after accounting for the defendant's winnings in the amount of $2,717,484 HKD.

[4] Partial payments were made on various dates with the last payment being made January 19, 2022. In addition, a large payment was made on September 9, 2021, by way of cheque, which was dishonoured when presented for payment.

[5] In accordance with the authorization, the plaintiff completed the pre-signed promissory note calculating the amount to be owing at $4,484,358 HKD, which included interest accrued to the maturity date of March 28, 2022. The notice of civil claim did not specify the interest rate that was applied, but in the prayer for relief

indicated that judgment was being sought in the amount of $4,484,358 HKD on the basis of such interest being calculated and included.

[6] The plaintiff attempted to personally serve the notice of civil claim on the defendant through the services of a process server at an address in Vancouver. The defendant is the co-owner of that Vancouver property with his son. The process server wrote in an email dated May 27, 2022, that on his first attempt a woman answered and said that "Mr. Huang" was not at home, but she would ask him to call.

[7] As the defendant did not call the process server, further attempts for service were then made. On the more recent attempt, the process server was told that "Gui Jun Huang" was out of the country. When the process server asked when he would be back, the answer was "not for a long time." The process server explained to the young man who had answered the door that he had important legal documents. The process server asked for an email or phone number for the defendant. The young man apparently replied:

> He has contacted the sender already, so I do not need to provide that.

[8] Notably, the email does not provide particulars such as dates or times of the attempts and these discussions. In any event, consistent with that advice on May 17, 2022, a lawyer contacted the counsel for the plaintiff by letter addressed to this particular plaintiff's counsel and referencing this action by both name and action number. In that letter, the lawyer writes as follows:

> Mr. Gui Jun Huang has recently learned that your client is suing him in Vancouver. He does not understand why your client is doing so. He has retained me presently on a limited basis to review this matter. At this time, I am not able to speak to any position in the litigation or settlement, procedure, or merits, etc, of your case. It would be helpful for my review if you could provide me with the following documents:
>
> > 1) the loan agreement or agreement setting out the terms of the debt; and
> >
> > 2) a printout/statement of all payments/repayments of the debt to date.
>
> Please advise me in advance of any further steps you intend to take so that I have an opportunity to discuss further instructions with my client. Thank you for your assistance.

[9] In response, counsel for the plaintiff replied by letter dated May 30, 2022, as follows:

> Further to your letter of May 17, 2022, we enclose the following documentation:
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> 1) notice of civil claim filed March 28, 2022; and
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> 2) documentation relating to Gui Jun Huang's dealings with our client.
>
> In terms of pending steps in the action, we confirm that we will enter default judgment against Gui Jun Huang if a response to civil claim is not filed in accordance with the *Supreme Court Civil Rules* on or before June 27, 2022.

[10] By email dated May 30, 2022, counsel replied "thank you."

[11] The plaintiff took the position that this was an acknowledgment of service and, given the notice in his letter that default would be taken if no response filed by June 27, 2022, proceeded to submit his application for default judgment on August 2, 2022. In support of that application, he filed an affidavit which attached the correspondence as referenced between counsel as proof of service.

[12] For reasons that are not fully explained but presumably are a result of a defect notice being issued by the registry regarding the amount of the claim and currency conversion issues, on December 13, 2022, a further requisition for default judgment was filed with an affidavit setting out more particulars as to the calculations for judgment, specifically that the prejudgment interest rate was calculated at 29.25% from March 28, 2022, to August 2, 2022, in the total amount of $456,391 HKD, and that the total amount claimed when converted to Canadian dollars amounted to $79,914.07 CDN as of August 2, 2022.

[13] Default judgment was then, as noted, issued on December 16, 2022, and subsequently registered against the defendant's interest in the Vancouver property as co-owned with his son.

[14] The defendant learned of the default judgment on February 1, 2023, when his son informed him that he had received a letter from the Land Title Office on January

23, 2023, stating that a certificate of judgment had been registered against their jointly owned property.

[15] After arranging to speak with a lawyer on February 7, 2023, the defendant's lawyer conducted a court services online search and found this action along with the default judgment. The defendant immediately instructed counsel to apply to have the default judgment set aside.

## Analysis

### Common Law Service

[16] I will deal firstly with the argument that the default judgment is a nullity given lack of personal service, or whether proof of service at common law is sufficient.

[17] There is no dispute that the defendant was not personally served as contemplated under the Rules of Court. Specifically, under R. 3-8(2), a plaintiff must provide proof of service of a notice of civil claim on the defendant in order to be entitled to default judgment. Rule 4-31(1)(a) provides that an originating pleading such as a notice of civil claim must be served by personal service to be proven by way of an affidavit "of personal service in Form 15".

[18] The Court of Appeal has confirmed in *Tiamzon v. Vandt*, 2020 BCCA 336, at para. 15, that if a default judgment was granted when it should not have been due to non-compliance with the rules, in that case because the claim was not for a "specific or ascertainable amount," that being the modern concept of a liquidated claim, the default judgment is a nullity.

[19] In *Paolucci Holdings Ltd. v. Girard Insurance & Financial Service Inc.*, 2018 BCSC 1810, a default judgment was set aside as a nullity because of the failure to comply with the requirement to prove service through affidavit evidence, with the court noting as follows:

> [32] I accept the submissions of Mr. Stewart Q.C. that it was an honest and inadvertent mistake that the affidavit of service of the notice of civil claim on Maioha was not provided with the material submitted for the default judgment.

> However, default judgment is an extraordinary remedy. The filing of proof of service is mandatory pursuant to Rule 3-8, and in this case it was not done.
>
> [33] Proof of service goes to the heart of an application for default judgment. This is not a situation where a style of cause was incorrect or a term was omitted. There was no evidence before the court with regard to the service of the notice of claim when the default judgment was granted. This is a significant irregularity in the proceeding.
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> [34] If default judgment is entered because of an irregularity the defendant is entitled to have it set aside: *R & J Siever Holdings Ltd. v. Moldenhauer*, 2008 BCCA 59, as well as *Cahoon v. Maiden*, (1984), 1984 CanLII 539 (BCSC) at para. 19 and *James v. 627210 B.C. Ltd.*, 2010 BCSC 470.
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> [35] I would set aside the default judgment entered March 24, 2016 against Maioha for that reason alone. It would be an injustice not to.



[20] In *Ming Sun Benevolent Society v. Philippine Women Centre of B.C.*, 2020 BCSC 423, a default judgment was obtained after the notice of civil claim and response to counterclaim of the plaintiff had been set aside for lack of compliance with both the Rules of Court and orders that had been pronounced with respect to disclosure obligations.

[21] In that proceeding, the plaintiff's counsel had withdrawn and provided an address for delivery for the then self represented plaintiff which was an old address that it no longer used. As such, the various demands and applications for the discovery and disclosure orders had not been received by the plaintiff.

[22] After the plaintiff’s notice of civil claim and response to counterclaim were struck, an amended counterclaim was filed by the defendant and delivered to that same address, by regular delivery. It was not personally served. When no further response was filed, default judgment was obtained on the counterclaim.

[23] The plaintiff learned of the default judgment upon it being registered against title to its real property, and at that time the plaintiff took steps to determine what had transpired and to then to set aside the default judgment.

[24] In setting aside the default judgment, the court confirmed that personal service of the amended counterclaim was required as the plaintiff was no longer a party of record as a result of its pleadings being struck.

[25] The court found that sending the amended counterclaim by regular mail to the previous address as had been noted on the notice of withdrawal-of-counsel was not personal service as required under the Rules of Court. Despite that finding, the court went on to consider the *Miracle Feeds* test and determined that it would set aside the default judgment in any event as there were issues raised that were worthy of investigation, and defences that may well be meritorious. An appeal of that decision was then dismissed with those reasons being indexed at 2021 BCCA 240.

[26] Here the defendant argues that because he was not personally served with the notice of civil claim, it would be an injustice to allow the default judgment to stand and that it is a nullity given the lack of compliance with the Rules of Court.

[27] In response, the plaintiff argues that the plaintiff was served based on common law principles of service. Specifically, as noted in R. 4-6(4), the court may consider any evidence of service that it considered appropriate in the circumstances. In issuing the default judgment, the registry had the benefit of the correspondence between counsel. As such, the plaintiff argues that the respondent was satisfied as to the proof of service, in accordance with the Rules of Court.

[28] In support of its argument that the registry was entitled to accept that evidence, the plaintiff relies on *Fast Fuel Services Ltd. v. Michelin North America (Canada) Inc.*, 2008 BCCA 216 ("*Fast Fuel*"), where the Court of Appeal declined to accept a rigid and technical interpretation of the service rules, noting as follows:

> [20] What must be borne in mind is the fact that both CGEM and MFPM had notice of the actions within the time permitted by the Rules of Court for filing and serving a writ. It has long been recognized the purpose of service is fulfilled once notice has been received. The following statement was made by the Lord Chancellor in the mid-nineteenth century in the case of *Hope v. Hope* (1854), 43 E.R. 534 (H.L.) at 539-540:
>
> > The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required.

> [21] The force of that statement may now be somewhat tempered by other considerations but, in my view, where a defendant has notice of an action within the time prescribed by the Rules for service of a writ, only a compelling case of prejudice should defeat its renewal, unless perhaps the plaintiffs' conduct in causing the delay is so egregious a refusal to renew can be justified. This is not a compelling case of prejudice caused by delay in the relevant period if it is any case at all.

[29] Notably *Fast Fuel* was not a case where a default judgment was being set aside, but rather it was a case determining whether or not it was necessary to renew a writ of summons on the basis that it had not been properly served, such that the court was considering whether or not the defendant had notice of the proceedings despite the lack of personal service. *Fast Fuels* was a case considering prejudice arising from the writ's renewal some years after it would have otherwise expired, in the context of effective notice.

[30] Similarly, in *Balla v. Fitch Research Corporation*, 2005 BCSC 1447 ("*Balla*"), while the court confirmed that there can be common law service, it was again done so in the context of whether a writ and statement of claim ought to be renewed or if it was properly served, not an application to set aside a default judgment. Nonetheless, at para. 24, the court summarized various decisions where service was held to be valid despite not being in strict compliance with the Rules of Court, including *Rupertsland Mortgage Investment Ltd. v. City of Winnipeg and Gemmill (Medical Officer of Health for Winnipeg)*, 1981 CanLII 3468 (MB KB), where service on a corporate solicitor, who was also the wife of the company's principal but not authorized to accept service, was found to be valid as it was "found as a fact that the wife had informed her husband of the documents within a day and that the husband, principal of the company, was aware and understood the import of the document served."

[31] The court summarized the principles as to common law service as follows:

> [27] In extracting a common principle from these authorities, I can do no better than the language of Kirk Smith, Co. Ct. J., in *Orazio v. Ciulla, supra*:
>
> > The essential ingredient, as I see it, on the authorities, is that the process delivered to the defendant must be so delivered under circumstances which enable the Court to conclude that

> he knew, or reasonably should have known, what it was, or, to adopt the language of Hogg J.A. in *Re Avery*, (1951 CanLII 111 (ON CA), [1952] 2 D.L.R. 413), ... to the facts of this case, that he knew the document was a writ, issued against him by the plaintiff, and he knew in addition the general nature of the claim therein advanced.



[32] As to decisions that have considered the issue of service since the amendment of the *Civil Rules* in 2010, in *The Owners, Strata Plan VR456 (Re)*, 2022 BCSC 502 ("*Strata Plan VR456")* the court considered a petition to wind up a strata plan and appointment of an administrator for that purpose, given the failure of the owners to maintain the property sufficiently resulting in a City of Vancouver emergency work orders being made in respect of the development.

[33] Two of the individual owners who opposed the windup and sale argued that they had not been personally served with the petition, and that a consent order that was then entered into ought to be set aside on that basis.

[34] The court considered *Balla* and confirmed that common law service occurs when an originating process is brought to the attention of a named defendant:

> [22] The requirement for service to be effective at common law is evidence that allows the court to confidently conclude that the person knew that the originating process was a legal claim, who commenced the proceeding, and the general nature of what was sought: *Balla* at paras. 18, 27.

[35] The plaintiff argues that correspondence with the defendant's counsel, even though he was retained for a limited purpose as set out in that correspondence, leads to the inescapable conclusion that the defendant had notice of the claim and the general nature of what was being sought therein.

[36] The defendant does not necessarily dispute that he understood the nature of the claim. Rather, he deposes that his lawyer advised him as follows:

> This action is improper because there is a serious jurisdiction issue among other reasons. Given that the plaintiff did not provide me with the notice of civil claim, [defendant's lawyer] advised me that no response to this action was required at that time, but he would try to find more information for me.

[37] That lawyer has not given any evidence for this application.

[38] While I agree with counsel for the plaintiff that common law service is available and may be sufficient basis on which service can be found to be effective and that the defendant knew of the nature and claim and importance of the document, I am not satisfied that he knew of the consequences of not filing a response. To the contrary, his evidence is that he was told it would not be necessary because it had not been property served.

[39] It is notable in this respect that in the May 30, 2022 letter enclosing the loan documents, counsel for the plaintiff did not include that they were being enclosed "for service." Rather, counsel only included them and said default judgment would be obtained if no response was filed "in accordance with the *Supreme Court Civil Rules*."

[40] The Rules of Court require personal service and, if that cannot be done, allow for an alternative means of such service.

[41] Thus, it is reasonable to conclude that neither the defendant nor its counsel was alerted to the fact that the plaintiff would be acting on the basis that that letter constituted service. Notwithstanding that the court in *Strata Plan VR456* references notice and knowledge as the criteria for finding common law service, implicit in that is knowing the potential consequences of having been sent the documents, including that service is being deemed to have been carried out, such that there is a risk of default proceedings if a response is not filed.

[42] While such notice and knowledge may be implied in some circumstances, in the case at bar, the defendant's evidence is that he was advised that there was no such risk as proper service had yet to be carried out.

[43] In the circumstances faced by the plaintiff in this case, given that counsel for the defendant had specifically indicated that his retainer was for a limited purpose to investigate and not to defend the claim, that no statement was made that he would be acting generally, that he specifically did not acknowledge service on behalf of the defendant and that the plaintiff did not specifically indicate that the enclosures were

being sent as service upon the defendant, I cannot conclude that the defendant was willfully disregarding the claim but rather that he was waiting for a further formal step to be taken. That was not, in my view, unreasonable.

[44] The proper course for the plaintiff in these circumstances would have been to obtain an order for alternative service, which although it is somehow hypothetical, I suspect would have been carried out by service upon any adult at the Vancouver property. Such service would have sufficiently alerted the defendant at that time as to the need to file a response should he wish to defend the claim or file his notice of jurisdictional dispute, as may have been available to him if a jurisdictional defence was to be raised.

[45] I am satisfied that the case law supports that in the circumstances of this case, it would be unjust to allow a default judgment to stand against a defendant who believed that further steps were required before he would be required to file a response, and that the failure to properly serve constitutes a nullity such that the default judgment should be set aside.

### ***Miracle Feeds*** **Test**

[46] Even if I am wrong in that finding, I am satisfied the defendant has met the test in *Miracle Feeds*.

[47] In this respect, the plaintiff does not take any issue with the timing of the application in terms of it being brought in a timely way and without delay upon learning of the default judgment. Rather, the plaintiff argues that the defendant willfully and deliberately failed to respond and does not have a meritorious defence or one worthy of investigation.

[48] The onus to establish the factors set out in *Miracle Feeds* is on the defendant and one that must be met on the basis of evidence and not mere allegations: *Mrsic v. 1106468 BC Ltd.*, 2022 BCSC 1149 (“*Mrsic*”), at para. 16.

[49] While I agree with the plaintiff that for the most part the defences raised by the defendants are bare allegations without any evidence to support them, as long as one of the factors is identified and satisfied, the test will be sufficiently met: *Mrsic* at para. 15.

[50] Dealing firstly with deliberate delay, that is addressed by my previous comments as to the lack of notice in the enclosure letter that service would be deemed. With the defendant's evidence as to the advice he received from counsel that no step would be required until personal service effected, I find that to be a satisfactory explanation for the decision to not file a response.

[51] Turning, then, to the merits of the defences, the defendant raises various issues. Firstly, the defendant argues that it has a jurisdiction defence, saying that this court has no jurisdiction over this dispute which relates to a debt incurred in Macau. The defendant denies that he is a Canadian citizen and says that he resides in China such that Canada has no jurisdiction. The plaintiff argues that a jurisdiction argument is not a true defence and as such, a default judgment cannot be set aside on that basis.

[52] Secondly, the defendant disputes that it is not his signature on the documents. In this respect, he questions the documents themselves and notes that they are blurry rather than crisp when compared to the rest of the documents, suggesting that his signature was Photoshopped or otherwise added to the document. There is no independent evidence to support this such as an expert report. In my view, this defence falls into the category of a bare assertion without evidence in support.

[53] Thirdly, the defendant argues there is a criminal interest rate. However, there is no evidence to support this allegation at all. In particular, there is not even the most barest of bones of calculations to show that the interest rate applied would be in excess of the criminal rate of 60%. As such, this, again, falls into the category of bare assertion without evidentiary support.

[54] Finally, the defendant denies agreeing to the contractual interest rate at all. This is the type of defence that is normally easily answered on the documents and pleadings themselves. However, in this case, it is, in fact, difficult to determine.

[55] As I previously noted, the pleadings do not reference an interest rate at all. In addition, the calculation of the debt as claimed and for which judgment was ultimately granted is difficult to determine given the lack of properly particularized calculations not only in the notice of civil claim but in the default judgment materials themselves and supporting affidavit.

[56] In this respect, the principal is noted to be $2,717,464 HKD on December 1, 2019. The promissory note amount as of March 28, 2022, was $4,484,358 HKD. In the notice of civil claim, the plaintiff acknowledges that $550,000 HKD was paid in partial satisfaction by January 19, 2022. Thus, the debt, after that payment ($4,484,358 + $550,000 - $2,717,464), seems to have increased by some $2,316,894 HKD from December 1, 2019, to March 28, 2022, or in a 28-month period.

[57] Interest on $2,167,464 HKD ($2,717,464 - $550,000) at a stated rate of 29.25% per annum on the full amount, over 28 months, would be approximately $1,480,000 HKD calculated on a simple interest basis.

[58] Thus, on the face of the notice of civil claim itself, there appears to be a significant discrepancy. While compounding and other factors may explain the discrepancy, the amount of the discrepancy is more than that can be easily dismissed, meaning that it is one that is worthy of further investigation.

[59] Further, as to the rate itself, as noted on the notice of civil claim, there is no reference to a specific interest rate in the pleadings. In the record before the court, the documents are reproduced and appear to be in both English and Chinese. It is not evident on the face of those documents if these are complete translations or if there is some text that may be in the Chinese text that I was not able to read. However, the promissory note, insofar as the English text is included, did not appear

to reference an interest rate, but rather only included the amount owing as was handwritten in at $4,484,258 HKD, and that that was "inclusive of a 10% accrual in relation to lawyers' fees".

[60] While I did not review the documents in detail, and neither counsel took me to any particular term of the loan documents, I did note that the application for credit indicated at clause 17 that interest would be applied at "three times the Macau interest rate." However, there is no reference in the materials as to the amount of the Macau interest rate. In this respect, if it was a fixed rate I would not expect it to be referenced in that manner. That seems to imply that it is similar to a Bank of Canada type rate, which likely fluctuates, and in the usual course a default judgment would therefore have to include affidavit evidence as to what those prime rates are.

[61] As stated, all of these calculation issues may ultimately have a reasonable explanation. However, on the face it of it, they do give rise to a defence worthy of investigation, specifically as to the amount found to be due and owing.

[62] There may also be an argument that it was not a sum ascertainable given the lack of inclusion in the notice of civil claim of reference to the contractual interest rate and failure in the later filed affidavit to provide particulars or an accounting based upon fully pled interest rates, or alternatively expressing it as a fixed percentage when it is, as it appears to be framed under the credit facility, may be based upon a variable rate, which is not specified. At the very least, there ought to have been evidence as to those calculations.

## Conclusion

[63] For the reasons stated, I am exercising the court's discretion to set aside the default judgment. However, I will order, in setting aside the default judgment, that a response to civil claim must be filed by March 24, 2023.

[64] Since the defendant was wholly successful, I will order that costs be to the defendant on this matter. However, costs shall not be payable until the conclusion of the matter in its entirety or further court order.

[SUBMISSIONS ON TERMS AS TO JURISDICTIONAL QUESTION]

[65] THE COURT: It is open to either party to bring an application for the jurisdiction issue to be resolved in isolation of the rest of the action, if appropriate. I also would not be surprised if a summary judgment application was set down before setting the matter for trial, given the nature of the issues and defences raised, which at this preliminary stage, suggest that it this matter may be appropriate for a summary determination. However, I do not think it is appropriate for me to make an order at this time compelling either to be done, or finding that either are appropriate. Those will be issues for the court to determine on those applications.

"Master Robertson"