IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lofti v. Bugga Trucking Ltd.,*
2023 BCSC 1427

Date: 20230816
Docket: S205037
Registry: New Westminster

Between:

Milad Lofti and Miladtowers Consulting Ltd.

Plaintiffs

And

Bugga Trucking Ltd., Kulwinder Singh Mann and Gagandeep Kaur Mann

Defendants

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for Plaintiffs:	R.J. Carter
Counsel for Defendants:	A. Randhawa
Places and Dates of Hearing:	Chilliwack, B.C. August 25, 2022 New Westminster, B.C. January 6, March 31 and April 6, 2023
Place and Date of Judgment:	New Westminster, B.C. August 16, 2023

Introduction

[1] The parties filed three applications:

a) an application of the plaintiffs filed December 9, 2020, for assessment of damages ($200,000) and debt ($17,228.74) for alleged breach of an oral immigration services agreement and a loan agreement, or alternatively damages for unjust enrichment (“Assessment Application”). This application follows a default judgment obtained by the plaintiffs against the defendants on February 25, 2019 (“Default Judgment”);

b) an application of the defendants filed September 15, 2021, to set aside the Default Judgment (“Set Aside Application”); and

c) an application of the plaintiffs filed December 20, 2021, to amend the style of cause (and consequently the Default Judgment) which names Bugga Trucking Ltd. as a defendant, to the correct name of the company, which is Bugga Trucking Inc. (“Misnomer Application”).

[2] The parties agreed to adjourn the Assessment Application pending the results of the Set Aside Application and the Misnomer Application.

[3] The plaintiff Mr. Lofti is an immigration consultant. The plaintiff Miladtowers Consulting Ltd. is the corporation through which he provides those services.

[4] The defendants Kulwinder Mann and Gagandeep Mann are spouses. Mr. Mann is the sole shareholder and director of Bugga Trucking Inc. (“Bugga”). Ms. Mann is an employee and the operations manager of Bugga. The defendant Bugga Trucking Ltd. does not exist. When I refer to Bugga, unless indicated otherwise, I am referring to the actual entity even though it was incorrectly named.

[5] For the reasons below, I set aside the Default Judgment and correct the style of cause from Bugga Trucking Ltd. to Bugga Trucking Inc.

Overview of the NOCC

[6] The notice of civil claim ("NOCC") alleges the following with respect to an immigration services agreement:

a) In August 2017, Bugga was experiencing a labour shortage of long-haul truck drivers. The plaintiffs and defendants entered into an oral immigration services agreement ("ISA"), the terms of which included:

   i) the plaintiff will prepare and provide services for obtaining a Labour Market Impact Assessment Application ("LMIAA") for ten foreign workers. An LMIAA is a document required by the Canadian government if an employer wishes to hire foreign workers and obtain work permits for those foreign workers; and

   ii) in lieu of payment of a fee for the immigration services, the defendants will name in the LMIAA, eight foreign workers to be hired by Bugga from a pool of foreign worker candidates provided by the plaintiffs. The foreign workers in the pool had agreed if selected, to engage the plaintiffs to provide immigration services to prepare their work permit and visa applications for a fee.

b) Prior to the submission of the LMIAA, the defendants had selected five foreign workers from the plaintiffs' pool of candidates, and these five workers were named in the LMIAA. The plaintiffs and defendants agreed that three remaining foreign workers would be selected from the plaintiffs' pool of candidates at a later date, and the defendants would fill the final two foreign worker positions with local foreign workers.

c) Between August 2017 and June 16, 2018, the plaintiffs provided between 100 and 120 hours of immigration services to the defendants for the LMIAA. The LMIAA application was approved by the government on June 16, 2018.

d) On about June 16, 2018, the defendants breached the ISA by refusing to select the remaining three foreign workers from the plaintiffs' pool of candidates, and indicated that they would remove the five candidates listed on the LMIAA, and select candidates of their own choosing. As a result, the plaintiffs suffered damages, including the time and labour invested, and lost profit from performing work permit and visa applications for the foreign workers.

[7] The NOCC alleges the following with respect to a loan agreement:

a) By March 2018, the LMIAA had been rejected three times by the Canadian government because the credit card which the defendants used to pay the $10,000 processing fee was declined. Further, foreign workers hired by Bugga under a previously approved LMIAA obtained by Bugga through the work of the plaintiffs, were ready to come to Canada to begin work. A term of the employment contract between Bugga and these foreign workers, was that Bugga was obligated to pay for the airfare and travel insurance for these foreign workers.

b) The defendants advised the plaintiffs that they were experiencing financial difficulties and requested that the plaintiffs pay the LMIAA fee, airfare and travel insurance. As a result, the plaintiffs and defendants entered into an oral loan agreement ("Loan Agreement"), the terms of which were:

i) the plaintiffs will loan the defendants $10,000 for the LMIAA fee;

ii) the plaintiffs will pay for the airfare and travel insurance on behalf of Bugga;

iii) the defendants will repay the LMIAA fee, airfare and travel insurance, upon demand.

c) Further to the Loan Agreement, the plaintiffs loaned and paid a total of $17,228.64. Subsequently, the plaintiffs made demand, and in breach of the Loan Agreement, the defendants have failed to pay this amount.

[8] In the alternative, relying upon all of the same alleged facts, the plaintiffs seek damages for unjust enrichment.

[9] Mr. Lofti swore an affidavit that mirrors the allegations in the NOCC. I will refer to that in more detail below when discussing the defences raised by the defendants. This was the third immigration services agreement through which the plaintiffs had assisted one or more of the defendants to obtain an LMIAA for Bugga.

Set Aside Application

[10] A default judgment is an extraordinary remedy and will be set aside if the defendant was not properly served with the pleadings: *Shang v. Dhuu*, 2020 BCSC 1568 at para. 25.

[11] If a defendant was properly served, then the Court must exercise its discretion as to whether to set aside the default judgment. Relevant factors to be considered were summarized in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.). These are whether the defendant:

> 1. wilfully or deliberately failed to enter an appearance or file a defence to the plaintiff's claim;
>
> 2. made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or explain any delay in the application being brought; and
>
> 3. has a meritorious defence or at least a defence worthy of investigation; …

[12] These factors should be addressed through affidavit material.

[13] The factors in *Miracle Feeds* are not inflexible conditions that must be met in order to set aside a default judgment, but a non-exhaustive set of factors to be considered by the Court. The failure to meet or address a factor in *Miracle Feeds* is "not necessarily fatal" and there may be other relevant factors which the Court will

consider in exercising its discretion: *Director of Civil Forfeiture* at paras.12–15; *Andrews v. Clay*, 2018 BCCA 50 at paras. 29–31.

Were the Defendants Properly Served?

[14] Rule 4-3 of the *Supreme Court Civil Rules*, B.C. Reg 168/2009 [*SCCR*], requires a notice of civil claim to be personally served, and sets out the methods of acceptable service. Rule 4-4 permits the Court to order that a notice of civil claim be served by alternative methods.

[15] On August 13, 2018, the plaintiffs filed the NOCC. On August 28, 2018, a process server Ryan Carnegie, swore two affidavits stating that on August 17, 2018, he personally served Ms. Mann and Bugga with the NOCC at the business address of Bugga on 114th Avenue in Surrey, B.C. He did not attach the NOCC to his affidavit but described it as the:

> Notice of Civil Claim between Milad Lofti and others and Bugga Trucking Ltd and others, bearing court stamp dated August 13, 2018.

[16] On August 26, 2018, Mr. Carnegie swore another affidavit describing his attempts to serve Mr. Mann at the Mann's home on 138A St. in Surrey, B.C. and at Bugga's address, and his several messages left on Mr. Mann's cellular phone to which he did not receive a response. On November 26, 2018, the plaintiffs obtained an order of alternative service on Mr. Mann.

[17] On December 5, 2018, Mr. Carnegie swore another affidavit stating that on November 29, 2018, he served the NOCC and "Order Made After Application" by delivering copies to Mr. Mann's home address, "in a sealed plain envelope marked only with the defendant's name and 'important legal documents enclosed' as well as posting the documents to the door of his home address". This is what the order for alternative service required. Mr. Carnegie did not attach those documents to his affidavit but described them as:

> The Notice of Civil Claim between Milad Lofti and others and Bugga Trucking Ltd., and others, bearing court stamp dated August 13, 2018
>
> Order Made After Application, bearing court stamp dated November 26, 2018.

[18] On February 25, 2019, the plaintiffs obtained the Default Judgment. On February 26, 2019, plaintiffs' counsel couriered a letter and copy of the Default Judgment to the Mann's home address and Bugga's address, and courier tracking receipts show these were delivered the following day.

[19] On December 9, 2020, the plaintiff filed the Assessment Application with a hearing date of February 19, 2021. There was no evidence as to what, if anything, took place in the nearly two-year gap between obtaining of the Default Judgment and filing of the Assessment Application. Between January 7 and 12, 2021, all three defendants were served with the Assessment Application materials.

[20] On February 16, 2021, plaintiffs' counsel received a letter from a lawyer, Sumandeep Singh, stating he had been retained by the defendants and requesting an adjournment of the Assessment Application, to which the plaintiffs agreed. On the same day, Mr. Singh filed a notice of appointment of lawyer on behalf of the three defendants. The notice refers to Bugga Trucking Ltd., and not Bugga Trucking Inc.

[21] Plaintiffs' counsel had difficulty securing a long chambers date, but was finally successful and the Assessment Application was set for September 15, 2021. In March and April 2021, plaintiffs' counsel sent emails to Mr. Singh inquiring about the defendants' response materials.

[22] On September 13, 2021, plaintiffs' counsel received unfiled response materials to the Assessment Application and the unfiled Set Aside Application. A legal assistant of plaintiffs' counsel states that this was a "never before seen or heard of application". A judge was not available to hear the applications on September 15, 2021 and they were adjourned.

[23] In support of the Set Aside Application, Mr. Mann swore an affidavit on September 12, 2021, in which he states:

> 3. …The reason of not filing the Response of Notice of Civil Claim was not intentional. My spouse forgot to diarise the service of the Notice of Civil Claim and the documents were misplaced and she forgets about the action.

> 4. I and my spouse Gagandeep, immediately upon receipt of the Notice of Application filed December 9, 2020, initiated the required legal proceedings.
>
> 5. I did not intentionally cause the default. It was caused due to various circumstantial reasons including but not limited to the lack of understanding of the legal procedures, losses in the business and the financial pressures. The Notice of Civil Claim was served in or around August, 2018.
>
> 6. Around same time, Bugga Trucking was suffering grave losses in the business and was under a huge debt of governmental organisations. I was working as a long haul truck driver at the time with Bugga Trucking and Gagandeep was responsible for the management of Bugga Trucking and was overseeing the office work. Both of us were under great financial pressure and the overall situation was stressful. Gagandeep now remembers receiving a legal notice of some sort around that time. Unfortunately, due to immense stress at work, she did not gave much attention to it and put it somewhere in the office. She was extremely busy in business that she completely forgets about the letter. She also forgets to inform me about any such letter. She now anticipates that the notice might have been mixed up by the office staff with the recycle papers and it never got Gagandeep's attention after that.
>
> 7. I, immediately upon the discovery of the default judgement, approached my legal representatives to initiate these proceeding for setting aside the default judgment. I am fully inclined towards pursuing the proceedings as it will cause a grave harm to me.
>
> [Emphasis added.]

[24] On September 23, 2021, the defendants filed a notice of intention to act in person. Although the typed portion of the notice refers to Bugga Trucking Ltd., the person who signed the document has crossed off "Ltd." and written "Inc." at the signature line.

[25] On December 7, 2021, Mr. and Ms. Mann swore affidavits before their current counsel, Mr. Randhawa. In his second affidavit, Mr. Mann stated that the documents Mr. Carnegie provided in his affidavit of alternative service "were not similar or identical" to the NOCC and Order that are filed in these proceedings. Mr. Mann does not state how they are not similar or identical.

[26] In her affidavit, Ms. Mann states:

> 6. I confirm that the documents which the process server Ryan Carnegie provided in his affidavit sworn August 28, 2018 and another affidavit sworn same date under section 1 of his affidavit were not similar to the NOCC that is filed in these proceedings. The Notice of Civil Claim that I now read and responded to is about 9 pages. However, the NOCC that received from Ryan Carnegie on August 17, 2018 was only 2-3 pages which I treated as letter. I

> did forget about it as it has no instructions to file response within specified period of time. I did go to a lawyer to understand the authenticity of the documents provided to me by Ryan Carnegie and the lawyer on Scott Road said it was simply a letter for demand and there is no need of responding it. It has been long time and I have now forgot the exact name and location of such lawyer. …
>
> 7. Upon learning that there has been a default judgment take against me by the Plaintiffs. I immediately retained a lawyer to set aside the default judgment.
>
> [Emphasis added.]

[27] In my view, the documents served by Mr. Carnegie are identifiable. He describes the abbreviated style of cause and correctly identifies the court stamp date on the NOCC. Although he does not refer to the style of cause with respect to the order for alternative service, he correctly identifies the court stamp date.

[28] I do not accept the evidence of Mr. and Ms. Mann that what was served was not the complete NOCC, and not the order for alternative service. Their evidence (and the hearsay reports of Ms. Mann's evidence) has changed significantly over time, and is not reliable. In his September 2021 affidavit, sworn at a time when the defendants had counsel (Mr. Singh), Mr. Mann admitted that the defendants were served in August 2018. Mr. Mann also referred to hearsay from Ms. Mann that she had received a "legal notice of some sort" and then completely forgot about it. He fails to discuss the substituted service on him, or the several messages to his cell phone. Three months later in December 2021, Mr. and Ms. Mann swore affidavits stating that documents Mr. Carnegie served were not complete. Further, in Ms. Mann's affidavit, she stated that she brought the document to an unidentifiable lawyer, who told her it was a letter. None of this is referred to in Mr. Mann's affidavit sworn three months earlier. No explanation is given for how they now remembered this. This is a material omission, particularly in the context of Mr. Carnegie's evidence of his attempts to serve Mr. Mann personally, none of which is denied by Mr. Mann. The advice of the unidentified lawyer is unattributed hearsay and not admissible: *Meier v. Canadian Broadcasting Corporation* (1981), 28 B.C.L.R. 136, 1981 CanLII 644 (S.C.); *Albert v. Politano*, 2013 BCCA 194 at paras. 19–22. Further,

it is not believable that a lawyer receiving any part of a notice of civil claim would advise a client that it was a “letter”. They are two completely different documents.

[29] I find that Ms. Mann and Bugga were properly served in August 2018, and that Mr. Mann was properly served in November 2018.

Did the Defendants Wilfully or Deliberately Fail to File a Response to Civil Claim?

[30] Wilful delay in filing a response to civil claim carries with it the connotation of blameworthy conduct. However, “depending on the circumstance,” “purposeful, deliberate or intentional” conduct may also constitute “blameworthy” conduct: *Forgotten Treasures International Inc. v. Lloyd’s Underwriters*, 2020 BCCA 341 at paras. 19–20.

[31] In *Tiamson v. Vandt*, 2020 BCSC 587, Justice Sharma summarized when a Court generally will or will not infer that a party wilfully or deliberately failed to file a defence, stating:

> [21] When a defendant decides not to defend an action or chooses to simply ignore it, the court will generally infer that the party willfully and deliberately failed to enter an appearance or file a defence. However, if there is evidence of steps taken during the time limit for filing a statement of defence, which are inconsistent with the inference that the party was simply ignoring their obligation, then the court need not draw such an inference: *Daum v. Elko*, 2009 BCSC 349 at para. 6.

[32] In Mr. Mann’s affidavit sworn in September 2021, he stated that the failure to file a response was not intentional and the defendants did not file a response because they were under financial stress, Ms. Mann did not tell him about the NOCC (not addressing that he was substitutionally served), they did not understand the legal process, and that the NOCC may have gone into recycling. Mr. Mann does not provide details concerning the defendants financial position, and how that prevented them from seeking advice or acting on their own to respond to the NOCC. In her affidavit of January 2022, Ms. Mann attaches the T4’s for her and Mr. Mann for 2017 to 2019, which show low income in 2017, but approximately $100,000 combined income for each of 2018 and 2019. However, Mr. Lofti and Mr. and Ms. Mann state

that Bugga was in financial difficulty in 2018, and this was the reason for the Loan Agreement. Ms. Mann states that she took the NOCC to a lawyer so whatever financial stress the defendants were under did not prevent her from consulting counsel. There is no other evidence of steps taken by the defendants during the time limit for filing the response to civil claim and up to the time of the Default Judgment. There is no evidence which is inconsistent with the inference that the defendants were simply ignoring their obligation to respond to the NOCC. In all the circumstances, I find it is blameworthy conduct.

[33] I conclude that the defendants willfully and deliberately failed to respond to the NOCC.

Did the Defendants Apply to Set Aside the Default Judgment as Soon as Reasonably Possible or Explain any Delay?

[34] The Default Judgment was couriered to the Mann's home and Bugga's business address in late February 2019. Neither Mr. Mann nor Ms. Mann deny that they received the Default Judgment at that time. They do not address this evidence in their affidavits. I find that the defendants became aware of the Default Judgment then.

[35] Mr. and Ms. Mann state that upon learning of the Default Judgment they "immediately" retained counsel to set it aside, but they do not provide that date. Mr. Mann states that upon receipt of the Assessment Application (served in January 2021) he and Ms. Mann immediately initiated the required legal proceedings. Mr. Singh's letter to plaintiffs' counsel of February 16, 2021 states he has been retained; it does not state when he was retained. Plaintiffs' counsel interprets Mr. Singh's letter as being that Mr. Singh was "just" retained. That is not what the letter states, although that is a reasonable inference. I conclude that the defendants first retained counsel to set aside the Default Judgment in January or February 2021.

[36] With respect to the further seven or eight-month delay in bringing the Set Aside Application (from January/February to September 2021) after Mr. Singh was

retained, Mr. and Ms. Mann both state that they retained Mr. Singh to set aside the Default Judgment. There is no affidavit from Mr. Singh as to why he did not bring the application earlier. In the face of what appears to be a reasonable assertion by the defendants that they retained Mr. Singh to set aside the Default Judgment, and no evidence to the contrary, I do not conclude that the further seven-month delay was caused by the defendants personally.

[37] I conclude that from the time the defendants had knowledge of the Default Judgment in late February 2019, until Mr. Singh was retained in January/February 2021, the defendants did not apply to set aside the Default Judgment as soon as reasonably possible after obtaining knowledge of it, and that they have not reasonably explained the nearly two-year delay up until January/February 2021. There was no evidence as to what, if anything, took place between the parties in the nearly two-year gap between obtaining of the Default Judgment and filing of the Assessment Application. I accept that once the defendants received the Assessment Application, they acted promptly by retaining counsel.

[38] I note here that between September 2021, and when these applications eventually came on for hearing, nearly a year passed. In this time period, there were several attempts by counsel to find and secure dates between themselves and the Court. Neither party casts blame on the other for this period of delay. Unfortunately, when the applications finally did come on for hearing, insufficient time was reserved. Although the Court offered earlier dates for continuation, counsel were not available. All of this has resulted in an unusual and undesirable amount of time passing.

Do the Defendants have a Meritorious Defence?

[39] As summarized by Justice Douglas in *Shang*:

> [63] The burden is on the defendant to present evidence to suggest that, if there were to be a trial, the plaintiff might not succeed: *BC Director of Civil Forfeiture*, at para. 18. Such a defence must have a degree of plausibility: *Hawkins v. Fernie One Outfitters Ltd.*, 2012 BCSC 84 at para. 25.
>
> [64] The defendant concedes the authorities establish that a defence “worthy of investigation” requires more than bare assertions, allegations, or mere denials: *Summit Leasing* at para. 40; Hawkins, at paras. 22 and 25. …

[40] I interpret Mr. and Ms. Mann's evidence as raising five main defences on the merits, in addition to an argument regarding the Default Judgment being obtained against a misnamed party. I will address the five defences here, and the Misnomer Application separately. The five defences are: (1) the terms of the ISA were not as alleged; (2) Mr. and Ms. Mann were not party to the ISA; (3) There was no Loan Agreement; (4) Mr. and Ms. Mann were not party to the Loan Agreement; (5) overlapping all of the above, the ISA and Loan Agreement were contrary to professional codes of conduct and "regulations", such that they should not be enforced as being "illegal".

(1) The Terms of the ISA were Not as Alleged

[41] Mr. Mann states that Mr. Lofti represented that: (1) he was waiving his professional fee to apply for the LMIAA as he would be earning professional fees from the work permit applications of the foreign workers which he will recommend to Bugga to hire; and (2) he would not take any "undue advantage" of the foreign workers and will charge them the "prevailing professional fee" in the industry.

[42] With respect to the first allegation, Mr. Mann states that after the breakdown of the parties' relationship, Mr. Lofti "began to pressurize me to hire candidates from his pool of clients" and that the plaintiffs have "no authority or right to advise me to hire any worker". I take this combined with his other affidavit to be an assertion that while the plaintiffs would recommend foreign workers from their pool, Bugga was not obligated to hire from that pool.

[43] With respect to the second allegation, Mr. Mann states that subsequently, one of the foreign workers (presumably one hired under a previous LMIAA) told him that the plaintiffs were charging a lot more money than usual for the work permit application services. Mr. Mann discovered that the foreign workers were being charged more than "ten times" the prevailing fees. He also came to learn that the plaintiffs did not provide post-arrival services to the foreign workers. Ms. Mann similarly states that she was advised by many of the approved foreign workers that

they each had paid about $25,000 to $30,000 to the plaintiff for obtaining work permits.

[44] Mr. and Ms. Mann's evidence of what they were told by unidentified foreign workers is again unattributed hearsay and is not admissible. However, two employees (who also provided other inadmissible evidence) swore affidavits that they were charged $28,000 and $22,000 each by Miladtowers for processing a work permit application. Mr. Lofti states that the fee in 2018 was approximately $20,000. There is no evidence supporting that these fees exceeded prevailing rates.

[45] Mr. Mann states that as a result of this information, he told Mr. Lofti to return all the "unjustified money" to the foreign workers. He told Mr. Lofti that he and Ms. Mann did not want to become a party to the "fraud" which the plaintiffs were committing, and he terminated any future dealings. Mr. Mann states that Mr. Lofti then advised him that the process of the LMIAA was almost complete and he will complete the LMIAA as a "good gesture for past professional relationship" and will not charge any professional fees even though Bugga was not hiring any foreign workers through the plaintiffs.

[46] Mr. Lofti states that the parties entered into the ISA in August 2017 on the terms outlined in the NOCC, being that Bugga would hire eight employees from the plaintiffs' pool of foreign employees, and that the defendants would pay the LMIAA processing fee of $10,000. However, in an email sent to Ms. Mann on June 22, 2018, less than a week after the LMIAA was obtained, and after the dispute arose, Mr. Lofti states:

> … Please see attached employment contract along with LMIA confirmation with five names. Further to our agreement with Kulwinder, he advised me that he had 2 local drivers that he wanted to place. We agreed and said we would do all of the legal services for the 2 local drivers. Kulwinder also agreed that we would file 8 work permit application from overseas, if we agreed to pay the LMIA processing fee after your visa card declined 3 times due to insufficient funds. We held up our part of the agreement and after many month and lots of office hours spent on this LMIA application, the file was finally approved with 5 names confirmed. Please keep in mind we filed this LMIA application with 5 names.
>
> [Emphasis added.]

[47] On July 12, 2018, Mr. Lofti wrote to Ms. Mann's email address, addressing the email to both her and Mr. Mann:

> I am disappointed that you have changed our agreement after I worked extremely hard to get your LMIA application approved. … I did not charge your company a fee and I paid the $10,000 processing fee. In return, Kulwinder agreed to allow me to place 8 drivers on the LMIA from overseas. 5 drivers were named with the original application and I was to fill an addition 3 drivers. …
>
> [Emphasis added.]

[48] Later in that email, Mr. Lofti states:

> Kulwinder said that he would be returning the $10,000 I paid for the LMIA application processing fee via company cheque. …
>
> I have no problem sharing all user names and passwords once I have received a cheque for $10,000. Please ask Kulwinder to make the right choice in this regard … please simply return the money which is owed to me and we can stay on good relationship in the future should you need any other information or documentation from my office. Thank you.
>
> [Emphasis added.]

[49] Mr. Lofti's statements could be interpreted as being inconsistent with his evidence that the terms of the ISA were that Bugga would hire eight foreign workers from the plaintiffs' pool. The statements could be interpreted as confirming that an agreement that Bugga would hire eight workers from the plaintiff's pool only came about in March 2018, and as a result of him agreeing to pay the $10,000 LMIAA fee.

[50] I am satisfied that Mr. Mann's evidence in combination with the emails appended to Mr. Lofti's affidavit establishes that there is a defence worthy of investigation with respect to the terms of the ISA.

(2) Mr. and Ms. Mann were not party to the ISA

[51] Mr. and Ms. Mann state that they did not personally contract with the plaintiffs, and that when they were dealing with the plaintiffs with respect to the ISA and LMIAA, it was in their capacity as director (Mr. Mann) or employee (Ms. Mann) of Bugga.

[52] Mr. and Ms. Mann's evidence on this point is not specific as to what was said between the parties to lead an objective bystander to the conclusion that they were not parties to the ISA. Rather, their evidence appears to be their subjective beliefs that they were acting in their capacity as representatives of Bugga and not in their personal capacity. The test for formation of a contract is objective, not subjective: there must be, to a reasonable objective bystander, a manifest intention by the parties to be bound, and sufficient certainty on the essential terms: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc*., 2009 BCSC 1303 at paras. 322–325; *Berthin v. Berthin*, 2016 BCCA 104 at paras. 46–47; *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99 at paras. 15–16.

[53] However, there is other objective evidence which could support Mr. and Ms. Mann's evidence that they were not parties to the ISA. The ISA was entirely oral. The subject and purpose of the ISA was obtaining the LMIAA for Bugga. The LMIAA is in evidence. The LMIAA was submitted on behalf of Bugga, and was approved by the Canadian government in the name of Bugga. The LMIAA indicates that the applicant and intended employer is Bugga. It is thus plausible that when Mr. or Ms. Mann were in discussions with the plaintiffs regarding the ISA, a reasonable bystander would conclude that they were doing so in their capacity as director or employee of Bugga and not in their personal capacities.

[54] Further, some of the evidence filed by Mr. Lofti could support that Mr. and Ms. Mann were not parties to the ISA. Mr. Lofti states that these were "informal contractual relations". In the June and July 2022 emails partially replicated above, while discussing the dispute, Mr. Lofti stated: "Further to our agreement with Kulwinder …"; "Kulwinder also agreed ..."; "as per our agreement with Kulwinder", and "In return, Kulwinder agreed to …". There is no suggestion in these emails that the plaintiffs reached any agreement with Ms. Mann. While I appreciate that the plaintiffs do not have any burden to show that there is not a defence worthy of investigation, Mr. Lofti does not state that Mr. and Ms. Mann personally agreed to be bound. Rather, he states that he "considered" that he was contracting with them as well. Like Mr. Mann's evidence, his subjective intention is not relevant.

[55] In my view, it is plausible that a reasonable objective bystander knowing the subject and purpose of the ISA was to obtain an LMIAA for Bugga, may conclude that there was not a manifest intention by Mr. and Ms. Mann to be personally bound. Mr. and Ms. Mann have shown that they have a defence worthy of investigation with respect to whether they are parties to the ISA.

(3) There was no Loan Agreement

[56] There are two aspects to the Loan Agreement: (1) the $10,000 processing fee; and (2) $7,228.64 in airfare and travel insurance costs.

[57] The defendants deny that it was a term of the ISA that Bugga was obligated to pay the government fee or any other fee, therefore denying the existence of the Loan Agreement. Mr. Mann states that as part of the ISA, Mr. Lofti advised him that the plaintiffs will bear all expenses including but not limited to the required "government fee, professional fee and any other charges". In his affidavit filed in December 2021, Mr. Mann states that the $10,000 cheque provided to Ms. Mann were funds Mr. Lofti paid to them as repayment after they had complained that the foreign workers had been "exploited". Mr. Mann goes on to state that he "distributed [the $10,000] to the foreign workers as refund of extra charges of the Plaintiff", although he provides no corroborating evidence of this. In any event, he denies Bugga was required to pay the $10,000 processing fee.

[58] Ms. Mann states that the $10,000 "referred to as a loan" was provided to her to pay for the LMIAA fee as the plaintiffs were going to collect "huge cash of payments from the workers approved under the LMIA applications".

[59] Mr. Lofti states that he first submitted the LMIAA in February 2018 and at that time requested Ms. Mann to provide the credit card payment for the $10,000 processing fee. Ms. Mann provided the credit card number, but the credit card was declined. Mr. Lofti attaches an email chain with Ms. Mann which corroborates that this is what took place. Instead of denying an obligation to pay the $10,000 processing fee for the LMIAA in this email chain, Ms. Mann provided the credit card number to Mr. Lofti, which was later declined. The LMIAA was rejected two more

times because the defendants' credit cards were again declined. Mr. Lofti states that ultimately, in early March 2018, he spoke with Mr. and Ms. Mann and they told him that Bugga was experiencing financial difficulties. Mr. Lofti offered to loan the defendants $10,000 to pay the LMIAA processing fee. Mr. Lofti attaches the bank draft he had issued, payable to Ms. Mann dated March 8, 2018, and the LMIAA processing fee payment form which Ms. Mann completed two days later using the same credit card information she had previously provided, for the $10,000 payment.

[60] Neither Mr. or Ms. Mann explain why they would be paying the processing fee if that was not part of the ISA reached in September 2017. Neither explain the three failed attempts to use their credit card. If Bugga was not obligated to pay the government processing fee pursuant to the ISA, there would be no reason for the plaintiffs to provide their own credit card information. The plaintiffs would have simply paid the fee themselves, rather than have the LMIAA from which the plaintiffs would eventually benefit, be rejected three times.

[61] On the other hand, despite Mr. Lofti's evidence in the body of his affidavit that he loaned the $10,000, as discussed previously, his June and July 2018 emails suggest that in March 2018 he agreed to pay the $10,000 LMIAA fee in exchange for Bugga agreeing to hire eight employees from the plaintiffs' pool. Further, Ms. Mann's evidence that Mr. Lofti agreed to pay the fee so that he could make money from the visa applications of the foreign workers, is consistent with Mr. Lofti's June and July 2018 emails.

[62] In considering the above, I am satisfied that Bugga has established a defence worthy of investigation with respect to the $10,000 payment. Mr. and Ms. Mann deny that the $10,000 was a loan. Mr. Lofti's emails support that this may not have been a loan, and Ms. Mann's evidence is more consistent with this evidence than that of her husband.

[63] I turn next to the airfare and travel insurance paid by the plaintiffs. Mr. Mann states that about the time Mr. Lofti provided them with the $10,000, he asked Mr. Lofti about the work permit applications which were already under process

based on the previous LMIAA application as he was concerned about what those workers were being charged. Mr. Mann states that he did not cancel the previous LMIAA as he did not want to jeopardize the future of these foreign workers. He demanded details of the work permit applications from Mr. Lofti but he did not receive any information. When these workers arrived in Canada, Mr. Lofti began pressuring him to hire candidates from his pool. Other than Mr. Mann's general assertion that Mr. Lofti advised him that the plaintiffs will bear all expenses associated with the LMIAA, Mr. Mann does not specifically refer to the airfare and travel costs, but given his denial of any information concerning the status of these workers, I interpret this as denying any agreement to refund the airfare and travel costs.

[64] Mr. Lofti produced the visa statements showing the airfare and travel insurance payments. Mr. Lofti also attached to his affidavit the form of employment agreement that he states Bugga uses, and explains how he knows this is the form Bugga uses, because he was involved in creating it as it had to be submitted as part of the LMIAAs. Mr. and Ms. Mann do not deny that this is the standard form of employment agreement that Bugga uses for their foreign workers. Clause 13 of that agreement states that Bugga will pay the airfare and travel insurance costs of the foreign worker employee.

[65] I find there is some basis in the evidence for a defence worthy of investigation, although it is the weakest of all the defences raised. I have considered that the issue of the payment of the airfare and travel costs by Mr. Lofti appears to be connected to and part of the same conversations in March 2018 concerning the $10,000 payment, which does more strongly raise a defence worthy of investigation.

[66] In summary, Bugga has established a defence worthy of investigation for the alleged Loan Agreement.

(4) Mr. and Ms. Mann were not party to the Loan Agreement

[67] Mr. and Ms. Mann deny that they took any loan or sum of money from the plaintiffs for their personal use. Mr. and Ms. Mann state that they have never

personally borrowed money from the plaintiffs, and that in their dealings with the plaintiff they were acting in their capacity as director and employee.

[68] I refer to the earlier discussion of whether Mr. and Ms. Mann were parties to the ISA, which is applicable here. These were informal discussions between the parties, the LMIAA was made on behalf of Bugga and not the Mann's personally, and it was Bugga and not the Mann's that would be the employer of any foreign workers. The LMIAA processing fee could only be a business expense of Bugga and not Mr. and Ms. Mann. Similarly, the obligation to pay airfare and travel costs was the responsibility of Bugga pursuant to written employment contracts with foreign workers.

[69] In my view, for the reasons given previously with respect to whether Mr. and Ms. Mann are a party to the ISA, Mr. and Ms. Mann have established that they have a defence worthy of investigation as to whether they were party to any alleged Loan Agreement.

(5) The ISA is Contrary to Regulatory Provisions and is Unenforceable

[70] Finally, I turn to what was a poorly articulated defence, which eventually resulted in two further hearing dates and delay in this matter.

[71] Mr. Mann states that he and Ms. Mann asked Mr. Lofti to enter into a formal written agreement containing the discussed terms of the ISA. Mr. Lofti denied this request, saying that as an immigration consultant, he is not permitted to enter into a contract with such payment arrangements, as the Immigration Consultants of Canada Regulatory Council ("ICCRC") does not authorize it.

[72] Mr. Lofti states that the agreement he reached with the defendants was "standard" in the industry. He states the agreement was verbal because "in [his] experience, South Asian people operating long-haul trucking companies are not interested in signing long contractual documents. Rather, they prefer to do business on a verbal agreement and a handshake."

[73] The defendants filed their Set Aside Application and response to the Assessment Application at the same time. The facts alleged for both are identical. In the Legal Basis section of the defendants' response to the Assessment Application the defendants alleged that the plaintiffs "breached the terms of the verbal contract by performing illegal activities". Another paragraph referred to the Retainer Agreement Regulation ("Retainer Regulation") of the ICCRC, and to s. 9.2 which allegedly provides that "All fees shall be fair and reasonable".

[74] During initial argument defendants counsel submitted that the plaintiffs were in "conflict", and they could not lend money, or act for others such as the foreign workers, unless there was an agreement in writing. Counsel referred to the ICCRC Code of Professional Ethics ("Code of Ethics"), and submitted that the fees charged were required to be reasonable. However, there was minimal analysis of what were the governing provisions, despite that Mr. and Ms. Mann's evidence had raised these issues. Further, despite that illegality was raised in the application materials, it was not pleaded in the legal basis section of a proposed draft RTCC. Counsel for the defendants was under the impression that it was not necessary to do so. The combination of counsel's argument and the inadequate draft pleadings left me in doubt as to what legal basis was being alleged other than the ISA should not be enforced because it was contrary to some ill-defined regulatory provisions.

[75] As a result, I sought clarification from counsel. This resulted in a second proposed draft RTCC and a further appearance before me. This second draft RTCC provides a more detailed and broader basis of the illegality argument, but no new factual evidence was tendered.

[76] The plaintiffs object to the Court considering the broader draft proposed pleadings to clarify the basis of the illegality argument. While I have some sympathy for that position because it resulted in a further court appearance and delay, a RTCC has not yet been filed, and even when pleadings are filed, amendments are generally granted liberally to determine the true issues between the parties so long as there is no prejudice to the other party. Further, it is the evidence rather than the

pleadings which is most important on this application, as pleadings unsupported by affidavit evidence are not sufficient to meet the *Miracle Feeds* factors. Regardless, I do not find it necessary to consider this broader basis, and only find it necessary to consider the Retainer Regulation and the Code of Ethics, both which were referenced in the application materials and at the initial hearing.

[77] Counsel for the defendants provided me with a copy of the Retainer Regulation said to be in existence in 2018. I was not provided with the Retainer Regulation in existence in 2017, but neither counsel suggested that the earlier version was not similar. Section 4 (entitled “Expectations”) and s. 5 provide that a written retainer agreement is required for certain services, including an LMIAA. Section 5 sets out matters which must be addressed in that written agreement, including the name of the client, the scope of services, the fees payable, the payment terms and conditions, and details on how to contact the ICCRC. Section 6 addresses joint retainer agreements. There is no s. 9(2). Section 12 requires the member to identify the expected types of expenses within the scope of services for which the client is responsible. Section 13 requires the written agreement to contain a statement regarding the relationship between the member and the IICRC and how a complaint may be made. Section 14 requires that a member identify what costs will be incurred by the client in the event that the client discharges representation.

[78] Although this is termed a “regulation”, s. 1.1, states it was “enacted pursuant to section 3.1 of the *By-law* of the Council”. Defendants’ counsel submitted that the Retainer Regulation was a law such that an argument of illegality will be made, but I am not convinced this is necessarily so. Since I did not receive argument on this, I will not address it further other than to state that the government backgrounder on new legislation that was introduced to regulate immigration consultants in 2020, states that the ICCRC was created under the *Canada Not-for-profit Corporations Act*, and not as a regulatory body created by statute. Part of the reasons for the new legislation was to give force to regulatory provisions.

[79] Counsel for the defendants provided me with the Code of Ethics published by the IICRC in 2017. Section 9.1.1 states:

> A Member shall not advise or represent parties with potentially or actually conflicting interests in an immigration matter unless, after adequate disclosure to each party, all parties consent in writing.

[80] In response to this, plaintiffs' counsel referred to a sample agreement with a foreign employee to obtain a work permit. Counsel submits that this agreement is in writing, is with a Mr. Gabriel Chand a lawyer, and identifies that Mr. Lofti may provide services, and has acted or is acting for the employer Bugga.

[81] In my view, this does not answer that there is no written ISA with Bugga. Mr. Lofti states he and Mr. Chand have an "unofficial partnership" and that either one of them would enter into contracts with the foreign employees.

[82] In summary, while issues one to four discussed above, by themselves raise defences worthy of investigation, this fifth issue reinforces my view that there are defences worthy of investigation. Further, the circumstances are a factor to be considered in exercising the discretion as to whether to set aside the Default Judgment.

[83] Before leaving this issue, I note that the draft RTCC has one paragraph that as presently drafted is not appropriate. It alleges that there is "reason to believe" the plaintiffs may have "forged" a signature of Mr. or Ms. Mann on the LMIAA. There is no evidence in the affidavits of Mr. or Ms. Mann to support this allegation, and nor did defendants' counsel make any argument with respect to it. No specifics are provided. No document or signature is identified. If there is an allegation of a forgery, a serious allegation, then the allegation must be made precisely and with particulars. There is no defence worthy of investigation with respect to this improperly pled allegation.

Are there Other Factors?

[84] The factors in *Miracle Feeds* are not exhaustive. I have also considered that although it has been over four years since the Default Judgment was obtained, part of that was nearly two years between the Default Judgment and the filing of the Assessment Application, where there is no evidence of any substantive step in the

litigation being taken. Further, the plaintiffs were not able to point to any actual prejudice as a result of the delay.

Summary – Weighing all the Factors

[85] The defendants were properly served and wilfully and deliberately ignored the NOCC and failed to file a response. They delayed retaining counsel to set aside the Default Judgment for nearly two years. They have failed to provide a reasonable explanation for that delay. These weigh heavily against the defendants in whether to set aside the Default Judgment.

[86] On the other hand, the defendants have raised defences worthy of investigation. The ISA was entirely oral, and even if the Retainer Regulation and Code of Ethics in 2018 did not have the force of law such that it could be argued that the ISA was unenforceable, there appears to have been at least a professional expectation that the ISA be in writing. If it had been, much of the dispute here would have likely been narrowed or eliminated. In my view, in combination, these are factors that weigh heavily in favour of setting aside the Default Judgment. Also, there is no actual prejudice to the plaintiffs.

[87] Both groups of factors pull strongly in opposite directions. In balancing these, in my view the interests of justice favour setting aside the Default Judgment. Other than the delay and undoubted frustration which the defendants have created, their conduct has not caused actual prejudice to the plaintiffs in the prosecution of their case.

Misnomer Application

[88] A misnomer may be corrected under Rule 6-1 which provides the authority to amend pleadings, and where the considerations under Rule 6-2 (adding or substituting a party), including whether a limitation date has expired, do not apply: *Sperling v. Queen of Nanaimo (Ship)*, 2014 BCSC 326; *Strata Plan LMS1564 v. Odyssey Tower Properties Ltd.*, 2010 BCSC 1134 at paras. 37–39.

[89] The test for whether there has been a misnomer is whether a reasonable person receiving the document would say “of course it must mean me, but they have got my name wrong”: *Jackson v. Bubela* (1972), 28 D.L.R. (3d) 500, 1972 CanLII 978 (C.A.).

[90] I find that naming Bugga Trucking Ltd., instead of Bugga Trucking Inc. was a misnomer. In my view, Mr. and Ms. Mann knew from the outset that Bugga Trucking Inc. was the intended defendant. The NOCC identifies Bugga by its business address and states that Mr. Mann is the director and officer. There is no evidence of any other company called Bugga at that address. A company search shows that there is no other company with a similar name. The defendants filed their response to the Assessment Application on behalf of Bugga Trucking Ltd. and in Mr. Mann’s September 2021 affidavit, he referred to himself and his wife owning and operating Bugga Trucking Ltd. The first time that the error in the name was raised was in December 2021, almost three years after the Default Judgment had been obtained. It was obvious that the “litigating finger” was pointing at Bugga Trucking Inc.

[91] The defendants argue that plaintiffs’ counsel had completed a corporate search and had the LMIAA, and should have known the correct name. While that is true, in my view it is not an answer to the application. Plaintiffs’ counsel accepts that he made an error. It was not intentional. The defendants and Bugga Trucking Inc. have not identified any prejudice to themselves because of the misnomer.

[92] I grant the application to amend the style of cause to Bugga Trucking Inc. instead of Bugga Trucking Ltd.

Orders

[93] The Default Judgment is set aside.

[94] The style of cause is amended to Bugga Trucking Inc. in place of Bugga Trucking Ltd. The plaintiffs shall file and serve an amended NOCC within two weeks. The defendants shall file and serve a RTCC within two weeks following service of the amended NOCC.

[95] There has been divided success. Each party will bear their own costs of the Set Aside Application and the Misnomer Application.

"Norell J."