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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Williamson
May 8, 2001

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

Plaintiff

AND:

TEO LE, THIEN PHAM, NO DAO PHAM, ANH THRONG HUYNH, LAN DUY PHAM, BINH VAN NGUYEN, TIEN BANG NGUYEN, HOANG OANH VU, PHI PHU PHAM, TRAI THI VO, MINH HUNG PHAM, LAN THI LE, DUC VAN TRAN, THUY THU NGUYEN, TUNG HO NGUYEN, VAN HUNG DUONG, THANH VAN PHAN, THANH VAN NGUYEN, DUC THANH NGUYEN, SON NGOC HO, THUY DUY PHAM, VAN THI DUONG, SON HOANG NGUYEN, MANH VAN DOAN, SUU THI NGUYEN, NHUAN DINH DUONG, DINH TUAN TRAN, THANH TUNG VU, VAN LIET DINH, VAN VINH NGUYEN, ANH HOAI CAO, VAN KHANG NGUYEN, SAM NGUYEN, VAN HANH PHAM, DINH TAN NGUYEN, NGHI "PHILLIP" TRAN, HAI LE, KIM CUONG LUU, DUNG VAN NGU EN, VAN DUYEN NGUYEN, HUNG NEN DO, VAN LANG NGUYEN, HUNG THANH NGUYEN, HUNG HUY NGUYEN, XAO VAN DO, DUC CHANH NGUYEN, CUONG MANH NGUYEN, BAC VAN TRAN, HUNG VAN NGUYEN, THI THUC NGUYEN, LIN NGUYEN, VAN TUYEN DO, PHI LONG NGUYEN, PHIEU VAN TRAN, VAN NGHIA NGUYEN, THANH HUNG LY, HANG LE and TAN BAY NGUYEN

DEFENDANTS

Counsel for Plaintiff: J. Gopaulsingh

Counsel for Defendant, Dinh Tan Nguyen: L. Spencer

[1] **THE COURT:** This is an application by one of the defendants in this matter, Dinh Tan Nguyen, to set aside a default judgment that was granted by Madam Justice Satanove on June 15th, 2000 in favour of the Plaintiff.

[2] The Defendant is one of some either 51 or 59 defendants in this matter, which concerns a submission by the Plaintiff, the Insurance Corporation of British Columbia, that these defendants were involved in a number of fraudulently staged accidents in order obviously to obtain funds by fraud from the Plaintiff.

[3] On the 15th of June 2000, Madam Justice Satanove ordered that this particular defendant's statement of defence be struck for failure to attend at his examination for discovery on June 7th, 1999, and for failure to produce a list of documents. She also ordered that judgment would be granted against this particular defendant in favour of the Plaintiff with damages to be assessed. That original application by the Plaintiff would have been brought pursuant to Rule 2, Subsection 5 of the ***Rules of Court***, which states that where a person neglects to obey a subpoena, or to attend at the time and place appointed for his or her examination for discovery, the Court may order the proceeding to continue as if no statement of defence had been filed. I am not quoting that

rule completely, but just the relevant portions. The way it was worded in the order was that the statement of defence be struck because of failure to attend the examination for discovery on June 7th.

[4] Mr. Gopaulsingh for ICBC says that I do not have jursisdiction to do what I am being asked here, and that is because of the differences between Rule 2 and Rule 17. It is Rule 17 of the ***Rules of Court*** that allows the Court to enter into a default - or to order a default judgment situation, and the test for that is set out in ***Miracle Feeds v. D. & H. Enterprises Limited***, which is a well-known case frequently cited in these matters. It is reported at (1979) 10 B.C.L.R. 58. It is a decision of His Honour Judge Hinds as he then was in the County Court.

[5] At first blush I wasn't taken by the jurisdictional argument that was put forward by Mr. Gopaulsingh here, but he put before me a number of cases -- or I should say three cases in chronological order. They are -- this is a photocopy and it is difficult to read, but it appears to be ***Munegatto***, M-U-N-E-G-A-T-T-O, is that right?

[6] COUNSEL: Yes, My Lord.

[7] THE COURT: ***Masonry Ltd. v. Keltech Kamloops Sales***, which is a decision of His Honour Judge D. M. MacDonald, in the County Court of Yale, February 16, 1979, which was a motion by the defendants for an order pursuant to Rule 2(2), or alternatively Rule 17(11) that default judgment obtained by the Plaintiff be set aside.

[8] That case was followed in the case of ***Dhaliwal v. Morrissette***, a decision of Mr. Justice Low as he then was, a local judge of the Supreme Court, and the judgment is dated March 26, 1981. In that case Mr. Justice Low considered the earlier decision of Judge MacDonald and said he agreed with that decision, and I am going to return to what he said in a moment, but I also point out that Mr. Justice Meredith of this Court in 1981 in the case of ***Price Printing Ltd. v. Native Arts of Canada Ltd.***, reviewed the earlier decision of Judge Low and said that he was in respectful agreement with that case.

[9] There has been some discussion with counsel about the difference between proceeding under Rule 17 and under Rule 2, and I think that decision -- I think that distinction is of some importance. Where there is a motion brought because a person has filed to comply with the rules, and an application is brought pursuant to Rule 2, the Court may make an order.

In order words, the person seeking the order has to come before the Court and say why the matter should continue as if no defence had been filed. Whereas when one is proceeding pursuant to Rule 17, one simply files the default judgment and the remedy or the time that one gets before the Court is later, that is to say the person who is the subject of the default judgment can come before the Court and ask that that judgment be set aside on the grounds that are set out as I have said in ***Miracle Feeds***. Each of these rules provides an opportunity for the party against whom the order is to be made or has been made to come before the Court and argue his case.

[10] I go back to the ***Dhaliwal*** case. In that case the earlier ***Munegatto*** decision was reviewed. It was said that in that case an order was made that the action proceed as if no appearance had been entered. Here it is as if no defence had been entered. In that case judgment was entered, and the defendants applied to have the judgment set aside under Rule 17 (11). The judge refused that application. At page five he said in a passage that was pointed out to me by Mr. Spencer, who is here on behalf of the applicant, that the Defendant argued, and I am going to quote here:

> …that in any event the judgment by default of pleading by the Plaintiff should be set aside under Rule 17 (11) of the Supreme Court Rules. The Court

> may set aside or vary any judgment entered pursuant to this Rule. The question comes to mind: has the Plaintiff proceeded pursuant to Rule 17. In this case an appearance and a statement of defence was entered by the Defendants. It was after the Defendants failed to comply with the demand for discovery of documents that the Chamber Judge made the order, that the action continue as if no appearance or statement of defence had been filed.

I stop there while I am quoting to say there is some discussion of Rule 17.

[11] And then at the bottom of that -- this page three, the following is said:

> I would hold that the Plaintiff's proceeded pursuant to Rule 17 (3) to file default judgment. Under Rule 17(11) the Court has the power to set aside any judgment under Rule 17. The question arises: should this be done? The affidavit material filed by the Defendant's solicitor states that the Defendants had a defence on the merits. The Chamber Judge, in effect, ruled out any further proceedings on the merits when he ordered the Plaintiff to proceed as if no appearance had been entered. I do not feel, therefore, that the Court can overturn the effect of that order by setting the default judgment aside on the grounds that there is a defence on the merits.

[12] That is what Judge MacDonald said, and Judge Low, as he then was said, I agree with that decision. If I simply substitute one word from what Judge MacDonald said, it would read this way: "The Chambers Judge in effect ruled out any further proceedings on the merits when, in this case, she,

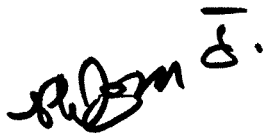
ordered the Plaintiff to proceed as if no defence had been entered."

[13] In the circumstances, I feel bound (there being no ***Hansard Spruce Mills*** circumstance here) by the reasoning of Mr. Justice MacDonald which has been accepted by both -- or I should say, Judge MacDonald, that has been accepted by Mr. Justice Meredith and Judge Low, as he then was, and in the circumstances, then, I conclude that I do not have the jurisdiction to do what I am being asked in this case.

[14] I simply add the following: If I were wrong in that, and I were to apply the ***Miracle Feeds*** decision, I would have great difficulty in allowing this application in any case. And that is because in ***Miracle Feeds*** it is made clear that the three requirements of the test in ***Miracle Feeds*** must be established to the satisfaction of the Court through affidavit material filed by and on behalf of the Defendant. The affidavit material here on the face of it is unreliable. And I say that principally because the affidavit material with respect to the failure to show for the examination for discovery doesn't seem to make sense. I understand, I am told that this was the continuation of an examination for discovery which took place in these courts, that is to say at 800 Smithe Street in Vancouver, and yet the affiant deposes that he got lost on his

way to New Westminster. He says that in two different places. Whatever that means, it appears to me that the affidavit material -- the reliability of it is in question. However, I simply say that as obiter. I accept the jurisdictional argument. Despite the persuasive argument of Mr. Spencer, I feel bound by those other decisions.

[15] Thank you.



Mr. Justice Williamson

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