C.A. No. 116457

NOVA SCOTIA COURT OF APPEAL

Cite as: National Utility Service (Canada) Ltd. v. Pick O'Sea Fisheries Ltd., 1995 NSCA 208
Freeman, Jones and Flinn, JJ.A.

BETWEEN:

NATIONAL UTILITY SERVICE (CANADA) LIMITED Appellant - and - PICK O'SEA FISHERIES LIMITED Respondent	D. Kevin Latimer for the Appellant Jonathan C.K. Stobie for the Respondent Appeal Heard: September 26, 1995 Judgment Delivered: November 14, 1995

THE COURT: Appeal allowed per reasons for judgment of Flinn, J.A.; Freeman and Jones, JJ.A. concurring.

FLINN, J.A.:

The appellant appeals the decision of a judge of the Supreme Court of Nova Scotia, in Chambers, which dismissed the appellant's application to set aside a default judgment entered against it by the respondent for $8,000 plus interest and costs for a total of $11,284.42.

The order for judgment was issued by the prothonotary under circumstances where the prothonotary had no authority do to so in accordance with the **Civil Procedure Rules** (**Rules**). The Chambers judge decided that the error was a curable irregularity which did not nullify the order for judgment. The Chambers judge also refused to set aside the order for judgment on the basis of the appellant's claim that it had a good defence together with a reasonable excuse for failing to file a defence within the time limit prescribed by the **Rules**.

The main thrust of the appellant's position is that the prothonotary had no jurisdiction to issue the order for judgment, and that such an excess of jurisdiction cannot be saved by the curative provision in the **Rules**.

Background

It is necessary to review the background to these proceedings, and the proceedings themselves, before addressing the issues raised by this appeal.

The appellant is an Ontario corporation which carries on the business of a consultant in matters pertaining to, inter alia, energy and utility costs.

The appellant entered into a contract with the respondent on June 15th, 1988. Under the terms of the Contract the appellant undertook to make a detailed analysis of the respondent's energy and utility expenses; and to make recommendations with a view to the respondent achieving savings on these expenses.

With respect to payment for these services, the respondent covenanted in the Contract as follows:

> "5. We agree to pay you as follows:
>
> (a) A service fee calculated at 5% of our past twelve months' total energy expenditures (minimum service fee of $2,000 - maximum $8,000). The service fee of .....$8,000.00..... is due to you on acceptance of this agreement and is payable once only for the term of this agreement and all consecutive renewals. We will recapture this amount in full from the first gross savings and/or refunds after they appear on our invoices.
>
> (b) After recapture of our service fee we will pay you 50% of each savings secured for a period of 60 months after which the entire savings will be ours. We will also pay you 50% of each refund secured.
>
> (c) Payment will be made upon receipt of your invoice showing computation of savings and/or refunds."

The Agreement is for a 5-year term subject to certain renewal provisions.

The $8,000 service fee is the subject matter of the default judgment which gives rise to this appeal. There is nothing in the Agreement providing for the return of the $8,000 service fee to the respondent, other than the above provisions relating to its recapture by the respondent from gross savings.

Subsequently, a dispute arose between the parties as to whether or not the appellant's efforts resulted in actual savings in energy and utility costs to the respondent. This dispute was not resolved, although much correspondence was exchanged between the parties and their solicitors, each putting forth their respective positions.

On December 7th, 1994, the respondent commenced an action in the Supreme Court of Nova Scotia against the appellant. Since the jurisdiction of the prothonotary to issue

an order for judgment against the appellant is one of the issues of this appeal, it is necessary to examine the statement of claim.

The statement of claim makes reference to the contract between the parties dated June 15th, 1988, as a "letter arrangement" and refers to the service fee of $8,000, paid thereunder, as a "deposit".

The statement of claim alleges:

(a) that the appellant failed to make a detailed analysis of all of the factors in the respondent's costs or, to advise where refunds and reductions could be obtained with respect thereto; and further, that any analysis provided by the appellant was superficial and consisted only of recommendations relating to obtaining new pricing formulas with the respondent's suppliers. It further alleges that the respondent did not approve or act upon or otherwise accept any recommendations made to it by the appellant, and none of the recommendations were implemented;

(b) that a claim of the appellant (that it is entitled to substantial payments from the respondent as a consequence of the reduction in prices to the respondent for furnace fuel oil and marine diesel oil) is without legal or factual foundation;

(c) that the letter arrangement between the parties does not constitute an enforceable contract in that its terms are too vague and uncertain;

(d) in the alternative, that if the letter arrangement was an enforceable contract, that the appellant's entitlement to participate in any savings ceased in mid September 1991.

The actual claim of the respondent in the statement of claim is as follows:

"13. The Plaintiff claims judgment against the Defendant as follows:

(a) the sum of $8,000.00 representing the return of the deposit;

(b) a declaration that:

(i) the Letter Arrangement does not constitute an enforceable contract;

(ii) if, in the alternative, the Letter Arrangement is found to constitute an enforceable contract, that the Plaintiff has no liability to the Defendant NUS thereunder;

(iii) if, in the further alternative, it is found that the Plaintiff is liable to the Defendant NUS, that liability is limited to the sum to be determined by this Court;

(c) the costs of this action."

The originating notice and statement of claim were served on the appellant on December 12th, 1994, and the appellant was advised that judgment would be entered, if a defence was not filed, on December 23rd, 1994.

Counsel for the appellant had advised counsel for the respondent that an action would be commenced by the appellant against the respondent, in the Province of Ontario, claiming payments owing under the contract. Ontario counsel for the appellant, in an affidavit filed with the application, deposed that she was concerned that by filing a defence in Nova Scotia the appellant could be attorning to the Nova Scotia jurisdiction; and that attornment might affect the proceedings which were planned in the Province of Ontario.

In any event, the appellant did not file a defence within the time limit. Instead, on December 23rd, 1994, the appellant commenced an action, in the Province of Ontario, against the respondent, claiming damages of $395,000 for breach of the contract.

Also, on December 23rd, 1994, counsel for the respondent, through the office of the prothonotary, entered default judgment against the appellant, and the prothonotary issued an order for judgment against the appellant for:

Debt: - $ 8 , 0 0 0 .

Interest:	-	$2,880.
Costs:	-	$ 404.42
Total:	-	$11,284.42

Nothing was done with respect to the claims for declaratory relief. They were not formally abandoned, nor was any application made to court to deal with them. Further, no explanation has been given as to why counsel for the respondent had default judgment issued through the office of the prothonotary, i.e., whether it was through inadvertence or otherwise.

Subsequent negotiations between counsel for both parties failed to resolve terms whereby the default judgment might be set aside by agreement. It is apparent from these negotiations that the appellant wants the issues between the parties tried in Ontario; and the respondent wants any trial in Nova Scotia. In fact, the respondent sought a stay of the Ontario proceedings on the ground, inter alia, that the Ontario action is *res judicata* because of the respondent's default judgment in Nova Scotia. That application is in abeyance pending the disposition of this appeal.

Since the matter could not be resolved by agreement, the appellant made the application which is the subject of this appeal, to set aside the default judgment on two grounds:

1. Because of the nature of the respondent's claim (for $8,000 and declaratory relief, i.e., not one for a liquidated demand only) the prothonotary had no jurisdiction to issue an order for judgment, and leave of a judge was required.
2. Alternatively, because there were triable issues between the parties; and because the appellant had a reasonable excuse for failing to file a defence, that the judgment should be set aside to permit the defence to be filed.

As to the first point, the Chambers judge, in his oral decision at the conclusion of the hearing, said:

> "Although technically, the plaintiff ought to have sought the court's leave to take default under Civil Procedure Rule 12.03(1), because the statement of claim had combined a request for declaratory relief with a claim for what I consider to be liquidated damages, such a procedural omission did not, in my view, in the circumstances of this case, materially affect the defendant."
>
> . . . . . .
>
> "Here, the plaintiff's mistake was not one of substance rendering its claim for relief a nullity. It had the right to default. It attempted to exercise it. It merely erred in choosing the Prothonotary as being the appropriate authority to grant it.
>
> Further, I find that the claim for return of the sum of Eight Thousand Dollars ($8,000.00) meets the definition of "liquidated" damages in the authorities presented to me and is, therefore, claimable and recoverable upon default."

As to the second point, the Chambers judge, while agreeing that there were triable issues between the parties, found that the appellant did not have a reasonable excuse for failing to file a defence; and as a result he dismissed the appellant's application.

Grounds of Appeal

The appellant raises several grounds of appeal. In view of the conclusions which I have reached in this opinion, I need only refer to two of them:

> (i) the Chambers judge erred in treating the $8,000 amount claimed by the plaintiff as a "liquidated demand" which would support a default judgment for that amount; and
>
> (ii) the Chambers judge erred in deciding that the respondent's failure to obtain its default judgment in compliance with **Rule 12.03(1)** was curable by **Rule 2.01**.

Standard of Review

In **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143, Chipman, J.A. stated:

> At the outset it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or patent injustice would result . . . .
>
> Under these headings of wrong principles of law and patent injustice an appeal court will override a discretionary order in a number of well recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, when all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellant court interference in discretionary matters."

Civil Procedure Rules

Rule 12.01 provides that "where an originating notice contains any one of the claims mentioned in paragraph (2) and a defendant fails to file a defence thereto within ten days of the service of the notice . . . the plaintiff may enter judgment against the defendant . . ."

> "(2)(a) where a claim is for a liquidated demand only, for a sum not exceeding the claim, and where part of the claim is for interest to an unspecified rate, then for an additional sum for the interest to the date of entering judgment at the rate of six per centum per annum. (Emphasis added)
>
> (b) where a claim is for unliquidated damages only, for damages to be assessed;
>
> (c) where a claim relates to the detention of goods only, for the delivery of the goods or their value to be assessed;
>
> (d) where a claim is for the possession of land only, for possession of the land, provided if there is more than one defendant judgment shall not be enforced against any defendant until judgment for possession of the land has been entered against all the defendants."

Rules 12.02 and **12.03** provide:

> "12.02 Where an originating notice issued against any defendant is indorsed with two or more of the claims mentioned in rule 12.01 and no other claim and the defendant fails to file a defence, the plaintiff may, after the time limited for defending, enter against the defendant such judgment in respect of each such claim that he would be entitled to enter under those rules as if it was the only claim indorsed on the originating notice and continue the proceeding against the other defendants, if any.
>
> 12.03 (1) Where an originating notice issued against any defendant is indorsed with any claim not mentioned in Rule 12.01, or any of the claims mentioned in Rule 12.01 together with any other claim and the defendant, or all the defendants if there is more than one, fails or fail to file a defence or appear on the hearing under the originating notice, the plaintiff may, after the expiration of the time limited for defending or appearing apply to the court for judgment and the court shall give such judgment as is just."

Rule 51.05 deals with orders made by a prothonotary. **Rule 51.05(1)(d)** provides as follows:

> "51.05(1) Notwithstanding the provisions of any other Rule, a Prothonotary may make and enter an Order,
>
> (d) where the order applied for is an interlocutory or final judgment under Rules 12.01 or 12.02."

To summarize these **Rules** as they relate to the matter before us:

(1) if the claim is for a liquidated demand only, the prothonotary has the jurisdiction to issue an order for judgment for that amount together with costs and interest;

(2) if the claim is for unliquidated damages, the prothonotary's jurisdiction is only to order interlocutory judgment for damages to be assessed;

(3) the prothonotary has no jurisdiction, under either **Rule 12.01** or **Rule**

12.02, to issue an order for judgment with respect to claims for declaratory relief, because such claims are not included in **Rule 12.01**; and

(4) where a claim is for a matter not included in **Rule 12.01** the plaintiff makes an application to the court for judgment, and the court gives such judgment as is just.

Liquidated Demand

Is the respondent's claim, for "the sum of $8,000 representing the return of the deposit", a "liquidated demand" within the meaning of **Rule 12.01(2)(a)**?

Apparently, this issue was not argued before the Chambers judge. Certainly, the Chambers judge did not specifically deal with it in his decision. Instead, the Chambers judge treated the $8,000 claim of the respondent as "liquidated damages". He said:

> ".....the statement of claim had combined the request for declaratory relief with a claim for what I consider to be liquidated damages....." {Emphasis added}

He further said:

> ".....I find the claim for return of the sum of $8,000 meets the definition of liquidated damages....." {Emphasis added}

In my respectful opinion, the Chambers judge erred in law when he categorized the $8,000 claim as liquidated damages.

Liquidated damages is a pre-estimate of damages, agreed upon in advance by the parties to a contract, as to what damages will be paid in the event of a breach of that contract. See **Blacks Law Dictionary**, 6th ed., at p. 391; **Strouds Judicial Dictionary**, 5th ed., vol. 3 at p. 1478; **Canadian Law Dictionary**, Yogis, 2nd ed. at p. 61; **Principles of Pleading**

and Practice, Odgers, 22nd ed., at p. 46.

Clearly, there was no such provision in the contract between the appellant and the respondent.

"Liquidated demand" is not defined in the **Rules.**

The present English Rule, with respect to entering judgment in default of defence (Order 19, Rule 2), is similar to our **Rule** in that it refers to the case where the plaintiff's claim "is for a liquidated demand only". The words liquidated demand, as they are used in that English Rule, are defined in **Precedents of Pleadings**, Bullen & Leake, 12th edition, 1975 at p. 153 as follows:

> "A liquidated demand is a debt or other liquidated sum. It must be a specific sum of money due and payable, and its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic. Otherwise even though it be specified, or quantified, or named as a definite figure that requires investigation beyond mere calculation, it is not a "liquidated demand" but constitutes "damages"."

Similarly, these words are defined in **The Supreme Court Practice**, 1988, Volume 1, p. 35 as follows:

> "A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand,' but constitutes 'damages'."

In **Principles of Pleadings and Practice**, Odgers (supra) at p. 46 the author says the following:

> "When the amount to which the plaintiff is entitled can be ascertained by calculation, or fixed by any scale of charges or other positive data, it is said to be "liquidated" or made clear . . . . But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by assessment or by what might be

> judged reasonable, the claim is generally unliquidated . . . . But if the claim is in its nature a claim for damages at large, it is not in law treated as a "liquidated demand" even if the plaintiff puts a figure on the damages which he is claiming."

There is little judicial consideration of the meaning of these words in Nova Scotia. In **Bennett v. Savory** (1978), 22 N.S.R. (2d) 333 O Hearn, J.C.C. considered whether a plaintiff's claim for conversion of a motor vehicle, valued at $800, was a liquidated demand within the meaning of **Rule 12.01**. Judge O Hearn decided that it was not such a claim. In considering what is meant by liquidated demand, Judge O Hearn referred to an earlier edition of **Principles of Pleading and Practice**, Odgers and then said at p. 337:

> "It is apparent from these sources that some *quantum meruit* and *quantum valeat* demands can be treated as liquidated demands. This applies, however, only where they are for work, services, goods and materials supplied on some consensual basis (or possibly on application on the doctrine of restitution) where there are established rates, charges or standards that can be referred to."

Counsel for the appellant has referred to the Ontario case of **Gold Dust Corporation v. Marquette** (1932), 29 O.W.N. 283. I have reviewed that case, and others, dealing with the meaning of the words liquidated demand as they appeared in the previous Ontario Rules dealing with specially endorsed writs. I have not considered those cases relevant because the words liquidated demand are used, in those Rules, in a much more restrictive sense than they are in the Nova Scotia Rules. The Ontario Rule provided that a writ of summons could be specially endorsed where the plaintiff "seeks to recover a debt or liquidated demand in money" arising in various ways including, "upon a bond or contract under seal for payment of a liquidated sum".

Counsel for the respondent has referred to the case of **Lagos v. Grunwaldt**, [1910] 1 K.B. 4 as authority for the proposition that a restitutionary claim for money paid falls within the definition of debt or liquidated demand. I have reviewed that case and it is

authority, only, for the proposition that an untaxed bill for legal services could have been the subject of a specially endorsed writ of summons (as a claim for "debt or liquidated demand") under the English Rules of the day. Further, at least at that time, judgment for that bill for legal services could not be entered until it was taxed.

The **Civil Procedure Rules** in Newfoundland are quite similar to our **Rules**. Their **Rule 16.01(2)(a)** is, for all intents and purpose, identical to our **Rule 12.01(2)(a)**.

In **Saunders et al v. Lewis** (1990), 40 C.P.C. (2d) 40 Cameron J. (as she then was) considered the Newfoundland Rule 16.01(2)(a) and the meaning of the words "liquidated demand" in the context of whether or not a particular judgment had been properly entered for a liquidated demand. She said at p. 44:

> "The claim by the plaintiffs is for compensation for breach of contract. The ease with which damages may be quantified does not change the characterization of the claim from a claim for unliquidated damages to a liquidated demand.
>
> It is the contract itself which must be looked at to determine how the claim is to be characterized. Generally speaking, in order that a demand may be 'liquidated' one party must obligate himself to pay the other a specific sum of money either absolutely or upon the happening of a specified contingency."

In the case of **Soreltex International Inc. v. Custom Carpet Sales Ltd.** (1993), 24 C.P.C. (3d) 315, the Court of Appeal of Newfoundland also dealt with this issue. In a statement of claim, the plaintiff alleged that the defendant had sold and delivered to it carpeting that was defective. It claimed $15,000 for the defective carpeting in stock; $3,000 for the cost of replacing the defective carpeting already sold; and an indemnity for further replacement costs. On default of defence, judgment was entered for all claims. On an application to set the judgment aside, a Chambers judge allowed the judgment for $15,000 to stand, as a judgment for a liquidated demand, but struck out the remainder of the judgment.

Goodridge C.J.N., after referring to **Saunders** (supra), said at p. 317:

> "Suffice it to say that a liquidated claim is generally a claim for an amount agreed to be paid by a defendant to a plaintiff, such as the price of goods sold and delivered, the amount due under a promissory note or the amount agreed to be paid as liquidated damages while an unliquidated claim is generally a claim for damages arising out of a tort or breach of contract. .....
>
> The claim of Custom Carpet does not involve any liquidated amount. It is essentially a claim for damages for breach of contract. Default judgment could only have been entered for damages to be assessed. The default judgment for a liquidated sum should not have been entered."

Turning, specifically, to the $8,000 claim of the respondent against the appellant, it is obviously not one of the clear examples of liquidated demand referred to by Goodridge, C.J.N. in **Soreltex** (supra). We must, therefore, examine the contract between the parties to decide how this claim should be characterized.

A review of the contract between the appellant and the respondent raises more questions than it answers. The contract refers to the $8,000 as a service fee. The respondent, in its statement of claim, refers to it as a deposit. Is it a deposit? Does it make any difference whether it is a service fee or a deposit? There is no provision in the contract for the return of the service fee (except to the extent that it is credited against the appellant's account until it is used up). Is all, or part, of this service fee returnable to the respondent? Is all, or part, of this service fee forfeited to the appellant? The contract is silent on these points.

Further, in reviewing the statement of claim, it is unclear as to the basis upon which the respondent is claiming that all of the service fee (deposit) be returned. Is it damages for breach of contract, because the appellant, as alleged therein, failed to live up to its end of the bargain? Is it in lieu of damages for breach of contract? Is it, as alternatively alleged therein, because the contract is unenforceable in that its terms are too vague and

uncertain? Finally, with respect to the respondent's claim for the return of the entire service fee, what is the relevance of the respondent's alternative claim that the appellant's entitlement to participate in any savings continued, at least, until mid September 1991?

If this were a case where the sole basis for the claim of the respondent (for the return of the "deposit") was a total failure of consideration on the part of the appellant, I would have less concern about how to characterize the claim. In that case it could be argued that the deposit is owing to the respondent by operation of law; and, as such, is a claim for a liquidated demand. In this case, however, the respondent has not pleaded total failure of consideration; and, in fact, acknowledges, in the statement of claim, part performance by the appellant. Further, the claims for declaratory relief are an acknowledgement that there is more to this claim than simply the return of a deposit following total failure of consideration.

Therefore, in my opinion, it cannot be said that, at the time the action was commenced by the respondent against the appellant, the $8,000 service fee was a specific sum due and payable by the appellant to the respondent. The respondent's claim, therefore, for the "return of the deposit" is not a claim for a liquidated demand within the meaning of **Rule 12.01(2)(a)**. Further, evidence would be required to substantiate the basis, and extent, of the respondent's claim against the appellant, and that would be done on an application to the court.

Since the respondent's claim is not one for a liquidated demand, the order for judgment granted by the prothonotary, which is a final order, should not have been granted.

The curative provisions of Rule 2.01

In this ground of appeal the appellant submits that the Chambers judge erred in deciding that the respondent's failure to obtain its default judgment in compliance with **Rule**

12.03(1) was curable by **Rule 2.01**.

> **Rule 2.01** provides as follows:
>
> "2.01. (1) A failure in a proceeding to comply with any requirement of these Rules shall, unless the court otherwise orders, be treated as an irregularity and shall not nullify the proceeding, any step taken in the proceeding, or any document, or order thereof.
>
> (2) Where there has been a failure in a proceeding as mentioned in paragraph (1), the court may, subject to paragraph (3) and such terms as it thinks just,
>
> (a) set aside, either wholly or in part, the proceedings;
> (b) set aside any step taken in the proceeding or any document, or order therein;
> (c) allow any amendment to be made under Rule 15;
> (d) make any such order as it thinks just.
>
> (3) The court shall not wholly set aside any proceeding or the originating notice by which it was begun, on the ground that the proceeding was required by any of these rules to be begun by an originating notice other than the one employed."

The reasoning of the Chambers judge, for using the curative provision of **Rule 2.01** to allow the judgment to stand, was as follows:

(1) he decided that the respondent's claim for $8,000 was a claim for "liquidated damages";

(2) he decided that the respondent had a "right" to judgment for $8,000 and simply chose the inappropriate vehicle (the prothonotary instead of the court) to grant it.

The Chambers judge said:

> "I think it also significant that had the plaintiff's Statement of Claim been restricted to the demand for Eight Thousand Dollars ($8,000.00), which is what, in fact, the plaintiff eventually obtained in the Prothonotary's default order, that order would be unassailable."

The Chambers judge concluded that since the error was not one of substance, he should use the curative provision of **Rule 2.01** and allow the order to stand.

In view of my conclusion that the Chambers judge erred in law in characterizing the respondent's claim as liquidated damages, and in view of my conclusion that the respondent's claim is not a liquidated demand within the meaning of **Rule 12.01(2)(a)**, the reasoning of the Chambers judge, for his use of the curative provisions of **Rule 2.01**, is based on an erroneous premise. The respondent did not have a right to an order for judgment for $8,000. The respondent's only right was to make an application to court for "such judgment as is just". Further, it is far from clear to me, on the basis of the questions which I have raised concerning both the absence of terms in the contract, and the unclear basis on which the respondent is claiming the $8,000, that a court would automatically grant judgment to the respondent for $8,000 plus interest and costs.

In considering whether or not the curative provisions of **Rule 2.01** should be applied here, it is well to remember the purpose for which the **Rules** exist. **Rule 1.03** provides:

> "1.03 The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding."

The **Rules** are an attempt to streamline the process which leads to the ultimate determination of the issues in dispute between the parties. If, in that process, rules are not complied with, in most cases through inadvertence, the court will invariably allow the non-compliance to be corrected, provided the correction does not cause an injustice to the other party, in order to get on with the determination of the real issues in dispute between the parties.

In this case the failure to comply with **Rule 12.03** is much more serious than an

error, or irregularity, in the process leading to the ultimate determination of the real issues in dispute between the appellant and the respondent. The granting of the order for judgment by the prothonotary - which the prothonotary had no authority to grant (and to which the respondent was not, at that time, otherwise entitled) - was determinative of the proceeding.

In **Soreltex** (supra) where default judgment had been entered for an amount which the Court of Appeal determined was not a liquidated demand, Goodridge C.J.N. said at p. 318:

> "When a default judgment is irregular, the defendant is entitled to have it set aside as of right. It is not a matter of discretion. The chambers judge ought to have set it aside. Because he did not do so, the appeal must succeed and an order substituted for that of the chambers judge setting aside the default judgment in its entirety."

In Newfoundland they have a similar curative provision to our **Rule 2.01**. Prince Edward Island also has a similar curative provision, and the same result was reached by MacDonald C.J.T.D. in **Huynh v. Mills** (1991), 2 C.P.C. (3d) 29.

The principle on which these two cases were decided had its beginnings in the often quoted English case of **Anlaby v. Praetorious** (1888), 20 Q.B.D. 764. In that case Fry L.J. said at p. 769:

> "There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant in which case the court has a discretion to impose terms as a condition of granting the defendant relief. But although the court is bound to set aside an irregular judgment *ex debito justitiae*, it has always exercised a discretion as to costs, and has imposed terms as a condition of the exercise of that discretion - a common term being that the defendant shall not bring any action."

I adopt the reasoning of Goodridge C.J.N. in **Soreltex** (supra) and conclude that the appellant is entitled to have this order for judgment set aside as of right. It is not a matter of discretion. The Chambers judge ought to have set it aside, and the Chambers judge erred

in law in not doing so.

I refer also to **King v. Brookins** (1980), 40 N.S.R. (2d) 278, at p. 285 where Coffin, J.A. referred to an order issued by the Prothonotary, which had not been initialled and approved by the trial judge (on whose decision the order was based) as "a complete nullity and of no effect".

I would allow this appeal. I would set aside the order for judgment against the appellant dated December 23rd, 1994. I would allow the appellant ten (10) days to file a defence to the respondent's statement of claim, failing which the respondent may apply to the court for judgment under **Rule 12.03(1)**.

Under the circumstances, each party should bear its own costs of this appeal.

Flinn, J.A.

Concurred in:

Freeman, J.A.

Jones, J.A.

C.A. No. 116457

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

NATIONAL UTILITY SERVICE (CANADA) LIMITED Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
PICK O'SEA FISHERIES LIMITED	)	
	)	FLINN, J.A.
Respondent	)	