**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *CIBC Life Insurance Company v. Hupman*, 2016 NSSC 120

**Date:** 20160505
**Docket:** Hfx No. 446408
**Registry:** Halifax

**Between:**

CIBC Life Insurance Company Limited

Appellant

v.

Bette Hupman

Respondent

**DECISION**

| | |
|---|---|
| **Judge:** | The Honourable Justice Suzanne M. Hood |
| **Heard:** | April 15, 2016, in Halifax, Nova Scotia |
| **Oral Decision:** | April 15, 2016 |
| **Written Release of Oral Decision:** | May 5, 2016 |
| **Counsel:** | J. Gordon Allen, for the Appellant<br>Ryan P.W. Lebans, for the Respondent |

**By the Court (Orally):**

[1] Bette and Arnold Hupman had a life insurance policy with the CIBC Life Insurance Company Limited for accidental death. Mr. Hupman died on April 10, 2014. Mrs. Hupman made a claim under the policy for the $25,000 death benefit. She filed a claim.

[2] She advised CIBC Life she would commence action if she was not paid. And she did so in Small Claims Court. She served the recognized agent.

[3] At the hearing at Small Claims Court on August 4, 2015, the defendant did not appear nor had it filed a defence. Adjudicator Slone held a hearing and granted judgment for Mrs. Hupman after hearing her evidence.

[4] Thereafter CIBC Life first asked that Mrs. Hupman consent to setting aside the judgment and, when that was not agreed to, an appeal was launched to the Small Claims Court pursuant to s.23 of the *Small Claims Court Act*.

[5] A hearing was held before Adjudicator Barnett and he concluded he had no jurisdiction to set aside the order of Adjudicator Slone. CIBC Life appeals both decisions.

[6] A question of jurisdiction is decided on the correctness standard and a question of breach of natural justice is to be decided by considering whether or not the process was fair.

[7] There is no question that Adjudicator Slone could do what he did.

[8] Adjudicator Barnett took the position he did not have the jurisdiction to set aside the order. He relied on the decision of Rosinski, J. in *Leighton v. Stewiacke Home Hardware Building Center*, 2012 NSSC 184, that the adjudicator in that case had no authority to reconsider an order where there was no defence filed and no defendant appearing at a hearing.

[9] Section 23(1) of the *Act* deals with a situation where no defence is filed and no hearing is held. It is called the quick judgment procedure.

[10] Section 23(3) of the *Act* deals with a situation where, although a defence has been filed, the defendant does not appear at the hearing.

[11] In both those cases, there is provision in the *Act* for the order to be set aside if certain conditions are met.

[12] There is nothing in the *Small Claims Act* which provides for a reconsideration if a hearing is held in the absence of a defence and in the absence of the defendant.

[13] Accordingly, Rosinski, J. concluded there was no authority for the adjudicator to reconsider an order since the power to reconsider is only pursuant to s.23(1), quick judgment, or s.23(3) where the defence was filed but the defendant did not appear. He did not cite *Kemp v. Prescesky*, 2006 NSSC 122, in his decision.

[14] CIBC Life says this case should be distinguished from *Leighton* upon which Adjudicator Barnett relied.

[15] A similar situation arose in *Kemp* where no defence was filed and the defendant did not appear at the hearing.

[16] In *Kemp*, Warner, J. noted that neither s.23(1) nor s.23(3) were applicable to the case before him. However, he concluded it was a breach of natural justice for there to be no possibility of reconsideration in those circumstances. Also with respect to natural justice, he considered the timelines for filings, particularly where the parties were all self-represented, and the increased monetary jurisdiction of the

Small Claims Court. He concluded it was only fair for the matter to be decided with both parties being heard.

[17] He concluded the defendant may have a defence or an arguable case re quantum, had a reasonable excuse for his default and that there was no prejudice to the claimant. He therefore sent the matter back for a re-hearing.

[18] Although a re-hearing was ordered in both of these cases, *Leighton* and *Kemp*, the basis for doing so differed. Both judges concluded s.23(1) did not apply, but Rosinski, J. said because there was no provision for a reconsideration on the facts of the case, the adjudicator was *functus officio* once he granted his order. He said the parties cannot confer jurisdiction where none exists.

[19] Rosinski, J. did conclude there was a breach of natural justice in the circumstances of the case. He concluded the adjudicator was in error in saying there was no evidence in favour of setting aside the judgment because he did note the defendant's illness and the fact that her lawyer had misdiarized the hearing date. He concluded it was a breach of natural justice for the adjudicator not to have offered an adjournment or accepted the representations of an officer of the court in those circumstances. It was because of that that he ordered a new hearing.

[20] However, he did not consider the broader issue of breach of natural justice where there is an apparent gap in the legislation, which is what Warner, J. considered. It is unfortunate he did not have the opportunity to consider the *Kemp* decision, which was apparently not brought to his attention.

[21] I therefore conclude the adjudicator should have reconsidered the decision of Adjudicator Slone and failing to do so resulted in a breach of natural justice. Although the Small Claims Court does not have inherent jurisdiction, s.2 of the *Act* does give the court the ability to establish its own procedures for adjudication. It provides:

> 2 It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

[22] Adjudicator Barnett considered this in *Lelacheur v. Densmore*, 2012 NSSM 58, at para. 23. He said with respect to the *Residential Tenancies Act*:

> [23] Despite the apparent absence of specific guidance in any applicable statute or any of the applicable regulations, I believe that it is important to bear in mind the purpose of the residential tenancies scheme as set out in Section 1A of the *Residential Tenancies Act, supra*:
>
> > "The purpose of this Act is to provide landlords and tenants with an efficient and cost-effective means for settling disputes."

[23] He continued in that decision, referring to the *Small Claims Court Act* at paras. 24-26:

> [24] Moreover, I am convinced that everything that the Small Claims Court does should be carried out "in accordance with established principles of law and natural justice": Section 2 of the *Small Claims Court Act, supra*.
>
> [25] That said, there is no question that the Small Claims Court is a statutory court that does not have "inherent jurisdiction" like a superior court …
>
> [26] The unassailable proposition that this Court lacks the 'inherent jurisdiction" of superior courts does not mean, however, that this Court does not possess powers necessarily incidental or ancillary to its statutory jurisdiction. In other words, it does not necessarily follow that this Court cannot act in the absence of an express statutory or regulatory power. The Court has an implied jurisdiction over a number of matters that flow from "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so …".

[24] There is, therefore, in my view, the ability for adjudicators to fill gaps in the legislation to ensure there is natural justice in the proceedings before the Small Claims Court. This is a broad and purposive approach to the *Small Claims Court Act*.

[25] In deciding whether to exercise my discretion to send the matter back for re-hearing, I must consider three things:

1. whether there is an arguable issue;
2. whether there is a reasonable excuse for the failure to file a defence and failure to appear; and

3. prejudice to the claimant.

**1. Is there an arguable issue?**

[26] Firstly, the appellant says it has an arguable defence and has provided in its appeal book copies of medical information it received which do not refer to Mr. Hupman's fall, which is the basis upon which the claim for the accidental death benefit is made. The EHS report, death report, and progress notes refer to other health problems. These are potential support for the defence's position that the claim should be denied.

[27] In my view this is an arguable defence. It does not appear to be frivolous; in fact, quite the contrary.

**2. Is there a reasonable excuse for failure to file a defence and failure to appear?**

[28] Secondly, there is an agreed statement of facts submitted by the parties. I summarize these as follows:

1. Service was made on the recognized agent on July 7, 2015. A mailing address for the defendant was found in the law firm's records and the Notice of Claim was sent to that address.

2. Through inadvertence, the recognized agent did not follow up with the insurer nor note the hearing date. The letter sent to the insurer was subsequently returned to sender after the hearing date.

3. The Notice of Claim was thereafter sent to a new contact person at CIBC Life.

[29] The issue is whether there is a reasonable excuse for the failure to file a defence and attend at the hearing.

[30] There is an expectation that a recognized agent who has been served, and therefore service is effective upon the client, will ensure he or she has instructions from the client in advance of the hearing date. Inadvertently that did not occur.

[31] Also as pointed out by counsel for the claimant, there is an expectation that a company doing business in Nova Scotia and appointing a recognized agent will ensure the agent has the company's correct address and contact information. That did not occur.

[32] I must consider whether these facts provide a reasonable excuse in this case. In *Strait Excavating v. LeFrank*, 2013 NSSC 420, Van den Eynden, J. (as she then was) did not accept the defendant's excuse for missing the hearing date. She said even if it was true, it was not reasonable. The hearing date was May 16 and the

Notice of Appeal stated the defendant put it on his calendar for May 28. She said he missed the hearing date "by no fault but his own". She also said the "parties need to be reasonably diligent, mindful and respectful of the process".

[33] In *Farrow v. Butts*, 2010 NSSC 387, the defendant had to be served by substituted service. Furthermore, there were text messages which showed the defendant knew of the hearing date. He admitted he chose to ignore it. Murray, J. cited as a reasonable excuse *Forsyth v. Shannon*, [1995] N.S.J. No. 431, where the appellant's wife took ill and instead of attending the hearing he attended to her and missed the hearing date.

[34] In *Logic Alliance Inc. v. Jentree Canada Inc.*, 2005 NSSC 2, Warner, J. dealt with a motion to set aside a default judgment entered in the Supreme Court. In considering the reasonableness of the excuse for delay, he cited *Temple v. Riley*, 2001 NSCA 36, which in turn referred to an English Court of Appeal decision *Rayner (Mincing Lane) Limited v. Brazil*, [1999] E.W.J. 4071 (C.A.), where the court said in para. 32:

> 32. The authorities to which we were referred demonstrated that if the court concluded that there was a defence on the merits which carried some degree of conviction it is the very strong inclination of the court to allow a default judgment to be set aside even if strong criticism could be made of the defendant's conduct.

[35] I do have some concerns with respect to the reasonableness of the excuse, but I do note that very quickly after the decision, the defendant acted to respond to the claim.

[36] To use the words of the English Court of Appeal, I conclude there is a defence on the merits which carried some degree of conviction. In this case, although I have some concerns about the reasonableness of the excuse, I conclude the case should be heard on its merits.

[37] In all these circumstances, I conclude there is a reasonable excuse for the failure to file a defence and appear at the hearing.

**3. Prejudice to the claimant**

[38] A new hearing can be held quite quickly, and there is no evidence before me of any prejudice to the claimant in ordering a new hearing, i.e., no evidence of unavailability of witnesses or loss of evidence.

**Conclusion**

[39] I therefore order a new hearing before a different adjudicator. The appeal is therefore allowed. No costs were sought and I order no costs.

Hood, J.