IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *CIBC Life Insurance Company v. Hupman*, 2015 NSSM 48

Date: 20151203
Claim: 440050
Registry: Halifax

Between:

CIBC Life Insurance Company Limited

Applicant

v.

Bette Hupman

Respondent

Adjudicator:	J. Scott Barnett
Heard:	November 9, 2015; last written submission November 20, 2015
Written Decision:	December 3, 2015
Counsel:	Ryan P.W. Lebans For CIBC Life Insurance Company Limited
	J. Gordon Allen For Bette Hupman

By the Court:

INTRODUCTION

[1] The Applicant, CIBC Life Insurance Company Limited ("CIBC Life"), seeks to set aside an Order of this Court dated August 7, 2015. In that Order, another Adjudicator of this Court granted the Claim of the Respondent, Bette Hupman, for benefits under an accidental death insurance plan subsequent to the passing of Mrs. Hupman's husband, Arnold Hupman. The Order was granted following a hearing on August 4, 2015 in the absence of CIBC Life which had not filed a Defence although it had been served via its recognized agent.

[2] CIBC Life filed an "Application to Set Aside Order" on September 30, 2015 pursuant to Section 23 of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, as amended. At the outset of the hearing, the parties raised the issue of whether or not I, as opposed to the Adjudicator who had granted the Order being challenged, should be hearing this Application.

[3] I also raised the question of whether or not this Court has any ability to set aside an Order of the Small Claims Court in the specific circumstances of this case and, in that regard, I advised

counsel of the decision in *Leighton v. Stewiacke Home Hardware Building Center*, 2012 NSSC 184.

[4] Ultimately, with my agreement, the parties elected to proceed with the Application with the intention of filing written post-hearing submissions addressing the jurisdictional questions that had been raised and with the understanding that, by proceeding, Mrs. Hupman was not conceding that this Court has jurisdiction to set aside the Order in question.

FACTUAL BACKGROUND

[5] The parties tendered an Agreed Statement of Facts dated November 9, 2015 that was signed by counsel for each of the parties. Before the hearing, counsel for Mrs. Hupman withdrew his agreement to a relatively short portion of the otherwise agreed upon facts but counsel for CIBC Life was content to proceed.

[6] After removing the disputed portion of the Agreed Statement of Facts, the document states as follows:

Agreed Statement of Facts

The following agreed statement of facts is provided for the sole and limited purpose of explaining the delay in responding to the Notice of Claim of May 26, 2015. There is no intent to waive any solicitor-client privilege and CIBC Life Insurance Company Limited expressly denies any such waiver.

1. The Notice of Claim in this proceeding was served upon Craig McCrea as Recognized Agent for CIBC Life Insurance Company ("CIBC") on or about July 7, 2015.
2. Craig McCrea's assistant, Irene MacKay, reviewed Cox & Palmer's internal records which identified the following mailing address for CIBC:
   CIBC Life Insurance Company Limited
   PO Box 3020 Mississauga Station A
   Mississauga, ON L5A 4M2
   Attn: Dianne Clark

3. Based on that information, the Recognized Agent sent the Notice of Claim to CIBC by ordinary mail to the aforementioned address.
4. Inadvertently, the Recognized Agent did not take note of the hearing date and did not follow up with CIBC prior to the hearing date. As a result, the Notice of Claim was not received by CIBC prior to the hearing date.
5. The hearing occurred on August 4, 2015 without any Defence being filed by CIBC and without representatives at CIBC having knowledge of the Notice of Claim beyond service of the Recognized Agent.
6. On August 7, 2015 (after the hearing had already occurred), the original letter with Notice of Claim mailed to CIBC was returned to the Recognized Agent stamped "Return to Sender".
7. On or about August 31, 2015, the Notice of Claim was sent by the Recognized Agent to a new contact person at CIBC.

[7] I was informed that this Agreed Statement of Facts was tendered so as to avoid the possible need for Mr. McCrea or someone else from the law firm of Cox & Palmer to attend in Small Claims Court and give evidence about the events set out in the Agreed Statement of Facts.

[8] In addition to the foregoing, and with consent, the parties tendered a Book of Exhibits, an Affidavit of Mrs. Hupman and an email from a solicitor representing CIBC Life to Mrs. Hupman's counsel dated September 14, 2015 inquiring as to the date upon which the Small Claims Court hearing had been held.

[9] Some portions of Mrs. Hupman's Affidavit were struck by consent (as noted in the court exhibit by strike-through lines over the evidence that has been removed) and each party asked me to accord less weight to any evidence contained in the documents tendered by the opposing party that constitutes hearsay.

ISSUES

[10] This Application raises two issues. First, is it within this Court's jurisdiction to grant the relief that CIBC Life seeks? Second, if this Court can grant such relief, should it be granted in this case?

DISCUSSION

(a) Jurisdiction of this Court

[11] The pertinent facts concerning the question of the jurisdiction of this Court in this case can be distilled down to the following:

a. CIBC Life was provided with appropriate advance notice of Mrs. Hupman's Notice of Claim including the basis for her Claim and the date, time and place for the hearing;
b. CIBC Life did not file a Defence nor did it appear at the appointed hearing time;
c. The Adjudicator at the hearing not only accepted documents into evidence but he also heard *viva voce* evidence from Ms. Hupman;
d. Following the hearing, the Adjudicator granted judgment in favour of Mrs. Hupman against CIBC Life by way of an Order in Form 7(c) in the *Small Claims Court Regulations*, N.S. Reg. 17/93, as amended (albeit containing a significant portion of the wording usually found in Form 7(a)); and

e. CIBC Life brought the within Application pursuant to Section 23 of the *Small Claims Court Act* but, in so doing, it did not specifically identify any particular subsection under this provision upon which it relies.

[12] Despite Mr. Lebans' valiant efforts to argue otherwise, the absence of this Court's jurisdiction in this case can be ascertained by following the path set out in the relatively recent decision of the Nova Scotia Supreme Court in *Leighton v. Stewiacke Home Hardware Building Center*.

[13] But for that decision, I might have been inclined to think that an Application such as the one brought by CIBC Life would appropriately be dealt with in this Court.

[14] As this Court has previously observed, one of the features of the Small Claims Court is an absence of extensive written procedural rules. As the statute creating the Small Claims Court states, the purpose of the Small Claims Court is to "informally and inexpensively" adjudicate claims within the Court`s jurisdiction: Section 2 of the *Small Claims Court Act*. As is obvious to anyone who looks at them, the *Small Claims Court Forms and Procedures Regulations* do not even come close to comprehensively

addressing every conceivable procedural question that can arise in this Court.

[15] Despite the absence of specific statutory or regulatory provisions, I do not believe that this Court is necessarily precluded from exercising such powers that are "necessarily incidental or ancillary" to its statutory jurisdiction: see, e.g., *Lelacheur v. Densmore*, 2012 NSSM 58 and see also an excellent paper entitled "Inherent Jurisdiction of Nova Scotia Courts" by William H. Charles, Q.C. for the Law Reform Commission of Nova Scotia dated August 2005 and, in particular, page 34 of that paper. Even though this Court is a statutory court with a jurisdiction more limited than that of a court of inherent jurisdiction such as the Nova Scotia Supreme Court (see, e.g., *Blair's Custom Metals v. Howard E. Little Excavating Ltd.*, 2006 NSSC 251 at para. 6), the Small Claims Court is a nevertheless a "court of law and of record" (Section 3(1) of the *Small Claims Court Act*) and it must be allowed some ability to control its own process by necessary implication as otherwise the Court could well be rendered ineffectual.

[16] Where a perceived "gap" in the written procedural rules pertaining to the Small Claims Court is identified, this Court can

refer to the *Civil Procedure Rules* (created by the judges of the Nova Scotia Supreme Court pursuant to Section 46 of the *Judicature* Act, R.S.N.S. 1989, c. 240, as amended) for guidance: *Brown v. Newton*, 2009 NSSC 388 at para. 27 and *Malloy v. Atton*, 2004 NSSC 110 at para. 14.

[17] Of interest is the old Rule 30.01 under the *Nova Scotia Civil Procedure Rules* (1972) that specifically addressed the circumstance in which a party fails to attend when a proceeding is call for trial. Subsection (3) stated that:

> Any judgment, order, or verdict given under paragraphs (1) and (2) may be set aside by the court on such terms as it thinks just, upon an application made to it within ten (10) days after the judgment, order, or verdict has been given.

In other words, this old Rule (no longer in effect) does not contemplate that a party absent at trial will be forced to proceed to an appeal of a decision following such a trial but rather that the matter will be brought before the Court that granted the order if that party seeks to set it aside.

[18] I cannot see where this old Rule or a version of it made it into the current *Civil Procedure Rules* with respect to trials in the Nova Scotia Supreme Court (which are the equivalent of hearings in the Small Claims Court of Nova Scotia). The point remains that, for an extended period of time (i.e. from 1972 until the end of 2008), the judges of the Nova Scotia Supreme Court accepted that there ought to be a procedure for setting aside an order made against a party absent at a trial without requiring that the order be appealed to a higher court.

[19] It makes some sense that a court, that is charged with adjudicating claims "in accordance with established principles of law and natural justice" (see Section 2 of the *Small Claims Court Act*), would have some capacity to set aside its own orders so as to avoid possible breaches of natural justice. In fact, Justice Warner held that the failure to have a mechanism to set aside a judgment of the Small Claims Court when a defendant does not file a defence or appear at a hearing by mistake is a breach of the requirements of natural justice: *Kemp v. Prescesky*, 2006 NSSC 122 at para. 19.

[20] A seemingly viable option to avoid a breach of the requirements of natural justice would be to invoke the implied jurisdiction of the Small Claims Court in order to institute a

process for setting aside a judgment issued against a party absent at a hearing who also failed to file a defence. An adjudicator could readily apply the test employed by the Nova Scotia Supreme Court pursuant to Civil Procedure Rule 8.09 (the successor provision to Rule 12.06 in the *Nova Scotia Civil Procedure Rules* (1972) to which Justice Warner referred in *Kemp*).

[21] This option would address the obvious expectation held by those involved in the Small Claims Court process that the Small Claims Court can address just such an issue – the Applicant in this case, represented by counsel, evidently believed it to be the case – but it also has the added benefit of increasing accessibility to justice in light of the historically low number of appeals from the Small Claims Court to the Nova Scotia Supreme Court. As stated by the authors of the March 2009 final report to the Nova Scotia Law Reform Commission entitled "Evaluation of the Nova Scotia Small Claims Court" at pages 98-99:

> While the current system does allow for appeals to the Nova Scotia Supreme Court, it does not seem that this mechanism is well-known to users nor is that appeal mechanism consistent with the objective of informal, low-cost, speedy justice.

[22] A brief check for applicable Canadian authorities reveals that there has been some judicial reluctance to find that the implied jurisdiction of a statutory court includes the ability of such a court to set aside its own judgments or orders: see, e.g., *Manley v. Manley and Armor Moving and Storage Ltd.*, [1988] O.J. No. 2942 (Ont. Prov. Ct., Fam. Div.), *Pottinger v. Toney*, [1988] O.J. No. 2403 (Ont. Prov. Ct., Fam. Div.), *Diciaula v. Mastrogiacomo*, [2006] O.J. No. 1504 (S.C.J., Div. Ct.) and *Boivin v. Smith*, 2010 ONCJ 411 but, more recently and to the contrary, see *Farhan v. Farhan*, 2012 ONSC 6596. These authorities from Ontario are not particularly persuasive when one considers that the majority of these decisions were made in the context of a direct statement by the Ontario Court of Appeal that the civil procedure rules of the superior court could not be used to guide proceedings in the Ontario Provincial Court (Family Division), a statutory court: *Boucher v. Boucher* (1983), 44 O.R. (2d) 481 (C.A.). At a minimum, this Ontario appellate ruling stands in conflict to the Nova Scotia authorities binding upon me that expressly mention that the *Civil Procedure Rules* can be referred to as a guide by Adjudicators in the Nova Scotia Small Claims Court even if those superior court rules are not directly applicable to this Court.

[23] The foregoing discussion presumes an absence of a specific statutory or regulatory procedural rule that would allow the setting aside of an Order granted in the absence of a party following a Small Claims Court hearing. An examination of Section 23 and its history suggests the possibility that relief could potentially have been available pursuant to its terms.

[24] In the original statute creating the Small Claims Court of Nova Scotia (S.N.S. 1980, c. 16), Section 23 read as follows:

> **Failure of defendant to appear**
>
> **23** Where the defendant does not appear at the hearing and the adjudicator is satisfied that the defendant has been served with the claim and notice of the time and place of the hearing and is satisfied that the merits of the plaintiff's claim would result in judgment in the plaintiff's favour if the defendant had appeared, the adjudicator may make an order against the defendant in the absence of the defendant.

[25] In *Moody Brothers Groceteria v. Benjamin* (1982), 54 N.S.R. (2d) 423 (Co. Ct.), the court held at paragraph 6 that this provision did not require that evidence be adduced under oath or otherwise by the claimant nor was it necessary that a hearing or trial be held

in the Small Claims Court before judgment could be issued in favour of a claimant where the defendant had been properly served with advance notice of the claim – all that was required was for an adjudicator to be "satisfied as to the merits" of the claim.

[26] At the time of the *Moody Brothers* decision, a defendant was not required to file a defence. Moreover, there was no form of "default judgment" procedure in the Small Claims Court – a claimant could not obtain judgment before the date set for the hearing. The authors of the March 1991 Report of the Nova Scotia Court Structure Task Force, including a number of leading practitioners, some of whom were elevated to the bench shortly before and some of whom were appointed after the report was issued, noted the potential desirability of allowing some form of default judgment in the Small Claims Court and they recommended as follows at page 212 of the Report:

> Recommendation 43
>
> The *Small Claims Court Act* should be amended to allow the adjudicator to order default judgment without a hearing when

(a) the defendant files a defence but does not appear at the time scheduled for the hearing of the matter; or

(b) the defendant does not file a defence within a reasonable time specified in the Act and the plaintiff furnishes written proof of service and the basis of the claim.

[27] The current Section 23(1) and (2) came in effect by reason of amendments to the *Small Claims Court Act* that came into force in 1993 (S.N.S. 1992, c. 16):

Default of defence or appearance

23 (1) Where a defendant has not filed a defence to a claim within the time required by the regulations and the adjudicator is satisfied that

(a) each defendant was served with the claim and the form of defence and with notice of the time and place of adjudication; and

(b) based on the adjudicator's assessment of the documentary evidence accompanying the claim, the merits of the claim would result in judgment for the claimant,

> the adjudicator may, without a hearing, make an order against the defendant.

[28] The *Interpretation Act*, R.S.N.S. 1989, c. 235, as amended, provides at Section 9(5) that every enactment is deemed to be remedial and is to be interpreted to insure the attainment of its objects considering a number of factors such as, among others, the circumstances existing at the time that it was passed, the mischief to be remedied, the former law, etc. The statutory change was slightly different than that recommended by the Nova Scotia Court Structure Task Force. Even though the contemporaneous debates in the Nova Scotia Legislature are not helpful since they focus on the other significant changes being instituted at the time (e.g. the abolition of the County Court) and there is not even a passing mention to the amendments to the *Small Claims Court Act*, one is forced to conclude that there was a desire to permit judgments in certain circumstances against defendants in advance of scheduled hearing dates.

[29] Even though that conclusion is not controversial, my examination of these amendments could leave one in some doubt about whether the Legislature actually intended to remove the ability of an adjudicator to issue a judgment against a defendant

who did not file a defence and who did not attend the hearing. If Section 23(1) is interpreted as being directed solely at allowing a judgment in advance of a hearing date, then the apparent intention of the original section to permit judgments against absent defendants following a hearing is now missing from the statute. This strikes me as a somewhat surprising outcome and perhaps an unintended consequence of the amendments in 1993.

[30] The meaning of the word "may" (which, as noted above, is used in Section 23(1)) is open to a number of different interpretations as explained in Sullivan on the Construction of Statutes (6th ed., 2014) at pages 81-82, paragraph 4.60:

> The legal effect of a provision that uses "may" varies depending on the purpose of the provision and its context. Such a provision may:
>
> - Confer a power: "an official may do something…". The official is given a power to do something that he or she would not otherwise have the legal authority to do…. In the absence of express or implied limitation, such a provision confers a discretion. The official may decide whether to exercise the power.

- Confer a power, subject to condition precedent: "an official may do something if…". The power may be exercised only if the conditions precedent are met. To that extent the discretion is limited….

- Stipulate a manner of exercising a power or carrying out an action: "a person may do (x) (e.g., enforce a judgment) by doing (y) (e.g., register it in a specified court")….

- Introduce alternative courses of action that may be taken: "a person may do (a), (b) or (c)"….

- Refer to the exercise of a power: "any order a Minister may make must be complied with". Strictly speaking, this use of "may" does not confer a power; it is a mere reference….

- Indicate possibility or capacity: "a person must not import a device that may cause injury". This use has nothing to do with powers or discretion….

[31] A seemingly reasonable interpretation of Section 23(1) is that it confers a power upon an adjudicator, subject to the establishment of conditions precedent, the second possibility listed in the aforementioned text. In other words, an adjudicator has the discretion to grant a judgment against a defendant, without a hearing, where two conditions precedent are satisfied – proof of service upon all defendants and the adjudicator's acceptance that the claimant should succeed based upon the documentary evidence accompanying the claim. More precisely, one could argue that the section permits "default-like" judgments that were previously unavailable but the section does not remove the adjudicator's ability to proceed with a hearing in the absence of a defendant who has not filed a defence. One might think that the intention was to modify an existing section so as to allow the former (i.e. "default-like" judgments before the scheduled hearing date) but not to preclude the latter (i.e. judgments against defendants after hearings at which they were absent).

[32] This interpretation is similar or even, perhaps, identical to that employed in *Consumer Impact Marketing Limited v. Rzepus*, 2003 NSSM 9.

[33] This brings me directly to *Leighton v. Stewiacke Home Hardware Building Center*. Not only is *Consumer Impact Marketing Ltd. v. Rzepus* expressly overruled (see paragraph 49 of *Leighton v. Stewiacke Home Hardware Building Center*) but Justice Rosinski held, at paragraph 57, that the adjudicator had "no authority under s. 23 of the *Act* to reconsider his order" that was granted where (a) the defendant did not file a defence, (b) the defendant did not attend the hearing and (c) the adjudicator issued an order after proceeding with a hearing on the date stipulated in the Notice of Claim form in the absence of the defendant. Given that there was no other statutory basis for potentially setting aside the earlier order, Justice Rosinski held that the adjudicator was *functus officio* upon issuing the order immediately after the hearing.

[34] I note that even in the case of *Kemp v. Prescesky*, Justice Warner must have been of the view that the adjudicator had no ability to set aside the previously granted Small Claims Court Order. The matter was not sent back for reconsideration by the adjudicator in question and, moreover, Justice Warner commented, at paragraph 18, that the rules permitting the setting aside of Orders pursuant to Section 23 of the *Small Claims Court Act* did not encompass a situation where a defendant does not file a

defence, does not appear at the hearing and a judgment is nevertheless granted against the defendant following a hearing at the appointed time on the Notice of Claim form.

[35] CIBC Life's attempts to distinguish *Leighton v. Stewiacke Home Hardware Building Center* are not persuasive. There are no material distinguishing facts in the *Leighton* case compared to those in the case before me.

[36] CIBC Life also maintains that in *Leighton*, Justice Rosinski did not consider Justice Warner's statements regarding the requirements of natural justice in *Kemp*. Respectfully, I am not persuaded by this argument either. The point of Justice Warner's statements was that the dictates of natural justice require that a defendant with a verifiable and justifiable excuse for failing to appear be permitted some means of setting aside an adverse judgment granted in his or her absence. His Lordship went on to supply a remedy by way of granting the appeal of the defendant in the case before him in a circumstance where there was a perceived lack of a remedy available through the Small Claims Court itself.

[37] Finally, CIBC Life refers to my decision in *Lelacheur v. Densmore* and argues that this Court ought to proceed on the basis

that it has the implied jurisdiction to set aside its own Orders. Whether or not the concept of an implied jurisdiction on the part of the Small Claims Court was argued or considered by Justice Rosinski in *Leighton*, I am not prepared to proceed in the face of higher authority that is directly on point and that states quite clearly that there is no room for the exercise of discretion on the part of an adjudicator in the circumstances at hand.

(b) Should the requested relief be granted?

[38] This question need not be answered; if the Applicant is to be granted any relief, it will have to proceed with an appeal of the Order in question even if, technically, such an appeal to the Nova Scotia Supreme Court is out of time as it was not filed within thirty days of the issuance of the August 5, 2015 Order that is being challenged.

CONCLUSION

[39] CIBC Life's Application for relief is denied for the reasons given but, in the circumstances, I decline to order any costs.