SCCH 313682

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Mullick v. International Exteriors (Atla) Ltd., 2010 NSSM 9

BETWEEN

SAMINA MULLICK

RESPONDENT/CLAIMANT

-and-

INTERNATIONAL EXTERIORS [ATLA] LTD. AND FIN-ALL ROOFING LTD.

APPLICANT/ DEFENDANT

Heard: January 21, 2010
Decision: February 26, 2010

Adjudicator David T. R. Parker

Setting Aside a Quick Judgment Order of the Small Claims Court. Considerations to be addressed by the court when dealing with section 23(2) of the Small Claims Court Act and Regulation 14 and Form 6 of the Small

Claims Court Forms and Procedures Regulations. An Applicant must show a reason excuse for not filing a defence, that the application has been made to set aside the quick judgment within a reasonable timeframe within the circumstances surrounding the matter and there is a defence.

Counsel; Elissa Hoverd represented the Respondent
John T. Shanks represented the Applicant

Decision and Order

Parker:-This matter came before the Small Claims Court on January 21, 2010 in Halifax, Province of Nova Scotia. The Application was brought forward to set aside a Quick Judgment Order issued out of this Court on August 28, 2009 awarding the Respondent/Claimant $27,143.56 inclusive of interest and costs. The Application to set aside the Quick Judgment was brought forward by way of a Notice of Motion supported by the affidavit of John T. Shanks, Counsel and this was supported by a supplementary affidavit. The Applicant has also provided to the court by way of a letter dated January 20, 2010 submissions with respect to the Application. I also have for purposes of this decision an affidavit of Stanley Doucet a claims specialist with the Dominion of Canada General Insurance Company as well as an affidavit of Elissa Hoverd, Respondent's Counsel, and both affidavits are dated January 19, 2010 and were filed with the court on January 20, 2010. In addition the Respondent's Counsel has provided submissions by way of a letter dated January 20, 2010 along with the Respondent's Book of Authorities.

Affidavits Provided to the Court by the Parties

1. Respondents Affidavits Opposing the Motion to Set Aside the Order

A.] Elissa Hovards Counsel for the Claimant/Respondent filed an affidavit setting out the following:

1. This case was commenced in the Small Claims Court on July 6, 2009.

2. Service of the claim was perfected pursuant to the Rules and Regulations of the Small Claims Court Act, on International Exteriors [ATLA] Ltd.[“ International “]on July 13, 2009 and on the Defendant Fin-All Roofing Ltd.[“ FA Roofing”] on July 20, 2009.

3. On August 3, 2009, 20 days had expired service since service on the Defendant International and 20 days had expired as of August 10, 2009 since service occurred on the Defendant FA Roofing. No defence from either Defendant had been filed.

4. The Defendants’ in-house Counsel Carole Rundle contacted the Claimant’s Counsel on August 13, 2009 and left a voicemail at Counsel's office. The message was that Ms. Rundle would be out on the office on August 13 and 14th 2009 and requested that Counsel hold off filing a default judgment until the matter was discussed between them. Ms. Rundle advised that she would be back in her office on August 17, 2009 and Ms. Rundle left her telephone number.

5. On August 17, 2009 Claimant’s Counsel attempted to contact Ms. Rundle at the telephone number she had previously left however Counsel’s call went to an answering service for Delta Building Products. Counsel for the Claimant also attempted to contact Ms. Rundle on the same date by way of a telephone number provided to her by her client. Again she received an automated answering service

identifying Ms. Rundle. Counsel left a message that she did not have instructions to waive filing a defence and that if she did not hear from her in short course she would proceed to file default judgment.

6. On August 19, 2009 Counsel having not heard from Ms. Rundle or anyone on behalf of the Defendants proceeded to make an Application with the Small Claims Court requesting a Quick Judgment.

7. On August 25, 2009, Claimant's Counsel received a voice message from Ms. Rundle of August 24, 2009. Ms. Rundle advised she had just returned to the office and would be in all day on August 25, 2009 and left a number where she can be reached.

8. On August 25, 2009 Claimant's Counsel attempted to contact Ms. Rundle and left a voice message advising that as she did not hear from her on August 17, 2009 that Application was made for a Quick Judgment and that Ms. Rundle could contact Counsel if she wished to discuss the matter.

9. On August 25, 2009 Claimant's Counsel was contacted by the Applicant's Counsel advising that they had just been retained by the Applicant/Defendant.

B.] Stanley Doucet's affidavit filed with the court said that the following:

10. The affidavit of Stanley Doucet referred to losses which occurred on November 4, 2007 with respect to the roofing system. Assessments were completed according to the affidavit and contacts were made with the Defendants' Ms. Rundle on a number of occasions through a 2007, 2008 and 2009 which ultimately led to a Statement of Claim being issued. Ms. Rundle did not respond to a request concerning the acceptance of the Statement of Claim according to Mr. Doucet's affidavit.

2. Affidavits in Support of the Motion to Set Aside the Order

C.] Carole Rundle, Solicitor for Interlock Group of Companies which includes both International and FA Roofing filed an affidavit with the court sitting out the following:

11. On July 6, 2009 a Small Claims Court Action was commenced by The Claimant/Respondent against the Defendants/Applicants.

12. The Claimant was not the original party who contracted for the roof to be installed rather the Claimant purchased the roof subsequent to the installation of the roofing system.

13. On August 6, 2009 Ms. Rundle attempted to contact the Claimant's solicitor. Ms. Rundle was unable to contact the Claimant's solicitor and left a voice message advising who she was and her position with respect to the Defendants.

14. On August 12, 2009 Ms. Rundle left a further message with Claimant's Counsel advising that she would be out of the office on vacation and that she had sent the complaint to their insurers and asked Claimant's Counsel to take no further steps until they were able to speak directly with each other.

15. Between August 13 and August 19, 2009 Ms. Rundle was away from her office and then on holiday until she returned to her office on August 24, 2009.

16. On August 24, 2009 Ms. Rundle received a voicemail from Claimant's Counsel and left a voice message requesting a return call in order to discuss The Small Claims Court Action.

17. On August 25, 2009 Ms. Rundle checked her messages on her cell phone and determined that she had received a message from Claimant's Counsel indicating that if she did not receive a response she will be filing a Quick Judgment.

18. On August 25, 2009 Ms. Rundle left a voice message for Claimant's Counsel to discuss the status of the claim and to inquire as to whether Quick Judgment had been granted. Ms. Rundle also contacted her legal Counsel in Nova Scotia on that date.

19. A supplementary affidavit of Ms. Rundle was filed with the court stating that the Warranty pertaining to the roofing system was excluded from the peril which caused the damage and further that the Warranty was not transferred to the Claimant.

I am impressed with the advocacy provided by both Counsels both in written form and oral presentation on behalf of their respective clients. They were both thorough and articulate and provided the court with well drafted affidavits and submissions.

Before I deal with the analysis and conclusion surrounding the issued Order of this court and the Application now before this Court I shall review some of the case law presented to this Court at the hearing and again for which I thank Counsel.

The Law:

TMC Law v. Hirschbach [2006] N.S.J. No. 299. This was a case which came before the Chief Adjudicator of the Small Claims Court and the relevant portions of his decision are the following:

"The setting aside of Quick Judgments such as the one rendered by Adjudicator Cooke in this case is governed by the provisions of Section 23(2) of the Small Claims Court Act. That Section provides that:

- **Where a Defendant against whom an order has been made pursuant to subsection (1) appears, upon notice to the Claimant, before the adjudicator who made the order and the adjudicator is satisfied that**
    - **(a) the Defendant has a reasonable excuse for failing to file a defence within the time required; and**
    - **(b) the Defendant appeared before the adjudicator without unreasonable delay after learning of the order,**
- **the adjudicator may set aside the order and set the claim down for hearing.**

28 The provision is obviously discretionary. An Adjudicator is not obliged to set aside any Quick Judgment simply because of an Application of the type made by the Applicant in the instant case. Instead, in determining whether to exercise its discretion to set aside a Quick Judgment, the Court must proceed on a two-pronged

test. It is incumbent upon an Applicant seeking to set aside a Quick Judgment to establish "a reasonable excuse for failing to file a defence within the time required". Additionally, the common law imposes on an Applicant seeking to set aside a Quick Judgment the requirement that he establish a reasonably plausible defence. Without both prongs of the test having been satisfied, an Application to set aside a Quick Judgment must fail.

29 In attempting to meet both prongs of the test, an Applicant seeking to set aside a Quick Judgment must be proactive. He must demonstrate his reasonable excuse on a preponderance of the evidence. He must also raise some reasonably arguable issues to be tried.

30 An overarching consideration arises pursuant to the provisions of Section 9(5) of the Interpretation Act. Those provisions constitute every other legislative enactment as being remedial in nature and requires them to be interpreted so as to ensure the attainment of their objects. The clear object arising pursuant to the provisions of Section 23(2) of the Small Claims Court Act is that Defendants in the position of the Applicant in the instant case should be permitted a second chance at establishing their defences as long as they are reasonable, are pursued expeditiously and against the backdrop of a reasonable excuse for not having pursued them in the first place.

31 Adjudicators of this Court have been generally admonished by the Justices of the Supreme Court of Nova Scotia not to apply procedural rules too rigidly. One example is the decision of Chief Justice Kennedy in Liberated Networks Inc. v. G.W.C. Online Systems Inc., (2002) N.S.S.C. 273 (not reported). A more recent example is Mr. Justice Warner's decision in Kemp v. Prescesky, [2006] N.S.J. No. 174. It is the latter case, in particular, which underscores the direction from the Supreme Court of Nova Scotia that, wherever possible, matters at issue in the Small Claims Court of Nova Scotia should be decided on their merits.

32 One of course cannot help but be struck by the possibility that the Applicant has lacked bona fides from the get-go. Being negligent in the response to a law suit can never be a good idea. Moreover, responding only once a judgment had been recorded and an Execution Order had been issued is an indication that only certain types of gravity compel the Applicant to respond rationally.

33 All of that said, one also cannot lose sight of the extreme emotional turmoil within which the Applicant was operating at some of the relevant times. If ever an Applicant was entitled to a "break" it is this Applicant who probably was. My sense from Mr. Justice Warner's decision in the appeal from my March 13th, 2006 ruling is that I should assess the Applicant's Application from the perspective of October 24th, 2005, when it was initially made and not from the perspective of the later evidence of the Applicant having ignored my two written requests that he perfect his Application.

34 Although I arrive at the conclusion obviously with hesitation, I find that the Applicant has established a reasonable excuse for failing to answer to the Respondent's claim as he should have.

35 In turning to the remaining issue, that of a reasonably plausible defence, the threshold test to be met by the Applicant is very low. Reference in that regard is made to the decision of the Honourable Mr. Justice Jamie W.S. Saunders (as he was) in Campbell v. Lienaux, [1997] N.S.J. No. 341. There, in writing with reference to a Summary Judgment Application, Mr. Justice Saunders observed both that "contentious issues of fact or of law are left for resolution at trial" and that the purpose of Applications such as the instant one "is not to try issues but to determine if there are issues to be tried." Those principles apply, by analogy, to this Application.

36 Countless decisions of this Court and the Supreme Court of Nova Scotia have held that in circumstances of a lawyer's claim for fees; it is incumbent upon a lawyer to prove that his fees were "reasonable". As such, countless authorities have held that "taxation cannot take place by default". Instead, each claim by a lawyer for his or her fee account must be proved according to the applicable standards and rules. To that end, it may have been initially inappropriate for Adjudicator Cooke to have dealt with the Respondent's claim by way of Quick Judgment.

37 While I naturally shy away of making any comment, whatsoever, on the merits of the Applicant's proposed Defence, it is at least arguable that he has raised a triable issue. I find, in all of the circumstances, that the Applicant has therefore met the minimum threshold test set out by the authorities."

The second case brought to my attention was

Anwyll-Fogo Architects Ltd. v. Hage [1992] N.S.J. No. 403 a decision of Justice Saunders as he then was of the Nova Scotia Supreme Court-Trial Division. In this particular case the Application was brought before the Supreme Court pursuant to the Civil Procedure Rules specifically 12.06 and 53.13 to seek an Order of the court to set aside a Default Judgment. Justice Saunders outlines the law as follows:

“Nova Scotia Civil Procedure Rule 12.06 provides:

- **"The court may, on such terms as it thinks just, set aside or vary any Default Judgment entered in pursuance ot Rule 12."**

Civil Procedure Rule 53.13 states:

- **"(1)**

  Where the court is satisfied that,

- **(a)**

  Special circumstances exist that render it inexpedient to enforce an order for the payment or recovery of money;

- **(b)**

  The Applicant is for any reason unable to pay any money payable ot recoverable under an order;

- **(c)**

  For any just cause;

- **The court may order the issue or enforcement of an execution order to be stayed, either absolutely or for such period and subject to such conditions as the court thinks just.**

  - **(2)**

    An Application under paragraph (1) shall be made on the notice supported by affidavit, and may be made by a judgment debtor notwithstanding that the judgment was entered against him by default.

  - **(3)**

    An order staying execution may be varied or revoked by a subsequent order."

In delivering the judgment of the court in Ives v. Dewar (1948), 23 M.P.R. 218 Mr. Justice Parker said at p. 221:

- **"Before the interlocutory judgment should have been set aside ..., it was necessary for the appellant to show by affidavit, facts which would indicate clearly that he had a good defence to the action on the merits; not necessarily a defence that would succeed at the trial because the action was not being tried on that Application, but facts which would at least show beyond question that there was a substantial issue between the parties to be tried. He must also show by affidavit why his defence was not filed and delivered within the time limited by the Rules. The reasons thus disclosed are material matters which the Judge or Court should consider in determining whether the Application to set aside the judgment should be granted or refused."**

This approach has been consistently followed in Nova Scotia: Atlantic Rentals Ltd. v. Marine Oil Services Ltd. (1988), 85 N.S.R. (2d) 395 (N.S.A.D.); Brown v. Toronto Dominion Bank (1984), 65 N.S.R. (2d) 88 (N.S.A.D.); Lloyd v. Manufacturers Life Insurance Co. (1989), 90 N.S.R. (2d) 339 (N.S.A.D.); Szczesniak v. Farocan Inc. (unreported, 1992 S.H. No. 82798, MacAdam, J., August 24, 1992) and Fleet v. Techsus Inc. (1992), 111 N.S.R. (2d) 293 (N.S.A.D.).

From all of these cases may be distilled the principle that in order to succeed in an Application brought pursuant to Civil Procedure Rule 12.06 the Defendant must demonstrate two things:

(a)

First that he has a fairly arguable defence, or a substantial issue to be tried; and

(b)

Second that he has a reasonable excuse for his delay and failure to file a defence within the time requirements, as prescribed"

Another case that was brought to the court's attention is the decision of Augustus Richardson Q.C. of the Small Claims Court of Nova Scotia. The case citation is **Rzepus v. Consumer Impact Marketing Ltd**. [2003] N.S.J. No. 340.

I have noted the following from that case which is pertinent to setting aside an Order in this Court. Adjudicator Richardson expresses the following;

"I am accordingly satisfied that my jurisdiction to set aside my Order flows from s. 23 (2) of the Act, which provides an adjudicator with the discretion to set aside an order where the adjudicator is satisfied that:

- **a.**

  "the Defendant has a reasonable excuse for failing to file a defence within the time required; and

- **b.**

  the Defendant appeared before the adjudicator without reasonable delay after learning of the order."

28 I am satisfied that the Defendant did appear "without reasonable delay." The issue here is whether the Defendant has a "reasonable excuse for failing to file a defence."

29 Before proceeding, I should note that I do not believe that an adjudicator has the discretion to consider on such an Application whether or not the Defendant has a potential or arguable defence. The Small Claims Court is a statutory Court and the adjudicator draws his or her power and authority from the Act which must be construed strictly.

30 Accordingly, the only issue here is whether the Defendant has "a reasonable excuse" and, in my view, it does not.

31 In this regard I note that there was no evidence that any representative of the Defendant did anything but move the matter off their desk on to someone else's. No one followed up; no one diarized the hearing. While service of the claim was effected on April 11, 2003 when it was served on Mr. Chiasson, neither he not anyone else made any apparent effort to ensure that a defence was entered; or that anyone was actually dealing with the matter. All that the various people did was forward the Notice to someone else. No one "took ownership" of the need to respond in any meaningful way to the fact that a claim for $10,000 had been filed against the Defendant.

32 In my view, the Defendant's basic "excuse" boils down to a statement that it "forgot" about the matter. However, to "forget" a claim is not a "reasonable excuse:" see McLaughlin v. Boudreau Auto (1986) Limited (1994), 150 N.B.R. (2d) 96; Anwyll-Fogo Architects Ltd. v. Hage (1992), 116 N.S.R. (2d) 370 at para 22.

33 The purpose of the Small Claims Court is to adjudicate claims "informally and inexpensively but in accordance with established principles of law and natural justice:" (s. 2 Small Claims Court Act). In my view that purpose is not served by permitting a Defendant to act (or, in this case, fail to act) without any regard for the consequences of failing to make any effort to ensure that a claim is properly handled; and, in particular, that a defence is in fact filed and mounted.

34 The Claimant in this case attended with a lawyer. She took the time and incurred the expense (expense which is not recoverable in the Small Claims Court) of marshalling her evidence and presenting her claim. The Defendant did nothing other than pass the matter along. In my view, if I were to hold that such lack of action was a "reasonable excuse" it would encourage lax practices on the part of Defendants; which in turn would add delay and expense to a Claimant who had followed all of the rules expected of him or her.

35 Accordingly, I decline to exercise my discretion to set aside my Order and I accordingly dismiss the Application. My Order of July 15, 2003 accordingly stands."

Counsel for the Respondent provided the following case:

Ocean Contractors Ltd. v. Shoreline Paving Ltd. [2007] N.S.J. No. 486 in which

Justice Robertson references of the law and makes her own comments as follows:

" LAW AND ARGUMENT

6 The test to set aside a default judgment is well established. It is a two part test:

- **1.**

  A fairly arguable defence, or serious issue to be tried; and

- **2.**

  A reasonable excuse for the delay in filing the defence.

Ives v. Dewar [1949] 2 D.L.R. 204, Temple v. Riley [2001] N.S.J. No. 66, 2001 NSCA 36.

7 In Temple, the Court found (at para. 39):

- **The appellant's submission has some attraction. However, we see no reason to depart from the half-century of jurisprudence developed in Nova Scotia on this subject. We think it best that an Applicant seeking to set aside a default judgment be required to show both a defence or serious argument on the merits and a reasonable excuse for delay, leaving it to the judge to consider the weight of evidence proffered for each requirement and whether one might to be given more emphasis than the other, depending upon the particular circumstances of that case.**

8 In Doyle v. C.L. Barrett Enterprises Limited (1989), 78 Nfld. & P.E.I.R. 280, the Court held that an Application to set aside a default judgment should be made as soon as possible after a judgment comes to the knowledge of the Defendant and then an Applicant should also have a reasonable excuse for the delay in making the Application itself to set aside the default judgment.

9 Justice Cacchione in Cat Lumber Inc. v. East Coast Kilns Inc. [1997] N.S.J. No. 126, 1997 CarswellNS 105 examined the second test established by Ives and agreed with the reasoning of the Newfoundland Court in Doyle.

10 Although Mr. Wheeler on behalf of the Applicant submits that Cat can be distinguished, noting that Cacchione J. commented on wilful delay in bringing the Application had caused prejudice to the Respondent by reasons of the depletion of the goods, no longer available for return. The delay had been from September 12, 1996, the date of the default judgment to January 29, 1997, the date of the Application to set aside the judgment.

11 Mr. Wheeler further submits that the pleadings do not make it clear that Mr. Doucet was being sued in his personal capacity nor were they clear that there was a contract between Ocean and Mr. Doucet.

12 The affidavit of Stephen Doucet is before the Court. He says that he was an officer (secretary/treasurer) and director of Shoreline Paving Ltd. ("Shoreline") which is now a defunct company. He was aware he was named as a Defendant and

acknowledges service on July 29, 2006, although he says he did not read the documents because he thought the matter was between the two companies. He says he did not realize he was being sued in his personal capacity. Further, he denies that he "made assurances to Ocean Contractors that he was personally liable for the debt." He also states, that having been served with the claim he called Michael Matthews whom he referred to as "the controlling force" of Shoreline, despite the fact that he was not an officer or director the company, who allegedly told him "that there was nothing to worry about." His wife Marnie Matthews was listed with the Registry of Joint Stock Companies as President and Director.

13 Rodney Rogers the process server, who served the documents upon Stephen Doucet, filed his affidavit and also gave evidence in person.

14 It is clear from his evidence that Stephen Doucet wanted to avoid service, when he was told by Mr. Rogers that he was a "named Defendant in a legal action." Indeed, Mr. Doucet was at home on the second occasion the process server called at his residence and admitted so in a subsequent phone conversation he had with Mr. Rogers.

15 I do not accept the distinction the Applicant has attempted to make that he was unaware of his potential personal liability versus liability as a director of Shoreline.

16 In my view by both the evidence I have heard relating to service and the subsequent correspondence of December 8, 2006, Stephen Doucet did understand he was a Defendant in this action.

17 Even if one were to find that an arguable defence could be raised that he had no personal responsibility for the debt to Ocean, in the circumstances of the evidence before me, the Applicant fails the two-part test required to be met to set aside the default judgment.

18 From all the evidence before me, I believe Mr. Doucet knew that he was a Defendant in this action. He not only failed to seek legal advice and file a defence, but actually willfully avoided service of court documents. Once served he chose to ignore the reality of the law suit against him for more than a year.

19 He has not proffered any reasonable excuse for this delay.”

Another case referred to by Counsel was

Gauthier v. Halifax (Regional Municipality) [1997] N.S.J. No. 396. In part Justice Cacchione made the following comments:

“The test on an (Application) such as this is well know to Counsel, as has been set out in Ives v. Dewar, [1949] 2 D.L.R. 204 (N.S.C.A.) and more recently in Marissink

v. Kold - Pak Inc. et al (1993), 125 N.S.R. (2d) 203. In order to set aside a default judgement the Applicant must show by affidavit facts indicating that the Applicant has a good defence to the action on the merits, not necessarily one that would succeed at trial, but at least, that there is a substantial issue to be tried between the parties, and also, there is a reasonable excuse for the delay in applying to Set Aside the Default Judgement.

15 In the case of Doyle v. Barrett (1989), 78 Nfld. and P.E.I.R. 280, the court pointed out that consideration should also be given to any delay in making an Application to set aside a default judgement. The Doyle v. Barrett case states that such an Application should be made as soon as possible after the judgement comes to the knowledge of the Defendant

In Marissink v. Kold - Pak Inc. (1994), 125 N.S.R. (2d) 203 a default judgement was set aside by our Court of Appeal on the basis that - a client should not be deprived of its right to defend because of the fault of its solicitor. Although, Crawford & Company was the Halifax Regional Municipality's agent, and its actions bind the principal, I am not persuaded that the situation is unlike that of a solicitor who fails to enter a defence. Not only our Court of Appeal, but other courts, both on the appeal level, and the trial level across Canada have held that the fault lies with the solicitor, or in this case the agent and not the client. Therefore, the client should not be deprived of its right to defend solely because of that solicitor, or agent's fault.

23 In this Application there is evidence that the Applicant intended to defend this action, as can be seen from the Affidavit of Mr. Allen. To allow the Defendant's Default Judgement to stand would mean that certain Defendants', who in my view, may have a valid defence would have been deprived of the opportunity to put forth that defence.

24 I do not believe that it would be appropriate to allow the Default Judgement to stand against certain Defendants and not against others. This would, in fact, amount to a finding of culpability without the benefit of a trial. Accordingly, I find that there is a substantial issue to be tried, at least as it concerns certain Defendants. I also find that the Applicants first became aware of the Default Judgement once the various Defendants were served with the (Notice of Assessment of Damages). From that moment onward, to use the words of Counsel, "all hell broke loose" and steps were taken to have the Default Judgement Set Aside.

25 I am not prepared to deprive certain Defendants of their right to defend solely because of the adjuster's fault. The Default Judgement is accordingly Set Aside with throw away costs to the Respondent. The throw away costs shall include; Counsel fees for both Counsels for the Respondent on this Application, together with other throw away costs. Having said this, and in the nature of obiter, I should indicate to Counsel for the Applicant that it would appear from what I have heard, and seen today, and the materials that are on file, that Constables Jackson and Bowers did no investigation at all before charging the Respondent, having him arrested and subsequently incarcerated."

Doyle v. C. L. Barrett Enterprises Ltd. [1989] N.J. No. 273

In this case Justice Russell of the Supreme Court of Newfoundland-Trial Division made the following comments with respect to setting aside default judgments:

" The criteria for setting aside a Default Judgment is set forth in Ives v. Dewar, [1949] 2 D.L.R. 204. That decision was relied on in Notre Dame Refrigeration v. Crimson Tide Fisheries Limited, 72 Nfld. & P.E.I.R. 120; Hunts Ltd. v. Mercer (1980), 40 Nfld. & P.E.I.R. 524; Smith v. Richardson (1977), 17 N.S.R. (2d) 358, and Errol B. Hebb & Associates v. C. & B. Enterprises Ltd. (1977), 23 N.S.R. (2d) 369.

In the Hebb case Cooper, J.A. at p. 374 stated:

- **"The power in the court to set aside a default judgment is contained in rule 12.06 of the Civil Procedure Rules which provides that: "The Court may, on such terms as it thinks just, set aside or vary any default judgment entered in pursuance of Rule 12" as was the default judgment here - see rule 12.01(1). The exercise of this power is a matter within the discretion of the judge to whom the Application is made. But this discretion is not untrammelled.. He must have before him proper material on which he may base the exercise of his discretion. In Ives v. Dewar (1948), 23 M.P.R. 218, at pp. 221,2; [1949] 2 D.L.R. 204, at p. 206, Parker, J., in delivering the judgment of this Court, sitting in banco, said:**
  - **Before the interlocutory judgment should have been set aside by the learned County Court Judge as Master before whom the first Application for that purpose was made, it was necessary for the appellant to show by affidavit, facts which would indicate clearly that he had a good defence to the action on the merits; not necessarily a defence that would succeed at the trial because the action was not being tried on that Application; but facts which would at least show beyond question that there was a substantial issue between the parties to be tried. He must also show by affidavit why his defence was not filed and delivered within the time limited by the Rules. The reasons thus disclosed are material matters which the Judge or Court should consider in determining whether the Application to set aside the judgment should be granted or refused."**

In accordance with the above authorities there are two questions to be determined. First, whether the Applicants have a good defence to the action on the merits, within the meaning of this phrase, as explained above, and second, whether any

explanation has been given as to why a defence was not filed and delivered within the time limited by the Rules.

In my view, in addition to the above two questions, the court should also consider any delay in making the Applications to set aside. This was addressed by Lamont, J.A. in Klein v. Schile, 59 D.L.R. 102 where at p. 103 he stated:

- **'The circumstances under which a court will exercise its discretion to set aside a judgment regularly signed are pretty well settled. The Application should be made as soon as possible after the judgment comes to the knowledge of the Defendant, but mere delay will not bar the Application, unless an irreparable injury will be done to the Claimant or the delay has been wilful. Tomlinson v. Kiddo (1914), 20 D.L.R. 182, 7 S.L.R. 132. The Application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits. Chitty's Forms, 13th ed., p. 83.**

- **It is not sufficient to merely state that the Defendant has a good defence upon the merits. The affidavits must shew the nature of the defence and set forth facts which will enable the Court or Judge to decide whether or not there was matter which would afford a defence to the action Stewart v. McMahon (1908), 1 S.L.R. 209.**

- **If the Application is not made immediately after the Defendant has become aware that judgment has been signed against him, the affidavits should also explain the delay in making the Application; and, if that delay be of long standing, the defence on the merits must be clearly established. Sandhoff v. Metzer (1906), 4 W.L.R. 18.'"**

Analysis:

Any analysis to provide the rationale behind the decision is fact driven. But within that context the end result must be supported by principles of law. This particular analysis considers the facts within the sphere of the Small Claims Court Act, R.S.N.S. 1989, c. 430, its Regulations and the Common Law. I have considered two aspects of the Small Claims Court Act, Section 23 which is the main issue before the court and I shall also reference Section 2 of the Small Claims Court Act as well as Regulation 14 of the Act all of which influences the decision that has to be made in this case.

Section 2 of the Small Claims Court Act in referring to the Court's purpose reads as follows:

> **“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.”**

It is the principle of natural justice which the courts have clearly stated must be adhere to by the Small Claims Court. The case of **Brown v. Newton [2009] N.S.J. No. 621 articulate how adjudicators must abide by principles imposed upon the judiciary in dealing with self represented litigants. The main purpose being here that the litigant is involved in a process that allows for fair play in order to present their side of the case fully under the law as they can.**

I also reference the case **Pyramid Properties Ltd. v. Johnston [2010] N.S.J. No. 59 the decision of Justice Duncan which outlines the influence of Section 2 of the Small Claims Court Act where at paragraph 36 and 37 he states:**

"36 Writing in Whalen et al. v. Towle 2003 NSSC 259 MacDonald A.C.J. (as he then was) addressed the compromise that the legislation creates between function and legal rigor:

- **[5] This Act therefore represents a compromise in the area of civil justice in this Province. It provides for a less expensive, less formal and more efficient process for claims that involve relatively small amounts of money. For example, most of the expensive pre-trial safeguards are abandoned in the interest of efficiency. There is no formalized regime for the exchange of documents, no discovery process (either written or oral), no pre-trial conferences, nor mandatory pre-trial submissions.**
- **...**
- **[8] Therefore, the Small Claims Court regime represents a less than perfect regime, but it is a fundamentally fair one. Whether in the criminal vein or the civil vein, in Canada's justice system, we strive for justice that is fundamentally fair and we acknowledge that perfect**

justice is often unobtainable. This was succinctly pointed out, albeit, in the criminal context by Chief Justice McLachlin in the Supreme Court of Canada decision of R. v. O'Connor, [1995] S.C.J. No. 98. At paragraph 193 she states:

- **What constitutes a fair trial takes into account not only the perspective of the accused but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chemeric as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice. [Emphasis added]**

1 Notwithstanding the increased informality of the Small Claims Court process, section 2 affirms that the proceedings of the court must conform with the principles of law and natural justice. It is intrinsic to the determination of a claim that there be procedural fairness which ensures that an affected party knows the case they must meet and is provided with a reasonable opportunity to present a response to that case. This principle is encapsulated by the Latin term " audi alteram partem" -- that one should 'hear the other side'"

It is extremely important that all parties involved in the court action be allowed as much leeway as legally possible that is within the enunciated principles of law to present their side of the matter. The courts in Nova Scotia seemed to ensure that all parties are heard unless of course the actions or inaction's of one side is prejudicial to the other party. The courts are also not prepared to promote lax practice as embodied in section 23(2) of the Small Claims Court Act which I will now refer.

The Small Claims Court Act allows a Claimant to make an Application to the court seeking an order against a Defendant who does not file a defence within the prescribed time for doing so and prior to the date set down for the hearing of the matter and is found in section 23 subsection 1 of the Act and reads as follows:

"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."

The Small Claims Court Act also provides a mechanism to have the order set aside which is found section 23 subsection 2 of the Act and reads as follows:

"23(2) Where a Defendant against whom an order has been made pursuant to subsection (1) appears, upon notice to the Claimant, before the adjudicator who made the order and the adjudicator is satisfied that

(a) the Defendant has a reasonable excuse for failing to file a defence within the time required; and

(b) the Defendant appeared before the adjudicator without unreasonable delay after learning of the order,

the adjudicator may set aside the order and set the claim down for hearing.'

These are the provisions which are applicable in the case at bar. The treatment of this section 23 subsection 2 has taken two paths. One direction is that which has been espoused by Gavin Giles Q.C. and Chief Adjudicator of the Small Claims Court. The other path is one that that has been taken by Adjudicator Augustus Richardson Q.C. also of this Court. In reviewing some of my past decisions reported I have taken the line similar to Adjudicator Richardson. There will be a modification of that as reflected in this decision.

I shall deal first with Adjudicator Richardson's position in that the Small Claims Court must consider the two-pronged test articulated in section 23[2] [a] & [b]. It does not concern the court whether or not the Defendant has an arguable defence as that is of no consequence. In the case Rzepus v. Consumer Impact Marketing Ltd., [2003] N.S.J. No. 340 adjudicator Richardson stated at paragraph 29:

"Before proceeding, I should note that I do not believe that an adjudicator has the discretion to consider on such an Application whether or not the Defendant has a potential or arguable defence. The Small Claims Court is a statutory Court and the adjudicator draws his or her power and authority from the Act which must be construed strictly."

In Appeals to the Supreme Court of Nova Scotia there have been situations where this policy is adhered to strictly and other occasions the requisite powers of the Adjudicator's appear to be outside the strict reading of the Act. [**Liberated Networks Inc. v. GWC Online Systems Inc.[2002] NSSC 273** and **Kemp v. Prescesky, [2006] NSJ No. 174**]

Nonetheless Adjudicator Richardson has adhered to the clear and precise wording of the act and simply determines in that particular case whether the Defendant had a reasonable excuse for failing to file a defence which he determined the Defendant did not. Adjudicator Richardson then used to discretion to not grant the Application.

Chief Adjudicator Giles on the other hand takes a more traditional approach embedded in the Civil Procedure Rules and the common law and places on the Defendant a third barrier. The Defendant must show they have "a reasonable plausible defence" in order to have a previous Order of the Small Claims Court set aside.

Certainly based on the Civil Procedural Rules and those requirements outlined therein and pursuant to the interpretation provided by the Supreme Court of Nova Scotia it would require a Defendant to show that the Defendant has a good defence to the action on its merits. As Justice Parker said in **Ives v. Dewar** [1948], 23 NPR to 218 this does not mean that the Defendant much show the defence will succeed only that there is any "substantial" issue to be tried between the parties. Substantial issue means an arguable defence. If this is the approach of the Small Claims Court then it is necessary for the Adjudicator to inquire into the merits Of the Applicant's proposed defence in order to make a determination on whether or not there is an issue that should go to trial.

Chief Adjudicator Giles does not in my view go so far as to suggest substantial issues have to exist. Rather he suggests that the bar is very low in determining whether the Defendant has a defence**.** In referring to what a reasonable plausible defence is Adjudicator Giles stated **"…**a reasonably plausible defence, the threshold test to be met by the Applicant is very low."

The approach that I have used recently is more in line with the reasonable plausible defense approach. It is appropriate to consider the facts that pertained to section 23[2] [a] and [b] and as well to make inquiries beyond that as to whether a Defendant has any defence to the claim whatsoever. It is not unusual for an Applicant to come before this Court with no drafted defence submitted to the court. This may be a result of the Defendant not realizing that he should have a defence filed which in most cases they were unaware or they would have filed a defence earlier. As well the Defendant may come before the court on an Application to set aside and Order with still no defence filed as the Act makes only reference to having a reasonable excuse for the filing a defence and to having come before the Adjudicator with their Application without unreasonable delay.

In my view it is necessary that the adjudicator inquire into whether there is a defence that has any merit at all. In other words it is necessary to go beyond the two-pronged test outlined in section 23 subsection 2 but not to the extent where you have to inquire if there

are any substantial issues to be tried rather merely are there any issues to be tried at all. I have had instances where people have appeared before the court soon after a Quick Judgment Order was issued with their defence having no substance. An example of this has been where Defendant acknowledges owing the money however the Defendant wants to have a time period over which to pay back the debt. That is no defence. Another situation that has arisen in the past occurred where the Defendant felt it was not fair but provided no real defence. If there is no defence whatsoever an Applicant's motion should not be granted.

In this particular case Counsel for the Defendant in their Notice of Motion to Set Aside Quick Judgment dated October 20, 2009 also filed a defence of even date. The defence sets out that the Defendants or its servants or agents did not act negligently in the installation of the roofing system. The defence also stated that any damage to the roofing system was an excluded peril and not covered within the ambit of any warranty.

I would conclude from these pleadings and what Counsel said at the hearing, there is in fact a defence and in this case substantial issues to be tried.

First Test re: s.23 (2) (a)

The Defendant has a reasonable excuse for failing to file a defence within the time required; and

With respect to the first prong of the two-part test on whether the Defendant has a reasonable excuse for failing to file a defence, it is clear that the parties were trying to contact each other when this matter finally got into the court system. It cannot be said that the Defendant simply did not try to contact the Claimant's Counsel. While answering machines may be the bane of our modern age and certainly can frustrate those that want immediate results they are a fact of life. And the fact is in this case that the answering machine was used in an attempt to communicate not only by the Defendant but also by the Claimant. I also understand the Claimant's frustration as this matter has been ongoing for several years before it arrived at the point where court action was commenced. As Counsel for the Claimant said "my instructions were to file default and frankly we didn't think we would get their attention". It did get the attention of the Defendants and they retained local Counsel to deal with the matter. This is not a matter of lax practice for as soon as Counsel were retained they became involved and contacted the Claimant's Counsel which ultimately led to the filing of the defence in this Application before the court today.

Counsel for the Applicant in his argument also made reference to The Rules and Regulations of the Small Claims Court. Regulation 14 of the Small Claims Court Forms and Procedures Regulations requires the filing of an Application for Quick Judgment to be in Form 6.

Form 6
Application for Quick Judgment
in the Small Claims Court of Nova Scotia

County of _____ File No.

_____

BETWEEN:

CLAIMANT

- and -

DEFENDANT

AFFIDAVIT IN PROOF OF APPLICATION

I, _____ of _____ in the County of _____, Province of Nova Scotia, make oath and say as follows:

1. ____ That I am the Claimant and Applicant herein.

OR

1. ____ That I am the _____ of the Claimant (if the Claimant is a body corporate).
(Check one of the above)

2. That I served the Claim on the Defendant by _____ and
(method of service)
documentation proving service is attached.

3. That 10 days have expired since the date of service.

4. That I have had no communication, either written or oral, from the Defendant to the effect that the Defendant intends to defend this action.[Emphasis added]

5. ____ That no payments have been credited.

OR

5. ____ That payments of $_____ have been credited to my account since the date of the issuance of this Claim.
(Check one of the above)

6. That the following breakdown of my claim is a true and accurate statement of the account owing by the Defendant, and documentation supporting my claim is attached:

Debt (amount claimed before costs)	$ _____
Credit (if any)	$ _____
Cost of filing claim	$ _____
Cost of service	$ _____
Interest to date (if applicable)	$ _____
TOTAL	$ _____

7. That I request judgment be issued in this matter in the amount of $ _____.

SWORN TO at _____,
in the County of _____,
Province of Nova Scotia, on
_____, 20 ____.

_____ _____

A Commissioner of the Supreme Court of Nova Scotia

Applicant

Form 6 replaced: O.I.C. 2000-169, N.S. Reg. 58/2000.

In this particular case there was communication from the Defendant to the Claimant and while strictly speaking it was not spelled out clearly that the Defendant was going to defend the action. It was clear that the Defendant wanted to discuss the matter before the Claimant would proceed with a Quick Judgment. The voice message left with the Claimant on August 12, 2009 by the Defendant's in-house Counsel clearly stated "I was hoping you could hang on before you file default or other actions until we talk."

While strictly speaking the Defendant did not offend the exact wording of Form 6 there was a specific request made not to file a default judgment against the Defendant a few days prior to the Quick Judgment Application being made. I do note that the Defendant was advised again via phone message that a Quick Judgment had been made. I say this because I do not think it was the intent of Counsel for the Claimant to employ sharp practice but rather to have the matter proceed according to the procedures allowable. At any rate this factored into my analysis of why the Application should succeed.

Second Test re:s.23 (2) (b)

The Defendant appeared before the adjudicator without unreasonable delay after learning of the order,

With respect to the second branch of the test did the Defendant appear before the adjudicator without unreasonable delay? Counsel for the Defendant advised the court that there were ongoing negotiations between Counsels however these failed to resolve the matter and therefore upon that being evident the Application was filed in October a few months after the Quick Judgment Order was issued. I do not consider this an unreasonable delay to take when Counsels were in discussions.

For all these reasons I shall not deny the motion and therefore I shall set aside the previous Order of this court dated August 27, 2009 and issued from this court on August 28, 2009. The Claimant should contact the court, Ms Elaine Ferrell, Clerk of the Small Claims Court in Halifax and request a date for the hearing of this matter. I assumed Counsels will provide each other in advance with the documentation they will be relying on in the presentation of their positions if they have not already done so.

IT IS THEREFORE ORDERED THAT the Order in claim No. 313682 dated August 27, 2009 and issued August 28, 2009 be hereby set aside.