IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Wilson Equipment Limited v. Simpson, 2018 NSSM 16

Claim: SCD No.468805
Registry: DIGBY

Between:

WILSON EQUIPMENT LIMITED

CLAIMANT

– and –

DAWSON E. SIMPSON

DEFENDANT

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: March 15, 2018

Decision: March 22, 2018

Appearances: The Claimant, Caitlin Regan-Cottreau
The Defendant, Jordan D. Armstrong

DECISION

FACTS

[1] This is a decision with respect to the Defendant's motion to set aside the Quick Judgment in this proceeding granted by me on November 21, 2017.

[2] The facts in this case are not in dispute and are quite straightforward. This Claim was filed on September 29, 2007 and served on the Defendant on October 16, 2007. The Defendant and his brother Harold Simpson worked together in their business of farming and forestry. The subject matter of the proceeding related to an excavator which was equipped with a specialized head in order to allow this machine to be used for harvesting trees. Upon receiving the claim the Defendant and his brother Harold wished to contest the claim on the basis that the machine had mechanical issues and other problems which rendered it unsuitable for use in forestry.

[3] The Defendant gave the Claim to his brother Harold for the purpose of seeking legal advice and defending the claim. Further to that object, Harold Simpson attended the lawyer who had represented the Simpson's for many years, Mr. Ronald Richter. Mr. Richter advised that he was no longer handling Small Claims Court matters and referred Harold Simpson to Jordan D. Armstrong, the Defendant's present counsel in this matter. Mr. Richter telephoned Mr. Armstrong who agreed to act in the matter and on the same date of October 18 faxed a copy of the Claim to Mr. Armstrong's office. Mr. Armstrong spoke with Harold Simpson and agreed to defend the claim pending receipt for further details by email. On October 19, 2007 Harold Simpson sent the requested details to an incorrect address namely jordan@armstronglawoffices.com instead of the correct email address of jordan@armstronglawoffice.ca. On November 21, 2017 Mr. Armstrong sent an email to Harold Simpson reminding him to send the requested details so a defence could be filed. On November 26, 2007 Harold Simpson sent emails to Mr. Armstrong which provided the necessary details. On December 4, 2008 Mr. Armstrong wrote to the Claimant's then counsel advising him that he intended to defend the claim and seeking an adjournment of the date of December 14, 2007 stated in the Claim. Plaintiff's then counsel advised Mr. Armstrong that Quick Judgment had already been granted.

[4] On December 5, 2017 Mr. Armstrong wrote to the Court to confirm that quick judgment had been granted on December 7, 2017. The Clerk of the Court communicated with me on December 9 and December 11, 2017 with respect to the date for hearing the motion under consideration in this decision. I indicated that I was open to hear the motion on the scheduled date of December 14, 2017 provided that the Claimant's counsel was prepared to accept short notice, but if not, the motion should be put to the next available date. Mr. Armstrong requested the court to advise when the earliest possible date would be to appear before the adjudicator and was advised by the court office on December 12, 2017 at the next available date was March 15, 2018. On December 20, 2017 this application to set aside the quick judgment was filed by Mr. Armstrong.

[5] In cross-examination on his affidavit the Defendant freely acknowledged that, other than giving the material to his brother Harold, he had done nothing to inquire about or follow-up on the conduct of defending the claim.

ISSUE

[6] The sole issue before the Court is to determine whether the Defendant is entitled to have the Quick Judgment set aside, enter his defence and have a trial.

LAW

[7] The parties agree that the relevant section for the Court's consideration in section 23 of the Small Claims Court Act which 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.
> (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.
> (3) Where a defendant has filed a defence but does not appear at the hearing and the adjudicator is satisfied that the defendant has been served with notice of the time and place of the hearing, the adjudicator, if satisfied on the evidence as to the case of the claimant, may, in the absence of the defendant, make an order against the defendant.
> (4) Where a defendant against whom an order has been made pursuant to subsection (3) 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 not appearing at the hearing; 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. *1992, c. 16, s. 121; 1996, c. 23, s. 3* ***[my emphasis]***

[8] The parties agree that the Defendant has complied with section 23 (2) in that I am the Adjudicator who made the order for Quick Judgment, appropriate notice has been given, and the section 23 (2) (b) requirement that the application be made in a timely manner is fulfilled. The focus of the submissions of the parties is primarily on section 23 (2) (a) which raises the

issue of whether the Defendant had a “reasonable excuse”. That is the central issue which I must determine.

[9] There have been a number of cases both in the Small Claims Court and on appeal in the Supreme Court of Nova Scotia where issues similar to this have been raised and determined. I have reviewed all of the cases submitted by the parties whether mentioned in this decision or not.

[10] It is to be noted that section 23 only specifically addresses two situations: the situation where no defence has been filed in subsection (2) and the situation where a defence has been filed and the defendant fails to appear at the hearing in subsection (4). Section 23 does not address the case where quick judgment has not been granted and the defendant does not appear at the hearing. However, I consider that the jurisprudence with respect to the unmentioned situations to be relevant to my consideration, because all cases where a question of whether a “reasonable excuse” for either not filing a defence or not appearing at the hearing regardless of the situation are relevant to an understanding what may be held to be a “reasonable excuse”.

[11] I will first review the Supreme Court cases as I consider these to be the most authoritative in the sense that the Supreme Court acts, in effect, as a court of appeal for the Small Claims Court and these decisions are binding on me. I note as well that there is no further appeal from the Supreme Court to the Nova Scotia Court of Appeal. Therefore there is no way for conflicting decisions in the Supreme Court to be authoritatively reconciled. In my view, I must assess the Supreme Court decisions with the view to understanding the principles which must guide my decision as best I can. I have found it most useful to look at the Supreme Court’s cases chronologically to see if I can discern the development of some clear principles.

[12] Justice Warner in **Kempt v Prescesky 2006 NSSC 122** appears to be the first Supreme Court Justice to have considered issues of the nature arising in this case. His Lordship made the following findings of fact:

> [4] The defendant states that before the hearing time on December 12, 2005, he intended to defend the claim. He has produced to this Court, a written document, prepared by a third party, and faxed to the defendant, containing an estimate of what it would cost to move the fireplace, and remedy the complaint.

> [5] Because the faxed document clearly shows that it was obtained before the Small Claims Court hearing took place, this Court is satisfied that the defendant had an intention to defend the claim and had taken steps to prepare his defence - at least with regards to what the costs would be to remedy his mistake. The court accepts that the excuse given by the defendant for not appearing on December 12, 2005, is reasonable; that is: (i) he left it with his Assistant Manager, Mr. Vandenhof, to deal with preparing for the hearing; and (ii) Mr. Vandenhof gave evidence under oath that he misread the Notice of Claim, and diary-dated it for the wrong night - December 13th at 7:00 p.m. Mr. Vandenhof stated that he and Mr. Kemp showed up at the Court House on Tuesday December 13, 2005, in the blizzard; they waited around for half an hour or more and checked the door several times; they assumed that Court was cancelled because of the weather; Mr. Vandenhof also says that he realized that it was the wrong day when he looked at the Notice of Claim then or the next day.

[13] In my view the core of Justice Warner's decision is the following:

> [19] In my view, it is a breach of the requirements of natural justice not to have a mechanism in Small Claims Court whereby, if a defendant does not file a defence or appear at a hearing by mistake, but can show that he or she has an arguable defence that should be heard on its merits, and he or she has a reasonable excuse for defaulting and is not just stalling, and there is no prejudice to the claimant's ability to prove its case, the judgment cannot be set aside. In light of the increase in the monetary jurisdiction of the court, it is as relevant to nature justice in the Small Claims Court as it is in the Supreme Court. There is still a requirement that the applicant show sufficient bases for the court to exercise discretion to avoid abuse. ***[my emphasis]***

[14] In **George L. Mitchell Electrical v. Rouvalis, 2010 NSSC 203** Justice LeBlanc considered the situation where no defence had been filed. The Court found that the Defendant had taken no action until notice of the judgment had been registered in the Land Registration Office. The adjudicator had set aside the quick judgment. His Lordship's decision, particularly at paragraph [23], makes it clear that a litigant is not presumptively entitled to a hearing, nor is there any basis in the statute for a test of "respective prejudice" between the parties. His Lordship makes it clear that the burden rests on the defendant to establish undue delay and a "reasonable excuse for failing to file a defence within the time required". The quick judgment was not set aside.

[15] If I may be permitted some obiter dictum, as an Adjudicator I have had concerns about the adequacy of the Form 1 Notice of Claim to bring home to a lay litigant the significant

consequences of not filing a defence. I have experienced many lay litigants who do not file a defence simply show up on the scheduled date expecting a trial. The process of Quick Judgement is not clearly stated in the Form 1 Notice of Claim prescribed by the Regulations. It reads:

> "If you do not file your Defence/Counterclaim by returning Form 2 to the court within 20 days after you receive the claim, the court may make an order against you without hearing from you."

[16] I wish to make clear in making the present decision I have put aside those concerns and I am strictly following Justice Leblanc's holding in **George L. Mitchell Electrical** as follows:

> [26] While it might be preferable for the standard Notice of Claim to indicate that a defence must be filed on its first page, the fact that this information appears on the second page does not automatically provide a "reasonable excuse" for not filing a defence on time. The test is "reasonable excuse," not "any excuse."

[17] Justice Rosinski in **Leighton v. Stewiacke Home Hardware Building Center, 2012 NSSC 184** considered a situation where the defendant had engaged counsel to defend a claim**.** Thereafter the defendant did nothing else and essentially completely relied on her counsel to take full responsibility in the matter. The defendant in the case had been extremely ill and unable to communicate with counsel without extreme difficulty. Counsel did not take steps to ensure that she was aware of the correct hearing date and to prepare a defence in advance of that date, file it and serve it or to attend at the hearing. Quick judgment was not sought and in the absence of the defendant or counsel for the defendant evidence was heard and judgment was granted against the defendant. An application was made to the adjudicator pursuant to section 23 (4) which was denied, and the matter came before the Supreme Court on appeal. His Lordship allowed the appeal and ordered a new trial on a "natural justice" basis, but also specifically held that section 23 of the Small Claims Court Act was not applicable to the case before him, holding at paragraph [53] that the Act was silent in a situation where no defence was ever filed and the defendant does not appear and grounded his decision on the principles of natural justice. I take instruction from the following paragraph:

> [26] In my opinion, courts should err on the side of ensuring liberal access to justice, yet they must assess, on a case by case basis, when it is just and equitable to use their inherent jurisdiction.

[18] In **Strait Excavating v. LeFrank, 2013 NSSC 420** Justice Van den Eynden considered a situation where the court date in the Small Claims Court had been set at May 27, 2013. The Defendant and did not appear and put forward as his excuse that he had marked his day planner and house calendar for May 28, 2013. The defendant said when he" got out his paperwork" and saw the date he called the courthouse. He acknowledged that it getting the date mixed up was purely his mistake. The adjudicator had proceeded to hear evidence on May 27, 2013 and grant judgment to the claimant. Her Ladyship reviewed the various authorities with respect to natural justice and concluded that in general terms it is about fairness, and one of the essential elements of that concept is that a decision-maker should" hear the other side". Having said this she makes it clear that this is not an absolute right but rather it is conditioned on the behaviour of the defendant. She concludes as follows:

> [35] Although Small Claims Court Hearings are intended to be accessible to the parties and informal, parties need to be reasonably diligent, mindful and respectful of the process. Otherwise the integrity of and respect for the process is undermined. Justice does not require the Court to exercise its discretion and set aside the order and permit a new hearing in these circumstances.

[19] She found no denial of natural justice and dismissed the appeal.

[20] Her Ladyship Justice Suzanne M. Hood considered the question in **CIBC Life Insurance Company v. Hupman, 2016 NSSC 120.** This involved a situation where the defendant CIBC's registered agent was served with the claim but did neither file a defence nor appear and judgment was entered after hearing the claimant's evidence. The adjudicator ruled that he had no jurisdiction based on Justice Rosinski's decision. Justice Hood cites Justice Warner's decision in **Kempt v Prescesky 2006 NSSC 122** which also dealt with a situation where no defence was filed and the defendant did not appear at hearing. Justice Warner had held that the principles of natural justice require that there be the ability for reconsideration upon finding that the defendant had a reasonable excuse for default and there was no prejudice to the claimant. He sent the matter back for rehearing. She held:

> [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. ***[my emphasis]***

[21] Her Ladyship says that she does have concerns with respect to the reasonableness of the excuse, but notes that CIBC acted very quickly after the decision. She also concluded that there would be no prejudice to the claimant in ordering a new hearing in that the same evidence would still be available. She did order a hearing. I can only conclude that Her Ladyship's view of a "reasonable excuse" was quite broad.

[22] I now turn to the cases in the Small Claims Court.

[23] Adjudicator Richardson in **Consumer Impact Marketing Ltd. v. Rzepus, 2003 NSSM 9** considered a case where the Nova Scotia registered agent for an Ontario based corporate defendant was served**.** The registered agent was a lawyer practising in the province of Nova Scotia but forwarded the claim to the defendant's Ontario solicitors and did nothing further. The Ontario solicitors forwarded it to an employee of the defendant asking that employee to contact them. There was no evidence of any further action either by the registered agent, Ontario counsel or the employee contacted. It was brought to the attention somehow of the defendant's Director of Human Resources who wrote to the Ontario counsel but did not involve herself further. Adjudicator Richardson heard evidence in open court on the scheduled date and granted judgment.

[24] The defendant brought a motion to set aside that order. Adjudicator Richardson determined that his jurisdiction lay under section 23 of the Small Claims Court Act and in particular considered the question of "reasonable excuse". He concludes as follows:

> [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) 371 at para 22.
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> [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.

[25] Adjudicator Parker considered the setting aside of a quick judgment in **Mullick v. International Exteriors (Atla) Ltd., 2010 NSSM 9.** The claim was duly served and the time for filing a defence had expired. Both parties were represented by counsel and for a period of about two weeks subsequent to the expiry of the time for filing a defence counsel engaged in what we commonly refer to as "telephone tag" leaving messages back-and-forth. Nevertheless at least one of these messages was a request by defence counsel for an extension of the time to file a defence. Claimant's counsel proceeded and obtained quick judgment. Adjudicator Parker points out that there had been some debate amongst adjudicators as to whether, the only jurisdiction of the adjudicator is the application of the two fold test of lack of reasonable delay and reasonable excuse, or whether in addition the defendant must show that they have a reasonably arguable or plausible defence. Adjudicator Parker favoured the latter approach. On the basis that the parties were indeed trying to contact each other and that claimant's counsel was aware that defendant's counsel had been instructed to file a defence a "reasonable excuse" was found to exist. There was no question of unreasonable delay and the quick judgment was set aside.

[26] Adjudicator O'Hare faced this problem as well in **D'Arcy v. McCarthy Roofing Ltd. 2015 NSSM 6**. The president of the defendant had been duly served and Quick judgment had been granted. He gave the claim to his office manager with instructions to email it to their lawyer. The office manager emailed it to the former lawyer of the company and the president of the defendant assumed it had been taken care of. The defendant had changed law firms approximately two years previously yet the president of the defendant had instructed the office manager to send it to the former lawyer. Other than that there was evidence that the president of the company was extremely busy at that time including several out of province trips for both business and pleasure. There was no question of delay. Citing Justice Rosinski decision in Leighton he held he had no jurisdiction to set aside but also stated that if he had concluded otherwise the defendant did not meet the test with respect to "reasonable excuse" set out in the statute.

[27] Adjudicator Richardson had the opportunity to consider this subject recently in **Hosseini v. Armour Transport Inc., 2017 NSSM 2** (a case not submitted to me by either counsel). He was satisfied that service had been effected. No defence been filed and the claimant appeared on the scheduled date. After hearing evidence he granted judgment on the claim based on the evidence before him. I acknowledge that this is not the situation before me.

[28] On motion to set aside the judgment Adjudicator Richardson expresses his concern as to the state of the law and the guidance provided by the Supreme Court jurisprudence particularly the decision in **Leighton**.

[29] He then proceeds to consider the merits. With respect to the issue of "reasonable excuse" he says:

> [62] The requirement is for a "reasonable excuse," not "any excuse:" George L. Mitchell Electrical v. Rouvalis 2010 NSSC 203. Forgetting is not a reasonable excuse: Consumer Impact Marketing Ltd v. Rzepus 2003 NSSM 9 at para.32. Nor is moving a claim from one desk to another without anyone taking ownership of the need actually to respond to the claim: Consumer Marketing, supra at para.31; D'Arcy v. McCarthy Roofing Limited 2015 NSSM 6 at para.35.
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> …..
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> [64] In this case Armour did not provide any excuse, other than that service did not happen. Yet it did. The evidence is clear–and I so find–that (a) front office staff accepted service, (b) they did so only after seeking authorization from Armour's lawyer to the effect that they could, and (c) someone from Mr. Gaudet's office spoke to the claimant about the Notice of Claim after it was served. Those facts establish that Armour did have a reasonable system in place to ensure that Notices of Claim delivered to its front desk (as opposed to, for example, its registered agent) would be brought to the attention of someone with authority to respond to the claim. None of those facts establish a reasonable excuse.

[30] The motion to set aside the judgment was denied. The central issue in the case was the adequacy of service but the comments as to reasonable excuse are consistent with my review of the jurisprudence.

[31] I share Adjudicator Richardson's concern that the jurisprudence in the Supreme Court does have a certain lack of clarity in its directions to Adjudicators, but I think this is inevitable when there is no court of appeal to reconcile that jurisprudence. Clearly it would be useful to

have a definitive opinion giving guidance in all of the various fact scenarios where applications for the setting aside of judgments come before the Small Claims Court, but this may never be rendered. However, I am required to decide the issue before me presently and I must make a decision based on my best interpretation of that jurisprudence, applied as best I can to the facts before me.

[32] The situation before me involves the following factual sequence:

- The Claim was properly served.
- No defence was filed.
- Quick judgment was applied for and granted before the scheduled appearance date.
- The Defendant applied to set aside the Quick Judgment at the earliest date he could give adequate notice to the Claimant.
- The matter was adjourned from the originally scheduled appearance date for the consideration of this motion.

[33] In my view, the matter before me is squarely under section 23 (2) of the Small Claims Court Act. Consequently I express no view in this opinion as to the approach to be taken with respect to other situations.

[34] Both parties have agreed that the Defendant acted with reasonable dispatch in bringing his motion before the court and that the requirement of section 23 (2) (a) is fulfilled.

[35] I note the use of the word "may" in the concluding words of section 23 (2) "*the adjudicator may set aside the order and set the claim down for hearing".* In my view the use of this word conveys that the adjudicator is entitled to exercise his or her discretion in the matter. Of course all discretions must be exercised judicially and on a principled basis. Although the jurisprudence does not specifically state so, I believe that this supports Adjudicator Parker's view that the existence of a reasonably arguable or plausible defence can and should be considered. If it were not so, a completely frivolous ground of defence would be sufficient if the criteria in subsections (a) and (b) were fulfilled. Surely the Small Claims Court must have the ability to deny a hearing on presentation of a defence that could not meet the standard that the Supreme Court would apply on a motion for summary judgement on the pleadings. It would appear to me this is the function and intent of the use of the word "may".

[36] The affidavits before me from the Defendant raise issues that the excavator supplied as furnished by the Claimant was not suitable for its intended purpose which was known to the Claimant. That arguably constitutes breach of a well-established warranty under the Sale of Goods Act, and in my view, clearly establishes an arguable ground of defence. I acknowledge that I have affidavits before me from the Claimant disputing this, however on this motion it is not my function to weigh the relative merits of the Claim and the Defence. The affidavits from both sides satisfy me that they both have positions to put and evidence to call at a trial on the merits. I am also of the view that the Supreme Court of Nova Scotia has created a very low threshold as to whether something is an arguable defence. I will not discuss that jurisprudence in detail here as in oral argument in this matter counsel for the Claimant essentially acknowledged that that is the state of the law in this province. Therefore to the extent that it is necessary for me to find the existence of an arguable or plausible defence I am satisfied that the Defendant has established that he has met that criterion.

[37] The evidence also raises no question that evidence has been lost or witnesses are unavailable or any suggestion that the Claimant would be prejudiced in the presentation of its case if the Quick Judgement were set aside. That potential factor does not impact this decision.

[38] Therefore, in my view, the central issue that I must decide lies squarely on whether or not the Defendant had a “reasonable excuse” for not filing his defence.

[39] Counsel for the Claimant urges upon me that the Defendant did nothing except pass the Claim to his brother and that should be the end of the matter. She argues that the burden is on the Defendant and remains on the Defendant. She suggests that I ought not to consider the steps taken by his brother in the absence of the actual Defendant personally following up to see what was going on or had been done. She emphasizes statements such as that of Justice Van der Eden which emphasize the duty of a Defendant “to be reasonably diligent, mindful and respectful of the process” but she strongly focuses that standard on the Defendant’s actions alone. If I were to accept this view her argument would have great force.

[40] With great respect, I do not agree with the position that the focus must solely be on the Defendant himself. In my view, a party can fulfil Justice Van der Eden’s formulation of the test by delegating actions to another person. However, once that delegation takes place, the person appointing a delegate is stuck with the actions of his delegate and must accept the consequences of the actions taken by the delegate. This is essentially no different than any other form of agency and would be inevitable with respect to a corporate Defendant. In

assessing this case, I will include what Harold Simpson did in my analysis, all the time attributing responsibility for his actions to the Defendant.

[41] My review of the Supreme Court jurisprudence leads me to think that the Learned Justices of that Court are very much concerned that the principles of natural justice be given full effect, particularly in relation to ensuring that both sides are heard. Those Judges seem, in my respectful view, to take quite a broad and lenient view as to what a reasonable excuse is. The cases where the judgement has been upheld and a hearing denied, are where the court process is essentially ignored. For example, **George L. Mitchell Electrical** is a case where the defendant essentially did nothing until faced with collection efforts and **Strait Excavating** appears to me to be a case of a complete lack of diligence on the part of the defendant. Adjudicator Richardson in **Hosseini** describes cases of non-engagement in the excerpt I have cited. In the cases where the motion was granted, there was some but quite minimal act expressing an intention to defend and/or an honest attempt to obtain representation or to attend to getting a defence filed in some manner. I cannot ignore the views of Justice Warner in **Kempt** and Justice Hood in **CIBC Life Insurance** who were very lenient to the defendants as to a reasonable excuse and it is hard to see where they would draw the line. **Leighton** suggests to me a broad view of natural justice and says that I should "err on the side of ensuring liberal access to justice". Overall the standard does not seem to me to be very high.

[42] I wish to make it clear that I have looked at the Supreme Court and Small Claims Court jurisprudence specifically in relation to the question of "reasonable excuse" regardless of the other issues that were involved in those cases. I do not believe that the other issues in the cases impact on the interpretation of what may constitute a "reasonable excuse". The determination of this issue is something which is essentially common to all of the cases and there is no reason to make a distinction based on the other issues which may have been addressed in them.

[43] In this case legal advice was promptly sought. There is no question that there was an intent to defend and that active steps were taken in that regard. Counsel was sought and obtained and Harold Simpson did attempt to email the necessary material to Mr. Armstrong. The conduct of concern with respect to the Defendant really lies in the failure to follow up to ensure that Mr. Armstrong had in fact received the material and taken the necessary steps to get a defence filed.

[44] The timelines involved here were very tight. Service took place on October 16, 2017 and the Quick Judgment was applied for on November 8, very shortly after the 20 day period for filing a defence had expired. The Quick Judgment was granted November 21, 2017 which coincidentally was the same day that Mr. Armstrong followed up with Harold Simpson looking for the defence material. He got that material on November 26, 2017 and contacted claimant's counsel on December 4, 2017.

[45] I find that the Defendant's excuse is stronger than what Justice Warner allowed in **Kempt.** Lack of diligence on the part of counsel after being engaged was found to be a reasonable excuse in **Leighton,** albeit affected by the Defendants health issues. Justice Hood in **CIBC Life Insurance,** despite having concerns with respect to the reasonableness of the excuse, granted leeway because CIBC acted very quickly. This suggests to me an inclination on the part of the Supreme Court to make the standard a fairly low one.

[46] It seems to me that the cases where motions to set aside quick judgment, or judgment granted solely on the claimant's evidence when the defendant does not appear, have not been successful, essentially have occurred where the defendant has not really taken any steps at all or did not take the matter seriously. In saying this I am mindful of Justice Van den Eden's caution that "parties need to be reasonably diligent, mindful and respectful of the process" but I don't take her to mean that the standard is higher than that applied by the other Justices. I do not find any reason to say that the Defendant in this case, or his brother Harold, were disrespectful of the process. The focus of my consideration must be on the question of diligence and mindfulness.

[47] The particular facts of this case are such that all of this took place before the scheduled court date of December 14, 2017 stated in the Claim. The Defendant knew the court date was set for December 14, 2017. I think I am entitled to take judicial notice that a lay defendant would not usually understand the full nature or timing of an application for Quick Judgment. I believe that he would be entitled to rely on his lawyer to ensure the timeliness of filing the necessary papers. I find that the Defendant and Harold Simpson honestly believed that they had engaged a lawyer to deal with the matter. Harold made the mistake of sending his material to a wrong email address which was very similar to the correct email. The Claimant produced evidence that when their staff sent an email to the wrong address that an undeliverable message came back. I have no evidence to support a finding that this occurs on all computer

systems and email systems. I cannot find fault with Harold on the basis of that evidence, despite Ms. Regan-Cottreau's resourcefulness.

[48] The Defendant and Harold knew they had to be in court for December 14, 2017. Beyond that the Defendant, and by implication his brother, honestly believed that they had taken appropriate steps and would have expected to be contacted by Mr. Armstrong at the appropriate time. I do not think the Defendant or Harold Simpson showed lack of diligence in so doing. Were I to accept the claimant's position, I believe I would be holding the Defendant to a higher standard of diligence than required by the Supreme Court for a "reasonable excuse". I am not convinced that a good faith mistake would be considered fatal in all circumstances. In my view the mistake of not ensuring that Mr. Armstrong received the intended email, although it has some degree of inattention, did not demonstrate laxness of the same character or level as occurred in **George L. Mitchell Electrical**, **Consumer Impact Marketing Ltd.** or **Strait Excavating.**

[49] Unless I completely misjudge the principles, logic, and approach of the Supreme Court Justices who have considered questions identical to or similar to the one before me, I am of the view that those learned jurists would accept the conduct of the Defendant and Harold Simpson as providing a reasonable excuse. I just don't think a large majority of Supreme Court Justices would deny this motion on Harold's mistake in the wrong email address and then failing to follow up. I believe that Court would lean very much to granting a hearing on a fairly low standard of diligence where the Defendant was acting *bone fide*, as the Defendant through Harold was in this case.

[50] I will therefore grant the motion, set aside the Quick Judgment Order and set the Claim set down for hearing.

[51] I will hear counsel as to an appropriate time for that hearing. If the hearing is expected to be over 2 hours and a special sitting is requested, counsel should contact the Clerk to arrange a conference call to set a date.

[52] I leave it to counsel to determine whether they think I have any authority to award any costs. I will hear counsel as to costs should it be requested, noting that I am limited to the costs as set out in the Regulations to the Small Claims Court Act. That can also be dealt with in a conference call if counsel wish.

[53] I would be remiss if I did not sincerely thank both counsel for their extensive, well presented and extremely helpful briefs and their insightful oral submissions, particularly in response to my questions. As has been pointed out, many adjudicators have struggled, as I did in this case, with the correct analysis on motions of this nature. Counsels' thorough preparation and able submissions have allowed me to consider and weigh all of the necessary factors and the appropriate jurisprudence, with a confidence that the question has been fully canvased, not often afforded to Adjudicators of the Small Claims Court.

Dated at Yarmouth, Nova Scotia, this 22nd day of March, 2018.

Andrew S. Nickerson Q.C., Adjudicator