IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Hosseini v. Armour Transport Inc.*, 2017 NSSM 2

Claim: SCCH 456752
Registry: Halifax

Between:

Rashed Hosseini

Claimant

v.

Armour Transport Inc, cob as Star Transport Inc.

Defendant

Adjudicator: Augustus Richardson, QC
Heard: January 24, 2017
Appearances: Rashed Hosseini, claimant, for himself
Alan Gaudet, Vice-President, Building Maintenance and Accident Control, Armour Transportation Systems

DECISION

[1] This motion by the defendant Armour Transport Inc ("Armour") poses three questions:

a. Does this court have the jurisdiction to set aside an order made at a scheduled hearing date when (a) no defence was filed and (b) the defendant did not attend?

b. If it does, when and how will service of a Small Claims Court Notice of Claim on employees of a corporation be effective? and, flowing from that,

c. When will this court set aside an order entered against a corporation which has failed to attend a hearing on the date scheduled in the Notice of Claim?

[2] The decision of the Supreme Court of Nova Scotia in *Leighton v. Stewiacke Home Hardware Building Center* 2012 NSSC 184 ("*Leighton*"), on appeal from a decision of a Small

Claims Court Adjudicator, gives rise to the first question. The practice and procedures of this court with respect to service give rise to the second and third.

Background Facts

[3] On October 24, 2016 the claimant Rashed Hosseini filed a Notice of Claim against the defendant Armour Transport Inc ("Armour"). He claimed $1,200.00 with respect to "an event that occurred on 01.26.2016 @ 22:15 ... to this date there has been no satisfaction from the defendant." The Notice of Claim, which is Form 1 under the *Small Claims Court Forms and Procedures Regulations*, NS Reg 17/93 as amended to NS Reg 156/2015 (the "Regulations"), stated that "the hearing of this claim is set for the 6th day of December, 2016" in the Halifax Small Claims Court.

[4] No defence was filed.

[5] On December 6th, 2016 the claim came on before me on my regular docket. Mr Hosseini appeared. The defendant did not. Mr Hosseini was affirmed. He gave evidence.

[6] I questioned Mr Hosseini about service. He had filed an affidavit of service to the effect that he had served Armour on October 28th, 2016 by leaving a true copy of the Notice of Claim with Armour. At the hearing before me he testified that he had travelled to Armour's office in Moncton at 689 Edinburgh Drive, and that he had left the Notice of Claim with the office staff there.

[7] On that evidence I accepted that service on Armour had been effected. Mr Hosseini then testified as to his claim. He said that he was a cab driver. On January 26th, 2016 he was driving to Halifax over the MacKay Bridge. He was behind a truck operated by the defendant Armour. It was rainy and windy. Sheets of ice flew off the Armour truck and struck Mr Hosseini's car, damaging its windshield. He testified that he called the defendant's office and attempted to get them to pay for the damage. They refused. So he commenced this action. He also testified as to his damages claim.

[8] Having heard his evidence I allowed some, but not all, of his claim. I ordered that Armour pay to Mr Hosseini $656.25 in damages plus $100.00 in costs for a total of $756.25. The order was made and dated December 6th, 2016.

[9] On December 14, 2016 Armour filed an application to set aside my order. It set out the following grounds:

a. Armour did not receive any court order or summons;

b. There was no evidence that Armour actually caused any damage; and

c. The Notice of Claim did not provide particulars as to where or when the incident occurred, or as to the identity of the truck or its driver.

[10] Armour's application came on before me on January 24th, 2017. On behalf of Armour I heard the testimony of Mr Gaudet. On behalf of the claimant I heard the testimony of Mr Hosseini and Mr Shahab Rowshan. The latter had travelled with Mr Hosseini on the day the Notice of Claim was served on Armour in Moncton on October 28th, 2016.

[11] Mr Gaudet is the Vice-President, Building Maintenance and Accident Control, for Armour, He is responsible for "keeping the company on the road." He handles all claims made against the company. He denied point blank that he had known anything about the notice, or that it had been served on the company.

[12] Mr Hosseini testified that he drove to Moncton to the office of Armour at 689 Edinburgh Drive, Moncton, New Brunswick. His witness, Mr Rowshan, came along as a passenger. They arrived at the Armour office and served the Notice of Claim on people at the front desk. He picked up the business card of Mr Gaudet. The card (entered as part of Ex.1) contained Mr Gaudet's office telephone number of 506-853-4426.

[13] Mr Hosseini testified that after serving the Notice of Claim he and Mr Rowshan drove back to Halifax. Along the way he received a call on his cell. He did not answer it because he was driving. Once he was stopped he called the number displayed on his phone's call log, which turned out to be 506-853-4426. He made two calls to that number (as indicated on his phone bill,

part of Ex 1). The person he spoke to mentioned the claim set out in the Notice of Claim; disputed responsibility; and said something along the lines of “see you in court.”

[14] Mr Rowshan testified that he had joined Mr Hosseini on the trip to Moncton on October 28th, 2015. He recalled that when they arrived at Armour’s office they were told by one of two people there that they were at the wrong office. He recalled that they (that is, he and Mr Hosseini) asked whether they had to go to the other office. One of the persons there said that would not be necessary, but that she would call to make sure. She said she would call Armour’s lawyer, which she did. Mr Rowshan recalled the secretary speaking to the lawyer on the phone, and that following that conversation she advised them that she could receive the Notice of Claim. They obtained a signature from the front office person to the effect that they had received the document. They then left.

[15] Mr Gaudet admitted that the business card filed by Mr Hosseini listed his company phone number. It is the number that appears on Mr Hosseini’s phone record. Mr Gaudet denied being the one who had any discussion with Mr Hosseini. He denied that he or anyone in his employ would say anything along the lines of “see you in court.”

[16] At the conclusion of the hearing I advised the parties that I would take the evidence and the argument of the parties under reserve. Having done so, I am satisfied that what happened on October 28th was this:

a. Mr Hosseini and Mr Rowshan showed up at the office of Armour that morning;

b. They spoke to two people at the front desk and explained that they wanted to serve Armour with a Notice of Claim;

c. One of the two indicated that she was not sure whether she could accept service, and advised that she would call Armour’s lawyer;

d. She called the lawyer and, within earshot of Mr Hosseini and Mr Rowshan, and asked whether she could accept service;

e. She was advised that she could, and on hanging up the phone accepted the Notice of Claim; and

f. Mr Hosseini picked up Mr Gaudet's business card at the front desk.

[17] I am also satisfied that shortly after this Mr Hosseini missed a call from a number associated with Mr Gaudet on his Armour business card. Mr Hosseini returned the call and spoke to someone, whether Mr Gaudet or someone in a position to answer his phone. I am satisfied that whoever spoke to Mr Hosseini at that time was aware of the Notice of Claim and, had he read it, would have known that it required an attendance at court on December 6, 2016.

[18] The apparent contradiction between the testimony of Mr Gaudet and that of Mr Hosseini can be explained in one of three possible ways:

a. Mr Gaudet is not being truthful when he denies any knowledge of the Notice of Claim or of a conversation with Mr Hosseini; or

b. Mr Gaudet has sincerely forgotten that a call between them took place; or

c. Someone with access to Mr Gaudet's phone did know about the Notice and the date for a hearing, did speak with Mr Hosseini, but failed to pass that information on to Mr Gaudet.

[19] I do not have to reconcile these three possibilities. In my view any one of them, when added to what happened at the front desk, is sufficient to satisfy me that Armour was personally served with the Notice of Claim and had notice of its contents and requirements.

[20] In ordinary course this would then bring me to a consideration of whether Armour had established grounds for an order setting aside my order of December 6th, 2016.

[21] It is at this point, however, that I come up against the decision in *Leighton*.

[22] What happened in *Leighton* was this. The claimant Stewiacke Home Hardware issued a notice of claim against Ms Leighton. It had counsel. The defendant was served. She retained

counsel to defend her. She herself was apparently quite ill. She was so ill that "meeting, and even communicating by phone with counsel has been difficult." Counsel for the claimant and for the defendant did communicate with each other. Counsel for the claimant agreed not to apply for quick judgment against the defendant. Unfortunately, counsel for the defendant "did not take steps to ensure that she was aware of the correct hearing date in Small Claims and prepare a defence in advance thereof:" para.4. She "misdiarized" the hearing date. As a consequence she did not attend on the scheduled hearing date to defend Ms Leighton. As for Ms Leighton, she was quite ill at the time and "was particularly reliant on counsel to defend her interests:" para. 2. As a consequence neither she nor her counsel appeared on the scheduled hearing date. The Adjudicator heard evidence from the claimant and issued an order requiring Ms Leighton to pay $6,581.06.

[23] I note that the evidence appears to have included the following:

a. Counsel for the claimant had assured counsel for Ms Leighton that he would not apply for Quick Judgment, and in fact no such application was made;

b. There had been some ongoing correspondence between counsel, although there had been none after July 5, 2011;

c. There was evidence that the defendant's illness was interring with the normal flow of information between she and her lawyer; and

d. Counsel for the defendant explained why she was not present at the hearing on August 8th, although there was no evidence as to why the defendant herself had not been: see para.11.

[24] Ms Leighton then applied to the Adjudicator pursuant to s.23(2) of the *Small Claims Court Act* RSNS 1989, c.430, as amended (the "Act"). That section empowers an adjudicator to set aside an order made against a defendant who fails to file a defence where the adjudicator is satisfied that the merits of the claim would result in judgment. She asked the Adjudicator to set the order aside. The Adjudicator ruled that there was "no reasonable excuse" for failing to file a defence within the required time or for failing to attend the hearing on the scheduled date. The adjudicator dismissed the application. Ms Leighton then appealed to the Supreme Court.

[25] The court on the appeal ruled that "a proper statutory interpretation" of s.23(1) was that that section was "targeted only at Application for Quick Judgment situations." Such applications could be made "only before a scheduled hearing date." Since s.23(1) applied only to orders issued by way of quick judgment, the remedy afforded by s.23(2) could not apply where there was no application for quick judgment; and where instead a claimant showed up at a hearing date and obtained judgment after presenting evidence. In such a case an Adjudicator was functus officio once the order was issued. He or she had no jurisdiction to do anything about his or her order. The only remedy available to the defendant was to apply to the Supreme Court to set aside the adjudicator's order on the ground that it was made without jurisdiction.

[26] If the decision in *Leighton* is correct, and if it is binding on me, then it would appear that I have no jurisdiction to hear Armour's application. I must say, however, that I find it difficult to see s.23(1) as being, as stated in *Leighton*, "intended solely to facilitate an Application for Quick Judgment:" para.43. There are several reasons for this difficulty.

Reason 1: Practice and Procedure

[27] The first is based on the practice and procedure of a Small Claims Court proceeding as mandated by the Act and the *Small Claims Court Forms and Procedures Regulations*, NS Reg 17/93 as amended to NS Reg 156/2015 (the "Regulations"). It would be helpful at this point to outline how such proceedings flow through the court system.

[28] A notice of claim (that is, a proceeding in the Small Claims Court) is commenced when a claimant files a notice of claim in the proscribed form with the clerk of the Small Claims Court on the filing of a claim by a claimant: s.19(1). The clerk of the court is then required to open a file, affix a number, date stamp the document, and "insert the time and place within which any defence or counterclaim is to be filed and served on the claimant [and] insert the time and place of adjudication in accordance with the regulations:" s.21(1)(a). The notice of claim contains, as per s.1 of the Regulations, the following statement in bold type: "This claim will be heard on [date of hearing] at [place of hearing]."

[29] It is then the duty of the clerk to

a. Prepare the docket for the court;

b. Ensure the availability of facilities and equipment required for the court to sit and conduct hearings: s.21(a) and (b).

[30] I pause here to note that defendants who intend to show up at the scheduled hearing do not always file and serve statements of defence, notwithstanding the requirement to do so set out in the Notice of Claim. That this should be so is not surprising, given the nature of this court. The vast majority of defendants–and of claimants for that matter–are self-represented. Some defendants have not understood what they are expected to do (other than show up on the hearing date). Some may believe they have only a partial defence. Even those who believe they have no defence still feel that they must attend (sometimes to discover, when they do attend, that they do in fact have a defence on the facts). Where such defendants do show up the Adjudicator will ask the defendant if he or she intends to defend and, if so, on what basis. If there is a defence that is then revealed, and if it surprises the claimant, an adjournment will be granted if the claimant needs time to gather the evidence necessary to deal with the defence. Some claimants, on the other hand, having heard the defence, elect to proceed without an adjournment. They can do so because they have shown up with the evidence (and witnesses) they are confident will establish their claim and defeat the now-revealed defence.

[31] In any event, when a defence is not filed within the time specified in the Notice of Claim a claimant has one of two options.

[32] One of those options–quick judgment ("QJ")–is provided by s.23(1) of the Act, which provides as follows:

> 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.

[33] If a claimant in such a case is aware of aware of the provisions of s.23(1) they can make an application for quick judgment. They complete a Form 6 "Application for Quick Judgment in the Small Claims Court of Nova Scotia:" s.14, Regulations. Form 6 is a sworn "affidavit in proof of application." The claimant deposes as to personal service having been effected; that no defence was filed; that he or she "have had no communication, either written or oral, from the Defendant to the effect that the Defendant intends to defend this action;" and as to the claim, attaching "documentation supporting my claim."

[34] Section 23(1) then empowers an adjudicator to review the affidavit in proof of the claim and, if satisfied that "the merits of the claim would result in judgment for the claimant," to make an order against the defendant "without a hearing."

[35] Note, however, that the power is discretionary: an Adjudicator "may," not "shall," issue an order in such a case without a hearing. And indeed, issuance of an order on a quick judgment application is not automatic. Adjudicators often find that the Form 6 affidavit, or the documents attached (if any), do not satisfy him or her as to the merits of the claim. In such cases the Adjudicator rejects the application, and the claimant is advised to attend on the date scheduled in the Notice of Claim ready to provide evidence to establish the claim.

[36] Second, and not uncommonly, a claimant does not make an application for quick judgment at all. Many claimants are unrepresented. They are not aware of the procedure or, if they are, are uncertain about how to fill out and swear the required application and Form 6. Note too that if, for example, the claimant has had some communication with the defendant "to the effect that the Defendant intends to defend this action" then the claimant cannot comply with the requirements of the Form 6 affidavit. In that case the claimant is forced to await the scheduled hearing date, even in the absence of a filed defence. Whatever the reason for not filing a QJ

application, these claimants instead show up on the date that has been set in the Notice of Claim. They attend with their documents, their testimony and their witnesses, all with the aim of proving their claim.

[37] Returning to the claim's progress through the system, the court docket for each hearing date is prepared. The adjudicator arrives on the scheduled hearing date and then deals with the matters scheduled for that day (or evening, as is the case in Halifax). The Adjudicator may then find on his or her docket two types of files in which no defence has been filed:

a. Those where an application for quick judgment was made but rejected; and

b. Those where the claimant did not make an application for quick judgment and instead is attending on the scheduled date to prove their claim.

[38] In either case the Adjudicator will first satisfy him- or herself that the defendant has been served with the Notice of Claim. Once that is done he or she will hear or review enough of the claimant's evidence to satisfy him- or herself that the claimant has a valid claim. That is not always the case, though it generally is. More often it is the amount of the claim that may be reduced because the claimant has included–or failed to establish–various heads of the loss claimed.

[39] An order will then be made to the effect that a claim was made; that it was served; that no defence was filed; and that the claimant had established the merits of his or her claim. And it is in these types of cases that the defendant will sometimes make an application seeking to set aside the order pursuant to s.23(2).

[40] Section 23(2) of the Act provides 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.

[41] It is here that the decision in *Leighton* gives rise to an odd and, with respect, cumbersome result.

[42] Applying the reasoning in *Leighton*, a defendant who is the subject of an order granted as the result of a successful quick judgment application is entitled pursuant to s.23(2) to apply to the Adjudicator to set aside his or her order based on the existence of "a reasonable excuse." However, a defendant who was the subject of an order granted on the scheduled hearing date cannot, and has no way to set aside the order so as to obtain a hearing on the merits other than by an appeal to the Supreme Court.

[43] Yet both defendants are in exactly the same position. Both were served. Both failed to file a defence. Neither had a chance to present their side of the matter. And both were subject to orders that were granted only after an Adjudicator had considered the claimant's evidence and were satisfied as to the merits of the claim. Why then must the Act be interpreted in such a way as to afford them different remedies? Why is the first defendant–the one subject to a QJ order–provided with the opportunity to use the informal, speedy and inexpensive procedure of a s.23(2) application, while the second–the one subject to an order after a hearing–is required to employ the formal, expensive and intimidating procedure of an appeal to the Supreme Court? Why, when the result both seek to achieve–the setting aside of the order so that their defence can be heard–is exactly the same?

Reason 2: Wording and Interpretation

[44] The Small Claims Court is a statutory court. Adjudicators can exercise only the powers expressly or by necessary implication granted to them by the Act and by the Regulations. What then are the powers conferred on an adjudicator to make an order with respect to a claim that comes before him or her on the date scheduled in the Notice of Claim?

[45] Section 29(1) deals with the adjudicator's order-making jurisdiction:

> 29(1) Subject to the provisions of this Act, not later than sixty days after the hearing of the claim of the claimant and any defence or counterclaim of the defendant, the adjudicator may
>
> (a) make an order
>
> (i) dismissing the claim, defence or counterclaim,
>
> (ii) requiring a party to pay money or deliver specific personal property in a total amount or value not exceeding twenty five thousand dollars, and any prejudgment interest as prescribed by the regulations, or
>
> (iii) for any remedy authorized or directed by an Act of the Legislature in respect of matters or things that are to be determined pursuant to this Act; and
>
> (b) make an order requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the regulations.

[46] Section 17 of the Regulations then provides that "[a]n order by an adjudicator shall be in Form 7(a), (b) or (c)" (emphasis added). A review of the wording of these three forms is instructive.

[47] Form 7(a), after setting out the title of proceedings and court number, goes on as follows:

> On _____ 20 ____, a hearing was held in the above matter and the following Order is made:
>
> The Claimant having appeared, and the Defendant ☐ appearing ☐ not appearing;
>
> AND UPON FINDING
>
> (a) that the Defendant was served with a notice of the claim; and
> (b) that the Defendant did not file a defence and the time for filing a defence has elapsed; and
> (c) that the Claimant has established the merits of the claim,
>
> I THEREFORE ORDER that the Defendant pay to the Claimant the sums as follows:
> Debt:
> Costs:
> Total:

[48] Form 7(b) is a little different. After setting out the title of proceedings and court number, it goes on as follows:

> UPON FINDING
>
> (a) that the Defendant was served with notice of the claim; and
> (b) that the Defendant did not file a defence and the time for filing a defence has elapsed; and

(c) that the documents filed with the claim establish the merits of the claim,

I THEREFORE ORDER that the Defendant pay to the Claimant the sums as follows:
Debt:
Costs:
Total:

[49] Form 7(c), on the other hand, appears to contemplate situations where a defence has been filed and a hearing has been held. After setting out the title of proceedings and court number, it goes on as follows:

On _____, 20___, a hearing was held in the above matter and the following Order is made:

[blank space for the order that was made]

Dated at _____ on _____, 20___

_____
Adjudicator

[50] Note that Form 7(a) and 7(b) overlap to some degree. Both state that the defendant was served. Both state that no defence was filed and that the time for filing such a defence has passed. Both also state that the claimant has established his or her claim, though the way in which the claim has been established is expressed somewhat differently. Form 7(a) says that "the Claimant has established the merits of the claim" while Form 7(b) says that "that the documents filed with the claim establish the merits of the claim." Form 7(b)'s reference to supporting documents carries with it echoes of the provisions governing an application for QJ already discussed. That being the case it seems clear that Form 7(b) is the order to be used on a successful QJ application, as noted in *Leighton* at para.40.

[51] But what about Form 7(a)? On its face it contemplates an adjudicator issuing it either with or without a hearing. Since it contemplates that a hearing did in fact take place, it must surely fit both types of situation we are considering:

a. Where a claimant shows up at a hearing after an unsuccessful QJ application, and

b. Where a claimant has not made a QJ application and turns up at the hearing to "establish the merits of the claim."

[52] If one takes Form 7(a) into account when interpreting s.23(1) of the Act one can read the latter as contemplating both situations. And if that is the case, then the remedy afforded by s.23(2) should be available in both. To read s.23(1) more restrictively–as was done in *Leighton*–results in the creation of two "appeal" processes (one simple, one not) for the same situation and for the same remedy–and to dictate the availability of either solely on whether a claimant elected to apply for QJ rather than wait his or her day in court.

[53] Such a result appears problematic when, as noted by Adjudicator Barnett in *CIBC Life Insurance Company v. Hupman* 2015 NSSM 48 at paras.24-27, s.23(1) was introduced in 1993 in order to expand the jurisdiction of adjudicators. Prior to 1993 there was no form of "default judgment" procedure in this court. Defendants were not required to file a defence. All they were required to do was attend the hearing. Adjudicators pursuant to the previous version of s.23 could only issue orders against defendants when they failed to attend the hearing. The 1991 Report of the Nova Scotia Court Structure Task Force had seen as desirable the introduction of some form of default proceedings in this court, presumably in order to streamline the system by removing matters from the docket that involved defendants who had no intention of defending the claims against them. That being the case, it would seem an odd that the Legislature, by introducing a change intended to improve the court system, intended at the same time to make it more cumbersome.

[54] It would seem then that the interpretation of s.23(1) reached in *Leighton* is one that does not seem to be in accord with the intent and purpose of the Act to ensure claims "are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice:" s.2.

Reason 3: The Decision in *Leighton* Was Arguably Obiter or Unnecessary

[55] A third reason for concern about the decision in *Leighton* is that it was, with respect, unnecessary. On the facts before the court in that case it was certainly arguable that the Adjudicator's dismissal of the s.23(2) application constituted an error of law or a failure to follow the requirements of natural justice, both of which are grounds for appeal: s.32(1)(b) and (c). On the facts it was clear that the claimant knew the defendant intended to defend. Counsel had been retained. Counsel for the claimant had agreed not to proceed to QJ. In such a case the adjudicator on the s.23(1) application could have considered that evidence together with the illness of the defendant to conclude that there was "a reasonable excuse." Had the court in *Leighton* followed that approach–one most in accord with the principle of Occam's razor–this court would not find itself in the quandary that it now does.

Reason 4: Uncertainty As to the Applicability of *Leighton*

[56] In *CIBC Life Insurance Company v Hupman* 2015 NSSM 48 Adjudicator Barnett, despite misgivings about the interpretation of s.23(1) arrived at in *Leighton*, concluded that he was bound by that decision. He accordingly dismissed a s.23(2) application in a case where an order had been issued against a non-attending defendant on the ground that he had no jurisdiction: see para.37; see also *Pike v. Simms* 2014 NSSM 55, and *D'Arcy v. McCarthy Roofing Limited* 2015 NSSM 6 at para.43 to similar effect.

[57] However, this does not end the discussion.

[58] The decision in *CIBC* was appealed: *CIBC Life Insurance Company v. Hupman* 2016 NSSC 120. There the Supreme Court noted that the court in *Leighton* had not had the decision in *Kemp v. Prescesky* 2006 NSSC 122 brought to its attention. *Kemp* had held that there was a broader question of potential breaches of natural justice when gaps in legislation were not abridged. The court in *CIBC* concluded that there was an "ability on the part of adjudicators to fill gaps in the legislation to ensure there is natural justice in the proceedings before the Small Claims Court:" para.24. That being the case the court ruled that the adjudicator's failure to consider the s.23(2) application constituted a breach of natural justice on the Adjudicator's part:

para.21. The court thereby filled the apparent “gap” in the Act introduced by the decision in *Leighton* and, as I read it, returned to adjudicators the jurisdiction to consider applications to set aside their orders against defendants who had not filed a defence and had not attended a hearing.

Conclusion With Respect to Jurisdiction

[59] I am accordingly satisfied that an Adjudicator who issues an order against a defendant where

a. The defendant was served,

b. No defence was filed, and

c. A hearing took place where the defendant did not appear,

does have jurisdiction under the Act to hear an application by that defendant to set aside the order. That jurisdiction may be found in s.23(2) or, if I am incorrect in that, in s.2 (as noted by the Supreme Court in *CIBC* at para.21).

The Merits of the Application

[60] Section 23(2) provides that an order such as the one made by me on December 8th where I am “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.”

[61] In this case I am satisfied that Armour has satisfied the requirements of s.23(2)(b). But has it provided "a reasonable excuse for failing to file a defence"? And, more importantly, had it established a reasonable excuse for not attending the hearing?

[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.

[63] I believe that the question must also be considered in light of whether the defendant is a corporation or an individual. The organizational structure of corporations makes them different from individuals. An individual who has been personally served cannot argue that he or she was not when they were. A corporation, on the other hand, can argue that its directing mind was not made aware of the claim because the individual who was served did not have authority to accept service–or was not in the particular chain of communication necessary to bring the claim to the attention of those within the corporation with the authority to respond to it. But the ability to mount such an argument brings with it the responsibility of an organization to ensure that the proper procedures for dealing with claims are made known to its employees, particularly to those front office staff who are so often the public's point of contact with the corporation. To do otherwise would be to 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:" *Consumer Marketing, supra* at para.34.

[64] In this case Armour did not provide <u>any</u> 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.

[65] I accordingly dismiss Armour's application. The order of December 6th stands.

Dated at Halifax, this 27th day of January, 2017

Original: Court File)
Copy:

Claimant
)
_____

Copy:

Defendants
)
Augustus Richardson, QC
ADJUDICATOR