Docket No.:CA164600
Date: 20010214

NOVA SCOTIA COURT OF APPEAL

[Cite as:*Temple v. Riley*, 2001 NSCA 36]

Roscoe, Hallett and Saunders, JJ.A.

BETWEEN:

JOHN RILEY

Appellant

- and -

TONIA TEMPLE

Respondent

REASONS FOR JUDGMENT

Counsel:	C. Patricia Mitchell and A. Douglas Tupper, Q.C. for the appellant W. Bruce Gillis, Q.C. for the respondent
Appeal Heard:	January 10, 2001
Judgment Delivered:	February 14, 2001
THE COURT:	The appeal is allowed per reasons for judgment of Saunders, J.A.; Hallett and Roscoe, JJ.A. concurring.

Saunders, J.A.:

[1] This is an appeal from an interlocutory order of a chambers judge, refusing an application brought by the defendant Riley (now appellant) to set aside an order entered against him by the plaintiff Temple (now respondent) for damages, interest and costs totalling $13,324.25.

[2] To follow the issues raised in this appeal it is necessary to set out the material facts in a chronology.

Factual Background

[3] Temple and Riley were involved in a motor vehicle accident at the corner of Quinpool Road and Robie Street in Halifax at about midnight August 23, 1998. Temple, driving her 1994 Geo Metro, was proceeding easterly on Quinpool Road, ahead of the defendant Riley who was driving his 1989 Volkswagon Fox in the same direction. The two vehicles collided after Temple - upon discovering that she was in the wrong lane - put her car in reverse and backed up in order to get into another lane. There is an on-going dispute between the parties as to whether Temple's car was in fact still backing up when the collision occurred.

[4] The mishap was investigated by Halifax police. Based upon the police investigation, and admissions attributed to Temple at the scene, it was believed that Temple was to blame. Ultimately, Temple's insurance company acknowledged liability, at least to the extent of paying Riley's personal injury and property damage claim.

[5] The defendant Riley was insured by Royal/Sun Alliance Insurance ("Royal"). On March 19, 1999, the plaintiff Temple's lawyer, Mr. Bruce Gillis, Q.C., wrote to Royal advising of Temple's claim for injuries. After conducting its own assessment and reviewing the police report, Royal concluded that the plaintiff Temple was, in fact, responsible for the accident, believing that she was still reversing her motor vehicle into another lane at the time of impact. In correspondence to Mr. Gillis, Royal's representatives made it clear that they were denying liability and that their file would remain closed.

[6] On April 1, 1999, Mr. Gillis wrote Royal advising that his client intended to continue with her claim and that he was instructed to sue. He concluded his letter:

> If you are not able to accept service, kindly advise the address of your insured so that I may serve him personally.

[7] In response, on April 12, 1999, Royal wrote to Mr. Gillis, confirming its continuing denial of liability and that it required personal service upon its insured, Riley. They provided Mr. Gillis with Riley's last known mailing address. On April 16, 1999, Mr. Gillis wrote to Royal advising he would serve Riley directly and concluded his correspondence:

> As you are not agreeing to accept service of any documents, I intend to serve him directly and further correspondence and service will be through him.

[8] It would appear nothing happened between April-September, 1999. On September 21, 1999, Ms. Jennifer Kikkert, an adjustor-in-training at Royal who had taken over responsibility for this file, wrote to their insured Riley enquiring whether a law suit had in fact been commenced and asking whether he had ever been served. He was requested to inform Royal of the status of the claim.

[9] On November 16, 1999, Mr. Gillis commenced a law suit against Riley. The originating notice and statement of claim were personally served upon Riley on November 22, 1999, some eight months after Mr. Gillis indicated that an action would be commenced. The defendant Riley forwarded the originating notice and statement of claim to Royal on November 25, 1999. The next day Ms. Kikkert completed a litigation assignment form in order to send the file to outside legal counsel to file a defence. The litigation assignment form was approved by Ms. Kikkert's supervisor on November 30, 1999. Ms. Kikkert mistakenly believed that the file had been sent by her supervisor to the law firm Patterson Palmer Hunt & Murphy to file a defence.

[10] After serving the documents upon the defendant personally, as requested by Royal, Mr. Gillis had no further contact with the insurance company about this claim. He took no steps to enquire about the lack of a defence after the 10-day period for filing a defence had expired. Rather, on the first day after the expiration of the 10-day period, default judgment was entered against the Riley. The default order was not sent to Royal, nor to the defendant. Both Royal and the defendant believed that a defence had been filed and were unaware that the plaintiff, through counsel, had entered default judgment.

[11] On December 8, 1999, Riley alerted Royal to the fact that he had moved, and he provided his new address.

[12] Ms. Kikkert left her employment with Royal in January, 2000. When she left, she assumed a defence had been filed. She had never been contacted by Mr. Gillis to enquire why no defence had been filed, nor was she provided with the default judgment obtained on the 11th day by counsel for Temple.

[13] On February 25, 2000, Mr. Gillis issued a notice of assessment of damages. Instead of sending his notice to Royal, Mr. Gillis sent the notice by regular mail addressed to Riley personally at the place where he lived when served with the statement of claim. The assessment of damages was scheduled to be heard on April 18, 2000. The notice of assessment was not received by Riley because by then he had moved. The notice of assessment was not received by Royal because it was never sent to Royal.

[14] The assessment of damages was heard before a judge of the Nova Scotia Supreme Court on April 18, 2000. No one appeared in opposition because neither Riley nor Royal had received either notice of the assessment, or notice of the original default order. The assessment of damages proceeded *ex parte*.

[15] An order assessing damages, pre-judgment interest, costs and taxes totalling $13,324.25 was issued on May 2, 2000.

[16] On May 5, 2000, officials at Royal, upon discovering that the file had not been forwarded to outside counsel, contacted their solicitors and instructed them to file a defence immediately. By this point, Royal still had never been advised that there was a default order granted in December, 1999, or that an assessment of damages had occurred in April, 2000, or that an order had been granted against their insured Riley on May 2, 2000.

[17] On May 8, 2000, counsel for Royal, Ms. Patricia Mitchell, filed a defence by fax with the Prothonotary at Annapolis Royal. The next day Ms. Mitchell wrote to Mr. Gillis by fax advising him of her retention and enclosing a copy of the defence.

[18] On May 10, 2000, Mr. Gillis faxed Ms. Mitchell advising that default judgment had been entered and an order for damages issued. In his fax, Mr. Gillis stated:

> As a matter of information, copies were also sent to his insurers.

The evidence before us is clear that Royal never received any notice of the default order, the notice of assessment of damages, or the order for assessment, prior to May 11.

[19] Curiously, it was not until May 11, 2000, nine days after the issuance of the Order for Assessment of Damages on Default, and after the defence had been filed and Mr. Gillis so advised by Ms. Mitchell, that Royal's counsel received by fax from Mr. Gillis the May 2, 2000, order. On the following day, May 12, 2000, Ms. Mitchell advised Mr. Gillis that she would be recommending to Royal that they proceed with an application to set aside the default judgment and order for damages.

[20] Between May 12-18 Mr. Gillis and Ms. Mitchell undertook settlement discussions. She requested an immediate response because time was of the essence in making an application to set aside the judgment. On May 18, 2000, Mr. Gillis responded, saying he needed more time to seek instructions. Mr. Gillis undertook not to use any extension of time as a reason for resisting their efforts to set aside the default judgment and order for assessment.

[21] By letter dated May 30, 2000, but not received via regular mail by Ms. Mitchell until June 5, 2000, Mr. Gillis wrote rejecting the settlement offer. The interlocutory notice (application *inter partes*) to set aside the default judgment and order for assessment of damages was filed on June 7, 2000.

[22] On June 20, 2000, the chambers judge heard the appellant's application to set aside the default judgment and the order for damages. The chambers judge dismissed the application. This is an appeal from his decision.

Standard of Review

[23] The standard of review to be applied by this court with respect to an interlocutory order is well settled. The chambers judge's decision was discretionary in nature and will only be set aside if a wrong principle of law was applied or a patent injustice would occur.

[24] In **Guy v. Guye**, (1992), 112 N.S.R. (2d) 323 (C.A.), Matthews, J.A., held at §17:

> The general rule applicable on this appeal is that enunciated in *Fleet v. Techsus* (1992), 111 N.S.R. (2d) 293 (C.A.):
>
> > The Chambers judge's decision and order are interlocutory and discretionary. This Court has repeatedly said that it will not interfere with such an order unless wrong principles of law have been applied or patent injustices would result. See *Exco Corporation Limited v. Nova Scotia Savings and Loan et al v. Westminister Canada Holdings et al. (*1989), 91 N.S.R. (2d) 214; *Nova Scotia (Attorney General) v. Morgentaler* (1990), 96 N.S.R. (2d) 54, and many others
>
> I am mindful that although the chambers judge's decision is interlocutory in nature, its effect is such that the proceeding is brought to an end.

[25] More recently, in **Norman v. Royal Canadian Legion** (1996), 156 N.S.R. (2d) 76 (C.A.), Bateman, J.A., considered these same principles. The defendant applied to have the default judgment set aside and the chambers judge denied the motion. On appeal, this court set aside the default judgment. Justice Bateman stated at p. 77:

> Chipman, J.A., wrote in *Minkoff v. Poole and Lambert* (1991), 101 N.S.R. (2d) 143; 275 A.P.R. 143 (C.A.), at page 145:
>
> > At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. . .
> >
> > . . . Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. (Emphasis added [by Bateman, J.A.])

[26] Justice Bateman continued at p. 77:

> Taking into account the gravity of the consequences of the order of the Chambers judge, in that it finally disposed of the rights of the parties, we are satisfied that he failed to give proper weight to the evidence that the adjuster had made a genuine, albeit unsuccessful, effort to have a defence filed. The appellant's counsel acted promptly in contacting the respondent, resulting in a very minor delay. In the circumstances, we are satisfied that the appellant did present a reasonable excuse for the failure to file the defence. (Emphasis added [by Bateman, J.A.])

[27] The test, whether to set aside default judgment, is well established in Nova Scotia and has been reiterated by this court recently in **Widmeyer v. Atlantic Pipeline Resources Inc.** [2000], N.S.J. No. 45 (C.A.), Justice Roscoe stated:

> *Ives v. Dewar* [[1949] 2 D.L.R. 204] has been consistently followed in this Court and in the Supreme Court for 50 years. There are two requirements to be met in order to have a default judgment set aside:
>
> 1. A fairly arguable defence, or a serious issue to be tried; and
> 2. A reasonable excuse for the delay in filing the defence.

[28] Applying those same considerations to this case, I conclude that the appeal must be allowed, the order for judgment in default of defence set aside and the order assessing damages totalling $13,324.25 against John Riley on May 2, 2000, set aside.

Analysis and Reasons

[29] Considerable time was taken by counsel for the respondent, both in his factum and in oral argument, attempting to challenge the basis of the appellant's initial application before the chambers judge and his subsequent appeal to this court as having been improperly initiated. The thrust of the respondent's argument was that the application before the chambers judge on June 20, 2000, was:

> ...an application to set aside the Order for Assessment of Damages issued May 2nd, 2000. There is not and has never been an application before the court to set aside the Default Judgment...

I cannot agree. In the pre-hearing brief filed by Ms. Mitchell with the chambers judge, she clearly stated that the application was to set aside both orders. Mr. Gillis

acknowledged that he received a copy of the brief. The transcript of the hearing before the chambers judge makes it perfectly clear that all counsel and the court proceeded on the basis that Riley sought relief from both the initial default judgment and the subsequent order for damages. The first words spoken by Ms. Mitchell in her submission were:

> This is an application pursuant to Rule 12.06 and 30.01 to set aside default judgment and Your Lordship's order for damages of May 2nd, 2000.

[30] Mr. Gillis never protested that the interlocutory notice (application *inter partes*) filed by Ms. Mitchell on June 7, 2000, did not, technically, mention **CPR 12**, nor the words "default judgment". However, his entire submission before the chambers judge was directed towards resisting Riley's attempt to set aside the default judgment. The first words of Mr. Gillis in his submission to the court were:

> I'm just trying to follow the same sequence that My Friend has. First of all I agree to set out the appropriate tests although with respect to the Rules for setting aside the default . . .

[31] And there can be no doubt that this was the very issue before the chambers judge , who commenced his oral decision by observing:

> This is an application to set aside a default judgment which was entered in the matter of Temple and Riley...

[32] Finally, it seems to me that the complete answer to Mr. Gillis's technical objection may be found in the order he drafted and to which both he and Ms. Mitchell consented as to form following the decision of the chambers judge at the hearing on June 20, 2000. The order was filed July 5 and the operative paragraph reads:

> (1) THAT the applications to set aside the default judgment and the Order for Assessment of Damages are hereby dismissed with costs of the application to the Plaintiff in the amount of $400.00.
> (Double underlining mine)

There is therefore in no merit to the respondent's submission that the appellant's initial application and this appeal were technically defective.

[33] At the start of oral argument Mr. A. Douglas Tupper, Q.C., counsel for the appellant, conceded that no challenge would be made to the *amount* of $13,324.25

awarded by the chambers judge after the assessment of damages hearing. That is to say, if the appellant were successful in setting aside the default judgment, then they were prepared to accept the sum of $13,324.25 being, as it were, their risk of exposure at trial. They would only contest the issue of liability before the trial judge.

[34] Consequently, the focus of the appellant's submissions during argument was directed towards setting aside the initial default order filed December 3, 1999, as opposed to the Order After Assessment of Damages on Default, filed May 2, 2000. Because of the importance of the issues raised on this appeal, the mingling of both the relief sought and the **Civil Procedure Rules** upon which such claims for relief were based, and because both matters were clearly placed before the chambers judge for adjudication by him, it will be necessary for me to consider the procedures mandated or implicated under **Civil Procedure Rules 12, 30** and **33.** Conceptually and practically speaking, if the default judgment were set aside, then clearly the order assessing damages as a consequence of that "default" should suffer a similar fate.

[35] During oral argument Mr. Tupper referred us to a very recent decision of the English Court of Appeal in **Rayner (Mincing Lane) Limited v. Bazil**. At §34 the Court of Appeal observed:

> The authorities to which we were referred demonstrated that if the court concluded that there was a defence on the merits which carried some degree of conviction it is the very strong inclination of the court to allow a default judgment to be set aside even if strong criticism could be made of the defendant's conduct. Indeed Mr. Hurst and his junior's researches have not discovered an authority where if that was the view of the court, the court nevertheless refused to set aside the judgment.

[36] Continuing at §42 the court stated:

> Thus it seems to me that once a defence on the merits to the requisite standard is identified it must take some very special feature for the court to conclude that still the default judgment should not be set aside. The court may impose terms and even stringent terms but it will normally set aside the judgment.

[37] Finally, the court concluded:

> The major consideration is whether there is a defence on the merits.

[38] Mr. Tupper urged that we endorse the same approach for Nova Scotia. In his able submission he said primary emphasis should be given to the requirement that an applicant establish a good defence on the merits. Once that threshold is crossed, the court ought not waste much time weighing the degree of blame as between the applicant/defaulter and the respondent. To do so, we were told, risks thwarting meritorious litigation by technicalities or "process".

[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.

[40] On the application before the chambers judge and again in this appeal, Mr. W. Bruce Gillis, Q.C., counsel for the respondent, repeatedly attacked Royal's conduct throughout, suggesting that it was delinquent and never serious in its treatment of this file. In argument, he said that Royal "neglected to defend the claim for whatever reason" and that Royal should not be heard now "seeking to be relieved of their neglect".

[41] The respondent places great reliance upon the decision of this court in **Gabriel and Gabriel v. Cameron** (1999) 181 N.S.R. (2nd) 196 and in particular this observation by Cromwell, J.A. found at §5 of that judgment:

> The only excuse offered for not appearing on the assessment is carelessness on the part of the adjuster. Our review of the record, including the proposed fresh evidence, and the submission made on behalf of the appellants, far from persuade us that there is any likelihood of a substantial injustice here if we do not intervene.

The **Gabriel** case is easily distinguished, as was very well stated by Ms. Mitchell during argument before the chambers judge. The facts were completely different. There, liability had been admitted. The adjuster had notice of the original default judgment and made no attempt to remedy the situation until after the assessment of damages had occurred. As Justice Cromwell himself pointed out:

> Not only was proper notice of the assessment given to the defendants and to an insurance adjuster employed by their insurer, numerous medical reports were also provided to the adjuster over the months intervening between the accident and the assessment of damages. Various interim payments were made by the insurer on behalf of the defendant and an offer of settlement in excess of $100,000 was made on behalf of the defendants and rejected . . .

[42] By contrast, in this case liability has always been very much in issue. Default judgment was entered on the eleventh day without notice to the insurer or to its insured, Riley. Neither Royal nor its insured received notice of the intended assessment of damages. That assessment proceeded *ex parte*, notwithstanding Temple's knowledge - through her counsel - that Riley's insurer denied liability.

[43] As noted earlier, in order to set aside a default judgment, the applicant must show that there is either a fairly arguable defence or a serious issue to be tried; and provide a reasonable excuse for the delay in filing the defence. It is impossible to say from reading the transcript whether the chambers judge failed to apply this test in determining whether to set aside the default judgment. While it is true that at no time did he comment on whether the appellant had a fairly arguable defence, it may be, as counsel for the respondent acknowledged, that this first requirement "was immediately conceded by the Plaintiff" and that given the fact that liability was always very much in dispute, the requirement that there be "...a triable issue..." was never seriously contested (Respondent's Factum, p. 6).

[44] Be that as it may, I am well satisfied that the appellant has provided ample evidence of an arguable defence on the merits.

[45] The next question, of course, is whether the applicant/appellant has provided a reasonable excuse for delay in filing the defence. In addressing that threshold the court must look at both the delay in filing a defence and the delay in applying to set aside the default judgment. In this respect, I endorse the comments of Russell, J. in **Doyle v. Barrett (C.L.) Enterprises Ltd. and Barrett** (1989), 78 Nfld. and P.E.I. Reports 280 at p. 282:

> 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.

[46] Here I am satisfied that the delay arising *in the circumstances of this case* has been reasonably explained by the appellant. Through simple inadvertence an adjustor trainee assumed that her supervisor had engaged counsel. It is clear that Royal intended to retain counsel and defend the claim. The same features I mentioned earlier which distinguish this case from **Gabriel v. Cameron, supra** constitute a reasonable excuse for Royal's failure to file a defence on behalf of its insured.

[47] It is important to remember that there are no fixed time requirements stipulated in **Rule 12.06.** The Rule simply states:

> The court may, on such terms as it thinks just, set aside or vary any default judgment entered in pursuance of Rule 12.

The ability of a plaintiff to proceed without *further* notice against a defaulting defendant is permitted by **Rule 12.08**, but the plaintiff is forewarned that such unimpeded steps will not avoid notice to the defendant of an assessment of damages. The Rule states:

> 12.08 Unless the court otherwise orders or a rule otherwise provides, a defendant who fails to defend, appear on the hearing under an originating notice or deliver a demand of notice, shall not be entitled to receive notice of any subsequent steps taken in the proceeding against him, other than the assessment of damages when ten (10) days notice thereof by ordinary mail shall be given to the defendant. (Underlining mine)

[48] The so-called "ten-day rule", which seemed to attract most of the chambers judge's attention during the application he heard on June 20, has nothing to do with setting aside default judgment under **Rule 12.** Rather, it arises pursuant to **Rule 30.01(3)**, infra.

[49] It is unclear from the decision of the chambers judge to what extent the issue of delay between the default judgment and the application to set aside the default judgment was a determining factor in his decision. However, the transcript of the evidence indicates he did consider the delay in some manner:

> And now the second judgment which came before me, which simply set the damages. So you are six (6) months late – six (6) or seven (7) months late in making the application to set aside the default judgment.

I think, *in the unique circumstances of this case* that the chambers judge ought to have calculated any delay in applying to set aside the default judgment from the date Royal first became aware of the default judgment, that is May 11, 2000. It must be recalled that neither the appellant nor his insurance company was provided with notice of default judgment until that date.

[50] Counsel for the respondent referred us to a chambers decision of Glube, C.J.N.S. in **Howlett v. Burton** (2000) NSJ No. 271 wherein the Chief Justice determined that the appeal period runs from the date of the order as opposed to the date of receipt of the order. The view expressed in that case by the Chief Justice is of no assistance to the respondent. The facts there and the Rule in question were entirely different. Here I am dealing with both **Rule 12** and **Rule 30**, as well as the unique circumstances already described at some length.

[51] In oral submissions at the application before the chambers judge, counsel for the respondent argued that he did not notify Royal of the default judgment because he was advised to serve the insured and "not bother" the insurance company. That characterization was partly relied upon by the chambers judge in his reasons. With respect, the statement is clearly incorrect and unfair. No such words were ever uttered in communications by the insurer. Neither does such a stance arise, implicitly, from the evidence. An insurer and its insured are bound, from the earliest of times, by virtue of their special contract, to observe the doctrine of *uberrimae fidea*. That is, the dealings between Royal and Riley were to be characterized by the utmost good faith. Their contract would require Royal to provide a defence to its insured. Royal could not simply walk away from this claim. Clearly there was no unreasonable delay in bringing the application to set aside this default judgment. Neither was there any delay in seeking to set aside the assessment of damages under **Rule 30**. The appellant became aware of the default judgment on May 11, 2000, in the ensuing weeks attempted to negotiate a settlement of the matter, and received a waiver of delay arguments from the respondent's counsel on May 18. It was not until June 5 that Ms. Mitchell received Mr. Gillis's letter rejecting the offer of settlement. Ms. Mitchell then took immediate steps to set aside the orders. I find that the chambers judge erred by perceiving the delay in this case to be some six or seven months, rather than a few

days. To hold otherwise would encourage counsel - once having obtained default judgment - to hold on to the order for a period of time so as to create sufficient delay to defeat the application.

[52] In any event, given the special circumstances of this case, and the undertaking given by counsel while settlement discussions were ongoing, I find that there was in fact no delay in applying to set aside either order. The appellant did not become aware of the default until May 11, 2000. Ms. Mitchell made an offer of settlement and asked for the respondent's answer "by 4:00 p.m. on Friday, May 19". By letter dated May 18, Mr. Gillis explained that his client was away on summer employment and sought additional time to contact her and obtain instructions. Mr. Gillis undertook "not to use any such extension of response time" as an excuse for resisting the "application to set aside default". As noted earlier, it was not until June 5 that the appellant was informed of the respondent's rejection of their settlement offer. In my view, one only ought to count May 11-17 (both days inclusive = seven days) and June 6-7 (both days inclusive = two days) with the result that there was no delay in applying to set aside the default judgment. Furthermore, the appellant was within time when she filed her application on June 7 to set aside the order assessing damages pursuant to **Rule 30.01(3)**.

[53] During argument Mr. Tupper cited several alleged errors on the part of the chambers judge. These included: finding that Royal had, effectively, told Mr. Gillis "do not bother us . . . we have washed our hands of this claim or our responsibilities surrounding it . . . proceed as you will . . . you are on your own" when there was no evidence to support such a critical determination; and in considering features that were irrelevant to the nature of the application. In reply, Mr. Gillis, for the respondent, maintained his position that the chambers judge was right to consider and weigh such factors as Riley being represented by an insurance company and the (relatively) small amount of Ms. Temple's claim. Respondent's counsel went so far as to emphasize that it would be Royal and not Riley who would ultimately pay any judgment awarded, and that the "general damage award of $10,000 for a minor motor vehicle accident" was hardly the kind of case that would warrant this application, either initially or on appeal. Finally, respondent's counsel insisted that the fact that Riley had "disappeared" and his whereabouts were unknown at the time of the application was a material consideration. When pressed, counsel for Ms. Temple said it was "relevant to the issue of prejudice to Ms. Temple".

[54] Such submissions may be summarily dismissed. I find it inconceivable that these features were in any way relevant to the motion before the chambers judge. For counsel to suggest that the amount of money at risk is relatively insignificant, or that the ultimate payor of this claim is Riley's insurer, is to effectively relegate Royal to lesser rights, lesser protections, than would be afforded any other litigant. That notion or result must be dispelled.

[55] The chambers judge dismissed the application, in part, on account of the fact that an appeal had been filed with regard to the assessment of damages.

> There is filed within time a notice of appeal with the Court of Appeal from the judgment which was granted on May 2. The appeal is presumably properly filed and thus if the remedies sought by the Applicant on this application should fail, then the applicant is not left totally without remedy.

Whether to appeal, or seek to set aside default, or both, were strategic decisions for counsel. To prefer one or the other, or to proceed in tandem was immaterial to the merits of this application.

[56] The chambers judge also based his decision in part on the fact that the insurer would be paying the judgment and not Mr. Riley personally.

> There is the fact that while the amount of money involved in this particular matter is not insignificant, it is not, I would suspect, in the overall course of things, a major concern to the people who are going to have to pay out the judgment.

Whether or not Riley was backed by an insurer had nothing to do with the merits of the application taken in his name.

[57] Whether Riley could be "found" and produced as a witness at trial was Royal's problem. It had nothing to do with the merits of the application.

[58] In **Minkoff v. Poole, supra** at p.3, Chipman, J.A., observed:

> ...Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. <u>As well, there are cases where no weight or insufficient weight has been given to relevant circumstances</u>, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts.

Here, the reverse occurred in that weight was given to irrelevant circumstances, constituting an error warranting our intervention.

[59] The chambers judge determined that he had no jurisdiction to grant the application because "the Court was *functus officio*". The appellant argues that the chambers judge was not *functus officio* and that he erred in law by failing to assume jurisdiction under **Civil Procedure Rule 30.01(3)**. I agree with the appellant. **Civil Procedure Rule 30.01(3)** provides:

> (2) When a proceeding is called for trial and any party fails to appear, the court may . . .
>
> (b) if the Plaintiff appears and the defendant fails to appear, allow the Plaintiff to prove his claim and dismiss any counterclaim.
>
> . . .
>
> (3) Any judgment, order, or verdict given under paragraphs (1) and (2) may be set aside by the court on such terms as it thinks just, upon an application made to it within ten (10) days after the judgment, order, or verdict has been given.

[60] The general rule is that a trial judge may change or amend his/her judgment at any time before issue and entry thereof, but that after the judgment has been issued and entered, he/she is *functus officio* and relinquishes any power to do so, subject of course to the provisions of the Rules. See, for example, *The Law of Civil Procedure*, W. B. Williston and R. J. Rolls, Vol. 2, Butterworths (Toronto: 1970), p. 1059.

[61] The Rules with regard to dealing with final orders are procedural. As well, various other **Civil Procedure Rules** allow for the amendment of orders no less final than an order for assessment of damages. For example, **Rule 12.06** allows for setting aside of a default judgment. A default judgment entered for liquidated damages has no less effect than a separate order for damages. **Rules 37.11** and **37.13** also allow for the setting aside of an order. Finally, in **Gabriel v. Cameron, supra**, this court made it clear that the appropriate way to seek to set aside an order such as this is to make an application under **Rule 30.01(3)**. Thus, I conclude that the chambers judge erred in failing to take jurisdiction under **Rule 30.01(3)** and

that on the merits of the application he ought to have set aside his previous order(s).

[62] Finally, I disagree with the chambers judge's conclusion that the application before him was defective, or at least tenuous, in that there was no formal application brought to extend the time for making it.

> Further, obvious circumstances which I think I should mention are that there is before the court no application to extend the time for making this application.

I find in the circumstances of this case that the chambers judge ought to have accepted the submissions of appellant's counsel as being a proper application under **Rule 3.03** for a formal extension of time (if actually required) as the Rule does not demand a formal application. I am satisfied, as well, that the appellant clearly argued **Rule 3.03** orally, at chambers, and in the written brief filed five days prior to the hearing. The respondent was fully aware the argument would be made and therefore suffered no prejudice as a consequence. The conclusion by the chambers judge that there was no "application" for an extension of time is not supported by the record and is unjust.

[63] Before disposing of this case, I wish to address one other issue raised by the appellant. In the appellant's factum it was submitted that in the circumstances of this case counsel acting on behalf of the respondent breached his ethical and professional duties.

[64] The appellant referred to **Rule 13** of the Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia, which reads in part:

> **Duties to Other Lawyers**
>
> **Rule**
>
> A lawyer has a duty to treat and deal with other lawyers courteously and in good faith.
>
> . . .
>
> **Avoidance of sharp practice**
>
> 13.2 A lawyer has a duty to avoid sharp practice and to take advantage of or act without fair warning on a slip, irregularity or a mistake on the part of another lawyer that does not go to the merits of the case or does not result in any sacrifice or prejudice of the client's rights .
>
> ...

> 13.3 ... A lawyer who knows that another lawyer has been consulted in a matter has a duty not to proceed by default in the matter without enquiry and warning.
>
> **Lay Persons**
> 13.13 A lawyer has a duty to comply with this rule in his or her conduct toward a lay person lawfully representing himself or herself or another person.
>
> **Duties to other lawyers in adversary proceedings**
> 13.15 In civil matters a lawyer has a duty to avoid resorting to frivolous or vexatious pre-trial procedures, including examination for discovery objections, or attempting to gain advantage from slips or oversights not going to the real merits, or tactics that will merely delay or harass or impose expensive hardships on the other side. Such practices can readily bring the administration of justice and the profession into disrepute. (Underlining mine)

[65] Mr. Gillis is a Queen's Counsel and a very experienced lawyer. He was well aware that Royal was denying liability on behalf of the appellant yet he did not advise Royal that he intended to enter judgment in default of defence or even that he had entered such a judgment. Neither did he warn Royal that he was proceeding to assess damages.

[66] In oral submissions Mr. Tupper, for the appellant, did not take the position that Mr. Gillis wilfully breached the rules of professional conduct. He submits that Mr. Gillis misinterpreted the letter from Royal advising him to serve the appellant personally. He says that Mr. Gillis's interpretation of that letter, being that Royal had washed their hands of the appellant and that Mr. Gillis was not to bother them, was an unreasonable interpretation. I agree. It clearly was an unreasonable interpretation by an experienced lawyer. Mr. Gillis ought to have advised Royal when no defence had been filed within 10 days of service of the statement of claim that he would enter a default judgment unless a defence was filed forthwith. He did not do that. Under the circumstances, the respondent ought not to be allowed to retain the benefits of the judgments resulting from her counsel's lack of judgment in his dealings with Royal which has resulted in a grossly unfair outcome to the appellant and Royal.

[67] The evidence is clear. Counsel for the respondent knew that Riley was insured. Counsel corresponded with Riley's insurer, Royal. Counsel knew that

Royal denied liability and was well aware of the basis for the insurer's denial. While counsel may have believed that the insurance company did not want to be "bothered" by him or the claim he was advancing, it would be an entirely erroneous and unreasonable view to take from the correspondence and communications between counsel and the insurer that the insurer had abandoned any interest in its insured or liability for the claim. The words "don't bother us" are not to be found anywhere in the record. They were a characterization advanced by counsel for the respondent in chambers, which was endorsed by the chambers judge and which had no basis in fact. The only position ever taken by the insurer and repeated in its various communications with counsel for the respondent, is captured, for example, in its letter dated March 30, 1999:

> ...the police report filed by your client in this matter states that she reversed into our insured.
>
> Her insurance company accepted liability in this matter and paid our insured's damages and injury claim.
>
> Therefore, on behalf of our insured, we are denying liability in this matter and our file remains closed.

By letter dated April 1, counsel for the respondent asked Royal if they were able to accept service, and if not would they kindly provide the address for their insured so that he might be served personally. To this inquiry Royal replied by letter dated April 12:

> Again, we are denying liability.....you will have to serve our insured. His last known address is . . .

[68] The characterization given to this correspondence by respondent's counsel is untenable. It would translate to:

> Ignore our denial of liability . . . we want nothing more to do with this claim . . . proceed as you will . . . let us know what judgment you recover and we will send you a cheque.

It does not work that way.

[69] The respondent cannot have it both ways. Either the defendant was still represented by his insurer, or he was on his own. If counsel for the respondent sincerely felt that Riley had been abandoned by his insurer, then he had a duty not to proceed against Riley by default without communicating a meaningful warning. On appeal we were shown correspondence written by respondent's counsel to the chambers judge, dated April 13, 2000, wherein counsel reported, *inter alia*:

> As indicated to you by phone, I was advised by the insurers for the Defendant that all documents should be served on him, personally, and they would not accept service and accordingly, I have followed that direction. The documents were served, Default Judgment was obtained with damages to be assessed, an Order was taken out setting the date for Assessment of Damages and notice has been given.
>
> However, at this point, I have heard nothing futher from either the Defendant or his insurers and therefore I suspect there may be an absence of anyone to respond to this claim on the Assessment.
>
> Accordingly, I don't propose to have the medical expert, Dr. Godine, subpoenaed for next Tuesday and if it turns out that someone shows up to represent the Defendant and wishes to cross-examine him on his report, I will be requesting an adjournment to the next available date to have Dr. Goodine available.

Thus it is clear that respondent's counsel had put his mind to the tactic of requesting an adjournment, should Riley or his representative intend to cross-examine the medical expert. Why, in light of those circumstances, respondent's counsel didn't simply pick up the telephone to call Royal or Riley, is puzzling.

[70] However, it is not appropriate in circumstances such as these, for this Court to determine whether counsel has violated his ethical and professional responsibilities. That is a matter more properly considered, if at all, by the Barristers' Society.

Disposition

[71] To allow the default judgment and order for damages to stand because of technical "defects" would defeat the purpose of the **Civil Procedure Rules** and frustrate the ends of justice. The decision of the chambers judge must be set aside both because of the errors of law I have noted, and because a patent injustice would result if it were left to stand.

[72] Consequently, the decision of the chambers judge is set aside. The order for default judgment issued December 3, 1999, and the order relating to the assessment of damages on default issued May 2, 2000, are struck. The appellant is granted ten days from the issuance of the order of this court to file a defence.

[73] Special consideration should be given to the matter of costs in this case. The ordinary course would be to set aside the default order but award the respondent her "throw away" costs incurred in taking the appellant up to default. However, taking into account the concessions made by the appellant during argument as well as earlier cost awards in these proceedings, such an approach would not be entirely satisfactory. For example, the appellant has accepted the quantum of damages, all inclusive, as fixed by the chambers judge, that being the sum of $13,324.25. That, of course, includes the figure of $1,750.00 costs based on Scale 3. Should Ms. Temple be successful at trial, she would be entitled to that amount of costs plus whatever costs were awarded by the trial judge as being the costs of the trial before him/her. Should, however, the trial judge be inclined to dismiss Ms. Temple's claim or divide liability on some basis, then Ms. Temple ought not to be entitled to all of the original $1,750.00 cost award.

[74] Accordingly, I will give the following directions with respect to costs. In any event of the cause Ms. Temple is awarded $400.00 as "throw away" costs to this point in the proceedings. She is also entitled to keep the $400.00 costs awarded her by the chambers judge following the hearing last summer. No costs are awarded on this appeal. Should Riley be found entirely responsible following trial, Ms. Temple will be entitled to her costs at trial, in addition to the fixed sum of $13,324.25. Should she be unsuccessful, or if there were a split in liability, then the figure of $13,324.25 would be subject to adjustment by the trial judge and the matter of the parties' respective costs at trial left entirely to the judge's discretion.

Saunders, J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.