Date: 20000201
Docket: CA 158237 & 158236

NOVA SCOTIA COURT OF APPEAL

[Cite as: Atlantic Pipeline Resources Inc. v. Widmeyer, 2000 NSCA 22]

Freeman, Roscoe and Cromwell, JJ.A.

BETWEEN:	)	
	)	
ATLANTIC PIPELINE RESOURCES INCORPORATED	)	J. Scott Barnett for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
GARY WIDMEYER	)	Ronald A. Pink, Q.C. and Gail L. Gatchalian for the Respondents
Respondent	)	
	)	
- and -	)	
	)	
ATLANTIC PIPELINE RESOURCES INCORPORATED	)	
	)	
Appellant	)	Appeals Heard: February 1, 2000
- and -	)	
	)	
ROY NORTH ENTERPRISES LIMITED and ROY NORTH	)	Judgment Delivered: February 1, 2000
Respondents	)	

THE COURT: The appeal is allowed with costs payable to the respondents as per oral reasons for judgment of Roscoe, J.A.; Freeman and Cromwell, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

[1] This is an appeal from a decision of Justice Felix A. Cacchione in Chambers dismissing applications by the appellant to set aside default judgments in two cases with similar facts and procedural background.

[2] The respondents Widmeyer and North were employees of the appellant who were discharged on June 21 and June 22, 1999, respectively. In statements of claim dated June 24, 1999, they each alleged that their defined term contracts of employment had been wrongfully terminated. In addition to general damages, special damages, prejudgment interest and costs, the respondent Widmeyer claimed:

> 1. The balance of the contract due and payable from the 22nd day of June, 1999 through to and including the 30th day of September, 1999 less two weeks already paid, plus 2% profit valued at $10,000 for a total amount of liquidated damages in the amount of $32,425.00;
>
> . . .

[3] The respondents North and his company claimed in addition to general and special damages and prejudgment interest:

> 1. The balance of the contract through to and including the 15th day of September, 1999 and lost revenues in the following amounts:
>
> (i) 12 weeks of wages at $ 86,400

(ii)	Subsistence at 12 weeks of	$ 8,568
(iii)	Truck costs and incidentals	$ 4,100
(iv)	Profit lost	$ 35,500
	Total:	$134,068

[4] No defence was filed and default judgments and execution orders were entered on July 8, 1999. The execution order in the North action was for the amount of $134,068 plus costs of $809.00 and in the Widmeyer action the execution order was for the amount of $32,425 plus costs of $550.00.

[5] The application to set aside the default judgments dated August 6, 1999 was heard in Chambers on August 17, 1999. Justice Cacchione, in an oral decision, rendered after hearing the evidence of the president of the appellant and the respondent Widmeyer, referred to the test in **Ives v. Dewar**, [1949] 2 D.L.R. 204 (N.S.C.A.), and concluded that there was no reasonable excuse for the failure to file a defence because there was never any intention to defend the action.

[6] The appellant submits that the Chambers judge erred in law in failing to set aside the default judgments and the execution orders because:

1. having found that there were arguable defences to the claims for damages, the matters should have been remitted for assessment of damages; and,

2. the claims were for unliquidated damages.

[7] Counsel agree that the standard of review in an appeal of this nature is as set out by Justice Matthews in **Frame and Pelley v. Richard, J.** (1996), 157 N.S.R. (2d) 77 at para. 5:

> . . . The burden on an appellant seeking to set aside an interlocutory order such as this is indeed heavy. We should only interfere if wrong principles of law have been applied, or serious substantial injustice, material injury or very great prejudice or patent injustice would result if we did not. See for example, **Exco Corp. v. Nova Scotia Savings & Loan Co. et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331 (C.A.); **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54 (C.A.); **Couglan et al. v. Westminer Canada Holdings Ltd. et al.** (1989), 91 N.S.R. (2d) 214; 233 A.P.R. 214 (C.A.); **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143; 275 A.P.R. 143 (C.A.); and **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.**, (1990), 96 N.S.R. (2d) 82; 253 A.P.R. 82 (T.D.).

[8] In **Marissink v. Kold-Pak Inc. et al.** (1993), 125 N.S.R. (2d) 203, Justice Chipman indicated at para. 15:

> [15] The leading case in this province on the setting aside of a default judgment is **Ives v. Dewar**, [1949] 2 D.L.R. 204, where Parker, J., speaking for this court said at p. 206:
>
> > "Before the interlocutory judgment should have been set aside by the learned County Court judge as Master before whom the first application for that purpose was made, it was necessary for the appellant to show by affidavit, facts which would indicate clearly that he had a good defence to the action on the merits; not necessarily a defence that would succeed at the trial because the action was not being tried on that application; but facts which would at least show beyond question that there was a substantial issue between the parties to be tried. He must also show by affidavit why his defence was not filed and delivered within the time limited by the **Rules**. The reasons thus disclosed are material matters which the judge or court should consider in determining whether the application to set aside the judgment should [be] granted or refused."

[9] **Ives v. Dewar** 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.

[10] The appellant has not provided any authority for the proposition that a finding satisfying the first requirement is sufficient. Here, the conclusion that there was no reasonable excuse for failing to file a defence because there was never any intention of filing a defence, was a finding of fact founded in the Chambers judge's findings of credibility. With respect to findings of credibility, in **Clayton v. Skrobotz and Hall** (1992), 110 N.S.R. (2d) 320 Matthews, J.A. stated at paras. 12 and 13:

> [12] The trial judge had the advantage, not given to us, of seeing and evaluating the witnesses and their testimony.
>
> [13] There was persuasive evidence in support of the various findings of fact and the inference drawn by the trial judge. Our duty is not to retry the case. It is not necessary to recite the many authorities for the proposition that we should not disturb the findings of fact and conclusions drawn by the trial judge unless there was palpable and overriding error on the part of the trial judge. The trial judge must be shown to be plainly wrong.

[11] In this case, it has not been established that the Chambers judge, who heard the evidence on this issue, made any palpable and overriding error which affected his assessment of the facts. Assuming**,** but without deciding, that there is an overriding discretion to set aside a default judgment in the interests of justice or if the traditional test is not met, there is no basis for its exercise here. There is no merit to the first ground of appeal.

[12] The appellant, on the second ground of appeal, submits that even if it was correct

not to set aside the default judgments, the Chambers judge should have amended the judgments so that they were for damages to be assessed since the claims were for unliquidated damages. This issue was not specifically argued before the Chambers judge.

[13] The **Civil Procedure Rules** regarding default judgments (12.01 **et seq**.) were summarized by Justice Flinn in **Pick O'Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.** (1995), 146 N.S.R.(2d) 203 at para. 29:

> . . .
>
> (1) if the claim is for a liquidated demand only, the prothonotary has the jurisdiction to issue an order for judgment for that amount together with costs and interest;
>
> (2) if the claim is for unliquidated damages, the prothonotary's jurisdiction is only to order interlocutory judgment for damages to be assessed;
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> (3) the prothonotary has no jurisdiction, under either rule 12.01 or rule 12.02, to issue an order for judgment with respect to claims for declaratory relief, because such claims are not included in rule 12.01; and
>
> (4) where a claim is for a matter not included in rule 12.01 the plaintiff makes an application to the court for judgment, and the court gives such judgment as is just.

[14] In the **Pick O'Sea** case, beginning at para. 34, Justice Flinn set out the following explanation of the term "liquidated damages" which is helpful in determining the issue in this case:

> [34] Liquidated damages is a pre-estimate of damages, agreed upon in advance by the parties to a contract, as to what damages will be paid in the event of a breach of that contract. See **Black's Law Dictionary** (6th Ed.), at p. 391; **Stroud's Judicial Dictionary** (5th Ed.), vol. 3 at p. 1478; **Canadian Law Dictionary**, Yogis (2nd Ed.), at p. 61**; Principles of Pleading and Practice**, Odgers (22nd Ed.), at p. 46.
>
> . . .

[36] "Liquidated demand" is not defined in the **Rules**.

[37] The present English Rule, with respect to entering judgment in default of defence (order 19, rule 2), is similar to our rule in that it refers to the case where the plaintiff's claim "is for a liquidated demand only". The words liquidated demand, as they are used in that English Rule, are defined in **Precedents of Pleadings**, Bullen & Leake (12th Ed., 1975), at p. 153 as follows:

> "A liquidated demand is a debt or other liquidated sum. It must be a specific sum of money due and payable, and its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic. Otherwise even though it be specified, or quantified, or named as a definite figure that requires investigation beyond mere calculation, it is not a "liquidated demand" but constitutes 'damages'."

[38] Similarly, these words are defined in the **Supreme Court Practice** (1988), vol. 1, p. 35 as follows:

> "A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand,' but constitutes 'damages'."

[39] In **Principles of Pleadings and Practice**, Odgers (supra) at p. 46 the author says the following:

> "When the amount to which the plaintiff is entitled can be ascertained by calculation, or fixed by any scale of charges or other positive data, it is said to be 'liquidated' or made clear . . . But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally unliquidated . . . But if the claim is in its nature a claim for damages at large, it is not in law treated as a 'liquidated demand' even if the plaintiff puts a figure on the damages which he is claiming."

[15] In this case, at the time the actions were commenced, it could not be said that the claims were for specific amounts due and payable, capable of being ascertained as a mere matter of arithmetic. Neither the exact completion date of the pipeline project nor the exact amount of profit earned by the appellant was known at that time. The prothonotary should not have issued default orders for these claims because they were not for liquidated damages.

[16] As in the **Pick O'Sea** case, the proper remedy is to set aside the default judgments and execution orders. However, since the finding of the Chambers judge that there was no reasonable excuse for failure to defend stands, default judgments for damages to be assessed shall be issued. The funds recovered pursuant to the execution orders shall remain the property of the respondents until there has been a determination at the assessment of damages that those amounts were not owed.

[17] The appeal is allowed, but since it is allowed on a question of the prothonotary's jurisdiction, which was not raised before the Chambers judge, the appellant shall pay costs of the appeal to the respondents in the amount of $1,500.00, including disbursements.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.