COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *VM Agritech Limited v. Smith,*
2025 BCCA 248

Date: 20250704
Docket: CA50525

Between:

VM Agritech Limited (formerly MyCo Sciences Limited) and Christopher J. Wightman

Appellants
(Defendants)

And

Alan Gilbert Smith

Respondent
(Plaintiff)

Before: The Honourable Justice MacNaughton
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated February 10, 2025 (*Smith v. VM Agritech Limited*, 2025 BCSC 206, Vancouver Docket S230800).

Oral Reasons for Judgment

Counsel for the Appellants:	M.L. Ross N.D. Galanopoulos (via videoconference)
Counsel for the Respondent:	S. Lin
Place and Date of Hearing:	Vancouver, British Columbia July 4, 2025
Place and Date of Judgment:	Vancouver, British Columbia July 4, 2025

Summary:

The appellants' application for an order extending time to serve a notice of appeal is granted. Applying the well-settled test for such an extension to these circumstances, and given the inconsistent decisions on whether an associate judge has jurisdiction to set aside a default judgment, this Court should consider the issue.

As a condition of granting the extension, the full amount of the judgment below and the two outstanding costs orders must be paid into court.

MACNAUGHTON J.A.:

Nature of Application

[1] The appellants seek an order extending the time to serve their notice of appeal pursuant to s. 32 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Act*].

Background

[2] The underlying cause of action arises in connection with an alleged agreement between the appellant company, VM Agritech Limited ("VM Agritech"), a UK corporation, and Voice Mobility International Inc. ("Voice"), a company based in Vancouver. The appellant, Mr. Wightman, is a director of VM Agritech and resides in the UK. The respondent, Mr. Smith, is a shareholder of Voice and resides in Vancouver.

[3] In 2020, VM Agritech and Voice entered into a series of agreements concerning VM Agritech's acquisition of Voice, with the intention of taking VM Agritech public through Voice's public listing (the "Agreements"). On June 30, 2021, the last of the Agreements terminated without the transaction closing.

[4] On February 1, 2023, the respondent filed the underlying notice of civil claim. The claim sought judgment in the amount of $24,155.91 on the basis that VM Agritech had retained, or caused Voice to retain, legal representation for the Agreements, that VM Agritech had failed to pay the invoices for those services, and that Mr. Smith had paid $12,000 to a law firm in exchange for an assignment of the debt.

[5] The interlocutory proceedings between the two parties are numerous; they are summarized at para. 7 of the reasons for judgment under appeal: *Smith v. VM Agritech Limited*, 2025 BCSC 206. I will not repeat the litigation chronology in these reasons however, suffice it to say, that three judges and two associate judges in the British Columbia Supreme Court have been involved with these parties and they have now appeared four times in this Court before the Registrar, single justices and a division, resulting in six reported decisions overall (2023 BCSC 729;

2024 BCCA 39; 2024 BCCA 166; 2024 BCSC 1017; 2024 BCCA 360; and 2025 BCSC 206).

[6] I will set out below the proceedings relevant to this application.

The Default Judgment

[7] On February 6, 2024, Associate Judge Muir granted default judgment in favour of the respondent in the amount of $24,155.91 together with $1,576.60 in pre-judgment interest: *Smith v. VM Agritech Limited*, 2024 BCSC 1017.

BCSC Application

[8] On March 6, 2024, the appellants appeared before Muir A.J. on an application to set aside her earlier default judgment. Associate Judge Muir exercised her discretion and declined to do so: *Smith v. VM Agritech Limited*, 2024 BCSC 1017.

BCSC Appeal

[9] On March 12, 2025, the appellants appealed Muir A.J.'s order declining to set aside her order for default judgment. Justice Fitzpatrick dismissed the appeal: 2025 BCSC 206. She rejected the appellants' argument that associate judges do not have jurisdiction to set aside a default judgment, finding that s. 11.3(2) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 [*SC Act*] and Practice Direction (PD)–50 confer the power on an associate judge to set aside a default judgment. She also highlighted that Rule 3-8(11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SC Rules*] allows a "court" to set aside default judgments, and the *SC Rules* provide that "court" includes an associate judge if they have jurisdiction.

[10] On March 12, 2025, the appellants filed a notice of appeal seeking to set aside Fitzpatrick J.'s order dismissing their appeal. It is the service of this notice that is at issue on this application; the respondent challenged the appellants' attempt to serve the notice via email, which is not a permitted method of service as set out in Rule 4(1) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*CA Rules*]. After receiving the notice of appeal by email, the respondent indicated that service by email was not permitted. The appellants filed the notice in accordance the *CA Rules*

eight days later, on March 20, 2025. Despite having received email service, the respondent upheld their challenge to service, requiring the appellants to file this application for an extension of time to serve the notice on April 7, 2025. The respondent highlights that this application is the "fifth chapter in this two-year saga over a small debt claim of $24,155.91".

[11] This application was set to be heard on May 30, 2025, but was unable to be heard due to the addition of an urgent application in chambers on the same day. The parties consented to adjourn the matter to today's date, July 4, 2025.

Positions of the Parties

[12] The respondent raised a preliminary objection to Mr. Ross appearing as counsel relying on his own affidavit. I agree with the respondent that doing so is often inappropriate and not permitted.

[13] In the circumstances of this case, as the error with respect to the manner of service was counsel's and the affidavit set out the chronology, I permitted counsel to speak to the application. I struck paras. 10–17 of the affidavit as they contained argument. I only considered those paragraphs of the affidavit necessary to understand the history of counsel's dealings.

[14] In their memorandum of argument filed on April 8, 2025, the appellants submit that their counsel served the respondent with a copy of the notice of appeal, filed electronically the same day (March 12, 2025), believing this form of service to be permissible under Rule 4(1)(b). Respondent's counsel responded on March 13, 2025 with a letter challenging service of the notice through email; after confirmation from the registry, appellants' counsel properly served the notice to the office of respondent's counsel on March 20, 2025.

[15] The appellants submit that, because the respondent would not forego their challenge of service, the appellants were forced to apply for an extension of time. On March 28, 2025, the appellants emailed to advise the respondent they aimed to

file and serve an application for extension of time to serve the notice of appeal on April 7, 2025 (which they have done).

[16] The respondent contests the application, taking the position that the appeal has no merit, the appellants' intentions to bring the appeal are "seriously in question" and the respondent would be prejudiced by an extension, given this two-year litigation over a small debt claim of $24,155.91, plus interests to date. They submit it is not in the interests of justice to grant an extension of time.

Legal Framework

[17] Rule 6(1) of the *CA Rules* governs the process for commencing an appeal:

> How to appeal
>
> 6 (1) A person who wishes to appeal an order must do the following within the time limit set out in subrule (2):
>
> (a) file a notice of appeal in Form 1 that names as a respondent each person
>
> (i) who was a party to the proceedings in the court appealed from, and
>
> (ii) whose interests could be affected by the relief sought in the notice;
>
> (b) serve, in accordance with Rule 4 (1) [permitted methods of service], on each respondent named in the notice of appeal a copy of the filed notice of appeal.
>
> (2) The time limit for filing and serving a notice of appeal of an order is the following:
>
> (a) unless paragraph (b) applies, not more than 30 days after the order is pronounced

[18] Rule 4(1) sets out the methods for service:

> Permitted methods of service
>
> 4 (1) A notice of appeal must be served on a respondent by
>
> (a) serving the respondent personally,
>
> (b) serving the respondent's lawyer of record in the court appealed from, or
>
> (c) serving the respondent in any other manner directed by a justice or the registrar.

> (2) A document, other than a notice of appeal, may be served on a party by
>
> (a) serving the party personally,
>
> (b) serving the party's lawyer of record on an appeal,
>
> (c) if the party has filed a document containing an address for service,
>
> (i) delivering the document to the party's address for service, or
>
> (ii) sending the document to the party's email address for service, if any, or
>
> (d) serving the party in any other manner directed by a justice or the registrar.

[19] Section 32 of the *Act* gives a justice of this Court power to dispense with rules and vary time limits:

> Dispensing with rules and varying time limits
>
> 32 (1) A justice may dispense with a requirement of the rules.
>
> (2) A justice may extend or shorten a time limit, provided in this Act or the rules, for doing an act, including the time limit for commencing an appeal or application for leave to appeal.
>
> (3) Subsection (2) applies to an extension of a time limit even if the time limit for doing an act expires before
>
> (a) a person applies for the extension, or
>
> (b) the justice orders the extension.

[20] The well-known factors to be applied in determining whether to grant an extension of time are set out in *Davies v. CIBC* (1987), 15 B.C.L.R. (2d) 256 at 259-260, 1987 CanLII 2608(C.A.):

1. Does the appellant have a *bona fide* intention to continue prosecuting the appeal?
2. When was the respondent informed of the intention?
3. Would the respondent be unduly prejudiced by an extension of time?
4. Is there merit in the appeal?
5. Is it in the interests of justice that an extension be granted?

[21] The overriding question is whether it is in the interests of justice to grant the extension: *Davies* at 260; *First Majestic Silver Corp. v. Santos*, 2014 BCCA 214 at para. 57, leave to appeal to SCC ref'd, 35962 (27 November 2014).

[22] There is a greater willingness to extend the time for service than to extend the time for filing the notice of appeal: *Davies* at 259.

[23] The burden is on the applicant to establish that the interests of justice favour an extension*: Rapton v. British Columbia (Motor Vehicles)*, 2011 BCCA 71 at para. 19 (Chambers).

[24] The application will be granted where there has been a short delay due to counsel's error. In *Davies*, counsel failed to serve the notices of appeal within the required time period. The Court opined, at 259: "The tendency now is to grant extensions of time where the delay is short and where the delay is due to an error on the part of the solicitor."

[25] Delay caused by counsel combined with a demonstrable intention to pursue the appeal is generally sufficient to find that it is in the interests of justice to extend time: *Rowan v. Dunwoody & Company*, 1999 BCCA 755 at para. 21 (Chambers).

Analysis

[26] The order under appeal was pronounced on February 10, 2025. The 30-day deadline for the appellants to file and serve their notice of appeal under Rule 6(2)(a) was March 12, 2025. It is important to highlight that on this application, the appellants are seeking an extension for a step they have already completed; they properly served the notice of appeal on March 20, 2025, eight days past the time limit.

Do the appellants have a *bona fide* intention to continue prosecuting the appeal?

[27] The appellants filed their notice of appeal within the proper time set out in Rule 6(2)(a), which demonstrates a *bona fide* intention to appeal. They brought this

application for an extension of time promptly, demonstrating an intention to continue to prosecute it.

When was the respondent informed of the intention?

[28] The respondent was informed of the appellants' intention to appeal on March 12, 2025, when they received the appellants' emailed notice of appeal, to which they responded on March 13, 2025.

Would the respondent be unduly prejudiced by an extension of time?

[29] The respondent would not be unduly prejudiced in circumstances where the extension sought is only for eight days and the respondent was made aware of the appeal on the date the notice was filed. Further, as the appellants point out, they are bound by the timelines for filing further materials, which are determined by the date of filing the notice of appeal; in that respect, the extension will not cause a delay in filing any subsequent materials.

Is there merit in the appeal?

[30] The appellants seek to appeal Fitzpatrick J.'s order on the basis that Fitzpatrick J. erred by concluding that Muir A.J.:

a. was acting within her jurisdiction when she declined to set aside the default judgment, and

b. had not misapprehended the evidence in finding that Associate Judge Hughes had previously made determinations about when the response period for service of a notice of civil claim began to run.

[31] On the first ground, Fitzpatrick J.'s reasons at paras. 20–25 demonstrate that she fully considered the basis on which an associate judge has jurisdiction to set aside a default judgment and properly grounded her reasons in the *SC Act* and the Practice Direction.

[32] At paras. 30–36 of her reasons, Fitzpatrick J. said that, although this Court had concluded in in *Euro Ceramics Tile Ltd. v. T & C Ceramic Tile Contractors* (1991), 60 B.C.L.R. (2d) 86, 1991 CanLII (B.C.C.A.) that British Columbia masters (now associate judges) did not have jurisdiction to refuse to set aside a default judgement as it was a final order, the relevance of *Euro Ceramics* was "very much in doubt." She gave a number of reasons for her conclusion:

1. *Euro Ceramics* was decided without the benefit of counsel's argument.

2. Section 96 *Charter* jurisprudence had developed considerably since *Euro Ceramics* was decided, including in the Supreme Court of Canada's decision in *Reference re Code of Civil Procedure (Que.)*, *Art. 35*, 2021 SCC 27.

3. Since *Euro Ceramics* was decided, an appeal from an associate judge is to a justice of the BC Supreme Court without leave under Rule 23-6 and deference is not owed to an associate judge's decision on questions of law: at paras. 36–37.

4. A number of cases decided by associate judges and justices went both ways on the issue of a master's jurisdiction. She wrote:

   > [41] …the above state of affairs, including the conflicting decision in this Court as to the status of *Euro Ceramics*, is sorely in need of some clarification.

5. At paras. 44–51, Fitzpatrick J. considers a number of Court of Appeal decisions concerning whether an order is final or interlocutory for the purposes of determining whether leave to appeal was required. At para. 52, she described the state of the law as "confusing and contradictory" and, at paras. 53–56 explains her view that the confusion was addressed by the amendments enacted in s. 13(2)(a) of the *Act*.

[33] At para. 57, Fitzpatrick J. considered the jurisdiction of an associate judge afresh. In the balance of her reasons, she considers earlier approaches taken in the Court of Appeal to determining whether leave to appeal was required.
Justice Fitzpatrick concludes that a decision to set aside a default judgment, or a

decision declining to do so, is an interlocutory judgment within the jurisdiction of an associate judge and that, as a result, Muir A.J. had jurisdiction to address the appellants' application to set aside the default judgment and dismiss it. She wrote:

> [76] Ultimately, when addressing an application to set aside a default judgment granted by an associate judge, an associate judge is exercising jurisdiction conferred by the SC Act and the Rules, not any inherent jurisdiction: *Sood v. Hans*, 2023 BCCA 138 at paras. 30-33.
>
> …
>
> [78] I am satisfied that no constitutional issues arise in respect of s. 96. Allowing Associate Judges to address these types of applications (leaving aside where a default judgment is granted by a justice of this Court) does not offend this Court's core jurisdiction under s. 96.
>
> …
>
> [80] In that vein, I do not consider that *Euro Ceramics* validly states the law at this time.

[34] Having reviewed Fitzpatrick J.'s reasons, this first ground of appeal does not seem likely to succeed.

[35] On the second ground, Fitzpatrick J.'s reasons demonstrate that she fully reviewed the parties' positions and Muir A.J.'s determination of Hughes A.J.'s finding regarding the timelines for the filing of a response to the notice of civil claim: at paras. 86–105. She agreed with the respondent that Muir A.J. "implicitly accepted that the time for service had expired by February 6, 2024" and that "it was open to [the appellants] to seek clarification on the service issue, if one existed, before Giaschi J." but the appellants did not do so: at paras. 91, 96.

[36] This second ground of appeal also does not seem likely to succeed.

[37] Nonetheless, the threshold question for the merits factor is whether the appeal is "doomed to fail" or whether "it can be said with confidence that the appeal has no merit": *Stewart v. Postnikoff*, 2014 BCCA 292 at para. 6 (Chambers). Given the short delay of eight days, the threshold for the merits is low: *Fred Walls & Son Holdings Ltd. (Re)*, 2003 BCCA 132 (Chambers). I conclude that the appeal is not "doomed to fail" and meets the very low threshold for merits which reflects the short delay.

Is it in the interests of justice that an extension be granted?

[38] I accept that the extensive litigation between these parties over a small claims debt is disproportional and has used a significant amount of scarce judicial resources. I also accept that there were steps available to the appellants that they did not take that could have avoided some of the costs and time consumed. For example, the appellants could have:

- Sought clarification from Justice Giaschi as to the deadline for filing their response to civil claim;
- Avoided a default judgment by seeking a stay of Justice Giaschi's order;
- Appeared before Muir A.J. on the application seeking default judgment; and
- On being told by counsel for the respondent that email service was not effective under the *CA Rules*, immediately served in accordance with those Rules.

[39] However, considering all of the above factors applicable to granting an extension for leave to appeal—in particular:

- the appellants' clear intention to appeal;
- the respondent's awareness of that intention on the filing deadline;
- the short delay;
- the fact that service has already occurred;
- the other filing deadlines in this appeal have not been affected; and
- that this Court's decision in *Euro Ceramics* was revisited by Fitzpatrick J. in her reasons,

it is my view that, in the circumstances of this case, it is in the interests of justice to grant the extension for the filing of leave to appeal. Given the lack of clarity and the

number of cases inconsistently decided on whether an associate judge has jurisdiction to set aside a default judgment, this Court should consider Fitzpatrick J.'s careful and substantial reasons for not following *Euro Ceramics*.

[40] I am persuaded however that under s. 30 of the *Act*, it is appropriate to order, as a condition of granting the extension, that the full amount of the judgment ($24,155.91) and the two outstanding costs orders, made payable forthwith by the court below ($1,376.61 and $1,493.61), be paid into court.

"The Honourable Justice MacNaughton"