

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1163499 B.C. Ltd. v. Yao*,
2025 BCCA 443

Date: 20251212
Docket: CA50763

Between:

1163499 B.C. Ltd.

Appellant
(Plaintiff)

And

Dong Sheng Yao

Respondent
(Defendant)

Before: The Honourable Justice Abrioux
The Honourable Justice Gomery
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated May 28,
2025 (*1163499 B.C. Ltd. v. Zhang*, Vancouver Registry S226633).

Counsel for the Appellant:

I. Ponomarenko

Counsel for the Respondent:

Z. Yang

Place and Date of Hearing:

Vancouver, British Columbia
November 18, 2025

Place and Date of Judgment:

Vancouver, British Columbia
December 12, 2025

Written Reasons by:

The Honourable Justice Gomery

Concurred in by:

The Honourable Mr. Justice Abrioux
The Honourable Justice Warren

Summary:

The appellant challenges an order setting aside a default judgment and a subsequent damages assessment made under R. 3-8(13) (the “Set Aside Order”). The appellant denies it had notice of the application to set aside the orders, argues that the judge applied the wrong legal test, and submits that application of the correct test necessitates the conclusion that the Set Aside Order was improperly made. Held: Appeal dismissed. As a preliminary matter, the Set Aside Order is one that can be appealed under s. 13(1)(a) of the Court of Appeal Act, even though no application for reconsideration was brought. Although this Court has the discretion to decline to hear the appeal until such an application has been brought and decided, in this case the circumstances weigh in favour of hearing the appeal. The appellant was properly served with the application materials; actual notice was not required. Further, the judge did not err in deciding to hear the application in the appellant’s absence. The application which resulted in the Set Aside Order was rightly decided under the Miracle Feeds test. The language and scheme of the Rules favour this interpretation, and authorities that hold otherwise are not binding. Although the judge made a palpable error on a factual point in applying the Miracle Feeds test, it was not overriding and does not warrant intervention.

Reasons for Judgment of the Honourable Justice Gomery:**Overview**

[1] The appellant commenced an action against Dong Sheng Yao. It obtained a default judgment for damages to be assessed, and a further order assessing the damages at \$150,000. Mr. Yao applied to set aside both orders. The application was heard in the appellant’s absence and allowed by a judge in chambers. The appellant maintains that the chambers judge erred.

[2] For ease of reference, I will refer to the order under appeal as the “Set Aside Order”.

[3] In its notice of civil claim filed in August 2022, the appellant pleads that it agreed to an investment proposed by Mr. Yao and a second individual, Ms. Zhang, in early 2022. It alleges that it paid them \$150,000: \$50,000 in two cash payments to Mr. Yao in February and March 2022; and \$100,000 by bank transfer to the two of them a few days later in March. It says that it was induced to make the payments by fraudulent representations and that it is the victim of a civil conspiracy.

[4] Mr. Yao has given evidence in an affidavit. He describes himself as a feng shui consultant from China with a limited understanding of English. He affirms that he was introduced to Ms. Zhang, a woman named Lily, whose legal name he does not know, and William Li, who is a principal of the appellant, and that the four of them had tea together at a restaurant in August 2021. He says that in 2022 he was drawn into facilitating a dispute between Ms. Zhang and Mr. Li concerning an investment. He denies that he ever received funds from Mr. Li, the plaintiff, or Ms. Zhang, or profited or benefited in any way from the transactions described in the notice of civil claim. Mr. Yao's affidavit attaches documents that appear to substantiate his account of events, at least in part, and contradict facts pleaded by the appellant.

[5] In August 2022, Mr. Li served Mr. Yao with the notice of civil claim. In what followed, each party in turn failed to respond to legal process. First, Mr. Yao failed to file a response to civil claim. Then, having obtained default judgment and an order assessing damages at \$150,000, the appellant did not attend the hearing when Mr. Yao applied to set aside the default judgment and the assessment of damages. The chambers judge proceeded in the appellant's absence and made the Set Aside Order.

[6] The appellant could have applied to the chambers judge to reconsider the Set Aside Order made in its absence. Supreme Court Civil Rule 22-1(3) specifically contemplates such an application. It chose instead to appeal. This was a deliberate decision and, as a consequence, the appellant has not placed before this Court its own sworn version of events in answer to that provided by Mr. Yao. In its notice of appeal and its factum, it seeks an order reinstating the \$150,000 judgment that was set aside.

[7] The appellant maintains that the judge erred in setting aside the orders it had obtained for three reasons: first, it denies that it had notice of the application to set aside the orders; second, it contends that the chambers judge applied the wrong

legal test; and third, it submits that application of the correct test leads inevitably to the conclusion that the Set Aside Order should not have been made.

[8] Mr. Yao responds that the application to set aside the orders was properly served in accordance with the rules, the chambers judge applied the correct test, and the Set Aside order was properly made.

[9] There is an issue as to the legal test that applies where an applicant seeks to set aside a default judgment after damages have been assessed. It is of some significance to the practice. The controversy is reviewed in *National Home Warranty Group v. Red Rose Appliances & Plumbing*, 2018 BCSC 234 [*National Home Warranty*]. At issue is whether the assessment of damages forecloses an application to set aside the default judgment under R. 3-8(11) and the assessment of damages under R. 22-1(3). A common test under both rules is well established and was articulated in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.), [1979] B.C.J. No. 1965. If recourse to these rules is unavailable, the court retains an inherent jurisdiction to set aside a judgment to prevent a miscarriage of justice, but the test is substantially stricter. It is common ground that the chambers judge applied the *Miracle Feeds* test in this case. The appellant says that was in error.

[10] In light of the appellant's decision to appeal rather than seek reconsideration, and in advance of the hearing, the Court asked the parties to address whether the appeal is properly brought. The parties agree that it is, though they differ in their legal analysis.

[11] For the reasons that follow, I conclude that:

- a) this Court has jurisdiction to hear the appeal, notwithstanding the appellant's failure to apply to the chambers judge for reconsideration;
- b) this Court could exercise a discretion not to hear the appeal, in the circumstances;

- c) I would nevertheless exercise our discretion to hear the appeal;
- d) the appeal should be dismissed because:
 - i. the application to set aside the default judgment and assessment of damages was properly served in accordance with the *Supreme Court Civil Rules*;
 - ii. the application is governed by R. 3-8(11) and the *Miracle Feeds* test; and
 - iii. while the judge erred in some respects in her appreciation of the facts, she did not commit an overriding and palpable error in applying the *Miracle Feeds* test.

Preliminary issues: is the appeal properly brought?

[12] In a memorandum to counsel prior to the hearing, the Court identified three preliminary issues:

1. Is the Set Aside Order one that can be appealed under s. 13(1)(a) of the *Court of Appeal Act*, S.B.C. 2021, c. 6, where no application was brought to have it reconsidered pursuant to R. 22-1(3)?
2. If so, does the Court have the discretion to decline to hear the appeal until an application for reconsideration is made to, and decided by, the Supreme Court of British Columbia pursuant to R. 22-1(3)?
3. If the Court does have the discretion to hear the appeal, how should the discretion be exercised in the circumstances of this case?

1. Is the Set Aside Order one that can be appealed under s. 13(1)(a) of the *Court of Appeal Act*, where no application was brought to have it reconsidered pursuant to R. 22-1(3)?

[13] This Court has only the jurisdiction conferred on it by statute. Section 13(1)(a) of the *Court of Appeal Act* confers appellate jurisdiction in respect of an order of the

Supreme Court of British Columbia. “Order” is defined in s. 1(1) as including a judgment, decree, or opinion, advice, direction, determination, decision or declaration that is specifically authorized or required under an enactment to be given or made.

[14] Despite the apparent breadth of this definition, there are rulings and directions sometimes termed orders of the Supreme Court of British Columbia that are not “orders” as defined in s. 13(1)(a), that is, orders that can be appealed: *Mead v. Mead*, 2022 BCCA 161 at paras. 18–21. What is included are orders (however they may be described in the Supreme Court’s record) “which make an adjudication upon some point arising during the course of a cause of action, or an adjudication upon the merits of the action or proceedings”: *R. v. United Fisherman and Allied Workers Union*, 63 DLR (2d) 356, 1967 CanLII 555 (B.C.C.A.); *Grewal v. Grewal*, 2017 BCCA 261 at para. 20. What is excluded are orders (however described) that do not determine procedural or substantive rights or make declarations of law: *First Majestic Silver Corp. v. Davila Santos*, 2015 BCCA 452 at para. 39; *Grewal* at para. 21. Examples of excluded orders include procedural and mid-trial rulings and directions dealing with procedural or administrative matters such as the admissibility of evidence, ordering of witnesses, and so on.

[15] At first sight, therefore, the Set Aside Order is an appealable order within the scope of s. 13(1)(a) because it determines a point of substance in the litigation, namely, whether the appellant has the status of a judgment creditor or must prove its case against Mr. Yao to obtain that status. Does it make a difference that it has not brought an application to reconsider under R. 22-1(3)?

[16] Rules 22-1(2) and (3) provide as follows:

(2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.

(3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

[17] By its terms, rather than expressly conferring a right to reconsideration, Rule 22-1(3) limits the Court's power to reconsider an order made in chambers where a party failed to attend. The limitation is that the party who did not attend must satisfy the court that they are not guilty of wilful delay or default. They must address both why they failed to attend and address delay in bringing the application.

[18] The reason the rule is framed this way is that, at common law, an order made in the absence of an affected party is presumptively susceptible to challenge by the affected party. The effect of the rule is that an affected party who had notice of the application giving rise to the order cannot wilfully choose not to come to court and then later complain. If they learn of the order after the fact, they cannot sit indefinitely on their complaint that it should not have been made.

[19] Judges in this Court have commented that, where a party complains of an order made in chambers in their absence, they should apply for reconsideration as contemplated in Rule 22-1(3) rather than filing a notice of appeal. In *Chinese Social Development Society v. The Vancouver Chinese Public School*, 2021 BCCA 100 (Chambers) at para. 12, Fenlon J.A. described reconsideration as “the correct remedy”, as opposed to an application for leave to appeal (required, in that case, because the order was a limited appeal order). She stated:

When parties miss a chambers hearing in the Supreme Court and the matter is decided in their absence, the correct remedy is to bring an application under Rule 22–1(3) (of the *Supreme Court Civil Rules*) to have the same court reconsider the order. On that application, the Supreme Court can receive evidence about the failure to appear and whether the School was or was not guilty of wilful delay or default as set out in Rule 22–1(3). The Court of Appeal, in short, is the wrong place for reconsideration. Once the court below deals with the application to reconsider, an appeal would lie as of right, and no leave would be necessary.

[20] Justice Fenlon's comments were cited with approval by Griffin J.A. in *Green Arms v. Shahabaldin*, 2023 BCCA 340 (Chambers) at para. 39 and by Bennett J.A. in *van Melle v. Mohammed*, 2021 BCCA 217 at para. 49.

[21] I agree that applying for reconsideration is usually the best approach. It is quicker and less procedurally cumbersome. As Fenlon J.A. noted, reconsideration generates a more complete factual record if the matter must indeed eventually be

considered in this Court. However, I do not think that these considerations go to the question of this Court's jurisdiction to hear an appeal where no application for reconsideration was brought. The extent of this Court's jurisdiction to hear an appeal is not determined by procedural considerations. Bringing an appeal is a matter of right.

[22] Even an affected party who is guilty of wilful default, say by deliberately deciding not to attend the hearing in the court below, and who is thereby barred from applying for reconsideration by Rule 22-1(3), is still entitled to test the lawfulness of the resulting order in this Court. It would not make sense that this Court's jurisdiction to hear the appeal would be contingent upon their making an application for reconsideration where that application is not permitted by the rule. Nor would it make sense to require an inquiry, in this Court, into whether an application to reconsider would succeed if one were brought.

[23] I conclude that this Court has jurisdiction to hear an appeal of the Set Aside Order.

2. If so, does the Court have the discretion to decline to hear the appeal until an application for reconsideration is made to, and decided by, the Supreme Court of British Columbia pursuant to R. 22-1(3)?

[24] In my view, this Court could, in the exercise of its discretion, decline to hear an appeal until an application for reconsideration is made to and decided by the lower court. As noted above, reconsideration is usually the best approach. The object of civil procedure is the just, speedy, and inexpensive determination of every dispute on its merits, and it is open to this Court to consider whether how this objective is most likely to be achieved, and to decline to hear an appeal that would not serve that end.

3. If the Court does have the discretion to hear the appeal, how should the discretion be exercised in the circumstances of this case?

[25] I would exercise the Court's discretion to hear the appeal in this case. The arguments raise a significant legal issue as to the test to be applied on an application to set aside a default judgment after damages have been assessed. The

issue is ripe for determination in this Court. It will benefit the legal profession and the public to have it decided. The parties have prepared for and argued the appeal on its merits. They both ask us to decide the appeal on the merits.

Issues on the merits

[26] Turning to the merits and having regard to the parties' arguments, there are three issues:

1. Must the Set Aside Order be set aside because it was made without notice to the appellant?
2. Is the application governed by the *Miracle Feeds* test?
3. If so, did the judge err in the application of the *Miracle Feeds* test?

Analysis

1. Must the Set Aside Order be set aside because it was made without notice to the appellant?

[27] This issue engages both a question of law—whether the order must be set aside in the absence of actual notice to the appellant—and consideration of the discretion exercised by the judge under R. 22-1(2) in deciding to proceed with the application in the appellant's absence. The standard of review for the first question is correctness: this Court comes to its own conclusion as to the correct answer, without an obligation of deference to the reasoning of the chambers judge. The standard of review for the discretionary aspect is deferential. This Court will only intervene if error is demonstrated, such as by taking irrelevant considerations into account, giving no or insufficient weight to relevant considerations, or coming to a decision that is so clearly wrong as to amount to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27; *R. v. Hoshal*, 2018 ONCA 914 at para. 28. In my view, the appellant fails on both aspects.

[28] The appellant concedes that the application for the Set Aside Order was served in accordance with the *Supreme Court Civil Rules*. This was ordinary service

by mail as expressly permitted by R. 4-2(2)(b) in the case of an interlocutory notice of application. The appellant maintains that it did not receive the notice of application, relying on an affidavit sworn in this Court which was admitted by consent as fresh evidence on the appeal. Of course, the fact that the envelope containing the notice of application was apparently lost in the mail was not known to Mr. Yao or the chambers judge.

[29] The appellant submits that service pursuant to the rules makes no difference if there was not actual notice. It offers no authority for this proposition of law but suggests that it follows from first principles, because service requirements exist for the purpose of ensuring that notice is received. The argument is mistaken because service requirements serve multiple purposes. The relaxed rules for ordinary service under R. 4-2 (as opposed to personal service under R. 4-3) balance an application respondent's need for notice against the applicant's need to be able to bring its application without undue difficulty. The overall objective is to facilitate the bringing of applications in a way that is fair to both applicant and respondent. Thus, every party of record provides an address for service and all that is required for ordinary service is that materials be sent to that address, even by ordinary mail. Actual notice is not required.

[30] Rules 22-2 and 22-3 are part of the scheme, because they provide for the eventuality that ordinary service did not achieve actual notice to the application respondent, by addressing the respondent's ability to apply to set aside the order made in its absence.

[31] The question is whether the judge erred in proceeding to hear an application that had been properly served, when the appellant failed to attend in chambers for the hearing of the application. The decision was discretionary. Unfortunately, the record does not provide a complete account of what occurred.

[32] The appellant provided an address for service in its notice of civil claim. While the notice of civil claim appears to have been drafted by a lawyer, it is signed by Mr. Li on behalf of the appellant, and no lawyer is named. The address for service

remained the same when Mr. Yao's counsel prepared the application for the Set Aside Order.

[33] Mr. Yao resides in Toronto and it seems that he visits Vancouver from time to time. He was served by Mr. Li in Vancouver with a sealed envelope containing the notice of civil claim on August 18, 2022. He opened the envelope on his return to Toronto. He consulted with Ms. Zhang and with lawyers in Toronto and took no steps to deal with the matter himself until February 2025.

[34] The appellant obtained default judgment for damages to be assessed on December 7, 2023. It was under no legal obligation to inform Mr. Yao of the default judgment and did not do so. He was unaware of it.

[35] On February 14, 2025, the appellant filed a notice of application scheduling a hearing seeking an assessment of damages on February 28. As with the notice of civil claim, the notice of application was signed by Mr. Li and did not identify a lawyer acting for the appellant. The appellant mailed the notice of application to Mr. Yao by registered mail.

[36] Mr. Yao received the registered letter on February 22, 2025 and became aware of the pending application. He contacted his Toronto lawyer, who retained a Vancouver lawyer, who conducted a registry search. On February 26, on receipt of a report from the Vancouver lawyer, Mr. Yao flew to Vancouver for the hearing on February 28.

[37] The application on February 28, 2025 was heard by Sharma J. The appellant retained Ms. Ponomarenko as counsel for the application. Mr. Yao attended and addressed the Court through an interpreter. The hearing appears to have been brief and Sharma J. summarily allowed the application. Her reasons consist of two paragraphs. She observed that Mr. Yao denied the allegations in the notice of civil claim but had not filed an application to set aside the default judgment. She was of the view that there was no reason to delay the matter.

[38] Mr. Yao retained his present counsel, Mr. Yang, who prepared and served the notice of application for the Set Aside Order. It was filed on May 7, 2025. The application was scheduled for hearing in chambers on May 28, 2025. Mr. Yang says that he attempted to telephone the appellant on May 23 at a telephone number given in the notice of civil claim, but there was no reply. He does not recall whether the call went through to an answering machine or, if it did, whether he left a message.

[39] Mr. Yang did not attempt to contact Ms. Ponomarenko. He says that he was unaware of her involvement in the matter. This is surprising but not wholly implausible. While Mr. Yao had met and spoken with Ms. Ponomarenko through an interpreter at and after the hearing before Sharma J., he could not be expected to appreciate the significance of her involvement, or to have made a note of her name to give to his lawyer when one was retained. Notably, Mr. Yang obtained a copy of Sharma J.'s order, in which Ms. Ponomarenko is named, prior to filing the notice of application. It seems that he overlooked her involvement. Ms. Ponomarenko had not filed a notice of appointment of lawyer and was not named in other documentation.

[40] This brings us to the hearing before the chambers judge. We do not have a transcript of the proceeding. We do not know what was said to the judge about service, except that she was provided with an affidavit establishing that ordinary service had been effected. We do not know what reasons the judge gave, if any, at the outset, when she decided to hear the application in the appellant's absence.

[41] All this is far from satisfactory in several respects. In the words of R. 22-1(2), the judge had to decide whether, considering the nature of the chambers proceeding, it would further the object of the *Supreme Court Civil Rules* to proceed with the hearing.

[42] Had the judge been informed or noticed from the materials that the appellant had been represented by a lawyer at the hearing before Sharma J., the practice would have been to require that efforts be made to contact Ms. Ponomarenko before proceeding with the application, but that did not occur. I infer that the judge was not aware of Ms. Ponomarenko's apparent involvement on the file. Noticing

Ms. Ponomarenko's involvement was much more the responsibility of Mr. Yang than the judge, because he was able to take the time he needed to properly prepare the materials, while the judge was confronted with the materials while addressing one application among many others heard in chambers that day. The judge made her decision without information she should have been given, though the lapse was not intentional.

[43] Given its argument that the judge erred in proceeding with the application, it was incumbent on the appellant to place before the Court materials necessary to a proper evaluation of the judge's decision. The appellant could have obtained a transcript of the hearing before the chambers judge, but did not.

[44] The entire issue could have been avoided had Ms. Ponomarenko filed a notice of appointment of lawyer pursuant to R. 22-6(1), in which case her address would have become the appellant's address for service. Presumably the appellant failed to instruct her in this regard.

[45] Taking all this into account, I am not persuaded that the judge erred in proceeding to hear the application for the Set Aside Order. Given the information made known to the judge, it was open to her to proceed to hear the application. Another judge might have dug deeper into the file, seeking to understand why a party who had obtained a default judgment and an order assessing damages at \$150,000 was not in attendance, and thereby unearthed Ms. Ponomarenko's name and a realistic alternative to proceeding. Without knowing what took place at the hearing, in the circumstances described above, I do not see that this judge was bound to investigate and come to that conclusion.

2. Is the application governed by the *Miracle Feeds* test?

[46] This issue presents a question of law and the standard of review is correctness.

[47] In my view, an analysis that begins with the language and scheme of the Rules is uncomplicated and favours the application of the *Miracle Feeds* test. The

only real question is whether consideration of *0754306 B.C. Ltd. v. Bains*, 2010 BCCA 244 (Chambers) [*Bains*], *Bassi v. Bassi*, 2013 BCSC 284, *National Home Warranty*, and *Ibrahim v. Hashemi*, 2024 BCCA 383 at paras. 17–18, dictate a different conclusion, as contended by the appellant. In my opinion, so far as the question at hand is concerned, *Bains*, *Bassi* and *National Home Warranty* are not good law. *Ibrahim* does not decide the point.

Language and scheme of the rules

[48] Rule 3-8 is headed “Default Judgment”. It sets out the procedural options where a defendant fails to file a response to civil claim within the time allowed following service of the notice of civil claim. Where the claim stated in the notice of civil claim is for a specified or ascertainable amount, the plaintiff may obtain a default judgment in the amount claimed: R. 3-8(3). If the amount is unspecified or unascertainable without hearing evidence, the plaintiff is limited to obtaining a default judgment in Form 8 for damages to be assessed: R. 3-8(5). In either case, it is open to the defendant to apply to set aside the default judgment pursuant to Rule 3-8(11), which states:

(11) The court may set aside or vary any judgment granted under this rule.

[49] The test on an application under R. 3-8(11) is the *Miracle Feeds* test. It requires the applicant to show through affidavit material:

- a) that it did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff’s claim;
- b) that it made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being brought; and
- c) that it has a meritorious defence or at least a defence worthy of investigation.

Andrews v. Clay, 2018 BCCA 50 at para. 28.

[50] While *Miracle Feeds* describes these as cumulative requirements, later jurisprudence establishes them as a non-exhaustive list of considerations or factors serving as indicators of whether it is in the interests of justice to set aside the default judgment: *Andrews* at para. 29.

[51] Where the plaintiff has obtained judgment for damages to be assessed, it may apply to a judge to have the damages assessed either at trial or summarily on affidavit evidence: R. 3-8(12) and (13). Having failed to file a response to civil claim, the defendant is not a party of record (as defined in R. 1-1(1)) and need not be served with the notice of trial or notice of application for summary assessment.

[52] Like a default judgment in an ascertained amount issued under subrule (3) or a default judgment for damages to be assessed under subrule (5), an order assessing damages under subrules (12) or (13) is an order granted under R. 3-8. On its face, subrule (11) affords the court the power to set aside or vary any of these orders. There is no obvious reason why that power should be unavailable once damages have been assessed, as submitted by the appellant.

The authorities

[53] In *National Home Warranty*, Riley J. (as he then was) held that he was obliged by the combination of *Bains* and *Bassi* to conclude that the court's power to set aside a default judgment under subrule (11) is lost once damages have been assessed. He was unhappy with the authorities that drove him to this conclusion, describing the reasoning in *Bains* as elusive and the conclusion as regrettable: at paras. 31, 33. I agree with these observations. In this Court, we are not bound to accept *Bains* and *Bassi* as authoritative.

[54] The appellant submits that this Court accepted *National Home Warranty* in *Ibrahim*. This argument is unsound. In giving judgment for the Court in *Ibrahim* at para. 28, Horsman J.A. identifies *Bains* and *Bassi* as “the two cases that grounded Justice Riley’s conclusion in *National Home Warranty* that there is no express authority under the rules to set aside an order assessing damages following a default judgment”. She noted that a division of this Court had yet to consider the

correctness of *Bains* and *Bassi*, and held that it was unnecessary to decide the point in *Ibrahim*. The point left undecided in *Ibrahim* now arises for decision on this appeal.

[55] *Bains* was a decision of Chiasson J.A. in chambers. The plaintiff had obtained an order assessing damages under the predecessor to R. 3-8(13) (R. 25(16) of the former *Supreme Court Rules*) and the defendant sought an extension of time in which to appeal. In determining whether to grant the extension, Chiasson J.A. had to consider whether the appeal had merit. The plaintiff submitted that the defendant's remedy was to apply to set aside the assessment under the predecessor to subrule (11) (R. 25(15)) rather than to appeal. Because the appellant had not applied for reconsideration, the plaintiff argued that the appeal was bound to fail. Chiasson J.A. rejected the premise of the argument that reconsideration was available. He held that what is now subrule (11) does not permit the court to set aside or vary an entered order following an assessment of damages: at para 14.

[56] The reasoning is sparse and seems to be based on the placement of the subrule permitting the assessment of damages (currently subrule 13) following the subrule permitting the court to vary or set aside a judgment made "under this rule" (currently subrule (11)).

[57] With respect, this is unconvincing. An order assessing damages under subrule (13) is plainly an order under R. 13 and the result is a pecuniary judgment against the defendant. The reasoning in *Bains* leads to curious and unsatisfying results in practice, because an assessment under subrule (13) may take place without notice to the defendant, and identically situated defendants may be treated differently according to how quickly the plaintiff proceeds with the assessment. Moreover, as noted by Riley J. in *National Home Warranty* at para. 31:

This is unfortunate, since it means that the Supreme Court can revisit a default order that includes specified damages made under Rule 3-8(3), but cannot revisit an order assessing damages made under Rule 3-8(13). The reason for this differential treatment is elusive, particularly considering that an order made under Rule 3-8(2) granting default judgment and specifying damages would appear to be just as final as an order made under Rule 3-8(13) assessing damages after the fact.

[58] Justice Riley's criticism is that, on the logic of *Bains*, a default judgment for a specified sum can always be set aside under subrule (11), but a default judgment for damages to be assessed cannot be set aside after damages have been assessed. It should make no difference whether the pecuniary judgment is perfected all at once or in stages. There is no principled reason to treat the two cases differently.

[59] *Bains* could have been decided on the basis that the appeal in that case was not bound to fail because, as set out above, this Court has a discretion to hear an appeal where an application to reconsider might have been brought.

[60] In *Bassi*, plaintiffs had obtained a default judgment and an order assessing damages. The defendant applied to set aside both orders. Justice Joyce did not distinguish *Bains* but took it at face value. He held that *Bains* precluded an order setting aside both the default judgment and the assessment of damages under Rule 3-11(11). He stated:

[55] If, as it appears, *Bains* precludes the Court from being able to set aside under R. 3-8(11) a final order made under R. 3-8(13), it would follow that the default judgment made under R. 3-8(5), upon which the order is based, can no longer be set aside under R. 3-8(11). I cannot see how the foundation liability judgment could be set aside with the order for the payment of damages kept in place.

[56] I conclude, therefore, that this Court no longer has any jurisdiction to set aside the default judgment order under R. 3-8(11).

[61] *Bassi* went on to hold that the order assessing damages could be set aside under Rule 22-1(3). Accordingly, Joyce J. applied a variant of the *Miracle Feeds* test, but under Rule 22-1(3) rather than Rule 3-8(11).

[62] As Riley J. observes in *National Home Warranty* at para. 38, Joyce J.'s application of R. 22-1(3) depended on a feature of the rules (requiring notice of an application under subrule 8-1(13) to assess damages) that had changed by the time *National Home Warranty* came to be decided. Consequently, as noted, Riley J. held that he was bound by *Bains* and *Bassi*, taken together, to hold that an order assessing damages under subrule (13) cannot be challenged under either subrule (11) or R. 22-1(13). He could not apply the *Miracle Feeds* test.

[63] Justice Riley held that the only avenue to challenging a default judgment and order assessing damages is the inherent jurisdiction of the court to prevent a miscarriage of justice: *National Home Warranty* at paras. 40–43. The test requires a showing that the order in question “would leave one party with such an unfair benefit or advantage at the expense of the other that a reasonable person would regard it as shocking and unconscionable”: at para. 41, quoting N. Smith J. in *Aquiline Resources Inc. v. Wilson*, 2005 BCSC 1461 at para. 12. In most cases, this imposes a substantially higher hurdle than is established by the *Miracle Feeds* test.

[64] Justice Riley noted a line of authority in the Supreme Court that had applied R. 22-1(3) to permit reconsideration of orders assessing damages following a default judgment: *Kallu v. Borkowski*, 2015 BCSC 1307 at paras. 16–18; *Lee v. Lee*, 2016 BCSC 2454 (B.C. S.C.) at paras. 37–42; *Saunders v. Churchill*, 2017 BCSC 2367 at paras. 11–20 (erroneously denoted as paras. 1–10). All these cases followed *Bassi* in permitting reconsideration under R. 22-1(3) without noticing the amendment to the rules that followed the decision in *Bassi*. He considered that they lacked precedential value because they were decided without consideration of the amendment.

[65] To summarize, the rejection of the *Miracle Feeds* test in the cases that have rejected it flows from a holding in *Bains* that is based on sparse and unsatisfying reasoning, with which I do not agree and that we are not bound to accept.

Conclusion as to the applicability of the Miracle Feeds test

[66] My conclusions may be summarized as follows. Rule 3-8(11) authorizes an application to vary or set aside a default judgment before or after an assessment of damages has taken place. If the default judgment is set aside after damages have been assessed, the order assessing damages also falls, just as a certificate of costs falls away if the order authorizing it is set aside on appeal. Whether or not damages have been assessed, the test on an application to set aside a default judgment is the same: it is the *Miracle Feeds* test. To the extent that they hold differently, *Bains*, *Bassi*, and *National Home Warranty* should not be followed.

3. If so, did the judge err in the application of the *Miracle Feeds* test?

[67] The application of a legal test to the evidence is a question of mixed fact and law. Absent an extricable error of law, the standard of review is deferential, requiring a showing of a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26, 36. A palpable error is one that is obvious. An overriding error is one that is determinative of the outcome of the case: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33.

[68] Although the judge did not cite authority, it is common ground that she turned her mind to the *Miracle Feeds* test. She concluded:

[10] It appears to me that Mr. Yao does have a defence to this claim. His affidavit addresses the steps that he took to deal with the matter once he became aware of it. I am satisfied that he took steps to set aside the default judgment as soon as possible after obtaining knowledge of the default judgment.

[69] The appellant does not take issue with the judge's conclusions on the first and third elements of the *Miracle Feeds* test. It does not suggest that the judge should have found Mr. Yao guilty of wilful delay or default. It does not dispute the judge's conclusion that Mr. Yao has what at least appears to be a meritorious defence to the plaintiff's claim.

[70] The appellant's argument is that the judge erred in addressing the second element of the test. It requires the court to consider matters of timing: when the applicant became aware of the order in question; whether the application to set aside the order has been brought as soon as possible; and the applicant's explanation for any delay in bringing the application.

[71] The appellant makes two points. It says that the judge made a finding of fact that is demonstrably wrong. And it says that the judge came to a conclusion as to Mr. Yao's delay in bringing the application that cannot be reconciled with the authorities. This is an argument that the judge's reasoning is vitiated by an extricable error of law.

[72] The appellant is correct that the judge erred in her appreciation of the facts. In my view, the error is palpable. The judge mistakes the evidence as to when Mr. Yao became aware of the default judgment. She gives February 28, 2025 as the date he was sent a registered letter and the order assessing damages (reasons, para. 7). This is incorrect on several counts. As noted, Mr. Yao received the registered letter on February 22. It did not contain the order assessing damages, which was not made until February 28. When the order was made, it was made in Mr. Yao's presence.

[73] However, while the error is palpable, I would not characterize it as overriding. It makes only six days' difference in the timing. Upon receiving the registered letter on February 22, Mr. Yao sought counsel, obtained advice on February 26, and flew to Vancouver for the hearing on February 28.

[74] This brings us to the legal argument. The appellant submits that, while Mr. Yao was present when the assessment order was pronounced on February 28, he did not move to set aside the default judgment until May 7. It argues that:

A delay of several months cannot be characterized as "prompt" within the meaning of the *Miracle Feeds* test. The jurisprudence is consistent that such delay fails the promptness requirement.

[75] The appellant cites *Yang v. Wang*, 2020 BCSC 1176 (aff'd 2021 BCCA 56) at paras. 34–38 for the proposition that a delay of several months cannot be considered as prompt.

[76] Apart from the fact that the submission exaggerates the delay—the 68 day period from February 28 to May 7 cannot fairly be characterized as "several months"—the argument fails to identify a sound extricable proposition of law that undermines the judge's finding. As noted and acknowledged by D. MacDonald J. in *Yang* at paras. 22–25, the *Miracle Feeds* test identifies a series of considerations bearing on the exercise of the court's discretion, not a list of inflexible requirements to be satisfied. Moreover, the question of timing and the applicant's delay in bringing the application involves a fully contextual assessment taking into account matters such as the applicant's knowledge, circumstances, sophistication, and efforts made

to deal with the matter. It is not simply a matter of counting the days, weeks, or months before the application was brought. In *Yang*, the applicant had delayed four years before bringing the application, and MacDonald J. cited another case in which a six-month delay was viewed as inordinate: at para. 42. But there is no fixed rule or guideline.

[77] The ultimate question in the application of the *Miracle Feeds* test is whether it is in the interests of justice that the default judgment be set aside. Having taken into account the necessary considerations, the decision is discretionary. The judge's palpable error on a factual point bearing on only one of the three factors, and that only to a modest extent, is not overriding.

[78] Accordingly, I conclude that the judge did not commit an appealable error in the exercise of her discretion.

Disposition

[79] For these reasons, I would dismiss the appeal.

“The Honourable Justice Gomery”

I AGREE:

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Justice Warren”