COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Crazy Greek Chick Foods Limited v. Chakroborty,* 2026 BCCA 204

Date: 20260506
Docket: CA50660

Between:

Crazy Greek Chick Foods Limited and Zoe Caverly

Appellants
(Plaintiffs)

And

Shounak Chakroborty also known as Roop Chakroborty, Marcel Schmitt, Sabrina Schmitt, and Monika Schmitt

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated April 8, 2025 (*Crazy Greek Chick Foods Limited v. Chakroborty*, Abbotsford Docket S06288).

Oral Reasons for Judgment

Counsel for the Appellants:	D. Klassen
Counsel for the Respondent, Shounak Chakroborty also known as Roop Chakroborty:	D. Winterton J.C. Fu
Place and Date of Hearing:	Vancouver, British Columbia May 5, 2026
Place and Date of Judgment:	Vancouver, British Columbia May 6, 2026

Summary:

This is an appeal from an order setting aside a default judgment and granting an extension of time to file a response to a notice of civil claim. The appellant argued there was an insufficient evidentiary basis for setting aside the judgment and that the hearing was procedurally unfair. HELD: Appeal dismissed. It was open to the judge to find sufficient evidence of a meritorious defence or one worthy of investigation. Furthermore, in reaching that conclusion, the judge did not conduct herself in a procedurally unfair manner.

[1] **DEWITT-VAN OOSTEN J.A.:** This is an appeal from a Supreme Court order setting aside a default judgment in the amount of $97,565.70 (plus costs) and granting an extension of time to file a response to civil claim.

[2] The appellants, Crazy Greek Chick Foods Limited and Zoe Caverly, submit the order reflects three errors. They say: a) the judge misapplied the legal test for setting aside a default judgment by relying on bare assertions and denials; b) there was insufficient evidence of a meritorious defence or a defence worthy of investigation; and c) the application hearing was procedurally unfair.

Background

[3] The dispute between the parties arises from an alleged oral agreement to lease a commercial premises in 100 Mile House.

[4] The appellants claim the agreement provided for a one-year lease at a defined monthly rate starting December 1, 2023, and obliged the respondent, Shounak Chakroborty, to convert the premises into a takeout kitchen and storefront.

[5] The appellants say they paid $60,000 for the improvements. The improvements were not done by the specified deadline and the respondent agreed to pay them a daily fee for each subsequent day for which the restaurant could not operate. The appellants allege that in late 2023, perhaps early 2024, they agreed to pay for a natural gas connection and were billed a monthly amount for that service.

[6] By January 2024, the appellants had spent about $4,500 on cookware, equipment, and other items in anticipation of opening the takeout kitchen. Ms. Caverly left her employment in anticipation of the start date.

[7] The appellants allege that in February 2024, they learned the respondent did not own the premises. They say he told them the opposite. The premises were owned by other individuals who have also been named as defendants. These latter individuals claim Mr. Chakroborty did not have authority to lease out the premises. They live in Germany and did not participate in the application to set aside the default judgment. They have not participated in the appeal.

[8] The appellants say that after the respondent asked for an additional $60,000 to complete the improvements, they considered the oral agreement to have been repudiated. In October 2024, they filed a notice of civil claim.

[9] What happened next is helpfully summarized by Justice Horsman in a chambers judgment indexed at 2026 BCCA 31:

> [6] … The appellants filed a notice of civil claim on October 10, 2024, and an amended notice of civil claim on October 28, 2024 (the "Claim"). They alleged that Mr. Chakroborty had breached the oral contract in failing to provide tenant improvements to the property within the agreed-upon time.
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> [7] On January 13, 2025, the appellants served Mr. Chakroborty with the Claim. On January 15, 2025, Mr. Chakroborty retained Kenneth Smith to defend the Claim.
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> [8] Due to an inadvertent error on Mr. Smith's part, he did not file a response to civil claim on Mr. Chakroborty's behalf or request a waiver of default judgment without reasonable notice within the 21 days for a response set out in R. 3-3(3) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
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> [9] On February 11, 2025, Mr. Smith realized his error and sent correspondence to Peter Loewen, counsel of record for the [appellants], to advise that he had been retained by Mr. Chakroborty and to request that default judgment not be taken without reasonable notice.
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> [10] On February 12, 2025, Mr. Smith received an email from Justin Klassen at Linley Welwood LLP advising that he was representing the [appellants] rather than Mr. Loewen. Mr. Klassen further advised that he had already applied for and obtained default judgment against Mr. Chakroborty on February 11, 2025.
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> [11] Mr. Smith then promptly took steps to report the circumstances to LIF [the Lawyers Indemnity Fund], and outside counsel was retained in relation to the [appellants'] default judgment.
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> [12] On April 8, 2025, the outside counsel appointed by LIF brought an application on behalf of Mr. Chakroborty to set aside the default judgment. Mr. Smith swore an affidavit in support of the application confirming that the failure to file a response to civil claim in time was due to his error, which

> could not be attributed to Mr. Chakroborty. He described taking steps to report to his insurer and retain outside counsel after realizing his error. Mr. Chakroborty also swore an affidavit confirming that it was always his intention to defend the Claim and he had relied on Mr. Smith to take appropriate steps in defence of the Claim.

[10] Default judgment against the respondent was obtained approximately one week after the deadline for filing his response to civil claim. The appellants did not notify him of the application. They were not legally obliged to; however, they could have done so as a matter of professional courtesy, and based on the record, notice likely would have avoided the ensuing litigation and associated expense. See, for example, this Court's discussion in *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341 at paras. 13–15. Counsel for the appellants had contact with Mr. Chakroborty by telephone and email prior to filing the notice of civil claim. The respondent was accessible.

[11] The application to set aside the default judgment was heard on April 8, 2025. As explained by Justice Horsman, judgment was granted that same day:

> [14] The chambers judge cited the well-established test from *Miracle Feeds v. D. & H. Enterprises Ltd*. (1979), 10 B.C.L.R. 58 (Co. Ct.), [1979] B.C.J. No. 1965, that applies on an application to set aside a default judgment. She noted there were three factors that Mr. Chakroborty had to establish to her satisfaction through affidavit evidence:
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> a) he did not wilfully or deliberately fail to enter an appearance or file a defence to the Claim;
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> b) the application to set aside the default judgment was made as soon as reasonably possible after obtaining knowledge of the default judgment or there were reasons for the delay; and
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> c) he has a meritorious defence or, at least, a defence worthy of investigation.
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> [15] There was no dispute that Mr. Chakroborty's application to set aside the default judgment had been made as soon as reasonably possible. Therefore, only the first and third of the *Miracle Feeds* factors were live issues before the chambers judge.
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> [16] The chambers judge was satisfied that Mr. Chakroborty's failure to file a response to civil claim within 21 days of service of the Claim was not wilful and deliberate. She accepted the evidence of Mr. Chakroborty and Mr. Smith that Mr. Chakroborty intended to defend the Claim, engaged counsel to do so, and the failure to file a response within the time required was solely attributable to counsel's mistake.

> [17] The chambers judge was also satisfied, based on Mr. Chakroborty's evidence, that he had a defence worthy of investigation.
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> [18] The chambers judge thus ordered that the default judgment be set aside, with leave to Mr. Chakroborty to file a response to civil claim within 14 days.

Standard of Review

[12] An order setting aside a default judgment attracts a deferential standard of review. As recently affirmed in *1163499 B.C. Ltd. v. Yao*, 2025 BCCA 443 [*Yao*]:

> [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.
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> [Emphasis in original.]

[13] Complaints of procedural unfairness are generally assessed by asking whether the proceeding was fair (in effect, a correctness standard); however, there may be cases in which the nature of the ruling or other judicial conduct said to have caused unfairness was discretionary and attracts deference: *P.R.C. v. C.K.C.*, 2024 BCCA 363 at paras. 62–63.

[14] Here, the unfairness complaint alleges a reasonable apprehension of judicial bias. In that context, a strong presumption of impartiality applies. We must ask whether an informed person, viewing the matter realistically and practically, and having thought it through, would find it more likely than not that the judge would not decide the case fairly: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General),* 2015 SCC 25 at para. 20. The bias assessment is based on the record and the proceeding as a whole: *Yukon Francophone* at paras. 25–26.

Discussion

[15] The appellants raise three grounds of appeal. I will address the first two together, as they are interrelated. The third ground requires a separate analysis.

Misapplication of the legal test and insufficient evidence

[16] The parties agree the application in the Supreme Court was properly governed by the legal test set out in *Miracle Feeds v. D. & H. Enterprises Ltd*. (1979), 10 B.C.L.R. 58 (Co. Ct.), [1979] B.C.J. No. 1965 (Chambers). As reiterated in *Yao*, to set aside a default judgment, an applicant must:

> [49] … show through affidavit material:
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> a) that it did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
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> 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
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> c) that it has a meritorious defence or at least a defence worthy of investigation.
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> *Andrews v. Clay*, 2018 BCCA 50 at para. 28.

[17] These are not cumulative requirements; rather, they represent 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": *Yao* at para. 50, citing *Andrews v. Clay*, 2018 BCCA 50 at para. 29; *Forgotten Treasures* at para. 17.

[18] In this case, only the first and third of the *Miracle Feeds* factors were at issue below. On appeal, it is the judge's assessment of the third factor that is alleged to reflect error.

[19] In my view, there is no merit to the first two grounds of appeal—either individually or in their cumulative impact.

[20] The appellants accept the judge correctly instructed herself on the *Miracle Feeds* test. However, they say she misapplied that test by failing to grapple with the respondent's evidence in a meaningful way and allowing bare assertions about his stated defence to inform her analysis. Consequently, she set aside the default judgment without a sufficient evidentiary foundation.

[21] The judge analyzed the respondent's application with express reference to *Miracle Feeds* (at paras. 2–3), and made findings specific to the first and third factors:

> [5] I am satisfied that Mr. Chakroborty's failure to file a response to civil claim within 21 days after service was not wilful or deliberate. The evidence of Mr. Chakroborty and his counsel of record, Mr. Smith, establishes that Mr. Chakroborty intended to defend the claim, engaged counsel to do so, and that the failure to file a response within the pertinent time was solely attributable to a mistake on the part of counsel.
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> [6] Mr. Smith's uncontradicted evidence confirms this. He mistakenly believed that he had sought and obtained additional time to file a response, and had requested a waiver of default without notice from the plaintiffs' counsel. Due to a subsequent family emergency on the part of Mr. Smith, he did not discover the mistake until sometime later. Mr. Smith took steps as soon as he realized that he had not obtained a waiver of default, but by that point, the application for default judgment had been submitted and granted the day prior.
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> …
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> [10] Turning to the third factor under the *Miracle Feeds* test, I am also satisfied that Mr. Chakroborty has a defence worthy of investigation. The test under the third branch of *Miracle Feeds* requires evidence that discloses facts worthy of investigation—facts that could disclose a defence to the claim. This must be established in sufficient detail in the affidavit evidence to enable me to determine whether such a defence exists.
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> [11] Mr. Chakroborty's evidence, as set out on paras. 7-9 of his first affidavit, provide evidence of a defence worthy of investigation. The contract in issue was oral in nature, and Mr. Chakroborty admits that he entered into a contract for construction services with one of the [appellants], but not others. He denies certain representations alleged by the [appellants] and disputes some of the alleged terms of the oral contract. Mr. Chakroborty further denies any breach of contract and says that the [appellants] were required to obtain multiple permits before construction could commence, and that their failure to do so in a timely manner caused the delay. Mr. Chakroborty also denies that he repudiated the contract and says that the [appellants] unilaterally terminated it.

[22] The appellants argued below that the respondent's affidavit material was insufficient to show a meritorious defence or one worthy of investigation. This submission is repeated on appeal. Effectively, the appellants contend that before an affidavit can justify setting aside a default judgment in anything other than a very simple case, a defendant's denial of facts alleged in the notice of civil claim must respond to all material issues, the defence must be particularized, and backed up

by documentation or some other form of corroborative evidence. Otherwise, the denial is of no probative value.

[23] The judge was alive to this argument: at paras. 7–8, 10. She directly addressed it when making her findings:

> [12] Again, the [appellants'] position to this application on the third ground of the *Miracle Feeds* test is based largely on an assertion that in the absence of corroborative documentary evidence exhibited to Mr. Chakroborty's affidavit, his evidence falls short of establishing a defence worthy of investigation. I disagree. Given the oral nature of the contract, the claim will at least in part turn on credibility, particularly given what appears, at this initial stage, to be conflicting versions of events and terms of the alleged oral contracts.
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> [13] Regardless, Mr. Chakroborty is not required to show that his defence will succeed, nor is he required to swear to all of the evidence that might support the defence raised: *Noble Moving Services Inc. v. Kohn*, 2008 BCSC 434, at para. 27.
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> [14] I find that Mr. Chakroborty's evidence is sufficient to establish that he has a defence worthy of investigation. I am satisfied that Mr. Chakroborty, in addition to denials of the agreements and representations, may be able to show that the delay in completing the tenant improvements resulted from the [appellants'] conduct in failing to obtain the necessary permits so that construction could commence.

[24] I see nothing erroneous about the judge's analytical approach to the respondent's affidavit material. The appellants cite *Andrews* in support of their position but that was a case in which this Court declined to interfere with a default judgment because there was "no evidence" supporting the only asserted defence to the notice of civil claim: at paras. 20, 33, 43. The Court stated in *Andrews* that an applicant cannot establish a meritorious defence "simply by asserting it": at para. 32. In other words, it is not enough to simply state that a meritorious defence exists. There must be some form of evidence that is responsive to the claim, explains the defence or fleshes it out in some way, and realistically provides the court with a basis from which to conduct the *Miracle Feeds* assessment.

[25] In their factum, the appellants contend that *Miracle Feeds* requires an applicant to "put some sort of sworn evidence forward before the court and for that court not to readily accept bare assertions but to look critically where there is a

lack of corroborating evidence and particulars" (emphasis added). In my view, the appellants have overstated *Andrews* and neither that case nor the other authorities cited by them go this far. The problem with the application to set aside the default judgment in *Andrews* was that the applicant provided no substantive affidavit in support of his defence. Such is not the case here.

[26] In this case, it was open to the judge to make the findings that she did. I have reviewed the respondent's affidavit material and contrary to the appellants' characterization, the asserted defence does not consist of bare denials.

[27] For example, in his affidavit, the respondent acknowledges that he contracted with Zoe Caverly to provide construction services and that the construction did not finish by the disputed date. He denies representing to the appellants that he owned the premises, asserts that they knew his spouse's company was leasing the premises, and says they understood their lease would take the form of a sublease.

[28] The respondent deposes that the construction delay was the result of the appellants failing to obtain the necessary permits in a timely way. He also says they have refused to pay for some of the construction and unilaterally repudiated the agreement.

[29] Some of what is contained in the respondent's affidavit consists of a bare denial; however, other parts explain the denials, respond to specific allegations, and make positive assertions about the appellants' conduct under the agreement. There are no exhibits attached to the respondent's affidavit. However, the affidavit itself, and the assertions contained within, arise from his personal knowledge and interaction with Zoe Caverly. His statements in the affidavit constitute evidence and are responsive to the pleadings. In *Forgotten Treasures*, this Court affirmed that the threshold for showing a defence is worthy of investigation is not onerous: at paras. 29–31.

[30] The respondent's affidavit formed part of the overall evidentiary foundation adduced in support of the set-aside application, and in my view, the judge was

entitled to take it into account. The amount of weight assigned to that material lay within her discretion. She clearly assigned the affidavit more weight than the appellants think it deserves but this does not mean she misapplied the *Miracle Feeds* test. In my view, this case is qualitatively different than *Andrews* and the appellants have not displaced the deferential standard of review.

Procedural unfairness

[31] The appellants' third ground of appeal (not pressed as a stand-alone ground before us), alleges a reasonable apprehension of bias based on: the judge's comments about the parties having used more time than estimated; the number of questions she posed during submissions by counsel for the appellants; and her descriptions or characterizations of the appellants' position. In their factum, the appellants have provided a mathematical assessment of the cumulative duration of the questions asked by the judge, contending that their counsel was only allowed to speak 58 percent of the time allotted for their submissions.

[32] As with the first two grounds of appeal, there is no merit to the third. I have reviewed the transcript of the proceeding. The judge's questions, which were predominantly aimed at trying to better understand or clarify the appellants' submissions, were appropriate and understandable. Many of the questions were directed towards the appellants' complaint about the respondent's factual assertions and the judge's reliance on those assertions without corroborative evidence. The judge found this position perplexing. She was right to question it.

[33] As explained in *Speckling v. Communications, Energy and Paperworkers' Union of Canada, Local 76,* 2025 BCCA 24, the law:

> [53] … presumes judicial [impartiality]. This presumption "… carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption": [*Wewaykum Indian Band v. Canada,* 2003 SCC 45] at para. 59. The party alleging judicial bias bears the burden of rebutting the presumption. Where the allegation … is one of actual bias, the appellant must prove that the judge consciously or unconsciously heard and determined the case without an open mind, "allowing extraneous influences to affect [their] mind" or "relying on inappropriate preconceptions": *Wewaykum* at paras. 64–65.

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> [56] … First, as noted, there is a strong and not easily displaced presumption of judicial impartiality. Second, to succeed in showing a reasonable apprehension of bias, an appellant must establish "a real likelihood or probability of bias". This is a heavy burden. In deciding whether the burden has been met, a judge's impugned comments are not assessed in isolation. Rather, bias allegations must be considered in the context of the circumstances and in light of the entirety of the proceeding: at paras. 25–26. Finally, the Supreme Court of Canada reminded appellate courts in *Yukon Francophone* that there can be a fine line between robust management of a case, which is permitted, and improper interference. Consequently, a cautious approach to appellate intervention is warranted …
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> [Emphasis added.]

[34] In my view, the reasonable apprehension of bias claim falls far short of the high threshold for appellate intervention. This was a chambers hearing in which the judge was entitled to ask questions to better understand the appellants' position; there was nothing inappropriate about those questions or her comments during the course of submissions; and it is clear from her reasons that she understood the nature of the appellants' challenge to the evidentiary foundation tendered by the respondent. The appellants say in their factum they were deprived of the opportunity to "make full answer and defence". This was not a criminal proceeding. The strong presumption of judicial impartiality has not been displaced.

Disposition

[35] For the reasons provided, the appellants have not persuaded me of a palpable and overriding error or procedural unfairness. Accordingly, I would dismiss the appeal.

[36] **HARRIS J.A.:** I agree.

[37] **WINTERINGHAM J.A.:** I agree.

[38] **HARRIS J.A.:** The appeal is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"