# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dhunna v. Brown,*
2026 BCSC 517

Date: 20260325
Docket: S218212
Registry: Vancouver

Between:

**Rakesh Dhunna**

Plaintiff

And

**Stephen Brown**

Defendant

Before: The Honourable Justice Stephens

## Reasons for Judgment
## (application to set aside default judgment and damages order)

| | |
|---|---|
| Counsel for the Plaintiff: | W.E. Knutson, KC |
| Counsel for the Defendant: | S. Solsona |
| Place and Dates of Hearing: | Vancouver, B.C.<br>December 1–2, 2025 and<br>January 8, 2026 |
| Written Submissions of the Plaintiff | December 17, 2025 |
| Written Submissions of the Defendant | December 17, 2025 |
| Place and Date of Judgment: | Vancouver, B.C.<br>March 25, 2026 |

## Table of Contents

## Overview

[1] The defendant applies to set aside (the "Set Aside Application") a default judgment order in this action made on November 18, 2021 (the "Default Judgment") and a subsequent order assessing damages against the defendant in the amount of $4,262,369.40 made July 18, 2023 (the "Damages Order").

[2] In the action, the plaintiff claims for breach of a contract of purchase and sale dated April 17, 2021 between the plaintiff and the defendant for a home with a sale price of $18 million (the "Purchase Agreement"). In his notice of civil claim filed September 16, 2021, the plaintiff alleges, among other things, that the defendant "wrongfully breached and repudiated the Purchase Agreement by failing to complete the sale and purchase of the Property." The plaintiff sought specific performance of the Purchase Agreement and damages or, alternatively, damages in lieu of specific performance.

[3] This Set Aside Application was filed on June 30, 2025, over three years after the Default Judgment, and approximately two years after the Damages Order.

[4] The defendant was self-represented in these proceedings until April 2025 and in June 2025 his counsel filed the Set Aside Application. The defendant deposes that it was not until he was represented that he became aware he could apply to set aside the Default Judgment. He deposes he "only recently became

aware that I have the right to apply to set aside the default judgment and to defend the action", and that he "had not previously understood that such a remedy was available". He states: "I now wish to defend the claim on the merits."

[5] In the substantial time between the Damages Order and the filing of this application there have been execution proceedings, including two examinations in aid of execution conducted by the plaintiff (in September 2023 and September 2024).

[6] Separately but relatedly, the plaintiff has filed a notice of application seeking an order that the defendant is in contempt (the "Contempt Application"), which was heard at the same time as this application (on December 1 and 2, 2025) but did not complete. The Contempt Application seeks an order that the defendant be committed for contempt for, among other things, intentionally refusing to pay money to the plaintiff pursuant to the Damages Order, when he has the ability to pay. These reasons do not decide the Contempt Application.

[7] This Set Aside Application presents the circumstance of a defendant who has engaged in severe delay applying to set aside a default judgment order which has led to a substantial damages order, and who did not engage legal counsel in the action for over three years after the Default Judgment and approximately 21 months after the Damages Order.

[8] The question on this application is whether, in all the circumstances, the Default Judgment (and Damages Order) should nevertheless be set aside.

[9] I conclude that both orders should be set aside, and that the defendant should be granted leave to file a response to civil claim for the reasons that follow.

**Issues**

[10] There are two issues on this application:

1. Should the Default Judgment be set aside?
2. Should the Damages Order be set aside?

## Discussion

### Legal Context: Setting Aside a Default Judgment Where Damages Have Been Assessed

[11] In the recent decision of *1163499 B.C. Ltd. v. Yao,* 2025 BCCA 443 [*Yao*], the Court of Appeal clarified the law with respect to the test for setting aside a default judgment where the plaintiff has already taken the additional step of obtaining an order assessing the plaintiff's damages:

> [66] … 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.

[12] The Set Aside Application was initially argued before the *Yao* decision. After the release of *Yao*, the parties were given an opportunity to make further submissions in light of that case.

### Factual Background for the Set Aside Application

[13] The Default Judgment was obtained on November 18, 2021, approximately nine weeks after the filing of the notice of civil claim on September 16, 2021, and approximately eight weeks after service of it on the defendant on September 21, 2021. Default Judgment was obtained about five weeks after the 21-day deadline for filing a response to civil claim.

[14] Default Judgment was sought approximately six weeks after an October 8, 2021, letter from counsel for the plaintiff to the defendant, insisting on strict compliance with the *Supreme Court Civil Rules* [*Rules*], but which did not expressly give notice that if a response to civil claim was not filed by a certain date, that the plaintiff would apply for default judgment against the defendant. The letter said:

> I act on behalf of Rakesh Dhunna. As you know, Mr. Dhunna has commenced an action against you in the Supreme Court of British Columbia. The Notice of Civil Claim in that action (S218212) was served on you on September 21, 2021. The purpose of this correspondence is to put you on notice that my client requires that you comply with the time limits for

> the filing of your Response to Civil Claim as stipulated in the *Supreme Court Civil Rules*.

[15] The defendant deposes: “At the time I was served, I briefly read the claim, but I did not appreciate the consequences of not filing a formal response.” He deposes that he believed at the time there was no longer an active transaction. The defendant further deposes that “[a]t the time, I was also overwhelmed with ongoing personal issues and lacked the means to retain a lawyer.” In cross-examination, he testified that he understood when he was served with the notice of civil claim that he had been sued and that he had a legal entitlement to defend.

[16] Following the entry of the Default Judgment on November 29, 2021, the plaintiff sent a letter by email to the defendant on December 13, 2021 enclosing the Default Judgment.

[17] There was then over one year passage of time between the Default Judgment and the damages assessment hearing. The defendant took no steps during this time to apply to set aside the Default Judgment.

[18] By order dated June 13, 2023, the damages assessment hearing was adjourned until July 18, 2023, peremptory on the defendant.

[19] The defendant deposes that he was not able to attend the damages assessment hearing on July 18, 2023 “due to a combination of personal hardship, lack of legal knowledge, and extreme financial distress”, and that he was “overwhelmed and outmatched”.

[20] The Damages Order ultimately made was a significant sum: $4,262,369.40.

**Should the Default Judgment be Set Aside?**

[21] The test for setting aside the Default Judgment is found in *Miracle Feeds v. D & H Enterprises Ltd.*, 10 B.C.L.R. 58 at 61, [1979] B.C.J. No. 1965 (Co. Ct.) [*Miracle Feeds*]:

> ... in order for a defendant to succeed on an application to set aside a default judgment, he must show:
>
> 1. That he did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
>
> 2. That he made his 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;
>
> 3. That he has a meritorious defence or at least a defence worthy of investigation; and:
>
> 4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant.

See also *Yao* at para. 49.

[22] These factors are not applied as a checklist but are considered holistically, as described by Mr. Justice Voith (as he then was) in *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940 at para. 15:

> [15] … [I]t does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in *Miracle Feeds* precludes them from being successful on an application under Rule 17(12) [the Rule in the previous *Supreme Court Rules* that permitted a party to apply to set aside default judgment]. These requirements are not immutable. The failure or inability of a defendant to address a particular factor in *Miracle Feeds* is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion.

See also *Chung v. Solimano Law Corporation*, 2021 BCSC 1225 at para. 34.

[23] Justice Chan stated in *Arbutus Capital Leasing Ltd. v. 1265644 B.C. Ltd.*, 2024 BCSC 1846 that the test is not to be applied rigidly and seeks to do justice between the parties:

> [8] … the *Miracle Feeds* test is not to be applied rigidly and the failure of a defendant to address each of the factors does not preclude them from being successful. Further, in applying the *Miracle Feeds* requirements, courts may consider a balancing of interests and prejudice as between the parties. Ultimately, any relief "must be consistent with the overarching aim of the court to do justice between the parties": *Al Boom Wooden Pallets Factory v. Jazz Forest Products (2004) Ltd.*, 2012 BCSC 487 at paras. 52.

[24] *Yao* confirmed that the focus of the *Miracle Feeds* test is the overall interests of justice:

> [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.

***Factor # 1: Did the Defendant Deliberately or Wilfully Fail to File a Response to Civil Claim?***

[25] *Chung* states:

> [18] On this factor described in *Miracle Feeds*, the court must determine whether the defendant's failure to file a response was "wilful", "deliberate", or otherwise blameworthy. Delay may be "purposeful, deliberate or intentional" but, depending on the circumstance, it may not be blameworthy: see *Anderson v. Toronto- Dominion Bank* (1986), 70 B.C.L.R. 267 (C.A.) at 270; *Passero v. Cupo*, 2010 BCSC 1667 at para. 26 and 27.

[26] "A defendant who decides not to defend an action, or chooses to ignore it, fails to meet the first branch of the *Miracle Feeds* test": *Pepinieres Guillame SA. v. Holman*, 2012 BCSC 1291 at para. 40 [*Pepinieres*]. Wilful or deliberate conduct is not unreasonable or negligent conduct. There must be an intention not to defend: *Asia Growth v. Qiao*, 2023 BCSC 2173 at para. 52.

[27] Counsel for the defendant contended that it was a short time from filing of the notice of civil claim to the time that default was taken, and that the plaintiff did not advise the defendant that default judgment would be taken against him.

[28] I do not endorse non-compliance with the *Rules* or inappropriate delay in the filing of a response to civil claim. However, here the Default Judgment was sought and made less then two months after service of the notice of civil claim on the defendant, and about five weeks after the 21-day time period following service of the claim. This is not an inordinate amount of time for a defendant to not have yet filed a response to civil claim.

[29] Failing to defend an action after being put on notice that the plaintiff intends to apply for default judgment if a response to civil claim is not filed can be relevant to determining whether that defendant has made a wilful and deliberate choice not to defend, and whether to set aside the default judgment: *Pepinieres* at paras. 41 and 47 ("despite being put on notice that the plaintiff intended to apply for default judgment if they failed to file a defence, [the defendants] made a decision not to defend the action"; application to set aside the default judgment ultimately dismissed). See also *Chung* at paras. 19–25. Here, no notice was given by the plaintiff to the defendant of an intent to apply for default judgment if a response to civil claim was not filed.

[30] The plaintiff relies on the fact that the notice of civil claim served on the defendant includes a statement that “JUDGMENT MAY BE PROUNOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.”

[31] However, while there is no obligation under the R. 3-8 for a plaintiff to expressly give notice to a defendant of their intent to take default judgment before applying to do so, decisions of this court have taken into account the failure to give such notice prior to taking default judgment when assessing the first branch of the *Miracle Feeds* test and in the interests of justice assessment more generally (albeit in cases with different factual circumstances): see *Royal Bank of Canada v. Rose*, 2022 BCSC 1472 at paras. 36, 38, 49 (plaintiff’s counsel knew defendant was actively participating in the litigation and that she disputed the claim); *Gill v. Sandhar*, 2022 BCSC 255 at para. 27 (where remedial work was still ongoing); and *MacLean Bros. Drywall Ltd. v. 1114136 B.C. Ltd*., 2023 BCSC 2356 at paras. 42-45 (closely related co-defendant had filed a response).

[32] The defendant deposes that “[a]t the time I was served with the Notice of Claim, I did not fully understand the legal process” and that “[d]ue to my lack of legal knowledge, financial hardships, and personal difficulties, I was unable to respond formally within the required timelines.” There is not good evidence which rebuts the defendant’s affidavit evidence that he was overwhelmed with personal issues at the time he was served with the notice of civil claim.

[33] The defendant deposes: “I intend to defend myself against the claim” and “am now prepared to respond to the claim and defend myself on the merits.”

[34] Overall, the evidence falls short of establishing that the defendant made a deliberate decision to not defend the action from the time of service on him of the notice of civil claim until the time the Default Judgment was taken. I do not find on the evidence that there was a deliberate or wilful failure by the defendant to file a response to civil claim by the time Default Judgment was applied for.

[35] I do not find in the circumstances that the defendant was otherwise blameworthy in his failure to file a response to civil claim during the period of time after he was served on September 21, 2021 and before the Default Judgment was obtained on November 18, 2021.

[36] The plaintiff contends that the defendant has extensively delayed and (contrary to the defendant's assertions) had the financial means to retain counsel and defend the action. The plaintiff relies on financial transactions from certain bank account information obtained through execution proceedings, summarized in schedules to his application response, as well as other evidence, and contends that the defendant has substantial financial means. The plaintiff also relies on the defendant's evidence given on cross-examination in which he acknowledged that he understood when he was served with the notice of civil claim that he had been sued and had a legal entitlement to defend. The plaintiff contends the defendant understood the legal process.

[37] The plaintiff contends that the defendant's explanation for his "extensive delay" is neither reasonable nor credible.

[38] However, the focus of Factor #1 of the *Miracle Feeds* test is the time from service of the notice of civil claim until the time of Default Judgment, within which time the defendant did not file a response to civil claim. There was not extensive delay by the defendant in this time period.

***Factor # 2: Did the Defendant Take Steps to Set Aside the Default Judgment as Soon as Reasonably Possible?***

[39] As to matters of "timing and the applicant's delay in bringing the application", I have engaged in a "contextual assessment taking into account matters such as the applicant's knowledge, circumstances, sophistication, and efforts made to deal with the matter" (*Yao* at para. 76). I have considered the fact that the defendant was 65 at the time he was served with the notice of civil claim, had some previous experience with other litigation at that time, and has a measure of sophistication in that he had in the past "run a couple of public companies".

[40] The Default Judgment came to the defendant's attention two or three days after December 13, 2021.

[41] There is also evidence that, after the Default Judgment was taken, the defendant has to some extent engaged in the legal process.

[42] The defendant deposes that he only realized he could apply to set aside the Default Judgment and seek to defend the action after retaining counsel in April

2025. His counsel then filed the Set Aside Application.

[43] I find the defendant did not take steps to set aside the Default Judgment as soon as reasonably possible. He did not provide a convincing explanation for the delay which occurred in the application being brought. He retained counsel over three years following the Default Judgment, on April 4, 2025. This came after the plaintiff asserted that he was in contempt of court in connection with execution proceedings.

[44] The defendant and his wife had retained legal counsel to defend them in a different proceeding in about the same time that the Default Judgment was obtained, but he apparently chose not to seek to retain legal counsel to advise him regarding the plaintiff's claim at that time.

[45] The defendant provided some partial explanation for the severe delay in retaining legal counsel and filing the Set Aside Application following the Default Judgment. The defendant deposes that during this time period he experienced "significant personal tragedies", including the passing of his father in Saskatchewan and the death (in circumstances described as tragic) of his wife's niece in Oregon in 2024.

[46] The defendant also deposes he "did not have the means or the knowledge to obtain legal advice until recently".

[47] The plaintiff contends that the defendant has extensively delayed and challenged the veracity of the defendant's assertion that he lacked financial means at the time and challenged the defendant's credibility and the reliability of the defendant's assertions. The plaintiff contends that the defendant's "evidence in support of his application is careless, misleading and unreliable" and that "[h]e clearly had the financial means to retain counsel but obviously chose not to."

[48] However, I need not, and do not, make conclusive findings on the defendant's credibility and reliability in this regard in order to decide the issues on the Set Aside Application.

[49] On this branch of the test, in support of his application, the defendant relies on the fact he was self-represented and not aware of his ability to set aside the Default Judgment for over three years.

[50] In my view, whether the defendant had the financial means to retain counsel earlier than he did is somewhat beside the point on the second branch of the test, since, given his position, the issue is the defendant's failure to inform himself, even if self-represented, of his right to seek to set aside a default judgment, and take steps to do so, for over three years following the taking of Default Judgment. In this regard, see generally, *Rahman v. Windermere Valley Property Management Ltd.*, 2022 BCCA 258 at paras. 32–33, citing *Pintea v. Johns*, 2017 SCC 23 at para. 4; *Baring v. Grewal*, 2022 BCCA 42 at paras. 107–108, leave to appeal to the SCC ref'd, 40173 (2 February 2023);;*Stephens v. Canadian Imperial Bank of Commerce*, 2021 SKCA 155 at para. 59; *St-Michael c. Agence du revenu du Québec*, 2023 QCCS 959 at paras. 2–4.

[51] In this case, while the defendant deposes he was overwhelmed and had difficult personal experiences during times when this litigation was extant—and I do not minimize his experience on the passing of his family members—he has not satisfied me that he was unable to, as a self-represented person, inform himself over the whole of an approximately three years and five months time period (December 16, 2021 to April 2025) that he could apply to set aside the Default Judgment and take steps to do so. In saying this, I express no comment on the expectation of a self-represented person in other legal matters in other contexts and circumstances which are not before me on this application.

[52] Accordingly, in light of the three years and five months passage of time, I reject as a justification for the defendant's delay in bringing the Set Aside Application the defendant's evidence that he "only recently became aware that [he has] the right to apply to set aside the default judgment and to defend the action", and that he "had not previously understood that such a remedy was available". I place no weight on this evidence in the defendant's favour.

[53] The defendant applicant bears the onus on this application. I find that he has not satisfied his onus on Factor #2 to show he took steps to set aside the Default Judgment as soon as reasonably possible.

[54] Further, I find for the purposes of this application that the defendant has engaged in severe delay bringing the Set Aside Application and has not provided a satisfactory or convincing explanation for the entirety of that delay.

[55] Having found the defendant has not met his onus on Factor #2 for these reasons, I do not find it necessary to make specific findings about the defendant's financial means on this application.

[56] Ultimately, the matter of the time it takes for a defendant to apply to set aside a default judgment is a factor in, but not necessarily dispositive of, the *Miracle Feeds* test. *Yao* states:

> [76] … 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.
>
> [Emphasis added.]

***Factor # 3: Is There a Defence Worthy of Investigation?***

[57] I am satisfied that there are defences to the action worthy of investigation.

[58] *Chung* states:

> [28] A defence is worthy of investigation if there is a "degree of plausibility": *Hawkins v. Fernie One Outfitters Ltd.*, 2012 BCSC 84 at para. 25. This requires more than merely making an allegation. The evidence in support of the application to set aside the default judgment must be sufficiently detailed to enable the court to correctly inquire as to whether there is indeed such a defence. The defendant's burden in this regard is low, but it is the defendant's burden: the plaintiff need not prove anything: *Director of Civil Forfeiture v. Doe*, 2010 BCSC 1784 at paras. 18-21; *Al Boom Wooden Pallets Factory v. Jazz Forest Products (2004) Ltd.,* 2012 BCSC 487 at para. 48; and *Pasanen v. Pasanen Estate,* 2021 BCSC 950 at para. 37.

[59] The plaintiff had deposed in an affidavit filed March 8, 2023, in support of the Damages Order, that the defendant waived the subject clauses on the Purchase Agreement on April 23, 2021 (although he did not attach any waiver document to that affidavit).

[60] Later, in 2025, counsel for the plaintiff cross-examined the defendant on a document said to be an addendum dated April 23, 2021, and showing the defendant waiving the subject clauses. The plaintiff contends that the defendant waived the conditions and relies on this contract of purchase and sale addendum dated April 23, 2021, which states the parties "HEREBY AGREE AS FOLLOWS: TO REMOVE THE FOLLOWING SUBJECTS…". On cross-examination, the defendant acknowledged his signature on that addendum document, but testified that he did not recall it, and unequivocally denied signing it. Further, while there is a place on the addendum next to the name of the plaintiff for the plaintiff's signature (along with the defendant's), there is no signature from the plaintiff seller on this addendum document.

[61] Thus, the defendant has deposed and testified on cross-examination that he did not agree to waive the subject clauses on this real estate transaction. Relatedly, the defendant deposed that at the time he was served, he "believed that the transaction referred to in the claim was no longer active", which is inconsistent with the plaintiff's evidence in his affidavit #1 (para. 13) --- but this is a conflict in the evidence I am unable to resolve on this application.

[62] Further, the plaintiff seller's signature is absent next to his name on the addendum said to document the waiver of subjects. The plaintiff contended, in supplemental oral submissions, that to argue that a seller has to sign an addendum waiving conditions of the buyer is patently wrong, but I have been provided no case authority which conclusively determines that to be so especially where the waiver of conditions is recorded in a contract of purchase and sale addendum in this form that has a place for both buyer and seller's signatures and the plaintiff seller's signature is absent.

[63] If subject clauses for the benefit of the defendant purchaser were not waived or removed, then this could have suspended, and have an effect on, the obligation of the parties to complete the transaction: *Han-Earl Consulting Ltd. v. 1048661 BC Ltd.*, 2022 BCSC 1073 at para. 23; *Mill Creek Developments Ltd. v. P & D Logging Ltd.*, 2008 BCCA 531 at paras. 18, 21–24; *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2012 BCCA 28 at para. 23.

[64] The plaintiff submits that the defendant "has not been careful with his evidence and it should not be relied upon." The plaintiff submits that the

defendant's evidence should be disregarded and that the court should find that he has not demonstrated a meritorious defence.

[65] However, I am not persuaded on this application to make a finding of fact as to the defendant's credibility and reliability in this regard that so wholly discounts the defendant's evidence on this point that it precludes a finding that this is a defence at least worth investigating.

[66] In my view, noting that the applicant defendant's burden on this branch of the *Miracle Feeds* test is low, the defendant's proposed defence that the conditions were not waived is at least a defence worthy of investigation.

[67] There is, at least, a defence worthy of investigation as to whether the defendant buyer's subject clauses were waived and whether the defendant is liable to pay damages to the plaintiff for breach of the Purchase Agreement.

[68] Further, the defendant argues that the plaintiff failed to mitigate his damages by declining another offer in February 2022 to sell the property at $14.8 million, an amount $500,000 more than the ultimate sale price of $14.3 million in April 2023. I understand that the Damages Order includes a component calculated as the difference between the contract price and the ultimate sale price. Thus, had the property been sold under this other higher offer, the defendant says, the amount of the Damages Order would have been $500,000 lower.

[69] I also understand that included in the quantum of the Damages Order is a component of approximately $562,369 for the plaintiff's carrying costs of the property until the date of sale. However, the defendant submits that amount for carrying costs is excessive since the plaintiff could have sold the property earlier, and for more, with less or no carrying costs.

[70] These arguments could support a plausible defence, worthy of investigation, of a failure to mitigate: *Hassel v. Khoshgoo*, 2010 BCSC 233 at para. 34, quoting *Cassidy v. Smith*, 2008 BCSC 1778. The duty to mitigate is related to a contractual repudiation analysis: *FPS Food Process Solutions Corporation v. XTL Inc.,* 2025 BCCA 305 at para. 29.

[71] As such, I also find the defendant's mitigation defences are at least worthy of investigation and are relevant to the analysis of whether to set aside the Default

Judgment.

[72] Having made these findings, I do not find it necessary to address in detail arguments about whether there are other defences worthy of investigation, although I do note that the defendant's other proposed defences set out in paras. 14(b) through 14(e) of his notice of application, some of which rely on the plaintiff's right to terminate and not proceed with the contract of purchase and sale, do not appear meritorious.

**Conclusion on Application to Set Aside Default Judgment – Interests of Justice**

[73] The final aspect of the test requires an assessment to determine what is in the interests of justice.

[74] The purpose of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits (at R. 1-3(1)), which includes (among other things) consideration of the amount involved in the proceeding (at R. 1-3(2)(a)).

[75] The defendant's severe delay before applying to set aside the Default Judgment requires an examination of the purpose of the rule permitting the setting aside of a default judgment. I conclude the second branch of the *Miracle Feeds* test seeks to assess the request to set aside a default judgment in the context of concerns around the proper administration of justice.

[76] Thus, the overall interest of justice assessment must balance the risk of a denial of justice with the proper administration of justice: *M.T.B. v. L.B.V*., 2024 BCCA 159. That is, "the interests of justice work for both sides of a dispute": *Buchan v. Rome*, 2018 BCCA 175 at para. 34.

[77] In *M.T.B*., the Court of Appeal upheld a decision declining to set aside a default judgment, stating that "to allow a defendant simply to disregard a claim and default judgment and then avoid the natural consequences of doing so, would be contrary to the proper administration of justice and would undermine the public confidence in the judicial system": at para. 23. However, *M.T.B* had different factual circumstances than the case before me, including that there the defendant had merely made a "flat denial" to the merits of claim in support of the third branch

of the test, which informed the interests of justice assessment (at paras. 12, 21, 37); that is not the case before me, where there is more evidence on the merits than merely a flat denial.

[78] The defendant has engaged in severe delay of over three years before applying to set aside the Default Judgment. While the defendant has experienced the death of two family members during this time, and deposed he was overwhelmed during this time period, this does not justify his failure, even when self-represented, to take steps during the entirety of this time to inform himself of his legal right to apply to set aside the Default Judgment, and take steps to do so more promptly.

[79] The plaintiff has not failed to comply with the *Rules*, while the defendant has both failed to comply with the *Rules* and been extraordinarily dilatory in applying to set aside the Default Judgment. Nevertheless, it inheres in R. 3-8(11) that a court may set aside a default judgment despite a defendant's non-compliance with the *Rules*.

[80] In *Yang v. Wang*, 2020 BCSC 1176, aff'd 2021 BCCA 56, there was a delay of four years before the defendant applied to set aside a default judgment, and the court declined to set aside the default judgment. However, in that case the defendant applicant failed all three branches of the *Miracle Feeds* test. That is not the case before me, where the defendant has satisfied branches one and three of the test.

[81] Here, default judgment was taken without prior notice of an intent to do so.

[82] Ultimately, I must consider what is appropriate in light of "the overarching aim of the court to do justice between the parties": *Al Boom Wooden Pallets Factory v. Jazz Forest Products (2004) Ltd.*, 2012 BCSC 487 at para. 52. I am mindful of the "caution[] against an inflexible application of the *Miracle Feeds* factors": *Andrews v. Clay*, 2018 BCCA 50 at para. 31.

[83] I am also mindful that post-*Yao*, where a plaintiff has taken the further step of obtaining an order assessing damages in reliance on a default judgment, a defendant need not meet the stricter "prevent a miscarriage of justice" test, in order to set aside a default judgment and related damages order (paras. 9, 63 and 66).

[84] I place no weight in the defendant's favour on the fact that the defendant was self-represented and has deposed that he was unaware until retaining counsel that he had the right to apply to set aside the Default Judgment. It is expected that he would nevertheless familiarize himself with the applicable law in this regard and in this specific context, and his failure to do so for over three years in these circumstances provides no excuse for the purposes of Factor #2 of the *Miracle Feeds* test.

[85] I find that the defendant's application to set aside this Default Judgment is close to the line.

[86] Nevertheless, overall, I am satisfied that the interests of justice merit an order setting aside the Default Judgment. The ultimate aim of the *Miracle Feeds* test is to "do justice between the parties". I have considered in the balancing of the interests of justice that the object of the *Rules* includes determining a "proceeding on its merits"—and I place weight on Factors 1 and 3 of the test for this reason. The set aside default judgment rule, by definition, contemplates that a default judgment can be set aside despite a defendant's non-compliance with the *Rules*.

[87] To the extent that all of the *Mircale Feeds* factors have not been fully satisfied, in that the defendant engaged in severe delay before applying to set aside the Default Judgment, I nevertheless find that, despite this delay, given his explanation for part of that delay relating to the deaths of two family members in this time period, that he has met two other branches of the test including defences worthy of investigation, and the significant quantum of damages at issue, the interests of justice weigh in favour of setting aside the Default Judgment.

[88] In coming to this conclusion, I have weighed the defendant's delay in taking steps to set aside the Default Judgment, contrary to the proper administration of justice, with these other considerations.

[89] The defendant's severe delay in applying to set aside the Default Judgment, while militating strongly against him on this application as being contrary to the proper administration of justice, does not in my view weigh so heavily that it outweighs other factors, including the importance of doing justice between the parties, such that I should not set aside the Default Judgment in all the circumstances.

[90] The plaintiff submits that if the Default Judgment is set aside,

> … Dhunna will be prejudiced by having incurred the time and expense of substantial legal proceedings since default judgment was granted. [And] … it will be highly prejudicial to the plaintiff to have to relitigate the debt when the details are no longer fresh in the parties' minds.

The plaintiff here relies on *Yang*; *Asia Growth*; *Pepinieres*; and *Labadie v. Hegel*, 2017 BCSC 909, aff'd 2017 BCCA 446. With the passage of time, it is possible that memories have faded, and this is part of the overall balancing of prejudice in the *Miracle Feeds* analysis: *Yang* at paras. 66–67, quoting *Tiamzon v. Vandt*, 2020 BCSC 587.

[91] I acknowledge that the plaintiff will be prejudiced by a setting aside of the Default Judgment and the Damages Order over four years after the Default Judgment was obtained. But such a duration of time is not so inordinate that from a quality of evidence perspective it outweighs other factors militating in favour of the applicant defendant. To the extent the plaintiff may be prejudiced by such an order, those considerations are not in my view sufficient to outweigh other factors militating in favour of setting aside the Default Judgment.

[92] The plaintiff contended, in supplemental oral submissions, that the defendant had failed to "show through affidavit material" that the *Miracle Feeds* test has been made out (*Yao* at para. 49; see also *Andrews* at para. 32), but I am satisfied on the evidentiary record the defendant has done so.

[93] I therefore order that the Default Judgment order be set aside and that the defendant be permitted to file a response to civil claim within 30 days.

**Should the Damages Order be Set Aside?**

[94] The Default Judgment having been set aside, the Damages Order is also set aside: *Yao* at para. 66.

**Order**

[95] I make the following orders:

1. Paragraphs 1 and 2 of the notice of application are granted, and the Default Judgment and Damages Order are set aside; and

2. Paragraph 3 is granted, and the defendant shall file a response to civil claim within 30 days.

[96] If the parties cannot agree on costs they may, within 30 days, submit a request to Supreme Court Scheduling for a court appearance before me to make submissions on the matter of costs.

"Stephens J."