

CANADA / JUDGMENT

Hightime Investments Pty. Ltd. v. Bromley

2009 BCCA 194

COURT

British Columbia Court of Appeal

DECIDED

1 May 2009

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2009 BCCA 194 Hightime Investments Pty. Ltd. v. Bromley COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Hightime Investments Pty. Ltd. v. Bromley, 2009 BCCA 194 Date: 20090501 Docket: CA36575 Between: Hightime Investments Pty. Ltd. Appellant (Plaintiff) And Stuart Bromley Respondent (Defendant) Before: The Honourable Mr. Justice Bauman (In Chambers) R.W. Grant Counsel for the Appellant R.B. Fraser Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia 27 March 2009 Place and Date of Judgment: Vancouver, British Columbia 1 May 2009 Reasons for Judgment of the Honourable Mr. Justice Bauman:

- [1] The plaintiff/appellant, Hightime Investments Pty. Ltd. ("Hightime"), brings an application for leave to appeal the order of Mr. Justice Sigurdson which set aside a default judgment obtained by Hightime against the defendant/respondent Stuart Bromley ("Bromley"). CIC Resources Ltd. ("CIC"), a company in which Mr. Bromley is interested, brings an application to be added as a defendant/respondent. CIC made submissions before Mr. Justice Sigurdson and no objection to its application is raised here. CIC is added as a defendant/respondent and the style of cause will be amended accordingly.
- [2] Mr. Justice Sigurdson's comprehensive reasons are indexed as 2008 BCSC 1353. The background to this and related proceedings in the Supreme Court is very complicated and involves various mining leases and transactions in China. For my purposes, Mr. Justice Sigurdson's summary of the proceeding will serve to give context to my disposition of the application:
- [23] To summarize, this action by Hightime is a claim that Mr. Bromley made certain misrepresentations. The key allegation is that Hightime reasonably relied on Mr. Bromley's false representations and was induced to transfer 9,000,000 shares of CICH to Mr. Bromley's nominee, CIC.
- [3] Mr. Justice Sigurdson then proceeded to summarize the background to Hightime taking default judgment:
- [24] Hightime asserts that Mr. Bromley was served with the writ of summons and statement of claim in Beijing, China, on Tuesday, November 21, 2006, at 11:15 a.m.

- [25] No appearance was entered by Mr. Bromley.
- [26] Over three months later, on March 7, 2007, Mr. Edinger, counsel for the plaintiff, with the affidavit of Robert Gardner in support, applied in chambers pursuant to Rules 17(9) and 18 for judgment. No further notice was given by the plaintiff to Mr. Bromley. No one appeared for the defendant.
- [27] After hearing submissions that took approximately forty minutes, Wong J. ordered that the initial lease transfer agreement be rescinded; that the share transfer agreement as defined in the statement of claim, pursuant to which nine million shares of CICH were transferred to Mr. Bromley's nominee, CIC, be rescinded; that CICH was authorized to take such steps as necessary so that the records reflect the rescission; and, that the plaintiff be awarded judgment for damages against Mr. Bromley to be assessed subject only to any set off in favour of the defendant against such award of damages.
- [28] On March 23, 2007, the CIC shares in CICH were cancelled and a new share certificate was issued in the name of Hawkshead Investments Limited ("Hawkshead"), which a week later, on March 30, 2007, transferred those shares to Hightime.
- [4] The learned chambers judge was considering the application before him in the context of the test set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58, [1979] B.C.J. No. 1965 (Co. Ct.).
- [5] The chambers judge dealt with the issues in this order:
- (1) whether Bromley could satisfy the *Miracle Feeds* test, and there the issue engaged only the first prong, viz, had he demonstrated that he did not wilfully fail to appear to this action;
 - (2) whether the failure to join CIC as a party to the action is a ground to set aside the judgment (regardless of the outcome on the *Miracle Feeds* inquiry);
 - (3) whether there was non-disclosure on the application before Wong J. so as to entitle Bromley to an order setting aside the judgment; and
 - (4) whether or notwithstanding Bromley's failure to satisfy the *Miracle Feeds* test, the court enjoys a residual discretion (which it should exercise in Bromley's favour) to nevertheless set aside the default judgment.
- [6] Mr. Justice Sigurdson resolved the issues in this way:
- (1) although it was "close to the line", Bromley had not established that he was not served; he failed the *Miracle Feeds* test;
 - (2) the failure to join CIC as a defendant was, in any event, fatal to the default judgment;
 - (3) in the circumstances, the Court need not decide the application on the non-disclosure argument; and

- (4) there is a residual discretion to set aside a default judgment notwithstanding the failure to meet the Miracle Feeds test and it should be exercised in Bromley's favour.
- [7] The factors to be addressed on an application for leave to appeal are:
- (i) whether the point on appeal is of significance to the practice; (ii) whether the point raised is of significance to the action itself; (iii) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and (iv) whether the appeal will unduly hinder the progress of the action: *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.).
- [8] In the case at bar, Mr. Grant, counsel for the appellant, concentrates on the chambers judge's discussion of the residual discretion and he forcefully submits that Sigurdson J. has given life to a novel and important development of the law in these matters, which most obviously should attract appellate review and consideration.
- [9] But what the learned judge said of the residual discretion was clearly obiter dictum. Mr. Justice Sigurdson, at para. 143 of this reasons, stated:
- [143] I have concluded that the failure to join and serve CIC is a sufficient basis to set aside the judgment, given the relief that was sought and obtained.
- [10] The learned judge then began his discussion of the residual discretion with the familiar "If I am wrong on that ...", a clear indication that what followed was said "by the way" and unnecessary for the resolution of the case.
- [11] In my view, the merits of the appeal from the actual ratio of the decision of the chambers judge, centering on the failure to join CIC, are so weak that a consideration of the leave to appeal factors, in particular (iii) and (iv), favours denying leave to appeal. Granting leave to appeal in the expectation that a panel of this Court would be tempted to ignore the legal force of the actual ratio in the impugned decision, for a chance to opine on obiter dicta therein, would ill serve the gate-keeping function of the leave to appeal requirement.
- [12] The application for leave to appeal is dismissed. "The Honourable Mr. Justice Bauman"

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Prepared on 30 October 2026 · Esheria