

CANADA / JUDGMENT

Malik v. Eagle Mountain Farms (A Partnership)

2021 BCCA 379

COURT

British Columbia Court of Appeal

DECIDED

12 October 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCCA 379 Malik v. Eagle Mountain Farms (A Partnership) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Malik v. Eagle Mountain Farms (A Partnership), 2021 BCCA 379 Date: 20211012 Docket: CA46963 Between: Raminder Kaur Malik Respondent Appellant on Cross Appeal (Plaintiff) And Eagle Mountain Farms (A Partnership), Jasbir Singh Banwait and Manmohan Singh Heer Appellants Respondents on Cross Appeal (Defendants) Before: The Honourable Chief Justice Bauman The Honourable Madam Justice MacKenzie The Honourable Mr. Justice Harris On appeal from: An order of the Supreme Court of British Columbia, dated July 17, 2020 (Malik v. Eagle Mountain Farms, 2020 BCSC 1481, New Westminster Docket 208116). Counsel for the Appellants: K. Rejminiak Counsel for the Respondent: J. Malik R. Diocee Place and Date of Hearing: Vancouver, British Columbia September 8, 2021 Place and Date of Judgment: Vancouver, British Columbia October 12, 2021 Written Reasons by: The Honourable Chief Justice Bauman Concurred in by: The Honourable Madam Justice MacKenzie The Honourable Mr. Justice Harris Summary: In proceedings below, the respondent was granted a default judgment against the appellants who are guarantors on a loan that the respondent made to a corporation. The notice of civil claim, however, erroneously named a partnership as defendant rather than the corporation with whom the loan agreement was made. The appellants applied to have that default judgment set aside, but the chambers judge dismissed that application. The chambers judge also awarded special costs against the respondent. The appellants challenge the dismissal of their application to have the default order set aside. The respondent cross appeals the award of special costs against her. Held: appeal allowed; cross-appeal dismissed. One of the factors in the test to set aside a default judgment is whether the defendant has a meritorious defence. In this case, the defendants had a complete defence: they were not guarantors of a loan with respect to the partnership. Given that the judge did not make the pleadings amendment (to substitute the correct corporate defendant) nunc pro tunc, the question of whether the default judgment should be set aside must be assessed against the pleadings as they existed when the defendants defaulted. On the cross-appeal, the judge did not err in awarding special costs against the respondent. The judge's award for special costs was based on a combination of factors. He found that there was a measure of carelessness and recklessness with respect to the pleadings, respondent's affidavit, and execution of the garnishing order against the Partnership. Reasons for

Judgment of the Honourable Chief Justice Bauman: Overview

- [1] This appeal challenges the order of the chambers judge, pronounced and entered 17 July 2020, dismissing an application to set aside a default judgment made against the appellants. The appellants contend the chambers judge erred in his discretion in declining to set aside the default judgment. The respondent cross-appeals on the basis the judge erred in awarding special costs against her.
- [2] For reasons that follow, I would allow the appeal and set aside the default judgment and dismiss the cross-appeal regarding special costs.

Background

- [3] Jasbir Banwait and Manmohan Heer (the "Appellants") are directors in a company, Eagle Mountain Farm Ltd. ("Eagle Mountain Ltd"). In 2013, the Appellants entered into a lease agreement with Satnam Education Society ("Satnam") for a 160-acre property Satnam owns in Mission, British Columbia, for the purpose of growing blueberries. The lease was negotiated through Satnam's director, Ripudaman Singh Malik, who is also the spouse of the respondent. The lands were in need of development for blueberry farming and so, later that same year, the respondent, Ms. Malik agreed to personally loan Eagle Mountain Ltd. up to a maximum of \$500,000 for that purpose. The Appellants, in their capacities as directors of Eagle Mountain Ltd., signed the loan agreement as guarantors.
- [4] Eagle Mountain Ltd. made the first payment under the loan agreement but, by 2 October 2018, issues had arisen between Eagle Mountain Ltd. and Satnam. Eagle Mountain Ltd. defaulted on the loan. The respondent made a demand on Eagle Mountain Ltd. and the Appellants as guarantors of the loan for the accelerated payment of the full amount of the loan owing under the agreement. Around this time, the parties entered into negotiations concerning the claims between Satnam and the Appellants.
- [5] When the full amount owing was not paid by 7 November 2018, the respondent filed a notice of civil claim in the Supreme Court seeking a monetary judgment under the loan agreement. No response to the civil claim was filed or served by the Appellants. Critically, however, the respondent named the wrong defendant, alleging the loan was taken out by "Eagle Mountain Farms (A Partnership)," an entity in which the Appellants were also involved (the "Partnership").
- [6] On 24 September 2019, the respondent successfully obtained default judgments against the Appellants and the Partnership. A garnishing order was subsequently made and executed against an account in the name of the Partnership. The default judgment entered against the Appellants ordered them to pay Ms. Malik \$259,740.98 plus interest of \$13,805.41 to satisfy the loan. The Appellants then applied in the Supreme Court for an order vacating the default judgments and setting aside the garnishing order. The respondent consented to having the default judgment against the Partnership set aside and applied to substitute "Eagle Mountain Farm Ltd." in place of "Eagle Mountain Farms (A Partnership)." Reasons for Judgment

- [7] The applications came before Justice Armstrong. The judge set aside the default judgment against the Partnership, substituted the named defendant "Eagle Mountain Farms (A Partnership)" with the corporate entity "Eagle Mountain Farm Ltd.", set aside the garnishing order issued against an account in the name of the Partnership and ordered the garnished funds paid out of court to the Partnership. He declined, however, to set aside the default judgment against the Appellants. Although the respondent sought the pleadings amendment nunc pro tunc, the judge declined to make it so. Default Judgments
- [8] On the matter of setting aside the default judgments, the judge referenced the principles outlined in *Miracle Feeds v. D & H Enterprises Ltd.* (1979), 10 B.C.L.R. 58, [1979] B.C.J. No. 1965 (Co. Ct.). He stated that the Appellants were required to establish through affidavit material they (1) did not wilfully or deliberately fail to enter an appearance or file a defence; (2) made application to set aside the default judgment as soon as reasonably possible after learning of it; and (3) have a meritorious defence or at least one worthy of investigation.
- [9] The judge accepted that the Appellants had been duly served with the notice of civil claim, despite the fact that Mr. Banwait did not recall being served and Mr. Heer denied being served. He noted the Appellants' counsel conceded in submissions that the notices of civil claim had been served and that he had been instructed not to receive them on behalf of the Appellants. The judge found the Appellants idly stood by and deliberately failed to file a response, which they could not justify except by some vague reference to negotiations.
- [10] The judge accepted the Appellants acted in a timely fashion after learning of the default judgment in applying to have it set aside.
- [11] The judge concluded, however, that the Appellants did not have a meritorious defence and that no details had been provided in their affidavit material permitting the court to assess whether any defence was worthy of investigation. He noted the Appellants did not dispute that the debt claimed against Eagle Mountain Ltd. was due and owing. Their only response was to contend that the mistaken naming of the Partnership was a deliberate and fraudulent attempt by the respondent to cause them financial loss and credit damage.
- [12] The judge determined the Appellants had not met the *Miracle Feeds* test and dismissed the application to vacate the default judgment against them. Special Costs
- [13] The Appellants requested special costs due to the error in naming the Partnership as a defendant. The judge opined there was a measure of carelessness and negligence on the part of the respondent's lawyer who failed to read the loan agreement and ensure the pleadings accurately reflected the proper parties. The judge considered that the lawyer's carelessness was compounded by the carelessness of the respondent. He noted that the respondent falsely swore an affidavit without reading the agreement and comparing it to the notice of civil claim and then executed a garnishing order against the improperly named partnership. He was satisfied the approach taken by the respondent to the litigation was "sufficiently cavalier to warrant a rebuke by the Court" and granted the order for special costs: at para. 64.

[14] The judge also found the Appellants were responsible for costs at Scale B to the respondent on the application to set aside the default judgment against them.

Issues

[15] The following issues are raised on appeal:

1. Whether the chambers judge erred by failing to consider factors beyond those in Miracle Feeds and applying those factors as though they were a rigid test;
2. Whether the chambers judge erred in the exercise of his discretion in declining to set aside the default judgment, including by failing to consider prejudice to the appellants.

[16] The following issue is raised on cross-appeal:

1. Whether the chambers judge erred in principle in awarding the Partnership special costs.

Analysis

The Appeal

[17] It is not necessary to engage with the issues in the manner raised by the parties on appeal. In my view the default judgment against the Appellants simply cannot stand.

[18] It is wrong to say on an application of the Miracle Feeds test that the Appellants, as guarantors of the debt of Eagle Mountain Ltd., had no meritorious defence to the action in which they defaulted. To a claim on the loan agreement against Eagle Mountain Ltd., that may be so, but in respect of the claims as pleaded--against the Partnership--they had a complete defence. The Partnership owed nothing; it was not a party to the loan agreement.

[19] Where the judge has (and indeed the parties have) erred is in assuming that one should apply the test for vacating a default judgment against the factual backdrop of the amended pleadings. That is not so. One must apply the test in the face of the pleadings to which the Appellants defaulted--a claim under the loan agreement against the Partnership. That this is so is made even starker when we appreciate that the judge correctly declined to make the pleadings amendment order *nunc pro tunc*, that is "now for then"--a phrase applied to actions allowed to be done after the time they should have been done with a retroactive effect.

[20] The judge's reasons indicate that the amendment of the named defendant was ultimately by consent of the parties. Whether that amendment could have or should have been made *nunc pro tunc*, as a typical misnomer, is not an issue on appeal before this Court.

[21] This is not elevating form over substance. This is not a case of simple misnomer in which we should ask whether the defendant would know "this must be myself who is meant": *Ladouceur v. Horwarth* (1973), [1974] S.C.R. 1111, 1973 CanLII 30; see also *Leesona Corp. v. Consolidated Textile Mills Ltd. et al.* (1977), [1978] 2 S.C.R. 2, 1977 CanLII 199; and see, e.g., *Hansen Grain Co. v. Shillington*, [1917] 2 W.W.R. 827, 1917 CarswellSask 75 (S.C.). In this case,

while it may have been clear that the "litigating finger" was pointed at the Appellants, the nature of their liability was not similarly clear. This mistake cannot be cured by an appeal to pragmatism and so called judicial economy. The respondent's "efficient" remedy was always available to her: amend the pleadings, name the correct party, and pursue a summary disposition of the action under the Supreme Court Rules.

- [22] While this analysis does not address each of the Miracle Feeds factors, those factors are neither mandatory nor exhaustive: *Andrews v. Clay*, 2018 BCCA 50.
- [23] I would allow the appeal. The Cross-Appeal Did the chambers judge err in awarding special costs? Positions of the Parties
- [24] The respondent says that special costs should not have been awarded because the error in naming the Partnership as a party was inadvertent and because the respondent consented to setting aside the default judgment as against the Partnership at the earliest opportunity, in response to the application. The respondent contends that parties cannot set aside court orders unilaterally and there is no suggestion that the respondent knew of the mistake before the application was filed. With respect to the garnishing order, the respondent says she is not aware of a way she could have ascertained the source of the funds paid into court and that she learned of the source of the funds at the same time as the chambers judge, which was the morning of the hearing. The respondent submits that, in principle, special costs are inappropriate where the relief sought is consented to, as error correction should be encouraged.
- [25] The Appellants say the award of special costs was appropriate in light of the error of counsel for the respondent in naming the Partnership rather than the corporation as defendant. The Appellants say the conduct of the respondent was reckless and deserving of rebuke. The respondent swore an affidavit in which she falsely attested that the notice of civil claim was correct and counsel for the respondent represented to the court during the hearing that Eagle Mountain Ltd. had been duly served with the notice of civil claim. Moreover, the Appellants submit the respondent attempts to challenge underlying findings of fact made by the trial judge without demonstrating a palpable and overriding error.

Analysis

- [26] An award of special costs is a discretionary award demanding deference; it should only be set aside on appeal if the judge misdirected herself on the law, made an error in principle, made a palpable and overriding error on a factual matter, or the award is clearly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27; *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 33.
- [27] The respondent submits in her factum that the chambers judge based the award of special costs on two factors: paras. 63-70:

1. The respondent could have vacated the judgment against the Partnership before her application was begun; and/or
 2. The respondent could and should have agreed to withdraw the garnishing order or made early efforts to ascertain the source of the funds paid into court, but she did not do so.
- [28] The Appellants say the respondent minimizes the reasons of the chambers judge in making the award. In essence, the respondent does not tell the full story. The Appellants submit the chambers judge also made the award for the following reasons: paras. 63-70:
1. The claim was ill-conceived because the respondent's counsel failed to properly prepare the notice of civil claim;
 2. The respondent was careless when she falsely swore her affidavit without reading the agreement and comparing it to the notice of civil claim;
 3. The respondent's counsel represented to the Court that the Partnership was subject to the loan when such representation was untrue and clearly wrong on the material contained in the affidavit on which the plaintiff relied to obtain the judgment;
 4. The respondent went on to obtain the Garnishing Order After Judgment against the wrong party;
 5. The respondent did not vacate her judgment after learning that it was made against the wrong party; and
 6. The respondent chose not to agree to withdraw the Garnishing Order After Judgment or make early efforts to ascertain the source of the funds paid into the court after learning the default judgment had been taken against the wrong party.
- [29] I agree that the respondent does not tell the full story. The judge's award for special costs was based on a combination of factors. The judge concluded there was a measure of carelessness and recklessness by counsel for the respondent, who simply did not read the pleadings to ensure they accurately reflected the proper parties. That carelessness was compounded by the respondent when she swore her affidavit without ensuring its accuracy. The judge noted that "a common theme" in the authorities was "that meritless claims and recklessness with regard to truth may warrant a special costs order": para. 66. He was satisfied the respondent "demonstrated a level of carelessness and indifference to the interests of the [Eagle Mountain] Partnership at a number of important points in the litigation" and that the claim was ill-conceived, due to the improperly prepared notice of civil claim: para. 68. Moreover, the respondent caused substantial interference to the Partnership by executing a garnishing order against it: para. 70. With minimal care, this could all have been avoided and the judge was therefore satisfied the respondent's conduct was deserving of rebuke.

- [30] The respondent does not deny that special costs have been awarded in cases involving meritless claims but says something more is generally needed, such as an improper motive, citing *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352. The respondent concedes the claim against the Partnership was meritless but says the error was inadvertent and that she attempted to correct the error at the earliest opportunity after having learned of it.
- [31] Again, in my view, the respondent misunderstands the reasons of the chambers judge. The judge did not award special costs merely because the claim was meritless; the judge also relied on the careless and reckless behaviour of the respondent and her counsel. The error may have been inadvertent, but the respondent has not pointed to any authority which indicates that a meritless claim must be advanced knowingly or maliciously in order to warrant special costs. Even within the category described by Justice Gropper in *Westsea* ("Meritless Claims and Improper Motive," at paras. 42-52), the actual authorities cited in describing that category do not limit special costs only to malicious conduct, but also include recklessness: see e.g., *Hung v. Gardiner*, 2003 BCSC 285 at para. 16. Moreover, I agree that the authorities relied on by the chambers judge support an award of special costs where a meritless claim is advanced recklessly. For example in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, Justice Walker wrote:
- [11] Special costs may be ordered in the following circumstances:
- (a) where a party pursues a meritless claim and is reckless with regard to the truth; See also *Beach Estate v. Beach*, 2018 BCSC 1108 at para. 71, rev'd on other grounds 2019 BCCA 277.
- [32] With respect to the garnishing order, I believe the argument of the respondent that she did not learn the source of the funds until an affidavit was filed the morning of the hearing is misguided. The reasons of the chambers judge clearly imply that it was for the respondent to ascertain the source of the funds and to remedy the error. The chambers judge determined the error was one that could have been remedied through a simple review of materials within the respondent's possession. That she was unaware of the error was due to her own carelessness and the carelessness of her counsel. The error resulted in the meritless pursuit of a claim against the Partnership, the execution of a garnishing order against the Partnership, and the payment of a substantial amount of monies into court. In my view, the respondent has not shown the judge erred in the exercise of his discretion in making the special costs award.
- [33] Finally, I agree with the Appellants the respondent also attempts to challenge certain findings of fact made by the chambers judge without demonstrating palpable and overriding error. That includes, for instance, the finding of the judge that the respondent's counsel represented to the court as fact that the Partnership had borrowed the money, when such a representation was untrue and clearly wrong. The respondent contends the chambers judge erred in so finding because counsel for the respondent was unaware the wrong defendant had been named. This argument is without merit; it is axiomatic that a representation can

be untrue even if the proponent is unaware of that fact.

[34] I would not accede to this ground of appeal.

Disposition

[35] I would allow the appeal and dismiss the cross-appeal.

[36] In all the circumstances, I would award the Appellants their ordinary costs on the appeal and cross-appeal. I would award the Appellants their ordinary costs in the Supreme Court proceedings. "The Honourable Chief Justice Bauman" I agree: "The Honourable Madam Justice MacKenzie" I agree: "The Honourable Mr. Justice Harris"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/21/03/2021BCCA0379.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/malik-v-eagle-mountain-farms-a-partnership-2021>

Prepared on 26 October 2026 · Esheria