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Bob Aaron *bob@aaron.ca*

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Litigation can prove a costly nightmare

Buyer goes to court five times

Tried to recover $15,000 deposit

When Baskaran Sinnadurai offered to buy a house to be built on Holloway Rd., in Markham, from Laredo Construction Inc., he probably had no idea that he would never get the house and then find himself in court five times trying to get back his $15,000 deposit.

Sinnadurai and the builder found themselves caught in a puzzling conflict between two levels of Ontario appeal courts both of which ruled that the other one should hear Laredo's appeal.

It all began when the original agreement of purchase and sale was signed on Oct. 18, 2000, setting the closing date at Oct. 3, 2001. This was later extended by Laredo to Dec. 6, 2001 and then March 28, 2002 the day before the Good Friday holiday.

That date was beyond the 120-day extension builders are allowed under the Ontario New Home Warranties Plan Act.

On the extended date for closing, Laredo delivered its closing documents to Sinnadurai's lawyer. Sinnadurai had requested a short closing extension to April 5 in the week after Easter and he did not, or could not, close on March 28.

When Sinnadurai failed to deliver the closing funds, Laredo notified him that it was terminating the agreement and forfeiting the deposit. Laredo later resold the property to another buyer.

Sinnadurai was unable either to revive the closing or get a refund of his $15,000 deposit, and in June, 2003, he sued Laredo for return of the money.

Someone in the Laredo office misplaced the court documents which were served on the company, and Sinnadurai's lawyer eventually obtained a default judgment against Laredo for return of the deposit and costs of $8,260.

Eventually, Laredo discovered the fact that judgment had been signed against it and applied to set aside the default judgment. When that request was tossed out of court, Laredo appealed to the Court of Appeal.

Before the appeal was heard, counsel for Laredo decided that the appeal should have been made to Divisional Court and not the appeal court. As a result, he obtained an uncontested court order transferring the appeal to the Divisional Court.

When the matter came up in June last year before three judges in the Divisional Court, they decided that the appeal should be heard in the Court of Appeal and sent it back there.

But when the case finally reached the Court of Appeal in December, 2005, three judges of that court ruled that it did not have the right to hear the appeal and it should be heard by the Divisional Court, after all.

Ultimately, the Court of Appeal judges waved a magic wand, temporarily constituted themselves the Divisional Court for the one case, and dismissed Laredo's appeal.

"This is the fifth hearing," wrote Justice Jean-Marc Labrosse. He noted that Laredo's requested costs for the appeal alone were $13,897 and Sinnadurai's costs were $14,932.

"All of this for a judgment of $15,000," the judge wrote, adding "The system of justice has not served the parties well."

As I calculate it, Sinnadurai is entitled to his original $15,000 plus interest back to September, 2003, and three awards of costs exceeding $21,000.

Typically, a litigant's actual lawyer's bills exceed the costs awarded by a court, so Sinnadurai may or may not net all of his original $15,000.

I agree with Justice Labrosse that the justice system failed the parties in this case. Something is clearly wrong when a builder refuses to extend a closing date by a week, terminates the transaction, and drags the purchaser through five court hearings before he gets his deposit back on a technicality.

I'm not sure what the solution is so this legal nightmare won't occur to a future new homebuyer. Maybe the Tarion Warranty Corporation or the Greater Toronto Home Builders' Association can come up with something creative.

Last month I wrote in this column about a recent Ontario court decision in which Justice John Jenkins ruled that a builder should have allowed a purchaser a one-week closing extension. Perhaps that's one answer.

Another might be something that's been discussed repeatedly over the years without any action being taken. The current monetary limit for Ontario's small claims courts is $10,000. Suggestions have been made that the limit should be raised to $15,000, $25,000, or even more. That would certainly go a long way toward improving affordable access to justice for Ontario's citizens.

I'm reminded of a discussion I had last year with one of Ontario's senior litigators. "Bob," he told me, "if I ever got involved in a court case, I couldn't afford me."

After reading the five court decisions in Sinnadurai v. Laredo Construction, I know what he means

Bob Aaron *is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. Visit the column archives at http://www.aaron.ca.*

Four reported decisions in chronological order...

http://canlii.org/on/cas/onsc/2004/2004onsc10767.html

Ontario >> Superior Court of Justice >>

This document: 2004 CanLII 24829 (ON S.C.)
Citation: *Sinnadurai v. Laredo Construction Inc.*, 2004 CanLII 24829 (ON S.C.)

Date: *2004-03-25*
Docket: *03-CV-250184CM2*

[Noteup] [Cited Decisions and Legislation]

COURT FILE NO.: 03-CV-250184CM2

DATE: 20040325

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
BASKARAN SINNADURAI	)	*Philip Cho* for the Plaintiff /Responding Party
Plaintiff	)	
- and -	)	
	)	*Ed Hiutin* for the Defendant/Moving Party, Laredo Construction Inc.
LAREDO CONSTRUCTION INC. and NATHAN SRITHARAN	)	No one appearing for the Defendant, Nathan Sritharan
Defendants	))	
	)	
	)	**HEARD:** March 10, 2004

Somers J.

REASONS FOR JUDGMENT

[1] This is a motion brought by the defendant, Laredo Construction Inc. (Laredo) to set aside the default judgment pronounced against it by the Honourable Madam Justice Himel on September 26, 2003, pursuant to which she gave judgment against Laredo for the sum of $15,000.00 for return of a real estate deposit and fixed costs in the amount of $2,750.00.

BACKGROUND

[2] On October 18, 2000, Laredo entered into an agreement of purchase and sale with the plaintiff for the sale to him of a house to be constructed at 19 Holloway Road, Markham, Ontario. Two separate deposits totaling $15,000.00 were paid by the plaintiff to Laredo. The closing date for the transaction was stated in the agreement to be October 4, 2001. This was extended by Laredo to December 6, 2001. On October 3, 2001, Laredo wrote to the plaintiff saying as follows:

> Re: Your purchase of Lot 121 Phase 2
> Laredo Construction Inc. Milliken Mills
>
> We regret to advise that we are unable to complete your home by the closing date of December 6, 2001. Pursuant to paragraph 21 of the agreement of purchase and sale, the closing date for the above-noted transaction is hereby extended to March 28, 2002. All of the terms of the agreement of purchase and sale shall remain the same and time is of the essence. We apologize for any inconvenience this delay may cause you

or your family and we ask that you attend our sales office to register your new closing date.

Yours very truly,

[3] By letter dated March 19, 2002, Laredo s solicitors sent by courier to the plaintiff s solicitor all of the documents relevant to the closing of the transaction scheduled for March 28, 2002. There is no suggestion raised by the defendant that the tender in this fashion was improper or incomplete. Laredo alleges that it was ready, willing, and able to complete the transaction on March 28, 2002 as required. The certificate of occupancy was issued by the Town of Markham on that date and a copy faxed to the plaintiff s lawyers the same day. Laredo takes the position that as of the date of closing, as extended, of March 28, 2002, the plaintiff was not in funds and was hence not ready, willing and able to close the transaction. Laredo then notified the plaintiff that it was terminating the agreement, and claimed forfeiture to it of the total of the deposits has subsequently sold the subject property to another purchaser.

[4] The plaintiff brought action against Laredo alleging that it had unilaterally extended the closing date past the 120-day limitation period prescribed in the agreement of purchase and sale without permission of the plaintiff. The transaction occurred during the Easter weekend, the plaintiff asked for a short extension to April 5, 2002, after the weekend so that he could complete the transaction on that date. He alleges that he was, in fact, ready, willing and able to close at that time. He claims that, in any event, this would be a proper case for the court to exercise its jurisdiction to grant relief from forfeiture.

PROCEEDINGS

[5] The statement of claim in this action was issued June 10, 2003, and served on Laredo on June 24, 2003. Following receipt by counsel for the plaintiff of the letter from Laredo s counsel terminating the agreement and declaring forfeit the deposit monies, counsel for the plaintiff attempted to persuade Laredo, through its counsel, to resurrect the transaction indicating, as I have said, that the plaintiff would be ready, willing and able to close two days after the termination letter. The discussions between counsel on both sides continued for some time. On November 22, 2002, plaintiff s counsel wrote to Laredo s counsel indicating that he had instructions to place the matter in litigation unless, in the meantime, he was sent written confirmation that Laredo s instructions were to refuse to make any settlement. Such instructions were never transmitted to plaintiff s counsel and he issued the claim on June 10, 2003, and served it on June 24, 2003. Final judgment was not obtained until September 26, 2003.

MOTION TO SET ASIDE DEFAUILT JUDGMENT

[6] In a motion to set aside a default judgment, the moving party must show:

(a) That the motion to set aside judgment has been brought as soon as possible after the moving party received the judgment;

(b) that the circumstances of the default gave rise to a possible explanation for the default; and

(c) the facts establish at least an arguable defence.

LeBlanc v. York Catholic District School Board 2002 CanLII 37923 (ON S.C.), (2002), 61 O.R. (3d) 686 (S.C.J.) at 692.

[7] The affidavit of Wayne Smith filed on behalf of Laredo indicates that his company did not become aware of the default judgment until a search done with respect to an unrelated purchase on the same plan turned it up. This was on October 20, 2003 and Laredo s counsel wrote to plaintiff s counsel on the same date asking that the default judgment be set aside. There is no suggestion by the plaintiff that Laredo did not move with appropriate dispatch to deal with the default judgment once it became aware of it.

[8] As to the failure on the part of Laredo to deal with the process after it was served with it, the explanation offered by it is particularly sparse. Only two paragraphs of Mr. Smith s affidavit deal with this. They read as follows:

> 12. Apparently the statement of claim was served on Laredo on or about June 24, 2003. I believed that I had sent a copy to Mr. Starkman to deal with the matter, as he had been previously dealing with Mr. Sinnadurai s claim with his then lawyer, Mr. Goldman.
>
> 13. Apparently I neglected to send the claim to Mr. Starkman and the claim was unfortunately misplaced in my office.

[9] As I read these two paragraphs, I see virtually no explanation at all. Mr. Smith s use of the word apparently casts doubt even on whether or not the statement of claim was served on his company. He does say, however, that he believed that he had sent a copy to his lawyer because he was aware that there were ongoing discussions about a possible settlement of the dispute. No material has been filed from his counsel Mr. Starkman to say that it was received or not received. All that Mr. Smith could offer after that is in effect saying I don t know .

[10] In my view, the affidavit should at least have indicated something to do with the volume of work that Mr. Smith had in his office at the time, particularly whether or not there were a number of matters in litigation that would cause a written statement of claim to be dealt with so casually. There is no written document indicating what was done with it, such as an office memo, diary entry or even an explanation of what the company s usual procedure was when legal matters arose and papers were served on it. In my view to allow the judgment to be set aside on such feeble evidence would be to deprive the decided cases placing restrictions on moving defendants of virtually any effect at all. See also *Citifinancial Services of Canada v. 1472354 Ontario Inc.*, [2003] O.J. No. 525 (S.C.J.) (Master); *Lanskis v. Roncaioli*, [1992] O.J. No. 1713 11 C.P.C. (3d) 99 (Gen. Div). I am not satisfied that this evidence meets the requirements of these cases.

[11] Much of the evidence given by Mr. Smith deals with a defence Laredo could raise in this action if the matter were to proceed to litigation. This would be based on the allegation that the plaintiff was not ready, willing and able to close the transaction on the extended date. There is some question as to just what the extended date was to be in view of the fact that the second extension date fell in the Easter week and indeed was extended even further because of it. This defence is certainly arguable on the facts as presented, although there is good reason to suggest, in view of the negotiations that took place between the parties after Laredo terminated the contract, that it would be appropriate to grant relief from forfeiture.

[12] Laredo has also submitted that this matter should not have gone to litigation because of the existence of the requirement that disputes between the parties be submitted to arbitration. Section 17(4) of the *Ontario New Home Warranties Plan Act,* R.S.O. 1990, c. O.31 (the Act) reads as follows:

> (4) Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court, and the *Arbitration Act* applies.

[13] This should be read on conjunction with section 7 of the *Arbitration Act 1991*, S.O. 1991, c. 17., which reads as follows:

> (1) If a party to an arbitration agreement commences a proceeding respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

This section goes on to list several exceptions to the provision. The two which have some significance in the consideration of this matter are as follows:

> (2) However, the court may refuse to stay the proceeding in any of the following cases
>
> (iv) The motion was brought with undue delay.
>
> (v) The matter is a proper one for default or summary judgment.

[14] Blair J. (as he then was) in *Ontario Hydro v. Denison Mines Limited*, [1992] O.J. No. 2948 (Gen. Div.) stated that the *Arbitration Act* provides a forceful statement from the Legislature signaling a shift in policy and attitude towards the resolution of disputes in civil matters through consensual dispute resolution mechanisms.

[15] Before enforcing any arbitration agreement, it must be clear that the parties agreed to arbitrate. Given the wording of the section 17(4) of the Act, it is clear that arbitration was a term and condition agreed upon between the parties. One might well think that this is limited to matters of dispute between them such as whether or not certain aspects of the construction were in fact substantially complete. Laredo argues that this goes to the very heart of the contract because it is a dispute .

[16] There is some question in my mind, however, whether or not at that time of the commencement of this litigation that provision was still in effect. The letter of April 2, 2002 from Laredo s counsel to counsel for the plaintiff reads:

> Inasmuch as a tender was effected on you in accordance with paragraph 12 of the agreement of purchase and sale on March 28, 2002 and you did not complete the transaction at such time, our client has instructed us to advise that it is hereby terminating the agreement of purchase and sale and it taking forfeiture of the deposit monies paid under the said agreement of purchase and sale has liquidated damages and not as penalty and reserves its right against your client for any damages that it may suffer as a result of your client s breach of the said agreement of purchase and sale.

[17] In my view, Laredo, having terminated the agreement and taken positive steps to sell the property as a result of such termination, can no longer refer back to and rely on the contract to invoke the arbitration section. No motion has been brought by Laredo to attempt to stay the proceedings. The question of arbitration has only been raised as a defence. Had such motion been brought, I would for the foregoing reasons have dismissed it in any event.

[18] It follows for what I have said that in my view this motion should be dismissed.

[19] If the parties cannot agree between themselves within 30 days as to the appropriate disposition of costs, I will receive brief submissions within 30 days thereafter.

Somers J.

Released: March 25, 2004

COURT FILE NO.: 03-CV-250184CM2

DATE: 20040325

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BASKARAN SINNADURAI

Plaintiff

- and -

LAREDO CONSTRUCTION INC. and NATHAN SRITHARAN

Defendants

REASONS FOR JUDGMENT

Somers J.

Released: March 25, 2004

This document: 2004 CanLII 24650 (ON S.C.)
Citation: *Sinnadurai v. Laredo Construction Inc.*, 2004 CanLII 24650 (ON S.C.)
Date: *2004-06-18*
Docket: *03-CV-250184CM2*

COURT FILE NO.: 03-CV-250184CM2

DATE: 20040618

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
BASKARAN SINNADURAI **Plaintiff** **- and -** **LAREDO CONSTRUCTION INC. and NATHAN SRITHARAN** **Defendants**	)	*Philip Cho* for the Plaintiff /Responding Party *Ed Hiutin* for the Defendant/Moving Party, Laredo Construction Inc. No one appearing for the Defendant, Nathan Sritharan
	)	
	)	Reasons released: March 25, 2004

Somers J.

REASONS FOR JUDGMENT - COSTS

[1] Having received a Bill of Costs from counsel for the successful plaintiff and a response thereto from the unsuccessful moving party, I am now in a position to deliver my decision on the costs of this motion.

[2] The successful plaintiff/responding party has submitted a bill of costs on a partial indemnity basis for $21,798.98. The unsuccessful moving party, plaintiff in the action, has filed a written response indicating that the total bill for fees and disbursements to be allowed to the plaintiff should be in the amount of $4,665.47. At the same time because of sharp disagreements that arose between counsel on both sides, counsel for the defendant has submitted a bill of costs of its own for the period between December 8, 2003 and December 15, 2003, which it says represents costs unnecessarily incurred because of this dispute. The amount of that draft bill for that period of time claimed is $2,500.00. I see no reason to award any costs to the defendants as claimed. This is particularly so in view of the outcome.

[3] While reviewing both of these draft bills, I note with some dismay that a considerable amount of time was spent by both parties sending angry letters and other correspondence between them, and exchanging angry telephone calls. I see no reason why either party should bear the costs of this type of conduct.

[4] I do take into account the fact that, subject to any adverse decision of the Court of Appeal, this action is at an end, and I also take into account the comparative inexperience of counsel for the plaintiff/responding party, in the exercise of my discretion, I fix the costs of the successful plaintiff/responding party, including disbursements and G.S.T in the amount of $10,000.00.

Somers J.

http://canlii.org/on/cas/onsc/2004/2004onsc11518.html

Ontario >> Superior Court of Justice >>

This document: 2004 CanLII 28735 (ON S.C.)
Citation: *Sinnadurai v. Laredo Construction Inc.*, 2004 CanLII 28735 (ON S.C.)
Date: *2004-06-22*
Docket: *03-CV-250184CM2*

[Noteup]

COURT FILE NO.: 03-CV-250184CM2

DATE: 20040622

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
BASKARAN SINNADURAI	)	*Philip Cho* for the Plaintiff/Responding Party
	)	
	)	
Plaintiff	)	
	)	
	)	
	)	
- and -	)	
	)	*Ed Hiutin* for the Defendant/Moving Party, Laredo Construction Inc.
	)	
LAREDO CONSTRUCTION INC. and NATHAN SRITHARAN	)	No one appearing for the Defendant, Nathan Sritharan
	)	
	)	
	)	
Defendants	))	

	)	
	)	Reasons released: March 25, 2004

Somers J.

AMENDED REASONS FOR JUDGMENT - COSTS

[1] After issuing a costs decision and my reasons therefor, it was drawn to my attention that I had inadvertently mixed up the figures representing the amounts suggested by counsel. In fact, counsel for the successful plaintiff responding party was asking for costs in the sum of $8,260.67 not $21,798.98. The latter is a figure suggested by counsel for the defendant, Laredo Construction Inc. as representing additional costs he claims his client incurred because of unnecessary disputes with opposing counsel, which he blamed on him. I see no reason for awarding any costs to this defendant as claimed. This is particularly so in view of the outcome.

[2] While reviewing both of these draft bills, I note with some dismay that a considerable amount of time was spent by both parties sending angry letters and other correspondence between them, and exchanging angry telephone calls. I see no reason why either party should bear the costs of this type of conduct.

[3] I do take into account the fact that, subject to any adverse decision of the Court of Appeal, this action is at an end, and I also take into account the comparative inexperience of counsel for the plaintiff/responding party, in the exercise of my discretion, I fix the costs of the successful plaintiff/responding party, including disbursements and G.S.T in the amount of $8,260.67.

_____

Somers J.

Released: June 22, 2004

DATE: 20051219

DOCKET: C41676

COURT OF APPEAL FOR ONTARIO

LABROSSE, ROSENBERG and GILLESE JJ.A.

B E T W E E N :	)	
	)	
LAREDO CONSTRUCTION INC. and NATHAN SRITHARAN	))	**Paul H. Starkman,** **for the appellants**
	)	
Appellants	)	
	)	

- and -	)	
	)	
BASKARAN SINNADURAI	))	**Philip Cho** **for the respondent**
	)	
Respondent	)	
	)	
	)	**Heard: November 16, 2005**

On appeal from the judgment of Justice William P. Somers of the Superior Court of Justice dated March 25, 2004.

LABROSSE J.A.:

[1] This is an appeal from an order dismissing a motion to set aside a default judgment with an added issue of jurisdiction.

The facts

[2] On October 18, 2000, Laredo Construction Inc. (Laredo) entered into an agreement of purchase and sale with Baskaran Sinnadurai (Sinnadurai) for the sale of a newly constructed residence for the price of $233,900, with an original closing date of October 4, 2001. Pursuant to the agreement, Sinnadurai paid a deposit of $15,000.

[3] As the house was not ready for October 4, 2001, Laredo, as permitted under the agreement, extended the original closing date to December 6, 2001, and then again to March 28, 2002. On March 27, 2002, Sinnadurai was not ready to close. The previous mortgage approvals had expired because of the closing date extensions and there were some last minute complications to securing the funds for the third closing date. Sinnadurai s solicitor requested a short extension of four business days (Easter Sunday fell on March 31) to April 5, 2002. Laredo had tendered already on Sinnadurai s solicitor and refused to extend the closing date. On April 2, 2002, Laredo purported to terminate the agreement and claimed forfeiture of the $15,000 deposit.

[4] Sinnadurai alleges that he was ready to close the transaction on April 5. Sinnadurai made a further request to Laredo for the reinstatement of the agreement on April 8, 2002. It is not disputed that, at least on that day, Sinnadurai was in funds to close the transaction. Laredo refused, relying on the provision in the agreement that time was of the essence. On that same date, Sinnadurai was told by Laredo that the house had been sold to another party. The sale was completed on May 6, 2002, for $242,151.61. Laredo refused to return Sinnadurai s deposit of $15,000.

[5] Counsel for Sinnadurai wrote to counsel for Laredo on November 22, 2002, confirming his instructions to place the matter in litigation if Laredo refused to settle. There was no reply. On June 10, 2003, Sinnadurai commenced an action for the return of the deposit and consequential damages. The statement of claim was served on Laredo on June 24, 2003, and Laredo failed to respond. On September 26, 2003, before Himel J., Sinnadurai elected to abandon the claim for consequential damages, and obtained default judgment of $15,000 for the return of the deposit, plus costs of $2,750. A writ of execution was filed against Laredo.

[6] Laredo became aware of the writ of execution on October 20, 2003, when an execution search was performed by a solicitor for another purchaser of a home from Laredo. Laredo posted security, had the writ lifted and brought a motion to set aside the default judgment before Somers J. Laredo has yet to file a statement of defence in the action.

The motion to set aside the default judgment

[7] In reasons released on March 25, 2004, the motions judge addressed the three part test for setting aside a default judgment. See: *Morgan v. Municipality of Toronto Police Services Board* (2003), 169 (O.A.C.) 390 (C.A.) at para. 19.

[8] First, the motions judge noted that Laredo moved with appropriate dispatch to set aside the default judgment once Laredo became aware of it and thus satisfied the first part of the test.

[9] Second, the motions judge saw the explanation of Laredo s failure to deal with the process after it was served as particularly sparse . The deponent on the affidavit in support of the motion said he had believed that a copy of the statement had been sent to Laredo s solicitor or he apparently neglected to send it and through inadvertence the claim had unfortunately been misplaced in his office. The motions judge saw Laredo s position as no explanation at all, as all it could offer was in effect I don t know . The affidavit should have at least dealt with the volume of work in the office; the number of matters in litigation that would cause a statement of claim to be dealt with so casually; what was done with it, such as a memo or diary entry; or even an explanation of the company s usual procedure when legal matters arose and papers were served on it. In his view, to allow the judgment to be set aside on such feeble evidence would be to deprive the decided cases placing restrictions on moving defendants of virtually any effect at all. Relying on the decisions in *Citifinancial Services of Canada v. 1472354 Ontario Inc.,* [2003] O.J. No. 525 (S.C.J.) (Master) and *Lanskis v. Roncaioli*, [1992] O.J. No. 1713 (Gen. Div.), he was not satisfied that this evidence met the requirements of the cases.

[10] Third, the motions judge noted that the defence that the plaintiff was not ready, willing and able to close the transaction on the extended date was certainly arguable on the facts, although it would be an appropriate case to grant relief from forfeiture. He also addressed the submission of Laredo that this matter should not have gone to litigation because of the requirement in the agreement of purchase and sale that disputes between the parties be submitted to arbitration pursuant to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the *Act*). In the view of the motions judge, Laredo, having terminated the agreement and taken positive steps to sell the property, could no longer refer back to and rely on the agreement to invoke the arbitration clause.

[11] The motions judge concluded that Laredo had not met the test to set aside a default judgment and he dismissed the motion, with costs to Sinnadurai fixed at $8,260.67.

[12] By way of Notice dated April 15, 2005, Laredo appealed to the Court of Appeal.

The jurisdiction issue

[13] This appeal was scheduled to be heard on November 16, 2005. In preparation for the hearing, it was noticed that the default judgment obtained by Sinnadurai was in the amount of $15,000. Accordingly, counsel were informed that they would be required to address the issue of jurisdiction in light of s. 19(1)(a)(i) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, which provides that an appeal lies to the Divisional Court from a final order of a judge of the Superior Court for a single payment of not more than $25,000, exclusive of costs .

[14] Counsel for Sinnadurai wrote back to inform the Court that the matter of jurisdiction had already been before a panel of the Divisional Court on June 22, 2005. The panel had decided the Divisional Court did not have jurisdiction to hear this case and ordered the matter transferred to the Court of Appeal. Further research revealed the following information.

[15] As stated above, Laredo commenced its appeal in the Court of Appeal. Shortly after it was commenced, counsel for Laredo concluded that in light of s. 19(1)(a)(i), the appeal ought to have been brought in the Divisional Court. On December 6, 2004, he brought a motion before Lang J.A. in chambers for an order transferring the appeal to the Divisional Court. The motion was unopposed and Lang J.A. granted the order.

[16] At the hearing on June 22, 2005, the Divisional Court, on its own motion, raised the issue of jurisdiction that had already been determined by a single judge of the Court of Appeal. Part of its endorsement states that it has no jurisdiction to hear this appeal and therefore it transfers the appeal back to the Court of Appeal with written reasons to follow.

[17] In reasons dated July 8, 2005, Matlow J., writing for the Court stated as follows:

It is not uncommon, as this case demonstrates, for appellants to assume that every order that involves not more than $25,000 can be appealed to this Court. However, s. 19(1) of the Act is much more restrictive and must be followed strictly in accordance with its wording. The relevant provision of s. 19(1) reads as follows:

19(1). An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice,

(i) for a single payment of not more than $25,000, exclusive of costs.

Although the order in appeal is, as recognized by our endorsement, a final order of a judge of the Superior Court of Justice, it is not, in form or substance, an order for a single payment and, therefore, this appeal does not fall within the scope of our jurisdiction.

[18] As to the basis for the decision, he reasoned as follows:

We are always respectful of and almost without exception bound by decisions made by judges of the Court of Appeal. However, having regard to the unusual circumstances in which the order for a transfer was made, I am persuaded that we should not follow its implicit recognition that we do have jurisdiction without further consideration of the issue by the Court of Appeal for the following reasons:

i. it was made on the basis of a submission by counsel for the appellant that was based on a clearly erroneous premise;

ii. it was made without opposition and without opposing argument;

iii. it was made without reasons and without any other explicit indication that it was made after specific consideration of section 19 of the *Courts of Justice Act*;

iv. it purports to confer an appellate jurisdiction on the Divisional Court which this Court has frequently held in similar cases is not conferred by the *Courts of Justice Act* and, if followed, would have a disruptive impact on appellate practice in this Court;

v. in the event that it is we who err in our interpretation of the *Courts of Justice Act* and that we do have jurisdiction to hear this appeal, justice would be best served if our consideration if this appeal were postponed until after further clarification by the Court of Appeal;

vi. our decision to decline jurisdiction until after further clarification by the Court of Appeal is based on a principled approach and

vii. comity between judges at different levels of the judicial hierarchy, the principle upon which *stare decisis* is based, would still be maintained without compromise.

[19] In my view, the Divisional Court was in error. The view of Matlow J. that the wording of the order in appeal THIS COURT ORDERS that the within motion is hereby dismissed is not, in form or substance, an order for a single payment, is not a proper interpretation of the words of the section. It is far too narrow. The wording of the order cannot be interpreted in a vacuum. The question must be asked: What is being dismissed? The answer is that a motion to set aside a default judgment *for a single payment of not more than $25,000, exclusive of costs* is being dismissed. This interpretation brings the appeal squarely within the jurisdiction of the Divisional Court and is consistent with the intention of the Legislature that matters involving a final order of a judge of the Superior Court for a single payment of not more than $25,000 lie with the Divisional Court. The single payment of not more than $25,000 does not lose its character because of an intervening motion that is dismissed.

[20] Moreover, the reasons for re-transferring the appeal back to this Court are questionable. In particular, I know of no authority to support the proposition that an order of a higher court made without opposition and without opposing argument or made without reasons and without explicit indication that it was made after specific consideration of a section of an act is a lesser type of order that can be overturned by a lower court.

[21] It was not open to the Divisional Court to overturn a valid order of a single judge of this Court. By way of analogy, I am not aware of any decision of a panel of the Court of Appeal that overrules a decision of a single judge of the Supreme Court of Canada. If the Divisional Court s intention was to have the law clarified, it is not achieved by overruling a higher court.

[22] More importantly, in my view, the Divisional Court seems to have been forgotten the parties in this exercise. The hearing before the Divisional Court was the fourth judicial proceeding in this case. This is the fifth hearing, in which the bills of costs submitted, on a partial indemnity basis, are in the amount of $13,897.75 for Laredo and $14,932.55 for Sinnadurai. And if this appeal were returned to the Divisional Court, it would be the sixth proceeding. All of this is for a judgment for $15,000. It would have been far more in the interest of justice had the appeal been dealt with in accordance with the order of Lang J.A. The system of justice has not served these parties well.

[23] In spite of the conclusion that this appeal is within the jurisdiction of the Divisional Court, this Court was not prepared to send the matter back. Accordingly, at our request, the Chief Justice of the Superior Court appointed the members of this panel as judges of the Divisional Court for the hearing of this appeal.

The appeal

[24] As reviewed above, on the motion to set aside the default judgment, the motions judge applied the three-part test. He accepted that Laredo had moved with appropriate dispatch. As to the explanation for the default, he concluded that it was virtually no explanation at all and that to allow the judgment to be set aside on such feeble evidence would be to deprive the decided cases placing restrictions on moving defendants of virtually any effect at all . He also concluded that the defence to the action put forth by Laredo is certainly arguable on the facts as presented but that it would fail because it would be appropriate to grant relief from forfeiture. He saw no merit to the arbitration issue.

[25] This Court has stated that the factors governing the setting aside of a default judgment are not to be applied rigidly. See *Chitel v. Rothbart*, [1998] O.J. No. 1197. There have been cases where the explanation for the default has been given less weight because the defence had merit. See: *441612 Ontario Ltd. v. Albert*, [1995] O.J. No. 27 (Gen.Div.) at para. 48 and *D.R. McKay Financial Group, Inc. v. Klad Enterprises Ltd*., [2004] O.J. No. 4288 (S.C.J.). However, this does not mean that the second part of the test is to be ignored because of an arguable defence. Otherwise, why have it?

[26] It is interesting to note, on this issue, the recent decision in *Janssen-Ortho Inc. v. Novopharm Ltd.,* 2005 SCC 33 (CanLII), [2005] 1 S.C.R. 776, where LeBel J. refused an application to extend the time of an application for leave to appeal to the Supreme Court of Canada. He stated at p. 778:

Time limits should mean something. Valid reasons should be given to explain the delay. Our Court must be flexible and fair. Fairness is owed not only to applicants but also to respondents who may very well be significantly inconvenienced by undue or unexplained delays.

[27] On the facts of this case, I see no error by the motions judge in giving serious consideration to the second part of the test, which requires that the moving party explain the circumstances which led to the default.

[28] The defence to this action raised by Laredo is that it was entitled to void the agreement and keep the deposit because Sinnadurai was not ready to close on the closing date and that it was not technically or legally obligated to give an extension. However, it will be recalled that Laredo had, in accordance with the agreement, unilaterally extended the closing date on two previous occasions for approximately two and six months, and it then refused Sinnadurai an extension of one week when the earlier arrangements for the mortgage monies had expired and the arrangements for closing were delayed. Within a few days and before the expiry of the extension asked by Sinnadurai, Laredo had sold the house for an additional $8,000, and kept Sinnadurai s deposit.

[29] In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., 1994 CanLII 100 (S.C.C.), [1994] 2 S.C.R. 490, Major J. wrote, at page 504:

The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach.

[30] Laredo has advanced no response or defence to the claim for relief against forfeiture.

[31] Accordingly, I see no error in the conclusion of the motions judge that, on the facts of this case, it would be appropriate to grant relief from forfeiture.

[32] As to Laredo s defence that the matter had to be dealt with by way of arbitration, the motions judge relied on s. 17(4) of the *Act*. It provides that:

(4) Every agreement between a vendor and a prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court, and the *Arbitrations Act* applies.

[33] He considered that subsection (4) had to be read in conjunction with s. 7(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17, which reads as follows:

(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on motion of another party to the arbitration agreement, stay the proceeding.

[34] The motions judge noted that there had been no motion to stay. He also noted that s. 7(2) of that act lists several exceptions to the provision. Specifically, there are two exceptions that he thought were of some significance to this matter, namely that the court may refuse to stay the proceeding if the motion was brought with undue delay (ss. (2)(iv)) or if the matter is a proper one for default or summary judgment (ss. (2)(v)).

[35] The motions judge did not express any view on the interaction of these provisions. He inferred that one might well think that [these provisions are] limited to matters of dispute between [the parties] such as whether or not certain aspects of the construction were in fact substantially complete . He went on to dispose of this issue on the basis that at the time of the commencement of the litigation, the arbitration clause in the agreement was no longer in effect. He concluded that as Laredo had terminated the agreement and taken positive steps to sell the property, it could no longer refer back to and rely on the contract to invoke the arbitration section.

[36] Accordingly, he dismissed the motion to set aside the default judgment. I agree with the motions judge, in the circumstances of this case.

[37] The decision to set aside a default judgment is a discretionary one. Rule 19.08(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 104, provides:

A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

[38] In *Bottan v. Vroom*, [2002] O.J. No. 1383, this Court held that:

Where a motions judge exercises discretion, an appellate court should intervene only where the discretion has been exercised on a wrong principle of law or a clear error has been made. It is not the role of an appellate court to replace the exercise of discretion by the motions judge. An appellate court should defer to the findings of fact by a motions judge unless the motions judge disregarded or failed to appreciate relevant evidence.

[39] In arriving at his conclusion that the test to set aside a default judgment had not been satisfied, the motions judge had before him the statement of claim in which Sinnadurai was seeking the return of the deposit of $15,000 for breach of contract or, in the alternative, the return of the money on the basis of relief from forfeiture. He did not have the benefit of a draft statement of defence and an affidavit attesting to the truth of the allegations in the pleading, as are normally provided on a motion to set aside default judgment. He had the affidavits and the cross-examinations in support of and against the motion, which dealt with the claim and the defence to the action, and raised the issue of arbitration. He decided the case on the evidence that the parties chose to put before him, and with full argument on all issues.

[40] In my view, in the context of the relative positions of the parties, the amount in dispute, the nature of Laredo s explanation for the default, and the nature of the defences raised by Laredo, the motions judge properly exercised his discretion in dismissing Laredo s motion to set aside the default judgment.

[41] The motions judge made no palpable and overriding error, and his decision is not so clearly wrong as to amount to an injustice. It would not be in the interest of justice to set aside the default judgment in this unfortunate case.

[42] Accordingly, the appeal is dismissed, with costs fixed at $10,000.

RELEASED: December 19, 2005

J.M. Labrosse J.A.

I agree: M. Rosenberg J.A.

I agree: E.E. Gillese J.A.
