

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Buchan v. Moss Management Inc.***,
2004 BCCA 423

Date: 20040812

Docket: CA031832

Between:

Steven Thomas Buchan

Respondent
(Plaintiff)

And

**Moss Management Inc., Alan Frederick Wolrige,
Peter Colin Graham Richards and TVI Pacific Inc.,
(formerly known as TVI Copper Inc.)**

Applicants
(Defendants)

Before: The Honourable Madam Justice Prowse
(In Chambers)

T.J. Delaney and K. Leung

Counsel for the Applicants

S.A. Mellows

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia
August 5, 2004

Place and Date of Judgment:

Vancouver, British Columbia
August 12, 2004

Reasons for Judgment of the Honourable Madam Justice Prowse:

[1] This is an application by Moss Management Inc., Alan Frederick Wolrige, Peter Colin Graham Richards and TVI Pacific Inc. (the "applicants") for leave to appeal from the decision of a chambers judge, pronounced March 24, 2004, dismissing their application to have Mr. Buchan's action against them dismissed for want of prosecution.

[2] I reserved judgment to review the authorities referred to by counsel on this application. In the result, I have concluded that the application for leave to appeal should be dismissed.

[3] A summary of the background giving rise to the order which is the subject of this application is set forth in the reasons of the chambers judge. In brief, Mr. Buchan and a corporate plaintiff of which he was a director commenced action against the applicants on November 3, 1994, alleging breach of trust, fraudulent misrepresentation, and breach of fiduciary duty in relation to certain financial dealings between them dating back to the late 1980s. The proceedings moved along at a snail-like pace thereafter, culminating in the application to have the claims dismissed for want of prosecution.

[4] The chambers judge found that there had been inordinate and inexcusable delay in the prosecution of the action by Mr. Buchan, but she also concluded that the applicants had not suffered serious prejudice and that, on balance, the interests of justice favoured allowing the appeal to proceed.

[5] In determining whether leave should be granted, the relevant factors I must consider are:

(1) whether there is merit in the appeal; that is, whether it raises an arguable point which would justify consideration by a panel of this Court;

(2) whether the issues raised are of significance to the parties and to the practice;

(3) whether the appeal would unduly hinder the progress of the action.

[6] The argument before me focused primarily on the first and second factors.

[7] The principal submission of counsel for the applicants is that the chambers judge erred in her interpretation and application of two decisions of this Court: **Busse v. Robinson Morelli Chertkow** (1999), 63 B.C.L.R. (3d) 174, and **Tundra Helicopters Ltd. v. Allison Gas Turbine, a Division of General Motors Corp.** (2002), 98 B.C.L.R. (3d) 238. Counsel submits that the error of the chambers judge in interpreting those decisions led her into further error in her assessment of the issues of prejudice and the interests of justice.

[8] Counsel for the applicants further submits that, to the extent there may be some inconsistency, or at least a perception of inconsistency, between the **Busse** and **Tundra** decisions, it would be of benefit to the practice generally if this Court clarified how those decisions should be read together.

[9] In dealing with the merits, counsel for the applicants also submits that the chambers judge erred in assuming that the limitation period for the action had not expired, and in placing too much weight on the effect of the limitation period on the question of prejudice.

[10] Counsel for the respondent submits that there is no merit to the submission that the chambers judge erred in interpreting and applying the **Busse** and **Tundra** decisions; that there is no significant difference between the principles stated in those decisions which requires clarification by this Court in this case; and that the chambers judge did not err in her treatment of the limitation issue. He also submits that the determination of whether to dismiss an action for want of prosecution is an inherently discretionary judgment which merits considerable deference by this Court.

[11] Despite the able submissions of counsel for the applicants, I am not persuaded that there is an arguable case that the chambers judge made any significant error in her interpretation or application of the **Busse** or **Tundra** decisions, or in her treatment of the limitation issues. Nor am I persuaded that the **Busse** and **Tundra** decisions present difficulties of interpretation which would justify granting leave to appeal.

[12] This case is fact-driven and the decision was based on an exercise of discretion by the chambers judge in applying the appropriate law to the facts. In my view, an appeal would simply further delay a proceeding which should be actively pursued to its conclusion.

[13] As earlier stated, I am not persuaded that this is an appropriate case in which to grant leave to appeal. I would, therefore, dismiss the application for leave to appeal, with costs of the application in the cause.

"The Honourable Madam Justice Prowse"