

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Buchan et al. v. Moss Management Inc. et al.***,
2005 BCSC 334

Date: 20050309
Docket: C945937
Registry: Vancouver

Between:

**Steven Thomas Buchan and
Prospectors Airways Consolidated Ltd.**

Plaintiffs

And

**Moss Management Inc., Alan Frederick Wolrige,
Peter Colin Graham Richards, TVI Pacific Inc. (formerly known
as TVI Copper Inc.), Span Corp. Limited, Hydrocarbon Limited,
Theodore Max Pandt, Durell Finance Ltd.,
Palmanvon J. Webster, Tetra World Investments Ltd.,
Argus Worldwide Holdings Ltd., James D. Clucas,
Gordon J. Fretwell, A. Edward McMullin**

Defendants

Before: The Honourable Mr. Justice Goepel

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff, Steven Thomas Buchan:

S.A. Mellows

Counsel for the Defendants, Moss Management Inc., Alan
Frederick Wolrige and Peter Colin Graham Richards:

T.J. Delaney

Counsel for the Defendant, TVI Pacific Inc.

R.V. Reichelt

Date and Place of Hearing:

January 26 and 27, 2005
Vancouver, B.C.

[1] This is an application by the defendants Moss Management Inc., Alan Frederick Wolrige, Peter Colin Graham Richards and TVI Pacific Inc., to strike out paragraphs 20 through 68 of the amended statement of claim filed on April 7, 2004 on behalf of the individual plaintiff, Steven Thomas Buchan. The other named defendants were never served.

[2] The action was commenced on November 3, 1994. It involves events that took place between 1986 and 1994. In May 2003 the defendants brought an application to have the action dismissed for want of prosecution. In oral reasons for judgment given March 24, 2004, Neilson J. dismissed the claims of the corporate plaintiff, which did not contest the application, but refused to dismiss the claims of Mr. Buchan.

[3] After rejecting the defendants' application to dismiss Mr. Buchan's claim for want of prosecution, Neilson J.

gave directions as to future procedural steps in order to move the action forward with dispatch. The first direction required the plaintiff file an amended statement of claim by April 7, 2004. The parties recognized that an amended statement of claim was necessary because of the removal of the corporate plaintiff from the litigation.

[4] In response to the amended statement of claim, the defendants filed this application, which remained in abeyance pending the outcome of the defendants' application for leave to appeal Madam Justice Neilson's refusal to dismiss the action. The application for leave was dismissed on August 12, 2004 (2004 BCCA 423).

[5] The background facts were set out in Madam Justice Neilson's reasons, commencing at ¶ 2:

[2] Mr. Buchan says that in the late 1980s he, the corporate plaintiff, and a James Marsh had substantial assets related to land and mineral claims. He was the director and the president of the corporate plaintiff at that time. Mr. Buchan says that in 1989 they met the defendant, Mr. Richards, a lawyer, and the defendant, Mr. Wolrige, an accountant. Mr. Buchan says he retained Mr. Richards as the plaintiffs' lawyer.

[3] In March 1990, Mr. Buchan and Mr. Marsh entered an asset management agreement with Mr. Richards and Mr. Wolrige whereby the plaintiffs' assets would be transferred to a new company, Moss Management Inc., in which Mr. Buchan and Mr. Marsh would hold the shares. This company would then manage and develop the plaintiffs' assets for the benefit of all four parties to the agreement. Mr. Buchan and Mr. Marsh were given a veto power over management decisions. The contract lists the assets, but does not state which ones initially belonged to each of the plaintiffs and to Mr. Marsh. Mr. Buchan places the value of the assets transferred to Moss Management Inc. at over \$100 million.

[4] Mr. Buchan alleges that Moss Management Inc. was incorporated, but that contrary to the agreement Mr. Richards and Mr. Wolrige became its sole officers, directors and shareholders, and that they fraudulently concealed this from him.

[5] Mr. Buchan claims that in 1991 and 1992, Mr. Richards, Mr. Wolrige and Moss Management Inc. sold some of his assets to the defendant, TVI Copper Inc., and granted it an option to acquire others. He says Mr. Richards and Mr. Wolrige wrongly kept the profit from these transactions, instead of distributing it in accord with the asset management agreement. He says the defendants did not disclose these transactions to him.

[6] Mr. Buchan says he did not find out about the transactions with TVI until late 1993. He says these assets and the funds from the sale are held by TVI, Moss Management Inc., Mr. Richards and Mr. Wolrige in trust for him.

[7] He started this action in November 1994. The Statement of Claim describes claims of fraudulent breach of trust and breach of fiduciary duty. Mr. Buchan seeks a declaration that the assets and shares of Moss Management Inc. are held in trust for him, as well as damages for breach of fiduciary duty and breach of trust.

[8] Mr. Richards, Mr. Wolrige and Moss Management Inc. filed Statements of Defence. TVI entered an appearance, but no Statement of Defence. It says this was by agreement of counsel. TVI also says it delivered a demand for particulars to the plaintiffs in November 1994, which was never answered. No other steps were taken at that time.

[9] In 1995, the shareholders of the corporate plaintiff voted Mr. Buchan off the board of directors. The new board did not want to pursue the action on behalf of the corporate plaintiff. Mr. Buchan claims that in the course of the asset management arrangements Mr. Wolrige and Mr. Richards had wrongly obtained control over shares in the corporate plaintiff, and voted those shares to oust him and gain control of the board of the corporate plaintiff in an effort to prevent the litigation from proceeding against them. Mr. Buchan says these manoeuvres made it very difficult for him to pursue the litigation on his own without financial support from the corporate plaintiff.

[6] The defendants submit that the amended pleading should be struck because it alleges new causes of action and new claims after the expiration of the limitation period without leave of the court. They also submit that leave to make the amendments should not now be granted.

[7] The defendants further submit that the amended statement of claim should be struck because it violates Rule 19(24) of the **Rules of Court** on several grounds, including the following: that parts of the amendments do not disclose a reasonable cause of action; other portions do not disclose the material facts upon which the cause of action is based; some of the amendments are vague, to the point that the defendants cannot reasonably answer the pleading; and other parts of the amended pleading are vexatious and an abuse of the court's process.

[8] The defendants also complain that the amended pleading does not distinguish between Mr. Buchan's claims and those of the corporate plaintiff, pleads allegations of fact that are inconsistent with the original pleading in breach of Rule 19(7), and advances claims of a Mr. Marsh who is not a party to the action.

[9] The plaintiff submits that subject to one exception, the claims do not raise any new causes of action, but simply provide a "fleshing out" of the allegations in the initial statement of claim. To the extent that any new causes of action are included in the amended statement of claim, the plaintiff acknowledges that leave is required and now seeks leave to allow those amendments. The plaintiff denies that the proposed amendments violate any pleading rules.

[10] In the course of submissions, the plaintiff acknowledged that the April 7, 2004 amended statement of claim did not properly distinguish between the claims of Mr. Buchan and those of the corporate plaintiff. At the hearing, the plaintiff submitted a further amended statement of claim that he asked leave to file, which in his submission corrected that deficiency and certain others raised by the defendants in the course of their submission (the "January 26 pleading").

[11] In **Homalco Indian Band v. British Columbia** (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), K. Smith J. (as he then was), in words which all counsel should heed, summarized the basic function of pleadings commencing at ¶ 5:

The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, *Handbook of Common Law Pleading*, (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:

Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.

If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the particulars should follow and should be identified as such: *Gittings v. Caneco Audio-Publishers Inc.* (1988), 26 B.C.L.R. (2d) 349 (C.A.) at 353.

[12] In **Homalco**, K. Smith J. went on to conclude that the pleading in front of him was embarrassing because it was constructed in a manner calculated to confuse the defendants and to make it extremely difficult, if not impossible, to answer. He further held that any attempt to reform the statement of claim by striking out portions and by amending other portions was likely to result in more confusion. In the result he set aside the pleading in its entirety with leave to substitute a proper pleading.

[13] Although the January 26 pleading may not be a model pleading, this is a complicated action dealing with events that took place over many years. I am satisfied that the pleading does disclose a reasonable cause of

action and, unlike the pleading in *Homalco*, I do not believe the drastic step of setting aside the entire pleading is necessary. The pleading sets out the plaintiff's case in sufficient detail to allow the defendants to understand the case they must meet. I do not find the pleading to be either vexatious or an abuse of the court's process. Whether the plaintiff can prove any of the allegations will be a matter for trial.

[14] I do not accept the defendants' complaint that the addition of certain properties to the litigation adds a new cause of action. The initial pleading did not limit the properties that might be involved.

[15] Although the January 26 pleading is inconsistent with the initial statement of claim concerning the ownership of certain assets, I reject the defendants' submission that the pleading should be struck out on the ground that it is in breach of Rule 19(7). Rule 19(7) must be read in conjunction with Rule 19(8). Those rules are as follows:

(7) A party shall not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.

(8) Subrule (7) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.

[16] Rule 19(7) does not prevent a party from applying to amend pleadings. *Bratsch Inc. v. LeBrooy* (1991), 3 C.P.C. (3d) 192 (B.C.S.C.), upon which the defendants rely, is clearly distinguishable and does not apply in these circumstances.

[17] Paragraph 31 of the January 26 pleading alleges that by an agreement dated December 15, 1994 the trustee in bankruptcy of James Frederick Marsh assigned certain rights to Mr. Buchan. The defendants submit that either Mr. Marsh or the trustee must be made a party to the action.

[18] I do not agree. Whether Mr. Marsh or the trustee should be a party to the action depends on the characterization of the assignment. It is only in the case of an equitable assignment that both the assignor and the assignee must be made parties to the proceeding. Failure, however, to join the assignor in the first instance is not fatal to the pleading and, if necessary, the court can add the assignor before the matter proceeds to trial:

Fredrickson v. Insurance Corp. of British Columbia (1986), 3 B.C.L.R. (2d) 145 (C.A.), affirmed [1988] 1 S.C.R. 1089; *Skeena Mortgage & Investments Ltd. v. Kowalchuk*, [1981] B.C.J. No. 36 (S.C.).

[19] The plaintiff concedes that paragraphs 33.c and 36 of the January 26 pleading allege new causes of action against Mr. Wolrige. The amendment alleges that the plaintiff retained Mr. Wolrige's professional services and that Mr. Wolrige owed certain fiduciary duties to Mr. Buchan arising out of that engagement. These allegations are not found in the original pleading.

[20] Although the limitation period to plead such a cause of action has passed, the court has the discretion to allow the amendment. In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.), Finch J.A. (as he then was) discussed at ¶ 67 the factors the court should consider in the exercise of its discretion in circumstances where a limitation period has expired:

In the exercise of a judge's discretion, the length of delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, but none of those factors should be considered in isolation. Regard must also be had for the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and the proposed new cause of action. Nor do I think that a plaintiff's explanation for delay must necessarily exculpate him from all "fault" or "culpability" before the court may exercise its discretion in his favour. ...

[21] In this case, the plaintiff submits that there is a close connection between the proposed new claims and the original claims against Mr. Wolrige: all involve the same assets and events. The plaintiff notes that the defendants have been aware of the additional claims against Mr. Wolrige since at least January 2002 when they received a draft amended statement of claim from the plaintiff's then solicitors. He notes the defendants have filed no evidence to indicate they have disposed of relevant documents or that witnesses are no longer available so as to prejudice the defence.

[22] In his Affidavit No. 5, Mr. Buchan deposes that he understood that the initial statement of claim encompassed all claims he had against the defendants. There is, however, no explanation as to why these proposed new claims against Mr. Wolrige were not included in the original pleading, or what has led to the decision

to now include such allegations.

[23] There is no evidence that Mr. Wolridge will be unduly prejudiced by the amendment and the addition of these allegations. He has been a defendant in this litigation since the outset and the new allegations are closely connected to the initial claim. Given all the circumstances of this case, I am prepared to grant leave to allow the new causes of action.

[24] In the result, the defendants' applications are dismissed. The plaintiff is at liberty to amend his statement of claim as set out in the January 26 pleading.

[25] Costs of these applications will be in the cause.

"R.B.T. Goepel, J."
The Honourable Mr. Justice R.B.T. Goepel