IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Hunter Resources Inc. v. Moss Management Inc.,* 2009 BCSC 1049

Date: 20090731
Docket: C940939
Registry: Vancouver

Between:

Pacific Hunter Resources Inc. and Robert Rome, the Administrator *de bonis non* of the Estate of Bruce Rome (Deceased)

Plaintiffs

And

Moss Management Inc.

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiffs:	Andrew J. Winstanley
Counsel for the Defendant:	Timothy J. Delaney
Place and Date of Hearing:	Vancouver, B.C. May 14-15, 2009
Place and Date of Judgment:	Vancouver, B.C. July 31, 2009

Introduction

[1] This is an application brought by the defendant Moss Management Inc. (“Moss”) for costs of the action and for an order that all monies paid into court to the credit of the action as security for the defendant’s costs be paid out to the solicitors for the defendant. At the commencement of the hearing an order was granted by consent for an amendment to the Style of Cause to name Robert Rome the administrator *de bonis non* of the estate of Bruce Rome, deceased, in place of Jane Rome in her capacity as executrix of the last Will and Testament of Bruce Rome.

[2] The litigation arose out of an unsuccessful effort to develop and bring into commercial production

certain tailings left at an abandoned mine, mill and smelter site in Anyox, British Columbia. The plaintiffs' position was that the parties entered into an enforceable agreement with respect to this development, which agreement the defendant repudiated. As a result, the plaintiffs alleged that they had been deprived of the potential profits from the venture. In the alternative, the plaintiffs advanced claims in *quantum meruit*, fraudulent misrepresentation and negligent misrepresentation. The defendant took the position that the parties did not conclude a binding agreement and that the plaintiffs had terminated the negotiations. The defendant disputed all of the other claims advanced by the plaintiffs. All of the plaintiffs' claims were dismissed in Reasons for Judgment indexed at 2008 BCSC 960.

[3] In this application, Moss seeks an order that it recover its ordinary costs at Scale B from the commencement of the action to the date of the Amended Statement of Claim filed June 21, 2001 and special costs from June 22, 2001 to the completion of trial. In the alternative, Moss seeks an order that it recover ordinary costs at Scale B from the commencement of the proceedings until June 21, 2001, ordinary costs at Scale C from June 22, 2001 to August 30 2007 and double costs thereafter.

[4] The position of the plaintiffs is that they are entitled to costs of the proceedings leading to the orders of Martinson J. pronounced December 10, 2001 and March 15, 2002 by reason of the fact that they were successful in their appeal of those orders; see 2004 BCCA 40. The plaintiffs submit further that although Moss was successful in the action on the merits, its conduct in the litigation is such as to disentitle it to an order for costs. The plaintiffs therefore seek an order that each party bear their own costs for the balance of the matter.

Is Moss Entitled to an Order for Costs?

The first question to be determined is whether Moss is entitled to any order for costs. The plaintiffs acknowledge that in the usual course costs follow the event and that Moss was the successful party in the event. However, counsel submits there are also cases where fraud was unsuccessfully alleged, but where the conduct or motive of the applicant or their counsel has led the court to deprive them of special costs citing *307527 B.C. Ltd. v. Cambridge Holdings*, 2003 BCSC 1568, appeal dismissed, 2005 BCCA 161 and *MacKinlay v. MacKinlay Estate*, 2008 BCSC 1570, 44 E.T.R (3d) 48. This, counsel submits, is such a case. It was the plaintiffs' submission that the defendant has specifically, since the outset of this litigation, persistently and systematically engaged in a course of conduct designed to subvert the letter and spirit of the rules governing the proper conduct of civil litigation, citing *Forsyth v. Pender Harbour Gold Club Society*, 2006 BCSC 1108 and *Al-Hendawi v. Sidhu*, 2008 BCSC 35.

[5] The plaintiffs filed a vey lengthy written argument elaborating in some detail these complaints. Some background is helpful to put the complaints in to context. There was another action concerning the same property that went to trial shortly after the trial of this action commenced. The plaintiffs in that action were Steven Buchan and Prospectors Airways, although the claims of the corporate plaintiff had been dismissed prior to the trial by the order of Neilson J. dated March 24, 2004. Among the defendants were Moss and its principles, Alan Wolrige and Peter Richards. Mr. Justice Bauman, sitting then as a trial judge, described the action as follows:

> The plaintiff, Steven Thomas Buchan, essentially alleges that the defendants have defrauded him of his interests in the Anyox-Kitsault area through a series of complex corporate machinations.

[6] Mr. Justice Bauman dismissed the action in Reasons indexed at 2008 BCSC 285. In Reasons indexed at 2008 BCSC 1286, Bauman J. ordered Mr. Buchan to pay special costs of the defendants Mr. Richards, Mr. Wolrige, Moss and 331609 B.C. Ltd. Mr. Buchan appealed. In Reasons indexed at 2009 BCSC 25 the appeal was dismissed.

[7] Mr. Delaney was counsel for the defendants Mr. Richards, Mr. Wolrige, Moss and 331609 B.C. Ltd. in the Buchan action. Prior to the time he was retained by the plaintiffs in this action, Mr. Winstanley was counsel for Mr. Buchan in the Buchan action and had been retained to seek leave to bring a derivative action in the name of Prospectors Airways against Mr. Richards, Mr Wolrige and Moss arising out of what was alleged to be their role as trustees/fiduciaries of the Anyox assets of Prospectors.

[8] Returning to this action, it is the plaintiffs' position that the defendant continuously and persistently failed in its obligation to make timely and thorough production of relevant documents essential to the proper conduct of this litigation. In the result, counsel submits that the plaintiffs were never in a position where it could be said they had had a fair and sufficient opportunity to advance their own case or to damage the case of the defendant. I think it is fair to say that Mr. Winstanley and Mr. Delaney have had very different views with respect to the issue of relevance and the appropriate scope of document production given their pleadings. These differences were exemplified by the position taken by plaintiffs' counsel in this litigation that all documents from the Buchan action should be produced in this action. Counsel for the defendant, relying upon the different parties and issues in the two actions did not share this view. These differences continued throughout the trial, resulting in many objections being taken with respect to questions of relevance.

[9] In this case, given the view I take of the matters at issue, unlike many cited by plaintiffs' counsel, there is in my view no evidence that important documents in this case were knowingly withheld by the defendants. I do not agree that the plaintiffs did not have a fair and sufficient opportunity to advance their case.

[10] Given that the matter is under appeal, it is not appropriate for me to elaborate further with respect to these matters. I will say that having presided over the trial, having heard the oral submissions with respect to costs and reviewed the written submissions filed, I can find nothing reprehensible with respect to the defendant's conduct of the litigation. Moreover, it was open to plaintiffs' counsel to apply under the *Rules* before trial with respect to any deficiencies in the defendant's document production. This step was not taken.

[11] I note that part of the plaintiffs' submission asks me to conclude that the decision of Meiklem J. in this matter, indexed at 2004 BCSC 1644, dismissing the plaintiffs' application to have the proceedings continue as if no defence had been filed, is wrongly decided. Even if I were of the view that was the case, which I am not, that is not the proper role of this court.

[12] The plaintiffs submit that Smith J.A., speaking for the court, in the Reasons indexed at 2004 BCCA 40 at para. 31 found that the defendant's conduct of the litigation was directed by an improper motive. I do not take that meaning from the reasons of the court and believe the court made no such finding.

[13] In the result, I have concluded that it is appropriate for the defendant, having succeeded in the action, to have an order for its costs. However, the plaintiffs are entitled to costs with respect to the appeal of the orders of Martinson J. pursuant to the order of the Court of Appeal of January 27, 2004. These are to set off against the costs of the defendants. The plaintiffs have sought costs with respect to the motions that were the subject of the appeal. At first instance costs were awarded to the defendants with respect to both motions. The order with respect to the appeal makes reference only to costs of the appeal, not to costs at first instance. In my view, the appropriate disposition with respect to these two appearances is for the costs to be in the cause. However, the defendant succeeded in the cause, and accordingly the defendant will have its costs with respect to the two motions.

Is Moss Entitled to an Order for Special Costs?

[14] The next matter to be addressed is the application for an order for special costs. The defendant notes that in 2001 the plaintiffs amended their pleadings to add claims against the defendant in tort. In particular, these claims advanced allegations of fraudulent and negligent misrepresentation. Broadly speaking, the plaintiffs alleged fraud by the defendant with respect to: the alleged ownership of Moss; the ownership of the tailings property; and concerning negotiations the defendant entered into with a third party, TVI Copper Inc.

[15] Initially the plaintiffs sought to add Mr. Richards and Mr. Wolrige as defendants in the action. That application was later abandoned but the Amended Statement of Claim continued to refer to the two individuals, including in the prayer for relief.

[16] Mr. Richards is a retired lawyer. Mr. Richards who was active in practice during the events that gave rise to this litigation, was a partner in the Vancouver law firm of Richards Buell Sutton. Mr. Wolrige is a retired Chartered Accountant. He was also active in his practice when the litigation was commenced and for some years thereafter. He was a partner in the Vancouver accounting firm of Wolrige Mahon.

[17] It was alleged in the pleadings and at trial that both Mr. Richards and Mr. Wolrige, through the defendant company, made false and fraudulent representations to the plaintiffs.

[18] At trial the plaintiffs continued to allege that Mr. Richards and to a lesser extent, Mr. Wolrige engaged in fraudulent conduct while acting as principals for the defendant, Moss Counsel for the plaintiffs referred to Mr. Richards' conduct as "devious". It was alleged he was not "truthful" and the allegation of "fraud" was maintained throughout. Paragraph 26 of the Amended Statement of Claim included an allegation that the defendant and Mr. Richards and Mr.Wolrige "maliciously" induced the defendant company to breach the contract with the plaintiffs.

[19] Counsel submits that special costs may be awarded where a party unsuccessfully alleges criminal conduct; where there are unproven allegations of fraud, dishonesty or incompetence against a litigant; and where an allegation of fraud and conspiracy is based on simply belief and speculation. The fact that the principals of the defendant company are retired professionals, a lawyer and an accountant, who depended upon their reputations, is also a factor favouring an award of special costs.

[20] Counsel submitted that this is not a case where a litigant makes an allegation of fraud which is a minor part of the claim and then abandons the allegation well before trial. On the contrary, the plaintiffs' allegations of fraud consumed the vast majority of the time at trial. These allegations put a cloud over Mr. Richards and Mr. Wolrige for over seven years.

[21] Counsel submitted that the allegations of fraud were baseless. No fraud was ever committed against the plaintiffs. The plaintiffs could have pursued their claims in contract and *quantum meruit* without these allegations. Indeed, in closing argument, counsel for the plaintiffs argued the claims in tort made no difference to the assessment of damages. Since the claims in tort required the plaintiffs to first prove a contract had been made between the parties and that it was repudiated by the defendant, it follows the allegations in tort were not only baseless, they were unnecessary.

[22] The test for an award for special costs is whether the litigant's conduct has been reprehensible, as that term has been defined in the jurisprudence. Reprehensible conduct has been found to encompass scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Special costs may be warranted when the court seeks to disassociate itself from the conduct of a litigant; see *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 (C.A.). Special costs have been awarded:

(a) where a party unsuccessfully alleges criminal conduct: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 17 B.C.L.R. (3d) 197, 70 B.C.A.C. 76 at para. 9;

(b) where there is a totally unfounded allegation of fraud: *Paz v. Hardouin* (1996), 25 B.C.L.R. (3d) 201, 138 D.L.R. (4th) 292 (C.A.) at para. 9;

(c) where there are unproven allegations of fraud, dishonesty or incompetence against lawyers: *Patriquin v. Laurentian Trust of Canada Inc.*, 2002 BCCA 6, 96 B.C.L.R. (3d) 318 (C.A.) at para. 29;

(d) where the plaintiff shows reckless indifference to the legitimate interests of the defendant by failing to come to terms with "the manifest deficiency in its claim at an early stage in the proceedings": *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.*, 2002 BCSC 900 at para. 27.

[23] The plaintiffs submit that while an improper allegation of fraud is identified in *Garcia* as a basis for an award of special costs, subsequent decisions have introduced an additional requirement such as an improper motive for bringing the proceedings or improper conduct of the proceedings themselves, citing *Inmet Mining Corporation v. Homestake Canada Inc.,* 2002 BCSC 681, 23 C.P.C. (5th) 348.

[24] I do not read the Court of Appeal in *Paz* as stating that an improper allegation of fraud without more cannot form the basis for an award for special costs. On the contrary, the majority agreed that it could be the basis for such an award. Huddart J.A., writing for the majority, states that there is no inflexible rule and emphasizes that the matter is one of discretion, stating at paras. 4-6 [cited to D.L.R.]:

4. The pursuit of allegations of fraud for six years without any reasonable foundation for suspicion

> is conduct that should not be condoned by a court. It may be the "something more" of which Lambert J.A. wrote in *Garcia*, *supra*, at 748. It may be sufficiently reprehensible without more to require an award of special costs, as suggested by R.A. Blair J. in *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 (Ont. Gen. Div.) and Bouck J. in *Gaspari v. Creighton Holdings Ltd.* (1984), 52 B.C.L.R. 30 (S.C.).
>
> 5 Clearly, an award of special costs in favour of Mr. Hardouin and Wayfarer was open to the trial judge. She understood that. She referred to these cases in her reasons. She did not, however, read *Garcia* as suggesting that a finding of improper allegations of fraud, or improper conduct of the proceedings, or an improper motive, requires an award of special costs. Nor do I. Indeed, Lambert J.A. suggested otherwise when he wrote, again at 748, that the combination of absence of merit and an improper motive "may well amount to reprehensible conduct sufficient to require an award of special costs".
>
> 6 Whether misconduct deserves rebuke by an award of special costs is a matter for the trial judge to determine in all the circumstances of the case. As Macdonald J. wrote in *304498 B.C. Ltd. v. Garibaldi Whistler Dev. Co. Ltd.* (1988), 32 B.C.L.R. (2d) 260 at (S.C.) 263, "the discretion of the trial judge in respect of costs is not pre-empted by an inflexible general rule". The effect of counsel's submission that totally unfounded allegations of fraud "*per se* constitute reprehensible conduct as that phrase is used in the Garcia case" would be just such a rule.

[25] The Reasons in *Inmet* are to the same effect. Madam Justice Satanove states at para. 19:

> The mere fact that an allegation of fraud was advanced and failed is not conclusive proof of conduct deserving rebuke. It is a factor to take into account together with the conduct of the litigation itself and the conduct of the litigants. (*Ahluwalia v. Richmond Cabs Ltd.* (1994), 28 C.P.C. (3d) 226 (B.C.S.C.)). It is always preferable that pleas of this nature, which cast aspersions on a parties integrity, be withdrawn at an early stage if they cannot be made out.

[26] The correct test was stated by Newberry J., as she then was in *Ahluwalia v. Richmond Cabs Ltd.* (1994), 28 C.P.C. (3d) 226 (B.C.S.C.) (aff'd (1995), 13 B.C.L.R. (3d) 93, 42 C.P.C. (3d) 203 (C.A.)) at para. 5:

> The question in every case is whether, on a consideration of the substantive conduct of the party making the allegation, and the conduct of the litigation itself, the person or persons against whom the order is sought, has acted in a manner that is sufficiently reprehensible to warrant chastisement by the court.

[27] In the present case the very serious allegations of fraud were without foundation. They were never abandoned. Indeed, allegations were made at trial that went even beyond what was in the pleadings. In the plaintiffs' opening, for example, counsel stated:

> (a) Be this as it may, this Court will find, as this tawdry tale of conflict of interest, breach of trust and deceit unfolds, what Bruce Rome wanted so much to bring out into the light of day.
>
> (b) Richards and Wolrige signed the Asset Management Agreement and assumed the role of "co-trustee-managers" with Marsh and Buchan, and as such they owed a continuing fiduciary duty to the "Prospectors Group": Buchan and Marsh, Prospectors, 331609 B.C. Ltd., Pacific Geo-Roc from that point in time on.
>
> And yet while they were in that fiduciary relationship, they took control of Moss Management offshore and placed beneficial ownership of its shares in the hands of an entity about which we know next to nothing: an Anguillan private company called Separ Limited, apparently under the control of one Lyn Bell and his nominees.

> With this transfer of beneficial ownership of Moss' shares, went beneficial title to virtually every one of the Anyox assets of "Prospectors Group".
>
> How that happened is the tale Bruce Rome wants me to tell. Unfortunately, as I mentioned, I can only tell that tale so far. But I need not explain to the Court that, when a solicitor acquires his client's property, when a trustee-manager acquires the trust assets, the explanation lies with the fiduciaries. And so, we will await that explanation from Mr. Richards and Mr. Wolrige, who will be our first two witnesses.

Reference is also made later on in the opening to the "real target at all time[s] of the conspirators". These are all allegations of serious misconduct that go beyond what is alleged in the pleadings which do not allege breach of fiduciary duty, breach of trust or conspiracy.

[28] The allegations were made against professional men, striking at the heart of their professional reputations. The evidence with respect to these allegations consumed the majority of the time at trial, transforming what could and should have been a straightforward and relatively brief trial into one that consumed 17 days. The allegations of fraud were unnecessary in the sense that that they did not materially add to the plaintiffs' claims in *quantum meruit*. Although the plaintiffs' counsel took the position at closing that the damages for breach of contract and misrepresentation would be the same, in my view the plaintiff only stood to recover substantial damages if it could establish a loss of opportunity to benefit from the contract.

[29] In all of the circumstances, I am satisfied that the conduct here is worthy of rebuke in the form of an order for special costs. There will be an order, subject to the exception that the plaintiffs are entitled to the costs of the appeal pursuant to the order of January 27, 2004, that the defendant recover its ordinary costs at Scale B from the commencement of the action to the date of the Amended Statement of Claim filed June 21, 2001 and special costs from June 22, 2001 to the completion of trial. In addition, there will be an order that all monies paid into court to the credit of the action as security for the defendants' costs be paid out to the solicitors for the defendant.

[30] In the event that I ordered special costs, special costs were ordered, the defendant sought an order that the costs be summarily assessed at the hearing. However there was a second part of the defendants' application; namely for an order that plaintiffs' counsel be held personally responsible for a portion of the defendants' claim for costs that was adjourned. In my view it is more appropriate to defer the consideration of that issue until the conclusion of the submissions concerning the issue that has been adjourned.

"Ross J."