CA019166
Vancouver Registry

Court of Appeal for British Columbia

1994 CanLII 3287 (BC C.A.)

ORAL REASONS FOR JUDGMENT:

BEFORE THE HONOURABLE December 6, 1994

MADAM JUSTICE PROWSE

IN CHAMBERS Vancouver, B.C.

BETWEEN:

THE CORPORATION OF THE DISTRICT OF MATSQUI

PLAINTIFF
(RESPONDENT)

AND:

ALLSTATE INSURANCE CO. OF CANADA, CANADIAN NORTHERN SHIELD INSURANCE CO., COMMONWEALTH INSURANCE CO., GENERAL ACCIDENT ASSURANCE CO., PRUDENTIAL ASSURANCE CO., CANADIAN GENERAL INSURANCE COMPANY and MUNICIPAL INSURANCE ASSOCIATION OF BRITISH COLUMBIA

DEFENDANTS
(APPELLANTS)

D. Stewart appearing for the Appellant

A. Thiele appearing for the Respondent,
The Corporation of District of Matsqui

J. Hall appearing for the Respondent,
Commonwealth Insurance Co.

(motion for leave to appeal)

1 **PROWSE, J.A.:** The General Accident Assurance Co. of Canada (the "applicant"), applies for leave to appeal from the order of the Honourable Mr. Justice Tysoe pronounced June 24, 1994, dismissing the applicant's application pursuant to Rule 18A of the ***Rules of Court***, for an order that the Corporation of the District of Matsqui's action against it be dismissed.

2 I do not intend to set out in detail the lengthy history of this proceeding which is well known to the parties and which, for the benefit of any panel sitting on review of this decision, is contained in the written memorandum of argument filed on behalf of the applicant and the written submissions on behalf of Matsqui and Commonwealth in reply. Suffice it to say that Matsqui's action is against seven insurers and involves which, if any of them, are required to indemnify Matsqui for damages and/or costs arising from a previous action and appeal in which Matsqui was ultimately ordered to pay damages in the amount of $100,000.00 to a third party, and to purchase that third party's property.

3 The action originally came on before Mr. Justice Tysoe for three days in May 1994, at which time Matsqui was seeking judgment against one of the insurers, Commonwealth Insurance Co. At that time, Commonwealth and two other insurers argued that the case was not appropriate for disposition under Rule 18A. Mr. Justice Tysoe agreed with this position, and dismissed Matsqui's application. On that application, Mr. Justice Tysoe canvassed

1994 CanLII 3287 (BC C.A.)

essentially the same legal and factual foundations which were relevant to this applicant's 18A application in June. In dismissing Matsqui's Rule 18A application, Mr. Justice Tysoe stated, in part:

> "I dismiss the application of Matsqui for judgment pursuant to Rule 18A. Rule 18A(5) provides that judgment should not be granted if the court is unable to find the facts necessary to determine the issues before it, or if it would be unjust to decide the issues on an 18A application. Both of those obstacles are present in this case.
>
> It is my view that it would be inappropriate to grant judgment on this application for at least three reasons. The first reason is that I agree with the conclusion of Mr. Justice Drost in the ***Privest*** case, that it should be left to a judge following the introduction of evidence and expert opinions at a normal trial to decide whether the policies of Commonwealth and the other insurers have been triggered by an occurrence during the policy periods, including the decision alluded to Mr. Justice Drost as to which of the four triggering theories raised by the authorities is the appropriate one in the present circumstances."

Mr. Justice Tysoe then went on to give two other reasons for dismissing the application. At that time, Mr. Justice Tysoe seized himself of all further applications in this matter.

4 It is against that background that the applicant's 18A application came before Mr. Justice Tysoe in June 1994, together with an application by another insurer also seeking dismissal of Matsqui's action. At that time, Mr. Justice Tysoe gave the reasons

1994 CanLII 3287 (BC C.A.)

which are in dispute on this application. Because they are brief, I will repeat them in full.

1994 CanLII 3287 (BC C.A.)

> "**THE COURT:** In my Reasons for Judgment on May 12, 1994, when the plaintiff was seeking judgment on summary trial against Commonwealth Insurance Company, I made the comment that the trial judge should also consider the effect of the expired limitation period with respect to the insurers which provided coverage during the statute barred periods. Nothing that has been submitted to me by counsel for General Accident Assurance Company of Canada or Canadian Northern Shield Insurance Company has changed my views.
>
> I believe that there should be a trial to determine the matter even if it could be argued that the mandatory injunction for Matsqui to purchase the property is not covered by the policies issued by these two insurers. There is still the issue of the $100,000 damages awarded by the Court of Appeal. Although those damages may be damages that arose outside of the coverage periods, the acts giving rise to those damages were continuous acts from at least 1971 until the date of trial, and those continuous acts occurred during the policy periods of both General Accident Insurance Co. and Canadian Northern Shield Insurance Company.
>
> I dismiss the applications of these two insurers for judgment pursuant to Rule 18A."

5 When these two sets of reasons are read together, which I think they must be in order to place the latter decision in its proper perspective, it is evident that Mr. Justice Tysoe felt himself faced with complex issues of fact and law which involved several parties. As I read both sets of reasons, Mr. Justice Tysoe determined that he could not make the necessary findings of fact and law on the Rule 18A application which would enable him to do justice in the case. He was not persuaded that he could simply

rely on the underlying judgment giving rise to Matsqui's action against these insurers as settling all necessary matters of fact. He, therefore, dismissed the application with the result that the applicant was required to proceed to trial with the rest of the parties to the action.

1994 CanLII 3287 (BC C.A.)

6 Counsel for the applicant submits that this was an appropriate case for an 18A determination; that Mr. Justice Tysoe misapprehended the facts and the import of the ***Privest*** decision; and that the underlying judgment against Matsqui provided all the facts necessary to resolve the issues between the applicant and Matsqui. He submits, therefore, that he has established sufficient merit to this appeal to warrant leave being granted. He also submits that priority appeal dates for a two day appeal could be obtained for mid-May if this court so ordered. The trial is currently set to proceed for ten days in June and is presently being managed by a Supreme Court judge.

7 Counsel for Matsqui, supported by counsel for Commonwealth, submits that this court should not interfere with Mr. Justice Tysoe's exercise of discretion in refusing to decide this matter on an 18A application. She submits that this is indeed a case involving a number of complex issues of fact and law which were not resolved in the underlying action and which are very much alive between all of the parties to the action. She submits that it would be unjust to the other parties involved in the litigation

to permit the applicant to hive himself off in this fashion where the issues and liability of all of the defendants are inter-related. She is also concerned about redirecting the energies of the other parties to an appeal in May, when the best that the applicant could hope for on appeal is an order that the matter should proceed vis-a-vis this applicant under Rule 18A.

1994 CanLII 3287 (BC C.A.)

8 This court will not lightly interfere with the exercise of the discretion of a Chambers judge on an 18A application. In this case, it is apparent that Mr. Justice Tysoe knew the options available to him under Rule 18A. While the ***Privest*** case to which he referred in his reasons may well be distinguishable on its facts, it does not follow that Mr. Justice Tysoe erred in referring to or relying upon it. Nor am I persuaded that there is an arguable case that Mr. Justice Tysoe misapprehended the facts, or the complexity of the issues of fact and law before him. In coming to that conclusion, I bear in mind the fact that he heard three days of submissions dealing with related issues a short time prior to hearing the application which has given rise to this appeal. He was, thus, in a very favourable position to determine whether the issues could fairly be resolved on a summary basis. He concluded that they could not.

9 I am not persuaded that a division of this Court would interfere with his decision in that regard. I find the following remarks of Mr. Justice Lambert in ***Jon McComb et al v. Sunshine Cabs Ltd.***

(unreported), July 25, 1989, Vancouver Registry No. CA011038 at pages 3-4 of that decision instructive in these circumstances:

1994 CanLII 3287 (BC C.A.)

> "In my opinion, when a Chambers Judge has reached a conclusion that he is unable to find the facts necessary to decide the issues of fact or law then this Court should not grant leave to appeal except on the application of the usual rules with respect to leave to appeal, namely, that there is an issue involved that is of importance beyond the importance of the particular case, or there is some issue of fundamental and perhaps terminal justice between the parties.
>
> I would not wish to foster a process whereby an 18A application could be taken and refused, a leave application would be taken and granted, the appeal could be heard, and the appeal would turn out to be decided on the basis that the Chambers Judge had reached a proper decision in refusing the 18A judgment.
>
> Rule 18A is designed to promote the resolution of disputes through the Courts on a speedier and less expensive basis than the trial basis but without any sacrifice of justice. In my opinion, the merits of the saving of expense, and speed will not be fostered if leave to appeal from a refusal of judgment is granted merely on the basis that a Chambers Judge in this Court is persuaded that a Chambers Judge in the Supreme Court reached a wrong conclusion as to whether he was able to find, on the whole of the evidence before him, the facts necessary to decide the issues of fact or law properly required for judgment."

10 I am also of the view that, if leave were granted, there would probably be a lengthy delay of the trial. Even if the appeal were heard in May, 1995, the decision of this Court might well be reserved, and if the applicant were successful on appeal, he would have very little time to have the matter reset for hearing in Chambers prior to trial. Further, counsel for the applicant advises that the applicant is required to participate in the trial

in any event by virtue of its counter-claim and certain third party proceedings. Finally, I conclude that this appeal is of no interest to anyone other than the immediate parties to the action.

11 For these reasons, I would dismiss the application for leave to appeal.

"The Honourable Madam Justice Prowse"

1994 CanLII 3287 (BC C.A.)