IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Pacific Hunter Resources Inc. et al v. Moss Management Inc.***
2004 BCSC 1644

Date: 20041210
Docket: C940939
Registry: Vancouver

Between:

Pacific Hunter Resources Inc. and Jane Rome in her capacity as Executrix under the last Will and Testament of Bruce Rome, Deceased

Plaintiffs

And

Moss Management Inc.

Defendant

Before: The Honourable Mr. Justice Meiklem

Reasons for Judgment

In Chambers

Counsel for the plaintiffs:	A.J. Winstanley
Counsel for the defendant:	T.J. Delaney
Date and Place of Hearing:	November 5, 2004 Vancouver, B.C.

INTRODUCTION

[1] There are cross-applications before the court. The defendant's notice of motion dated April 28, 2004 seeks an order that the plaintiffs post security for costs in an amount determined by the court or alternatively, pay into court the sum of $10,000. This sum was awarded in costs to the plaintiffs in respect of the plaintiffs' successful appeal of an earlier order dismissing the claim for want of prosecution, and has not yet been paid to the plaintiffs.

[2] The plaintiffs' amended notice of motion, dated June 17, 2004 seeks an order that the proceeding be continued as if no defence has been filed, for refusal or neglect to produce a list of documents, as required by Rule 26(1), prior to June 10, 2004. On June 10, 2004, a list of documents appended to Mr. Delaney's June 10, 2004 affidavit was delivered after Mr. Winstanley delivered a notice of motion dated June 1, 2004 to strike the original statement of defence for failure to deliver a list of documents. Counsel clarified that the specific order now sought is limited to the striking of the amended statement of defence that was also filed June 10, 2004.

[3] The defendant's June 10, 2004 notice of motion seeks orders striking various portions of a certain affidavit #5 of Mr. Winstanley sworn June 1, 2004 for various reasons, the main ones being failure to state the sources of information and submitting argument in the guise of evidence. Without formally amending the notice of motion, these complaints were widened in Mr. Delaney's outline to challenge subsequent affidavits filed by Mr. Winstanley after the June 10, 2004 notice of motion. There was sufficient obvious merit to the notice of motion that Mr. Winstanley's affidavit #6 sworn June 17, 2004 is effectively a re-draft of affidavit #5 to remedy the defects complained of. That notice of motion is now moot and I will not deal with it further except to observe that I will hopefully not rely on any argument in the guise of evidence.

THE SECURITY FOR COSTS ISSUE

[4] It is acknowledged that the corporate plaintiff has no assets. The estate of Bruce Rome does presently hold a substantial real estate asset with equity stated at $714,500, but may transfer it to the beneficiaries before the incidence of costs in this action is determined and there may be no assets in the event that the defendant is eventually successful.

[5] The plaintiffs were able to post $26,940.43 as security for the costs of the appeal. Following their success, this sum was returned to the plaintiffs. When the defendant returned the consent order agreeing to the return of the funds, counsel advised plaintiffs' counsel that the defendant would seek security for costs. The defendant now seeks $30,000 as security for costs or, alternatively, $10,000 which is the amount of costs ordered to the plaintiffs on their

successful appeal of the order dismissing their claim for want of prosecution.

[6] The executrix, Jane Rome, has deposed that she has been lulled into a false sense of security by the defendant's decision to belatedly bring on a motion for security for costs, and says that if same had been brought in a more timely fashion (presumably before her husband's death in April 2002) her husband would have had the means to post security.

[7] I am not sure of the intended significance of Mrs. Rome's false sense of security. She also says that she is opposed to applying the appeal costs on the grounds that those costs are needed to partially mitigate the considerable legal costs she has incurred. Her counsel argued that the very delayed application for security for costs (this action was commenced in February 1994) gives rise to the suspicion that the application is but one example of "a defendant bent on vexatiously trying to impede the plaintiff".

[8] Given the acknowledged impecuniousity of the corporate plaintiff and the potential impecuniousity of Mr. Rome's estate, there is a risk of prejudice to the defendant in respect of costs. It strikes me as potentially unjust in the circumstances that the plaintiffs could recover and dissipate the appeal costs recoverable from the defendant at this stage and leave the defendant without recourse if it is successful on costs.

[9] I grant the defendant's alternative application that the plaintiffs pay the appeal costs recoverable from the defendant into court as security for costs, which I understand is the sum of $10,000.

THE PLAINTIFFS' APPLICATION TO STRIKE THE AMENDED STATEMENT OF DEFENCE

[10] A rather lengthy review of the history of this action is necessary to an understanding of this application because, while Mr. Winstanley acknowledges that striking the amended statement of defence for refusal or neglect to produce a list of documents is a drastic remedy, he argues that it is warranted by a tactical stratagem on the part of Mr. Delaney to block the production of documents needed by the plaintiffs to support the adding of individuals as defendants. He argues that the prejudicial effect of the stratagem is now exaggerated because, following Mr. Rome's death, the plaintiffs are at a serious disadvantage in evaluating the authenticity, significance and correctness of documents that are being produced.

[11] The following description of the early events in the action is contained in Mr. Winstanley's chambers brief and is not controversial: (The paragraph numbers are within the quoted portion.)

> (3) This action was commenced on February 15th, 1994. It arises out of a contract in which the plaintiff Pacific Hunter Resources Inc. ("Pacific Hunter") acquired from the defendant Moss Management Inc. ("Moss") an exclusive right and option to earn a 60% interest in certain Tailings created by the operation of the one of the British Empire's then largest copper smelters located at Anyox in Northern British Columbia.
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> (4) The Tailings from the smelter operations were but one of many assets left behind when Anyox was abandoned during World War II. There is the Hidden Creek mine which fed the smelter, and many surrounding mineral claims, where the Hidden Creek copper vein is believed to continue. There is also a non-operational hydroelectric dam which supplied the smelter with power and, behind it, a reservoir of fresh water. Finally, there is a deep-water port and merchantable timber on freehold lots which once supplied timbers for the mine.
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> (5) By the time of the contract, May 8, 1991, these Anyox assets (including the Tailings) had come under the control of the defendant Moss, a British Columbia company with only two registered shareholders and only two officers: Peter C.G. Richards, a senior lawyer and name partner in a downtown law firm ("Richards"), and Alan Wolrige, a senior accountant and name partner in a downtown accounting firm ("Wolrige").
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> (6) The plaintiffs allege that the option contract was signed on May 8th, 1991, and the plaintiffs Pacific Hunter and its president, Mr. Rome, immediately began to perform the work and expend the monies called for by that option contract. Two months and some $40,000 into that contract, Richards, the president of Moss, encountered Bruce Rome, the president of Pacific Hunter ("Rome"), on Hastings Street in Vancouver and informed him the contract was at an end.
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> (7) The plaintiffs initially retained James Howell, Esq. who filed a statement of claim on April 27, 1994, seeking damages for breach of contract and quantum meruit. A statement of defence was filed nearly a year later on March 31, 1995, by defence counsel, Mr. Delaney.

[12] Mr. Howell's affidavit sworn July 12, 2001 provides the following information to continue the chronology:

> 1. The plaintiffs delivered their list of documents on May 17, 1994.
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> 2. Mr. Howell states:
>
> On or after October 25, 1995, the plaintiffs delivered a Demand of Discovery of Documents, a true copy of which is . . . marked as Exhibit "A" to this my affidavit.
>
> He appended an unsigned copy of a demand dated October 25, 1995.

3. The plaintiffs examined Mr. Wolrige as a representative of the defendant on October 26, 1995. The defendant examined Mr. Rome on October 30, 1995.

4. In July 1996 the parties filed cross-applications regarding production of specific documents and documents mentioned at the discoveries. Mr. Howell states that he also sought an affidavit verifying the defendant's list of documents. In respect of that application he said:

> The latter application may have been misdirected as I have since seen an affidavit in which counsel for the defendant swears, to the best of his information and belief, that no Demand for Discovery of Documents had ever been delivered by me.
>
> This comment seems to suggest that his earlier statement asserting delivery of a demand may not be reliable.

5. The July 1996 cross-applications were adjourned when the parties reached an agreement which resulted in the defendant providing copies of 10 documents on August 1, 1996 and Mr. Rome agreeing to assemble "a mass of documentation requested at his examination for discovery".

6. Mr. Howell developed health problems in 1996 and was not able to keep Mr. Rome on task to produce the documentation agreed to be provided.

7. No further documents were produced by the defendant by January 2001, when Mr. Howell ceased to be counsel for the plaintiff.

[13] On January 18, 2001, very shortly after being hired in January 2001, Mr. Winstanley wrote to Mr. Delaney, pointing out that the defendant had not provided a list of documents in response to a demand dated October 25, 1995. Mr. Delaney responded indicating he had no record of receiving a demand for discovery of documents, so on January 29, 2001, in the same correspondence by which Mr. Winstanley delivered a notice of intention to proceed, he delivered a demand for discovery of documents, as well as a proposed amended statement of claim which would have added Mr. Richards and Mr. Wolrige as defendants, and made claims of fraudulent or negligent misrepresentation against them.

[14] On February 5, 2001, Mr. Delaney wrote a letter to Mr. Winstanley in which, speaking of the demand for discovery of documents he said:

> Finally, it is our view of the law that our client need not respond to the demand for documents until 49 days have expired. In other words, the demand does not start to run until the expiration of 28 days from delivery of the Notice of Intention to Proceed. In fact, strictly speaking, it is our position that your client is not entitled to deliver a Demand for Discovery of Documents and to otherwise proceed with the litigation until after 28 days have expired from delivery of the Notice of Intention to Proceed.
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> [Emphasis added]

[15] In March 2001, Mr. Winstanley delivered a notice of motion for orders adding Mr. Richards and Mr. Wolrige as defendants and amending the statement of claim. Mr. Delaney objected to the information supporting the proposed amendments as privileged and inadmissible. Consequently, Mr. Winstanley attempted to persuade the solicitors for the entity in which the privileged allegedly resided to consent to the use of the information. He failed in that attempt and on June 21, 2001 filed and delivered an amended statement of claim under Rule 24(1)(a) (not requiring leave) alleging misrepresentation against only the original defendant Moss Management Inc. He also delivered another demand for discovery of documents along with the amended statement of claim, hoping to obtain discovery of the allegedly privileged documents.

[16] On June 27, 2001, Mr. Delaney filed and delivered a notice of motion seeking three orders:

1. That the plaintiffs' claims be dismissed for want of prosecution;

2. Alternatively, the plaintiffs' claims be dismissed pursuant to Rule 18A;

3. Alternatively, the amendments to the statement of claim filed June 21 be struck out.

[17] This notice of motion has been referred as Mr. Delaney's tripartite application and is the next step of the stratagem that Mr. Winstanley alleges. In his covering letter, Mr. Delaney stated:

> It is our position that our client should not have to produce documents in relation to the new amendments until our application has been heard, as the amendments may not stand.

[18] Mr. Winstanley points out that the rendition contained in the defendant's outline in the present chambers record of the position taken by Mr. Delaney in June 2001 is misstated, in that the above wording did not limit the rationale to awaiting the outcome of only the application to dismiss for want of prosecution. Mr. Winstanley suggests that if the true intention was to avoid unnecessary costs, the application to dismiss for want of prosecution could have been split off to be heard earlier in Chambers, rather than set within the tripartite application, which was set through the trial coordinator's office for a two-day hearing commencing October 17, 2001.

[19] Mr. Winstanley responded to Mr. Delaney's stated position that he should not have to produce documents by bringing an application dated July 16, 2001, to compel production of documents. On August 14, 2001, Master Bolton ordered that the time estimate for that application

was two hours and the hearing date must be set through the Registrar. The application came on for hearing in Chambers on September 14, 2001, together with another application by the plaintiffs to adjourn the Rule 18A summary trial then set for October 17, 2001. Master Patterson acceded to Mr. Delaney's preliminary objection and adjourned the applications generally, directing that they be set for hearing pursuant to Master Bolton's order, in other words through the Registrar. This could not be done prior to the October 17, 2001 date set for the hearing of the tripartite application.

[20] The tripartite application was heard over three days in October 2001, and resulted in an order dismissing the plaintiffs' claim for want of prosecution. No order was made in respect of the Rule 19(24) application or the Rule 18A summary trial issues, but the chambers judge, Martinson J. made this comment in her reasons:

> . . . In my opinion, the contract issue is not suitable for summary trial. In addition, the questions that arise with respect to the contract issue are inextricably linked to the issues that arise as a result of the amendments. It would not be appropriate to deal with them separately.

[21] The plaintiffs successfully appealed the order dismissing for want of prosecution, but in respect of the above-quoted comments regarding the summary trial, the reasons of Smith J.A. for the court (released on January 27, 2004) state the following:

> [45] The appellants' assertion as a ground of appeal that the Chambers judge erred in concluding that the action was not suitable for summary trial is misconceived. It is true that the Chambers judge made a comment to that effect, but she did so in the course of her discussions of prejudice in relation to the motion to dismiss the action. She did not adjudicate the application for summary trial and, consequently, she made no order that the action is not suitable for summary trial. No appeal lies from an observation contained in her reasons for judgment.
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> [46] It is unfortunate for the appellants that Mr. Rome is now deceased. [Mr. Rome died April 23, 2002, prior to the hearing of the appeal on September 23, 2003.] However, there is an extensive record of his relevant evidence in his affidavits and in his examination for discovery. Moreover, the appellants' case is not entirely dependent upon Mr. Rome's evidence. It may be that his death is not a barrier to a summary trial of this action or to a conventional trial using the record of his evidence. However, those are matters to be considered in the Supreme Court.

[22] Mr. Winstanley's chambers brief on this application sets out his strategy and reasons for not pursuing the severance of the Rule 18A application and the interlocutory applications at the October 2001 hearing of the tripartite application, in these paragraphs:

> (25) Notwithstanding the fact that the amended statement of claim had been duly filed and served, and notwithstanding the fact that the defendant was embarking on a summary trial procedure pursuant to Rule 18A, no amended statement of defence was filed in answer to the new amendments in tort.
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> (26) By July 2001, the plaintiff Mr. Rome was 77 years of age and of failing health. Believing himself unable to withstand the rigours of a trial that had not yet been set down, he gave his counsel instructions to "lock onto" defendant's application for a summary trial. In taking this position, plaintiffs were mindful that no amended statement of defence had been filed, which would leave the defence vulnerable to judgment in default of defence (of the tort claims) on the summary trial if the two interlocutory applications were dismissed.
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> (27) Accordingly, in their Response of July 11, 2001, to the defendant's tripartite application, plaintiffs opposed the interlocutory applications pursuant to Rules 2(7) and 19(24), but agreed that all issues of liability were suitable for disposition by summary trial under Rule 18A, as were issues of quantum, with one possible exception, where directions and a referral to the Registrar might be necessary. (Tab 17, Exhibit "D")

[23] I infer that these same circumstances explain why Mr. Winstanley did not return the plaintiffs' application for production of documents on the date set for the hearing of the defendant's tripartite application; obtaining an order for production would be inconsistent with agreeing that all issues of liability, including the new tort claims were suitable for disposition by summary trial on that date.

[24] The following paragraphs in Mr. Winstanley's chambers brief set out his position on where the parties presently stand:

> (35) Plaintiffs take the position that the balance of the relief sought on the defendant's tripartite application now falls to be determined by Madam Justice Martinson: which is to say, the application pursuant to Rule 19(24) to strike the amendments in tort and, most importantly, the application pursuant to Rule 18A. In other words, the plaintiffs say that the defence is not entitled to withdraw its motion before this Court for judgment pursuant to Rule 18A without leave, which application they must oppose, because the death of Mr. Rome makes it impossible to adduce additional affidavit evidence from him.
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> (36) Similarly, the plaintiffs will oppose any attempt to adjourn the Rule 18A application on the basis that it would be unfair to accede to such a request given the fact that Mr. Delaney had blocked the hearing of the plaintiffs' September 14, 2001 application to sever the hearing of the Rule 2(7) and Rule

19(24) applications from the Rule 18A summary trial.

(37) If its application to strike the amendments in tort is unsuccessful, as it undoubtedly will be (see paragraph 15, *supra*) the defendant will find itself in a summary trial.

[25] The Court of Appeal decision was released on January 27, 2004. In the reasons for judgment Smith J.A. reviewed the correspondence between counsel in considerable detail and, in paragraph 31 commented as follows:

> [31] A consideration of the exchanges between Mr. Delaney and Mr. Winstanley to this point might suggest that the motion to strike out the action for want of prosecution was activated less by any prejudice that might have resulted from the plaintiffs' delay than by the imminent prospect that Mr. Richards and Mr. Wolrige might be joined in the action as personal defendants and that allegations of misrepresentation, fraud, and breach of trust might be made against them.

[26] Although the defendant's list of documents describes 27 documents to which there is no objection to production, Mr. Winstanley asserts that it is incomplete because he knows of the existence of other relevant documents. This dispute apparently involves the documents over which privilege has been claimed, but that issue is not directly material to the plaintiffs' present motion which is based on the past failures to deliver a list of documents prior to June 10, 2004.

[27] Mr. Winstanley suggests that this case presents the Rule 2(5) counterpart to the Rule 2(7) situation dealt with in ***Tundra Helicopters Ltd. v. Allison Gas Turbine*** (2002) 98 B.C.L.R. (3d) 238. He argues that even though the defendant's stratagem has been turned aside in this case by the decision of the Court of Appeal, the plaintiffs are seriously prejudiced by "their inability, without Mr. Rome, to evaluate the authenticity, significance or the correctness of documents that are only now starting to be produced." Mr. Winstanley argues that, as in ***Tundra Helicopters*** the default has now given rise to a substantial risk that a fair trial will not be possible.

[28] Mr. Delaney relies on Southin J.A.'s comments in ***Muscroft et al v. Eurocopter*** 2003 BCCA 229 that striking out a statement of claim under Rule 2(5) is a "Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence."

[29] Although no case was cited to me that has directly applied the established test for dismissal for want of prosecution under Rule 2(7) to delay occasioned by a refusal or neglect to make discovery of documents, which falls under Rule 2(5), it is, I think, appropriate that similar considerations apply. I do not interpret Southin J.A.'s comment in the circumstances in ***Muscroft*** as sitting out a more stringent test that requires in the circumstances of this case something more egregious than inordinate, inexcusable delay resulting in serious prejudice that affects the fairness of the trial.

[30] Mr. Winstanley did not urge upon me any reason to depart from the "most egregious" test set out in ***Muscroft***, but he urged me to characterize Mr. Delaney's persistent stratagem as most egregious and deserving of the striking out remedy that was denied the plaintiff in ***Muscroft***. In my assessment of the circumstances of this case, it is not most egregious of cases, nor would it warrant the striking of the amended statement of defence on an application of a test analogous to that applied in ***Tundra*** to a Rule 2(7) application to dismiss for want of prosecution.

[31] It is necessary to review the defendant's actions at the various stages of this proceeding.

[32] The evidence is equivocal as to whether a demand for discovery of documents was delivered to the defendant before Mr. Winstanley's demand in January 2001. It seems unlikely that Mr. Howell delivered the draft, but that is insignificant because examinations for discovery were subsequently held and the defendant produced some documents and the plaintiffs undertook to produce others.

[33] The lengthy delay in the proceedings from 1996 to January 2001 was due to inactivity on the plaintiffs' part and the ill health of plaintiffs' counsel.

[34] It is clear that the defendant's non-compliance with Rule 26 was not an issue until at least 21 days following Mr. Winstanley's January 29, 2001 demand for discovery of documents. Mr. Delaney's February 5, 2001 letter raised the valid issue of whether the 21 day limit for response could apply in light of the provisions of Rule 3(4). Clearly no question of whether delay was reasonably excusable arises until approximately March 28, 2001, that is 49 days following the demand.

[35] It was in March 2001 that Mr. Winstanley delivered the notice of motion seeking to add Richards and Wolrige and to amend the statement of claim. That motion was not set down for hearing, but resulted in the exchanges between counsel about privileged information and Mr. Winstanley filing an amended statement of claim without leave under Rule 24(1)(a) on June 21, 2001. Mr. Winstanley's delivery of another demand for discovery of documents with that amended pleading on June 21, 2001 certainly is suggestive that either he was not solely relying on his earlier demand or that he anticipated that Mr. Delaney would question its continuing sufficiency in relation to the new tort claim set out in the amended statement of claim. In any event, the delay between March 28, 2001 and June 21, 2001 was, in all the circumstances, neither inordinate nor inexcusable.

[36] The defendant had until July 12, 2001 to respond with a list of documents, but Mr.

Delaney, in his June 27 letter enclosing his tripartite application, put forth the position that the defendant should not have to produce documents until his application was heard. Mr. Winstanley's response was an application to compel production, which was delivered on July 16, 2001, and set for hearing on August 14, 2001.

[37] I have previously (para. 19 above) recounted the history of Mr. Winstanley's application to compel production. As matters unfolded, Mr. Delaney adopted positions that certainly played a role in having that application adjourned on two occasions with the result that it could not be set down prior to the October 17 hearing of Mr. Delaney's tripartite application. Nevertheless, the issue had been placed before the court and was unresolved, which in my view constitutes a reasonable excuse for non-compliance during that period of time.

[38] One cannot characterize Mr. Delaney's tripartite application as frivolous and purely a ploy in light of his success on the application to dismiss. Once Martinson J. granted the application to dismiss the plaintiffs' claim, of course, there can be no question that the defendant had no extant disclosure obligation until the Court of Appeal decision on January 27, 2004.

[39] The 135 days that elapsed from the release of the Court of Appeal decision on January 27, 2004 to the June 10, 2004 delivery of a list of documents together with the amended statement of defence is an inordinate delay. No excuse is tendered for the delay and although it is clear that counsel were busy with other matters such as assessing costs of the appeal, Mr. Delaney, nevertheless found the time to prepare his application for security for costs. It appears that he was moved to deliver his list of documents only after receiving the plaintiffs' original June 1, 2004 motion to strike the original statement of defence.

[40] The delay in 2004 is inexcusable, but in my view it does not fall into the category of one of the most egregious cases justifying a default victory for the plaintiffs. The serious prejudice that Mrs. Rome alleges, namely her inability, without Mr. Rome, to evaluate the documents that are now being produced, is not causally related to the 2004 delay because Mr. Rome died in April 2002.

[41] In fairness it is also relevant to consider that a great deal of the delay in this much-protracted action is attributable to the plaintiffs, and is also properly characterized as inordinate and inexcusable. In the context of that delay, and absent specific prejudice I cannot characterize the 2004 delay as egregious enough to warrant striking out the amended statement of defence.

[42] The plaintiffs' application is dismissed. Costs of both applications will be in the cause.

"I.C. Meiklem, J."
The Honourable Mr. Justice I.C. Meiklem