

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Buchan v. Moss Management Inc.,***
2008 BCSC 1286

Date: 20080925
Docket: C945937
Registry: Vancouver

Between:

Steven Thomas Buchan and Prospectors Airways Consolidated Ltd.

Plaintiffs

And

**Moss Management Inc., Alan Frederick Wolridge, 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 and 331609 B.C. Ltd.**

Defendants

Before: The Honourable Mr. Justice Bauman

Reasons for Judgment

Counsel for the Plaintiffs

T.W.T. Yu

Counsel for the Defendants, Moss
Management Inc., Alan Frederick Wolridge,
Peter Colin Graham Richards and 331609
B.C. Ltd.

T.J. Delaney and
S.W.K. Urquhart

Written submissions received:

24 April & 9 May 2008 (Defendants)
1 & 5 May 2008 (Plaintiff, Buchan)

[1] After pronouncement of my reasons following the trial of this matter, indexed as 2008 BCSC 285, the defendants have applied for an order granting them special costs of the proceedings.

[2] I have received written submissions in this regard. As this matter is under appeal I will endeavour to only briefly add to the record in my disposition of this application.

[3] The background to this litigation, some of its history and my critical findings of fact, especially in respect of Mr. Buchan's conduct herein, are set out in detail in my reasons for judgment.

[4] The plaintiff Buchan, in his amended statement of claim, essentially alleged that the defendants Richards and Wolrige, a lawyer and chartered accountant respectively, defrauded him of his holdings in the Anyox – Kitsault area through a detailed fraudulent scheme and sundry breaches of fiduciary duties owed by the defendants to Mr. Buchan.

[5] These allegations were outstanding for many years. Mr. Buchan fell far short of proving them at trial, as I detail in my reasons for judgment.

[6] The law on the discretion to award special costs is well summarized in **Garcia v. Crestbrook Industries Ltd.**, [1994] B.C.J. No. 2486 (C.A.). The test is whether the targeted litigant's conduct has been "reprehensible", a word of wide meaning (at para. 17):

... It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. ...

[7] The defendants also submit that the plaintiffs' claim essentially alleged criminal conduct on the part of the defendants and that in such circumstances, special costs are often ordered against the party who fails to make out the unfounded allegations: **Pocuca v. Gutiu**, 2007 BCSC 490, [2007] B.C.J. No. 724 (QL), see especially the summary at paras. 15 – 21.

[8] The essential submission of the plaintiff, in resisting an award of special costs, is found in paras. 11 & 12 of his brief:

A review of the trial judge's decision notes based on the evidence presented at trial that Moss at the time was likely contemplated to be owed beneficially by Buchan and Marsh (Reasons para. 310).

Among other things, the March 20, 1990 Agreement and its provisions suggested control by Buchan and Marsh over Moss, and indeed the recital in part A indicated that Buchan and Marsh had shareholdings in Moss (Reasons, paras. 127 and 302); the undated memo Exhibit 1, Tab 55, the precursor to the March 20, 1990 agreement also suggested ownership by Buchan and Marsh (Reasons, paras 290 and 293); and the April 18, 1990 letter, Exhibit 7, Tab 90, again suggests that Buchan and Marsh had beneficial ownership in Moss (Reasons para. 161-162).

In light of the evidence set out above, which notably post dates the unsigned Declarations of Trust executed by both Richards and Wolrige which purports to have Richards and Wolrige hold the beneficial interest of Moss in Separ since March 8, 1990 (Reasons, para. 123) there was an arguable basis to allege a false/fraudulent misrepresentation as to the ownership of Moss being with Buchan and Marsh and the subsequent scheme to convert the assets from Buchan and Marsh's purported beneficial ownership. Accordingly, it is submitted that the allegations of false/fraudulent misrepresentation and the scheme to convert the assets was not obviously unfounded, reckless or made out of malice and was there was reasonable evidence on which to found a plea of fraud, the court should not second guess the pleadings.

[Emphasis in original.]

[9] The problem with this submission is my finding that Mr. Buchan well knew that the proposed joint venture involving Moss failed before it was effectively put in place.

[10] At para. 390 (iv) I summarize this finding:

Buchan did not contribute to the acquisition by Moss of the Cominco assets; he acquiesced in letting Richards and Wolrige do so, and Buchan further acquiesced in their treating Moss as their own to allow them to salvage their investment, which was a serious risk;

[11] Mr. Buchan must have known from a very early date that he had no grounds for alleging the fraudulent conversion of his interests in the Anyox – Kitsault area by the defendants Richards and Wolrige.

[12] In my view, Mr. Buchan's conduct herein has been reprehensible in the sense discussed in the cases. I conclude that this is an appropriate case in which to impose on Mr. Buchan an obligation to pay special costs and I do so in respect of the costs of the defendants Richards, Wolridge, Moss Management Inc. and 331609 B.C. Ltd.

"The Honourable Mr. Justice Bauman"