COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Buchan v. Moss Management Inc.,***
2008 BCCA 495

Date: 20081127
Docket: CA035964

Between:

Steven Thomas Buchan

Appellant
(Plaintiff)

And

**Moss Management Inc., Alan Frederick Wolrige,
Peter Colin Graham Richards and 331609 B.C. Ltd.**

Respondents
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Smith

Oral Reasons for Judgment

Appellant appearing In Person

T.J. Delaney
S.W.K. Urquhart — Counsel for the Respondents

Place and Date: Vancouver, British Columbia
November 27, 2008

[1] **LOWRY J.A.**: Application is made to quash this appeal on the basis success on all of the grounds advanced could not lead to the relief sought in this Court.

[2] The appeal is taken from the order of Mr. Justice Bauman who, after a lengthy trial, dismissed the action in reasons indexed as 2008 BCSC 285. The dispute that underlies the action arose out of complicated commercial dealings pertaining to the development of a mining venture which the judge traced from beginning to end. It is neither desirable nor necessary to attempt more than a statement of the nature of the dispute here.

[3] Steven Buchan was one of four individuals who put together a proposal for the development of the venture. The other three were Peter Richards, Alan Wolrige and James Marsh. They entered into a management agreement. Moss Management Inc. was chosen as the corporate vehicle for the venture. It was to be held by a company in which each of the four individuals was to hold an equal share of the venture. Mr. Buchan was issued no shares in Moss; they were held by Mr. Richards and Mr. Wolrige. Broadly, Mr. Buchan maintains his interest in the venture is held in trust by them and he seeks declarations to that effect.

[4] The judge concluded the management agreement never came into effect and was void. Mr. Buchan had not invested in the venture and no trust arose in his favour. Mr. Buchan advances three grounds of appeal. He seeks to have the order for judgment set aside and the declarations he seeks made.

[5] It is contended the appeal cannot succeed because no appeal has been taken against two conclusions the judge is said to have reached that are determinative:

1. Mr. Buchan agreed to modify the parties' agreement and allow Messrs. Richards and Wolrige to take over ownership of Moss Management Inc.; and
2. the court should not aid Mr. Buchan on the equitable ground that he does not have clean hands.

[6] With respect to what is said to be the first conclusion, the first ground of appeal is stated as follows:

> A. Did the learned trial judge err in finding that the March 20, 1990 Managers Agreement although intended to be binding on the parties never came into effect but failed *ab initio*?

[7] As I understand it, the respondents' contention is that, even if Mr. Buchan succeeds in establishing the agreement came into effect, his appeal will nonetheless fail because he does not challenge what is said to be the judge's conclusion the parties agreed to a modification permitting Mr. Richards and Mr. Wolrige to take ownership of Moss. The conclusion is said to be found in the following paragraphs of the judge's reasons:

> [340] I find, as a fact, that Buchan accepted, in the spring of 1990, Richards' position that the Managers' Agreement would never be implemented or performed and that Richards and the others would work towards salvaging whatever they could.
>
> [341] While it was proposed that Marsh and Buchan would have an indirect interest in Moss, that never happened. The scheme was abandoned and Buchan accepted that and left Richards and Wolrige to do their best to preserve the Cominco Moss Agreement in the hope of selling off the assets of Moss to repay the outstanding loans to Moss.

[8] Reading what the judge said in context, it appears to me he concluded the agreement never came into effect and was therefore void *ab initio,* at least in part, because it was never implemented or performed (para. 348) and the parties never treated it as an executed contract (para. 379). If Mr. Buchan were to succeed on his first ground of appeal and establish the agreement did come into effect, it would have to be, at least in part, because Mr. Buchan did <u>not</u> accept it would not be implemented or performed.

[9] Thus I do not consider the position the respondents advance to be sound. Mr. Buchan's first ground of appeal does effectively challenge what the judge said in paras. 340 and 341. It cannot then be said that, if he succeeds on the first ground advanced, his appeal will necessarily fail.

[10] The judge's second conclusion – Mr. Buchan came to court seeking equity with what the authorities characterize as unclean hands – was drawn in respect of a claim Mr. Buchan makes for an interest in a numbered company that was acquired by Moss (paras. 362-72). The conduct giving rise to the judge's conclusion had to do with Mr. Buchan's participation in what the judge said was a fraudulent conveyance of certain assets from another company to the numbered company for the purpose of defeating creditors and Mr. Buchan's failure to deal at arm's length with those companies in which he claims an interest while acting as a director of a public company.

[11] As I.C.F. Spry explains in *The Principles of Equitable Remedies*, 6th ed. (Pyrmont, NSW: LBC Information Services, 2001) at 248:

> A plaintiff who has behaved unconscionably may be refused one remedy but granted another, because in the first case there is, but in the second case is not, a sufficient connexion between the behaviour in question and the particular relief that is sought to render the equitable intervention unjust.

[12] In ***Toronto (City) v. Polai*** (1969), 8 D.L.R. (3d) 689 at 699-700 (Ont. C.A.), aff'd [1973] S.C.R. 38, the Ontario Court of Appeal stated:

> The misconduct charged against the plaintiff as a ground for invoking the maxim against him must

> relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief; or as is indicated by the reporter's note in the old case of *Jones v. Lenthal* (1669) 1 Chan. Cas. 154, 22 E.R. 739: "… that the iniquity [sic] must be done to the defendant himself."

[13] On the argument advanced now, I cannot conclude Mr. Buchan's conduct with respect to the fraudulent conveyance and material non-disclosure would necessarily preclude his succeeding to obtain the declarations he seeks with respect to his interest in the venture and in Moss in particular. Mr. Buchan's conduct involving the numbered company appears to have nothing to do with his having an interest in Moss. It appears to me the equitable relief Mr. Buchan seeks in contending his interest in the mining venture is held in trust by Mr. Richards and Mr. Wolrige may not be impaired by his conduct in relation to the numbered company.

[14] I do not consider it has been established that Mr. Buchan's appeal will fail for the reasons now advanced and I would dismiss the application.

[15] **FINCH, C.J.B.C.**: I agree.

[16] **SMITH, J.A.**: I agree.

[17] **FINCH, C.J.B.C.**: The application is dismissed.

(discussion with counsel and appellant)

[18] **FINCH, C.J.B.C.**: The order will be that the appellant/respondent on this application, Mr. Buchan, will have his costs in the cause.

"The Honourable Mr. Justice Lowry"