IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Lieberman et al. v. Business Development Bank of Canada,*** 2005 BCSC 389

Date: 20050318
Docket: L041024
Registry: Vancouver

Between:

Lucien Lieberman and Marjory Morris

Plaintiffs

And

Business Development Bank of Canada

Defendant

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Plaintiffs:	D. A. Klein S.J. Tucker
Counsel for the Defendant:	C.A.B. Ferris M. Vesely
Date and Place of Hearing:	March 3, 2005 Vancouver, B.C.

INTRODUCTION

[1] The plaintiffs are seeking to have this action certified as a class action pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50.

[2] The defendant has applied under Rule 14 (6.1) of the ***Rules of Court***, B.C. Reg. 221/90 to have this court decline jurisdiction over the subject matter of the action on the basis that Quebec is a more convenient jurisdiction in which to have the issues determined.

[3] The plaintiffs have submitted that the defendant's *forum non conveniens* application should be heard at the same time as the certification hearing that is now set for five days in November 2005.

ISSUE

[4] The issue to be determined is whether the defendant's *forum non conveniens* application shall be heard at the same time as the plaintiffs' certification application.

BACKGROUND

[5] This action was filed on April 26, 2004. It concerns claims by the plaintiffs, as retired employees of the defendant, that the defendant has improperly administered an employee pension plan that is registered with the federal Office of the Superintendent of Financial Institutions pursuant to the ***Pension Benefits Standards Act, 1985***, R.S.C. 1985, c. 32 (2nd Supp.) (the "***PBSA***").

[6] The plaintiffs' claims include allegations of: breach of trust (including breaches of a specific trust agreement (the "Trust Agreement") dated June 4, 1991); breach of fiduciary duties in equity; breach of statutory fiduciary duties arising from the operation of the ***PBSA****;* and, allegations of statutory negligence also arising under the ***PBSA*** concerning the administration of the pension plan.

[7] There are presently no proceedings in Quebec that raise any of the issues that are the subject of this action. Although similar, if not identical, claims to those now advanced by the plaintiffs were commenced on March 21, 2003 in Ontario by two other retired employees pursuant to the ***Class Proceedings Act***, ***1992***, S.O***.*** 1992, c. 6, that proceeding was discontinued in December 2003, apparently because the Ontario Class Proceedings Committee denied funding.

[8] On January 18, 2005, at a case management conference in this proceeding counsel for the defendant advised that it was the defendant's intention to apply to have this court decline jurisdiction. Subsequently, no steps were taken by the defendant in this proceeding other than the filing of the present *forum non conveniens* application which, after discussions between counsel, was set for a two-day hearing to commence on March 3, 2005.

[9] On March 3, 2005, counsel for the plaintiffs applied to adjourn the defendant's application for two reasons. Firstly, Mr. Klein advised that he would be unable to fully respond to the defendant's application due to the late delivery of materials by the defendant. Secondly, Mr. Klein submitted that the defendant's application should be heard at the same time as the plaintiffs' certification hearing.

[10] Counsel for the defendant did not object to an adjournment on the basis that more time was needed by plaintiffs' counsel to respond to materials that had been recently delivered. Mr. Ferris did, however, submit that the plaintiffs had agreed that the jurisdictional issues would be decided prior to the certification hearing and also submitted that even without that agreement it was appropriate that those issues be determined before the plaintiffs' certification application is heard.

[11] I have determined that while an agreement to have jurisdictional issues heard as a preliminary issue could be inferred from the correspondence between counsel, the totality of the circumstances do not establish that a binding agreement to do so was reached.

ANALYSIS AND DISCUSSION

[12] The primary submission of the defendant in support of its position that its *forum non conveniens* application should be determined in advance of the certification application is that if its jurisdictional application is successful there will be no need to proceed with a certification hearing. It is submitted that this would save the defendant the cost of all pre-certification involvement in this action as well as the expense of a five day certification hearing.

[13] In support of that argument, the defendant relies upon numerous authorities that require that applications under Rule 14 (6) be brought before the close of pleadings. It also relies upon decisions in British Columbia and Ontario that have considered jurisdictional issues in advance of certification in the context of class action applications. See: ***Ezer v. Yorkton Securities Inc.***, 2004 BCSC 487, aff'd

2005 BCCA 22; ***Marren v. Echo Bay Mines Ltd.*** (2003), 13 B.C.L.R. (4th) 177, 2003 BCCA 298; ***Ontario New Home Warranty Program v. General Electric Company*** (1998), 36 O.R. (3d) 787, 50 O.T.C. 333 (Ont. Ct. Gen. Div.) and ***Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.***, [2002] O.T.C. 57, 20 C.P.C. (5th) 351 (Ont. S.C.J.).

[14] In response, the plaintiffs submit that the issues and evidence involved in the consideration of the defendant's *forum non conveniens* are so complex and inter-related with certification issues that they should be heard at the same time to avoid a multiplicity of applications and potential interlocutory appeals that will delay rather than expedite the judicial process.

[15] In support of those submissions the plaintiffs principally rely upon ***MacKinnon v. National Money Mart***, 2004 BCCA 473, which reached that conclusion and ***Garland v. Consumers' Gas Co.***, [2004] 1 S.C.R. 629, 2004 SCC 25, which raises concerns about litigation by "instalments" in class action proceedings.

[16] My review of all of the authorities upon which counsel have relied leads me to conclude that the timing of the hearing of jurisdictional issues in proceedings for which certification is sought under the ***Class Proceedings Act*** is a matter requiring the exercise of discretion determined by the circumstances of each case.

[17] A non-exhaustive list of the factors that will likely have to be considered in exercising that discretion will include: the cost to the parties of participation in ***Class Proceedings Act*** pre-certification procedures; the strength of a defendant's jurisdictional arguments and the extent to which a preliminary application may

dispose of the whole of the proceeding; the potential for delay arising from interlocutory appeals; the complexity of the evidentiary and legal issues that may arise in both the jurisdictional and certification applications; and, the interplay between the issues on both applications.

[18] My consideration of the factors that I consider important to the exercise of my discretion in this case has lead me to conclude that the defendant's jurisdictional application should be heard at the same time as the plaintiffs' certification application.

[19] I have reached that conclusion for the following reasons:

(1) The cost to the parties of participation in the ***Class Proceedings Act*** pre-certification procedures would only be less than if the jurisdictional issues were determined in advance if the defendant is successful. The opposite will follow an unsuccessful application so that, in my view, the potential for cost savings should not be considered an overriding factor in this case. Further, the defendant's submission is not that the plaintiffs do not have a cause of action. Steps taken in these proceeding by the defendant to join issue with the causes of action alleged by the plaintiffs including the identification of any available defences through the exchange of pleadings should continue to be of utility in Quebec if it is ultimately determined that Quebec is a more appropriate forum than British Columbia for the resolution of these disputes.

(2) The defendant's jurisdiction application is founded upon *forum non conveniens* rather than upon *jurisdiction simpliciter* principles. Unlike the situation in ***Ezer v. Yorkton Securities***, *supra*, there is in this case no choice of forum clause, a factor that is often of significance in determining whether a court will decline jurisdiction. In ***Ezer***, the Court of Appeal stated that:

> In the face of the exclusive jurisdiction clause the burden lies on Mr. Ezer to show why a stay should not be granted. In that regard, see *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 where Bastarache J. for the Court, at ¶ 21 stated:
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> > There is a similarity between the factors which are to be taken into account when considering an application for a stay based on a forum selection clause and those factors which are weighed by a court considering whether to stay proceedings in "ordinary" cases applying the *forum non conveniens* doctrine: E Peel in "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws", [1998] *L.M.C.L.Q.* 182, at pp. 189-90. The latter inquiry is well settled in Canada: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897. In the latter inquiry, the burden is normally on the defendant to show why a stay should be granted, but the presence of a forum selection clause in the former is, in my view, sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain, and where the plaintiff has the burden of showing why a stay should not be granted.
>
> A stay should be granted unless the party bearing the burden shows a "strong cause" for not doing so. The strong cause that Mr. Ezer must establish goes beyond mere balance of convenience: *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.).

(3) While, in this case, there is a clause in the Trust Agreement that provides: "Applicable Law: This Trust Agreement shall be governed by, and construed in accordance with, the laws of the Province of Quebec and the applicable laws of Canada," the pleadings also include claims for breaches of a federal statute and breaches of fiduciary in equity thus raising far more difficult choice of law issues and considerations than those that were determined before the certification application in ***Ezer***.

(4) The legal and evidentiary issues that relate to a determination of whether Quebec is a more convenient forum than British Columbia in which to litigate the issues raised by these proceedings are complex. To that extent, difficult issues concerning what law will govern the determination of various aspects of the plaintiffs' claims will also be of significance to the determination of whether this proceeding should be certified in British Columbia under the ***Class Proceedings Act***. While the interplay between those evidentiary and legal issues does not reach the level of "interdependence" between the outcome of issues as in ***Money Mart***, *supra*, I am satisfied that the overlap amongst the issues is such that a bifurcated hearing would not only have the potential to cause injustice but could also result in a multiplicity of proceedings on appeal. ***Consumers' Gas***, *supra*, says that such a result should be avoided if possible.

[20] I am accordingly satisfied that justice will be better served in this case by a determination of both the jurisdictional and certification applications at the same time to ensure that all issues are fully canvassed on as full an evidentiary record as the parties deem necessary to the complete analysis of all of the issues.

[21] Since I am satisfied that the determination of both issues will be better informed by the exchange of pleadings, I direct and order that any steps that the defendant takes in compliance with the pre-certification application procedures under the ***Class Proceedings Act*** will be taken without prejudice to its *forum non conveniens* submissions. In other words, as in ***Money Mart*** (at ¶ 58), the defendant's jurisdictional application will be considered as part of the certification application.

[22] The determination of the defendant's jurisdiction application as part of the certification hearing may require an adjustment to the timing of the pre-certification application procedures that must now be completed as well as the time set aside for the certification hearing. Counsel should contact the registry to schedule a further case management conference to settle those issues if agreement cannot be reached.

COSTS

[23] The defendant has submitted that it should have its costs thrown away as a consequence of the plaintiffs' late reversal of its position concerning the appropriateness of a bifurcated hearing.

[24] I have determined that although an agreement to have the defendant's jurisdiction application proceed in advance of the certification hearing could be inferred from the correspondence between counsel, the totality of the circumstances do not establish that a binding agreement was reached. Further, I allowed the adjournment of the defendant's jurisdiction application, in any event, due to late delivery of materials. In those circumstances there will be no costs to either party arising from this adjournment application.

"B.M. Davies, J."
The Honourable Mr. Justice B.M. Davies

April 29, 2005 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that on page 6, paragraph 19, the first sentence in (1) should read as follows:

> "The cost to the parties of participation in the ***Class Proceedings Act*** pre-certification procedures would only be less than if the jurisdictional issues were determined in advance if the defendant is successful.