COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Lieberman v. Business Development Bank of Canada,*** 2006 BCCA 300

Date: 20060620
Docket: CA033886

Between:

Lucien Lieberman and Marjory Morris

Respondents
(Plaintiffs)

And

Business Development Bank of Canada

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
(In Chambers)

C.A.B. Ferris and M. Vesely	Counsel for the Appellant
D.A. Klein and S. Tucker	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia May 8, 2006
Place and Date of Judgment:	Vancouver, British Columbia June 20, 2006

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] The Business Development Bank of Canada applies for leave to appeal the dismissal of its application to stay these class proceedings on the basis of *forum non conveniens*.

[2] The respondents, Mr. Lieberman and Ms. Morris, are residents of British Columbia. They are retired employees of the Business Development Bank of Canada and are members of the pension plan administered by it. In their statement of claim they allege that certain actions taken by the Business Development Bank of Canada, including contribution holidays given to active members and the payment of administrative expenses from the trust fund, were improper. Their action is brought pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50.

[3] The Business Development Bank of Canada applied to stay the proceedings on the basis that British Columbia was a *forum non conveniens*, arguing in favour of a class action in the Superior Court of Quebec. Mr. Lieberman and Ms. Morris cross-applied to certify the proceedings as a class action. The Business Development Bank of Canada did not oppose the motion to certify the proceedings as a class action and advised the Court that it would not oppose a similar application if made in Quebec.

[4] On February 16, 2006, the learned chambers judge in reasons for judgment indexed at 2006 BCSC 242, dismissed the application for a stay and certified the action as a class action. The Business Development Bank of Canada seeks leave to appeal that order, contending that the action should proceed in Quebec because

the trust is located in Quebec. It says that the causes of action are subject to Quebec law, that important witnesses and documents are in Quebec and that if there were damages suffered, it was to the Quebec-based trust fund.

[5] The Business Development Bank says that Mr. Lieberman and Ms. Morris are only representative of the class, and that the chambers judge has incorrectly used the choice of forum of the representative plaintiffs to overwhelm other proper considerations.

[6] Mr. Lieberman and Ms. Morris oppose the application. They say that as the question of a stay involves the exercise of the Court's discretion, the appeal has no prospect of success and thus the application for leave to appeal should be dismissed.

[7] The factors that this Court will consider on an application for leave to appeal are well-known. They include: (1) the significance of the point on appeal to the practice; (2) the significance of the point raised to the action itself; (3) whether the appeal has merit; and (4) the potential for delay or prejudice in the event the leave application is granted: ***Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.*** (1988), 19 C.P.C. (3d) 396 (C.A.). The overriding consideration on any leave to appeal application is the interests of justice.

[8] It is also well known that where the order sought to be appealed is a discretionary one, the burden on an applicant is substantial because this Court does not lightly interfere with a discretionary order: ***Yang v. Yang***, 2000 BCCA 486. The

question on such an appeal is whether the discretion was not exercised judicially or was exercised on a wrong principle.

[9] On a reading of the reasons for judgment of the chambers judge, I am not persuaded that he rested his decision on the choice of forum of the representative plaintiffs as the Business Development Bank of Canada contends. The chambers judge set out the law on *forum non conveniens* as established by ***472900 B.C. Ltd. v. Thrifty Canada, Ltd.*** (1998), 57 B.C.L.R. (3d) 332 (C.A.), ***Stern v. Dove Audio Inc.*** (1994), 51 A.C.W.S. (3d) 785, [1994] B.C.J. No. 863 (C.A.), and ***Amchem Products Inc. v. British Columbia (Workers/Workmen's Compensation Board)***, [1993] 1 S.C.R. 897, 77 B.C.L.R. (2d) 62 (S.C.C.). He then canvassed the connections that the litigation could have with Quebec that were recited by the Business Development Bank of Canada, and the factors which were advanced by the representative plaintiff as supporting an action in this jurisdiction. The latter included that the Business Development Bank of Canada is a national institution doing business nation-wide, that it carried on business in British Columbia from fifteen separate locations, that the class proceeding will involve class members from all provinces, that the class members in Quebec are not the majority of the total class, that more retired members live in British Columbia than in Quebec, and that no class members who reside in Quebec have come forward to spearhead the litigation. The chambers judge also recited the issues of law that, depending on the decision taken, may reinforce or diminish the ties of the litigation to Quebec.

[10] On a review of the reasons for judgment, I am not persuaded that there is any merit to the submission that the discretion of the chambers judge was not exercised

judicially or was exercised on a wrong principle, and his reasons for judgment advance a broader basis for his order than simply choice of forum, contrary to the Bank's submissions.

[11] The applicants refer to a practice of defendants to class proceeding actions commencing actions for a declaration in one province to avoid class proceedings in another, or to direct the action to the province of their choice. They say this practice illustrates the need to revisit the test for *forum non conveniens* to dilute the significance of choice of forum as a factor. However, as I have sought to explain, on my reading of the reasons for judgment, the choice of forum was not the determining factor for the order made.

[12] Nor am I persuaded that the point sought to be appealed is of such significance to the practice that it requires a resolution. The law on *forum non conveniens* is well settled.

[13] The application is dismissed.

"The Honourable Madam Justice Saunders"