COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Lieberman v. Business Development Bank of Canada,*** 2005 BCCA 268

Date: 20050513

Docket: CA032868

Between:

Lucien Lieberman and Marjory Morris

Respondents
(Plaintiffs)

And

Business Development Bank of Canada

Appellant
(Defendant)

Before: The Honourable Madam Justice Prowse
(In Chambers)

C.A.B. Ferris — Counsel for the Appellant

D.A. Klein and S. Tucker — Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
May 6, 2005

Place and Date of Judgment: Vancouver, British Columbia
May 13, 2005

Reasons for Judgment of the Honourable Madam Justice Prowse:

[1] This is an application by the Business Development Bank of Canada (the "Bank") for leave to appeal from the order of a chambers judge, made March 18, 2005, which provides, in part:

> 1. the application of the Defendant [the Bank] that the action be stayed pursuant to Rule 14(6.1) of the *Rules of Court* on *forum non conveniens* grounds be adjourned to be heard at the same time as the Plaintiffs' certification application pursuant to the *Class Proceedings Act;*
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> 2. the Defendant's application will not be prejudiced by its participation in this proceeding including, without limiting the generality of the foregoing, participation in Case Management Conferences, filing materials with respect to the certification application, and participating in any such certification application;

[2] The grounds of appeal proposed by the Bank are that:

> (a) the learned chambers judge erred by exercising his discretion on a wrong principle regarding the scheduling of an application to challenge jurisdiction on *forum non conveniens* grounds in a class proceeding; and
>
> (b) the learned chambers judge erred in scheduling the hearing of the Defendant's application to challenge jurisdiction on *forum non conveniens* grounds in such a manner that the Defendant has effectively been denied the benefits of its application before the application has been heard.

[3] By way of brief background, the plaintiffs are two retired employees of the Bank and members of the pension plan administered by the Bank. The general nature of their claim is summarized at paras. 5 and 6 of the reasons of the chambers judge, as follows:

> 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***").
>
> 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.

[4] At a case management conference on January 18, 2005, counsel for the Bank advised that he would be bringing an application to determine whether British Columbia was the appropriate forum to hear the action. He served his motion materials in that regard on February 21, 2005. In summary, it is the Bank's position that Quebec is the more convenient jurisdiction in which to have the action determined.

[5] On the return of the motion before the chambers judge, the plaintiffs submitted that the Bank's motion should be heard at the same time as the certification hearing which had been scheduled for five

days in November 2005. The chambers judge acceded to this argument; hence this application for leave to appeal.

[6] The factors which the Court must take into account in determining whether leave to appeal should be granted are:

> (a) whether the appeal is *prima facie* meritorious, or, on the other hand, whether it is frivolous;
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> (b) whether the point on appeal is of significance to the practice;
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> (c) whether the point raised is of significance to the action itself; and
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> (d) whether the appeal will unduly hinder the progress of the action.
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> (***Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*** (1988), 19 C.P.C. (3d) 396 (B.C.C.A.))

[7] In addressing the merits, the Bank submits that the chambers judge placed undue reliance on the decision of this Court in ***MacKinnon v. National Money Mart Co***., 2004 BCCA 473, [2004] B.C.J. No. 1961, that his decision was inconsistent with policies articulated by the courts which encourage applications regarding appropriate forum to be brought in a timely manner; and that the effect of the decision, if the Bank is ultimately successful on its application, will be unnecessary delay, expense and inconvenience, since it will have to bring a further application for certification in Quebec.

[8] The respondents, on the other hand, characterize this application as an attempt by the Bank to overturn what is essentially a scheduling decision of a chambers judge made in the exercise of his discretion in the course of case management of a matter commenced pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. They also submit that the effect of granting the application in the absence of compelling reasons to do so, is to encourage "litigation by instalments", a practice which the chambers judge observed had been the subject of adverse comment in class action proceedings in ***Garland v. Consumers' Gas Co.***, [2004] 1 S.C.R. 629, 2004 SCC 25. The respondents further note that the appellate standard of review of a discretionary order is stringent.

[9] Despite the cogent submissions of counsel for the Bank, I am not persuaded that the Bank has met the merits threshold for leave to appeal. In his reasons for judgment, after reviewing the submissions of counsel, the chambers judge stated (at paras. 16-18):

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

[10] The chambers judge then went on to consider several of these factors, including the cost and delay arguments, the ***MacKinnon*** decision, the relative strength of the Bank's submission that Quebec was the more appropriate forum, and the interrelationship of the evidence and the law on both applications.

[11] In the result, I am unable to agree with the Bank that there is an arguable or *prima facie* case that the chambers judge erred in principle or otherwise in concluding that it was appropriate to have the Bank's application and the certification application heard together on a "without prejudice" basis.

[12] Nor am I persuaded that this appeal is one of general importance. The decision to postpone the hearing of the Bank's application was based on the chambers judge's perception of the facts and the legal issues involved on both applications. Amongst other things, he concluded that there was a sufficient overlap in the material to be led on each application that it was appropriate to have them heard together. I reject the Bank's submission that his decision can reasonably be taken as precedent for the proposition that it is never, or rarely, appropriate for an application relating to *forums conveniens* to be heard in advance of a certification application. There are undoubtedly cases in which it would be entirely appropriate to do so.

[13] While I do not think that an appeal would likely result in a delay of the hearing set for November 2005, I find the other factors to which I have referred more compelling in determining whether leave to appeal should be granted.

[14] In summary, I am not persuaded that this is an appropriate case in which to grant leave, and I would dismiss the Bank's application.

"The Honourable Madam Justice Prowse"