COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20120201
Docket: CA039540

Between:

Leesa Marie McCulloch

Respondent
(Plaintiff)

And

Amanda Leigh Isaac

Appellant
(Defendant)

Before: The Honourable Mr. Justice Groberman
(In Chambers)

On appeal from: Supreme Court of British Columbia, November 30, 2011
(*McCulloch v. Isaac*, Victoria Registry 09-1884)

Oral Reasons for Judgment

Counsel for the Appellant:	T.H. Pettit
Counsel for the Respondent:	E.G. Lau
Place and Date of Hearing:	Vancouver, British Columbia February 1, 2012
Place and Date of Judgment:	Vancouver, British Columbia February 1, 2012

(leave to appeal)

[1] **GROBERMAN J.A.**: This is an application for leave to appeal a decision of a trial judge to adjourn a trial. The trial judge ruled that there were defects in one of the plaintiff's expert reports. He concluded that it would be overly prejudicial to the plaintiff to proceed with the trial in the absence of the expert report and he granted an adjournment. The issue of the propriety of the expert report had been raised previously by the defendant both with counsel for the plaintiff and in a case management conference.

[2] The defendant argues the trial judge erred in applying the traditional test for an adjournment as set out in the case of *Sidoroff v. Joe* (1992) 76 B.C.L.R. (2d) 82. She says that the appropriate test for the exercise of discretion on an adjournment application has been significantly modified by the 2010 *Rules* and that the focus is no longer exclusively on the interests of the parties. Rather, a judge entertaining an adjournment application in circumstances such as the present must consider the wider effects of an adjournment: the effect of the adjournment on witnesses, on other litigants, and on the judicial system in general. For emphasis, Mr. Pettit cites from a speech given by the Chief Justice of the Supreme Court explaining the need to marshal judicial resources in a more efficient manner and to reduce costs of litigation.

[3] The test for granting leave to appeal is well established. The first question that I must look at is whether the appeal is of importance to the parties. On the face of it, there is little utility to the parties in this Court re-examining a decision to adjourn the trial. It is impossible to unscramble the egg. The adjournment has been granted and we cannot, despite the extensive powers of this Court, reverse the flow of time.

[4] Counsel for the applicant suggests that the Court could make ancillary orders and, in particular, suggests that the Court might order that the plaintiff not be allowed to revise the expert report in question. It might, alternatively, order that the expert report cannot be used and that no further expert reports be filed by the plaintiff.

[5] In my view, it is highly unlikely that the Court would grant any of those orders because they interfere very directly and completely with the process of the trial court

and with the general discretion of a trial judge. Even if this Court were to conclude that the trial judge proceeded on wrong principles in granting the adjournment, it is unlikely, in my view, that this Court could make any order that would assist the parties to this particular litigation in the resolution of their dispute. I do not, therefore, see this proposed appeal as one that is important in the litigation.

[6] The second question is whether the proposed appeal is of importance to the profession generally. Mr. Pettit is quite persuasive in suggesting that this Court ought to consider the principles underlying the new Rules and particularly the role of "proportionality". He argues that this Court should provide guidelines for the exercise of discretion by Supreme Court judges on such matters as adjournments in order to avoid a situation where counsel are "wandering in the wilderness" for several years as the new *Rules* are interpreted.

[7] I have considerable sympathy for Mr. Pettit's argument that there is some importance in this Court dealing with the matter, but I am troubled by the fact that there is not extensive jurisprudence of the Supreme Court yet on the issue.

[8] The extent to which a new philosophy has been put in place by the new *Rules* is a question of considerable importance to the practice of law generally in the province. On the other hand, as I indicated to Mr. Pettit, there is strong interest, I think, in allowing the trial court – which is the expert court on management of trial matters – to establish jurisprudence on the matter of case management before this Court undertakes a review of the subject. A judgment of this Court would, effectively, set in stone the principles on which discretion should be exercised under the new *Rules*. While I recognize the strong interest in having the principles considered by this Court, it is my view that it is premature for this Court to do so.

[9] The third issue that has to be considered here is whether there is a meritorious case. I do not think that there is any doubt that the language of the new *Rules* and, in particular, the language of "proportionality" suggests that there may be some change in the way that the trial court should address issues of case

management and particularly of adjournments. I have no difficulty with Mr. Pettit's suggestion that there is a meritorious case to be considered by this Court.

[10] Finally, there is the question of whether the progress of the case would be interfered with by this Court hearing the appeal. It is clear that the trial process would not be assisted by this Court granting leave to appeal. Mr. Pettit argues that the appeal could be heard and decided before the scheduled trial date, which I understand to be in the summer of 2012. I think that he is right that the appeal could be dealt with before then. I am not convinced, however, that the existence of an appeal would not interfere with the parties' trial preparation. I concede that, in the context of this case that is a minor concern.

[11] All of these matters considered, and despite the very persuasive submissions Mr. Pettit has made, I am not minded to grant leave in this matter. The question raised – the basis upon which discretion to grant an adjournment should be exercised – is one of importance to the profession but, in my view, it is premature for this Court to be making a definitive decision on that matter in the absence of substantial jurisprudence from the Supreme Court. As this issue is not, in my view, of importance to the parties to this case or of significance to this litigation, the pressure to hear this appeal is limited. Leave is denied.

[12] In view of the manner in which this application has been brought and argued, I would order that each party bear her own costs of the application.

"The Honourable Mr. Justice Groberman"