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Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
ISAAC HOLDINGS LTD. AND AMCANA ENTERPRISES INCORPORATED	REASONS FOR JUDGMENT
PLAINTIFFS	OF
AND:	THE HONOURABLE
SUN ALLIANCE INSURANCE COMPANY	MR. JUSTICE MEIKLEM (IN CHAMBERS)
DEFENDANT	
Counsel for the Plaintiffs:	M. Phillip Tonstad, Esq.
Counsel for the Defendant:	F. Potts, Esq.
Place and Date of Hearing:	Vancouver, B.C. January 7, 1994

The plaintiffs' Rule 18A application was returnable before me, but the defendant applied at the opening of that application for a ruling that the issues are not suitable for determination under Rule 18A.

At the conclusion of submissions I allowed the defendant's objection and ruled orally that the plaintiff's claim was not suitable for determination under Rule 18A. As I embarked upon my extemporaneous oral reasons for that ruling, the recording mechanism malfunctioned and I therefore provide these reasons.

The defendant cited the case of ***Sinnott v. Westbridge Computer Corporation*** (1993) 15 CPC (3d) 376 in support of his application. That case has several points of similarity to the case before me, and the case before me has additional features which make it unsuitable for trial in a summary fashion.

The issue sought to be decided by Rule 18A is one of three claims made in this action. Trial is set for March 1994 for 5 days. This claim is for indemnity in the sum of $385,784.53 under an insurance policy in respect of a theft of inventory. The defences are that the claim is fraudulent or so exaggerated as to constitute a policy breach. Many affidavits have been sworn and filed by both sides and if this application by the defendant did not proceed, its application to cross examine the deponents in the latest series of

affidavits would undoubtedly succeed, and the Rule 18A application would be adjourned. Even if heard prior to trial on its new return date, it would not necessarily be decided prior to the trial date. The summary trial would require crucial credibility determinations as well as assessment of the quantum of the claim. The claim is very substantial and the documentary basis of the tendered proof is insubstantial. Counsel initially estimated one day would be necessary for hearing the 18A motion, but after hearing two and a half hours of submissions on this application, my estimate is that it would take two to three days to hear.

Even if the matter was heard, in my view it is likely the judge hearing the matter would decline to grant judgment under either Rule 18A(1)(a) or (b) because of the nature of the credibility issue. It is also possible that decision would be reserved and not rendered by the trial date. Whatever the result of a Rule 18A hearing, it would likely be appealed, since the usual reasons for appellate deference to the trial judge's findings of fact would not apply.

Some of the same credibility issues will arise in the trial of the other two claims and the prospect of the chambers judge determining credibility on the basis of affidavits on the summary trial and a trial judge coming to a contrary determination on a full trial of the other components of the claim is unsatisfactory.

A consequence of my ruling is that counsels' estimate of time required for trial now moves from five days to at least ten days. The original estimate did not include an allowance for a new claim that was advanced in respect of the activities of the defendant insurer's investigators. It is of course open to counsel to utilize the March 1994 trial dates in respect of the liquidated insurance claim proper and defer the damage action, and thus ameliorate the possible hardship of a lengthy postponement of the trial.

It is my view that the interests of justice require a full trial of this issue. A full trial is not a luxury in this case, but a necessity. The quantum claimed is very substantial and on the basis of the affidavits of Mr. Damani, filed November l, 1993 and the affidavit of Naomi Keller there is substance to the attack on the credibility of the plaintiffs' principal.

In addition to the above, the words of the penultimate paragraph of Chief Justice Esson's reasons in ***Sinnott*** are totally appropriate to this case:

> A preliminary determination that the case is not appropriate for proceeding under Rule 18A will generally be fitting if, as in this case, the application is brought close to trial in respect of an issue which is not completely severable from the remaining issues, and where substantial time will be required for hearing the 18A application. In this case, there is clearly a substantial risk of wasting time and effort, and of producing unnecessary complexity.

I therefore dismissed the plaintiff's summary trial application. Costs were sought and would normally follow the event, but it seems to me that it would be appropriate in this matter to leave the matter of costs of the motion to the trial judge who will be determining the credibility issue, and who might well wish to order costs of this motion to the party that prevails at trial.

"I. C. Meiklem, J."

Prince George, B.C.

January 12, 1994