

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110513
Docket: S084670
Registry: Vancouver

Between:

TNR Gold Corp., and Solitario Argentina S.A.

Plaintiffs

And:

**MIM Argentina Exploraciones S.A., Minera Andes Inc., Minera Andes S.A.,
Los Azules Mining Inc., and Andes Corporacion Minera S.A.**

Defendants

- And -

Docket: S102292
Registry: Vancouver

Between:

**Minera Andes S.A., Minera Andes Inc., Los Azules Mining Inc.
and Andes Corporacion Minera S.A.**

Plaintiffs

And:

TNR Gold Corporation and Solitario Argentina S.A.

Defendants

And:

MIM Argentina Exploraciones S.A.

Defendants by Counterclaim

Before: The Honourable Mr. Justice Macaulay

Oral Reasons for Judgment

(In Chambers)

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Solitario Argentina S.A.

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Place and Date of Hearing:

Vancouver, B.C.
May 11-12, 2011

Place and Date of Judgment:

Vancouver, B.C.
May 13, 2011

[1] **THE COURT:** The plaintiffs seek to amend their statement of claim to add new and significantly different claims and to adjourn the trial that is scheduled to commence June 20, 2011. The defendants all oppose and say that to permit the amendments would fundamentally alter the litigation and inevitably necessitate an adjournment of the trial with the attendant inconvenience, prejudice and cost.

[2] The plaintiffs, TNR, a junior mining company from British Columbia, and Solitario, an Argentinean subsidiary of TNR involved in mineral exploration, commenced the action in June 2008. Currently, in the litigation, the plaintiffs primarily seek rectification of an option agreement relating to mining and exploration rights in properties located in the high Andes in Argentina that contain a very valuable copper deposit.

[3] Solitario entered into the option agreement in May 2004 with the defendant, MIM, an Argentinean corporation (the "Solitario Option"). The defendant, Minera Andes S.A., or "MAS", is also an Argentinean company and a subsidiary of the defendant, Minera Andes Inc., or "MAI". The remaining defendants are also subsidiaries of MAI. Collectively these defendants may be referred to as Minera Andes.

[4] In November 2007, MIM entered into an option agreement with MAS respecting the same rights (the "MAS Option"). This option agreement was subject to Solitario's back in right under the Solitario Option. I will describe the back in right in a moment.

[5] The MAS Option excluded any Solitario rights respecting a certain property described as Escorpio IV. An issue had developed between Solitario and MIM whether the Solitario Option included or excluded the Escorpio IV property. That is one of the issues in the current litigation.

[6] The copper deposits more directly at issue in the litigation are not on the Escorpio IV property but on other properties located to the south and east of it. Roughly speaking, the properties to the east of Escorpio IV are also Solitario properties and fall within the definition of the property in the Solitario Option. Immediately to the south of the Solitario properties is a rectangular property running east to west sometimes referred to as the Bosque property. MIM held a separate option respecting that property. Generally to the south of the Bosque property are further properties, all owned or controlled by Minera Andes. The area of the copper deposit that is of direct concern is shaped roughly as a jelly bean and lies on a north-south axis; about half the deposit is in the Minera Andes properties and the other half includes part of the Bosque property and the Solitario properties, other than Escorpio IV.

[7] According to the plaintiffs' theory, MIM had the responsibility of preparing the final option agreement between Solitario and MIM. The plaintiffs allege that MIM, at the last moment, without consultation, changed a term in the final version of the Solitario Option such that Solitario lost its ability to buy back into the property on the terms that the parties had previously agreed to.

[8] The terms of the buy back in are significant. In the final Solitario Option, MIM is referred to as Xstrata. The term reads:

7.1 If, within 36 months of exercising the Option, Xstrata completes a feasibility study on any part of the Property, Xstrata must notify Solitario, and

Solitario will have the right to "buy back" up to a maximum 25% equity in the Property at any time within 120 days of receiving such notification (the "Back-in Right") by giving written notice to Xstrata of the exercise of the Back-in right.

According to the plaintiffs, the agreement should instead have provided the right to buy back in at any time within 120 days of the completion of a feasibility study on any part of the property. There has not in fact ever been a feasibility study respecting the property.

[9] I do not need to analyze the respective positions of the parties on this aspect of the current litigation. It suffices to say that the claim is hotly disputed.

[10] Alternatively in the current pleadings, the plaintiffs say that there was no consideration for the change and, in the further alternative, that there was an implied term in the agreement that MIM would exercise its best efforts to complete a feasibility study within 36 months of exercising its option, which MIM failed to do. The plaintiffs do not challenge the validity of the Solitario Option in the current pleadings.

[11] As a condition of the Solitario Option, MIM was required, so long as it did not withdraw from the agreement, to make five option payments over a five-year period. In addition, MIM was also required to spend a total of US \$1 million "in relation to the property or the exploration of the Property by the fifth anniversary of the Execution Date" of the agreement. In that regard, the option requires MIM to "Undertake ground-based mapping, sampling, geophysical surveys, drilling and any other work deemed necessary to fully evaluate and explore the Property."

[12] On October 5, 2006, MIM gave notice to Solitario that it had complied with the expenditure obligation of US \$1 million and attached a schedule showing the totals expended under various headings, including, for example, drilling, for each of the years 2003 through 2006. The entries totalled about \$1.321 million. Although MIM had until May 15, 2007, to make the final option payment, the notice stated an intention to make the final payment in near future.

[13] On April 23, 2007, MIM gave notice to Solitario that it was exercising its option. By that point the dispute over the Escorpio IV lands had developed. On May 8, 2007, Solitario and MIM signed a document transferring 100 percent of Solitario's interest in the property, except for the Escorpio IV lands. Later, in May 2009, MASA acquired 100 percent of the property from MIM, subject to the exceptions referred to above.

[14] The plaintiffs estimate that the rough value of their current claims is about \$.5 billion. The new claims, if permitted, will change the stakes in the litigation, as I understand it, to about \$2 billion.

[15] The new claims are in addition to, not in replacement of, the present claims. The difference in potential risk to the defendants, however, overshadows the current claims. Put bluntly, if the plaintiffs succeed on the proposed new claims, the current claims will be subsumed in the result. There is no doubt that the new claims would fundamentally alter the ongoing conduct of the litigation both before and during trial.

[16] The new claims are set out in draft pleadings and disclose proper causes of action. In essence, the plaintiffs now say that MIM never incurred the necessary expenditures to entitle it to exercise the Solitario Option. In brief, the plaintiffs claim that some of the expenditures listed in the schedule to the October 5, 2006, letter, particularly in relation to drilling activities, were not located on the Solitario properties within the option but instead on the Bosque property to the south. In essence, the claim is that the expenditures set out in the schedule were inflated and included drilling expenditures incurred outside the property. After removal of the inappropriate or improper expenditures, the remaining balance is less than US \$1 million.

[17] In 2006 some of the now challenged expenditures were incurred by MAI pursuant to its arrangements with MIM, but counsel for the plaintiffs say: that is not an issue. By that point, Andes Minera was making the option payments directly to Solitario and incurring all the expenditures relating to the property.

[18] Like the others, these new allegations are hotly contested but, if true, and depending on the interpretation of the Solitario Option, could support a finding that MIM breached the agreement when it exercised the option. These and other allegations are also capable of supporting a finding of intentional interference by Minera Andes with Solitario's economic relations. In the result, the plaintiffs now, having not previously challenged MIM's assertions that it and Minera Andes had complied with its expenditure obligations under the Solitario Option, seek a declaration that the exercise of the option was in breach of the conditions of the option and, as a result, according to the plaintiffs' proposed pleading, the option is a nullity. I do not know that the latter follows in law, but that need not be an issue here. At the very least, the plaintiffs, if successful, would be entitled to damages for breach of contract.

[19] The plaintiffs further seek a declaration that, as a result of the Minera Andes' intentional interference with Solitario's economic relations, they are entitled to a constructive trust entitling the plaintiffs to ownership of the property. Alternatively, the plaintiffs seek damages in contract and tort. Finally, the plaintiffs seek special costs.

[20] If the application to amend is denied, the plaintiffs intend to commence a separate proceeding to advance these claims. While the plaintiffs acknowledge that their application to amend comes, effectively, on the eve of trial, and given the complexity of the issues, that an adjournment of the trial will be required if the amendments are permitted, they say that it is nonetheless just and convenient to allow the proposed amendments.

[21] The approach to permitting amendments is liberal unless there is prejudice to the other side or the amendments are unnecessary. There are obvious policy arguments in favour of deciding all issues affecting the parties arising out of connected events in a single proceeding. A single proceeding is, at the end of the day, more likely to be cost-effective and result in a timely disposition than multiple

proceedings. Further, a single proceeding minimizes the risk of inconsistent outcomes.

[22] In spite of these and other policy arguments, it is necessary in determining whether it is just and convenient to allow amendments to consider the delay, any explanation for the delay and the extent of any prejudice caused to the other side. In this regard, the plaintiffs contend, with little more than the assertion by one of the principal officers of TNR on examination for discovery, that they only became aware in late February 2011 of the basis for the new claims as a result of reviewing the defendants' documents and extrapolating certain conclusions about the sites at which expenditures were incurred from those documents.

[23] I start with the question of diligence as it relates to delay and the explanation for it. During the course of submissions, counsel for the plaintiffs demonstrated the complexity of the forensic work that was undertaken. He submitted, and endeavoured to demonstrate, that significant efforts to connect the evidence were required before the basis for the additional causes of action became known. Regardless whether that submission is accepted, I accept that the plaintiffs moved quickly thereafter to prepare the proposed amendments, advised the defendants of their new position, and filed their application to amend.

[24] Counsel did not, however, suggest that the plaintiffs were unable to conduct the analysis that led to the proposed amendments at an earlier time. Instead he relied on the history of the litigation to demonstrate that, until late February 2011, there remained outstanding important procedural issues that required resolution before trial. These included applications to strike third party notices, including one naming the plaintiffs' solicitors at the time they entered into the Solitario Option, and another respecting joinder. I took his submissions in this regard to be a partial explanation of why the necessary analysis was not done earlier.

[25] As well, document production from the defendants continued until early March 2011. I do not understand the plaintiffs to say that their analysis depended on these final stages of document production, but it is apparent that all parties have been fully

engaged in pre-trial processes. To a limited extent, this may explain why the analysis was not done earlier.

[26] The defendants do not accept any suggestion that the plaintiffs could not have conducted the analysis earlier. Counsel for MIM did a masterful job of reviewing documents, some of which were produced by the plaintiffs themselves and others that were produced by the defendants as early as April 2009, to demonstrate that a diligent party could have reached the same conclusions that the plaintiffs have now reached, at least by 2009. There is considerable merit to this contention. Nonetheless, I am satisfied that the plaintiffs, or their counsel, for whatever reasons, did not do the necessary analysis until late February 2011.

[27] This factor weighs significantly against granting the application to amend, but it is only one of the factors and is not determinative in itself. As Barrow J stated in *Roy v. 1216393 Ontario Inc.*, 2009 BCSC 571 at para. 18, in dealing with lack of diligence:

There is nothing in the material to suggest that the plaintiffs did not know of all of the circumstances said to support their claim for deceit at the time they began their action, if not shortly thereafter. They have offered no explanation for why they have waited until five weeks before the trial to seek to amend their claim. I think it fair to observe, however, that the significance of the lack of an explanation may vary according to the length of the delay. In any event, the issue of delay and any explanation for it is but one factor to weigh in the balance.

[28] As to prejudice, the plaintiffs say that there are no limitation issues respecting the new claims and that there would be no judicial economy achieved in requiring them to pursue a separate action. They do not accept, as the defendants contend, that the new claims are inconsistent with the current claims, but agree that, if the new claims succeed, the current claims might be academic.

[29] The plaintiffs concede that the new claims are significant in light of their magnitude. They say that the decision to amend was driven solely by the timing of discovery. If they had discovered it earlier, they would have sought to amend earlier. While I think it is more a question of when they understood the potential significance

of the evidence in a legal framework than the actual discovery of it, I accept that the plaintiffs would have sought to amend earlier.

[30] The question of prejudice is very important here. The principal contention of the defendants is that they are prejudiced because the proposed amendments represent a "sea change" in the litigation. Counsel for the defendants say that the plaintiffs want to fundamentally recast their claims and, in doing so, now seek to advance positions inconsistent with admissions made throughout their existing pleadings respecting the valid exercise of the Solitario Option. The defendants point to *Civil Rule 3-7(6)* which prevents a party pleading an allegation of fact or a new ground or claim inconsistent with the party's previous pleading, except in the alternative as set out in *Civil Rule 3-7(6)*. The proposed pleadings are not offered in the alternative.

[31] In particular, the defendants rely on various admissions in the plaintiffs' existing pleadings to the effect that MIM exercised the Solitario Option. They say that the plaintiffs thereby admitted the validity of the option. As to the validity of the Option, the defendants further point to an admission by the plaintiffs in their capacity as defendants in an action commenced by the Minera Andes parties under VLC-S-S-102292, scheduled to be heard at the same time as the present proceeding. At paragraph 20 of their statement of defence, TNR and Solitario plead that MASA held 100 percent of the property subject only to Solitario's right to back in. TNR and Solitario also later incorporated that pleading by reference in their Response to Counterclaim in the present action. According to the defendants, the admission implicitly includes an admission that the exercise of the Solitario Option was valid.

[32] I am not persuaded that the defendants are correct on this aspect of the matter. Viewed in the context of the pleadings, the plaintiffs have consistently admitted that MIM exercised the Solitario Option. There does not appear to be any doubt that is factually true. What is now in doubt, but was not apparently in doubt at the time of the pleading, according to the plaintiffs, is whether MIM had satisfied the condition requiring the expenditure of US \$1 million in relation to the property or the

exploration of the property before exercising the option. Put a different way, the plaintiffs now question the accuracy of the information that MIM provided in the schedule to the October 5, 2006 letter.

[33] Even if the pleadings constitute an admission as to the validity of exercising the option, as the defendants suggest, I am not persuaded that it was a deliberate and clear concession made by the plaintiffs for the benefit of the defendants. I would not deny the application to amend on this limited basis.

[34] The defendants' other allegations respecting prejudice have more weight. As to the sea change, MIM says that the case has moved from one in which its maximum exposure in monetary terms was restricted to having to permit Solitario to back in to a 25 percent equity position upon payment of 50 percent of the total costs incurred on the property before the back in, about \$5 million, and further, upon Solitario being obligated to pay 25 percent of the exploration and development costs going forward.

[35] Now, the defendants potentially face a claim by the plaintiffs, in effect, for a 100 percent interest in the property covered by the Solitario Option. They say, and I agree, that the resources and tactics to be applied in responding to such a claim differ from the approach taken when less appears to be at stake. Having said that, I keep in mind that the claims as currently structured, likely still place the litigation near the top in this jurisdiction in terms of the monetary stakes.

[36] Nonetheless, the delay and cost associated with granting the proposed amendments to the pleadings, including the inability to proceed to trial as scheduled, and, in all likelihood, a further lengthy delay of at least many months, to accommodate additional discovery processes before the matter can be rescheduled and heard, all prejudice the defendants, who are ready otherwise to proceed with the trial as currently scheduled.

[37] Although there is no limitation issue in the present case, the determination of what is just and convenient necessarily includes a consideration of prejudice

associated with delay. Albeit in the context of a cause of action added after the expiry of the limitation period, the Court of Appeal recently affirmed the significance of the hardship faced where a defendant has worked to advance the litigation and taken steps to ensure that the trial will go ahead. See *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 26.

[38] There is an additional prejudice to the first Minera Andes defendant that must be taken into account. MAI is a publicly traded company and is currently in the process of spinning out the project into a new publicly traded company. Once the spin-out is complete, the new company will require financing. I accept that further delay to address the proposed new claims may adversely impact the new company's ability to obtain financing in time for the late 2011 drilling season in South America and, in turn, cause market prejudice to shareholders in the new company. That prejudice, however, will occur so long as the claims are outstanding regardless of whether the claims are included by amendment in the present proceeding or, as I discuss below, part of a new proceeding.

[39] The defendants rely on the decision of Bauman J., as he then was, in *Maximum Ventures Inc. v. de Graaf*, 2008 BCSC 199. Mr. Justice Bauman, as case management judge, declined to permit amendments proposed by the plaintiff within weeks before the trial was scheduled to commence. He considered that the plaintiff was fundamentally altering its case. However, there are, in my view, important distinctions in the case.

[40] In *Maximum* the plaintiff had advanced the case on two theories of liability: first, an in-trust claim arising out of an alleged oral partnership agreement to obtain mineral claims in Mongolia that the plaintiff was entitled to the benefit of by means of an assignment from one of the partners, and second, in the alternative, an alleged agency relationship between the plaintiff and one of the other partners. By its proposed amendments, the plaintiffs entirely abandoned their first theory of liability, retained their second theory, and also proposed a new theory of liability based on an alleged right of first refusal arising out of the same circumstances that gave rise to

their first theory. Mr. Justice Bauman referred to the abandonment of the first theory of liability as "dramatic."

[41] In the result, the court concluded that the first theory had "been a central, if not the central, focus" in the litigation (at para. 33). He denied the application to amend and specifically left it up to the plaintiff to apply to discontinue its action and commence a fresh action if it chose to do so (at para. 48).

[42] MIM says that a similar course is open to the plaintiffs here. They could seek leave to discontinue the present action and, if granted, presumably on condition that the plaintiffs pay the costs thrown away in the present proceeding, and then commence a new action putting forward the newly proposed theories of liability together with properly restructured alternate pleadings for the current claims. While such an approach is theoretically possible, it does not solve the problems associated with further delay and expense. It could well exacerbate them.

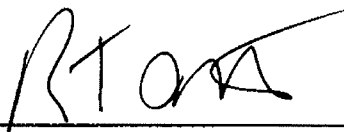
[43] The determination whether it is just and convenient to permit the amendments also requires a consideration of the effect on the plaintiff of denying the application. It is possible, if the applications to amend are rejected, that the plaintiffs might proceed with their current claims. Presumably, there would no longer be any need to adjourn the trial. However, to do so, in my view, the plaintiffs would have to forego proceeding with their new claims or, in the event they carry through with their stated intention to commence a new action in such regard, face an argument that issue or cause of action estoppel operates as a bar to them doing so. Part of the potential prejudice to the plaintiff in refusing the amendments in the present proceeding is that they may well be estopped from proceeding with a separate action in the circumstances.

[44] Because the plaintiffs do not seek to abandon any of their current claims and, instead, seek to add to them, I see no judicial economy in requiring them to discontinue in order to commence a new proceeding. It remains preferable that all the plaintiffs' related claims be dealt with in a single proceeding. In my view, if the new claims are not joined in the present proceeding, the plaintiffs will have to seek

leave to discontinue and then commence a new, restructured proceeding setting out all their claims. There is, in my view, as much prejudice to the defendants in terms of cost and delay associated with that as allowing the amendments.

[45] Taking all factors into account, I conclude that it is just and convenient to allow the proposed amendments. I understand that a case management judge has recently been appointed. Any other issues as to the state of the pleadings can be addressed with her. In the circumstances, I also order the adjournment of the trial to be rescheduled in consultation with the case management judge.

[46] Costs will be in the cause.


for _____
The Honourable Mr. Justice Macaulay