

CANADA / JUDGMENT

0116064 B.C. Ltd. v. Alio Gold Inc.

2020 BCSC 1214

COURT

Supreme Court of British Columbia

DECIDED

14 July 2020

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2020 BCSC 1214 0116064 B.C. Ltd. v. Alio Gold Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0116064 B.C. Ltd. v. Alio Gold Inc.,

2020 BCSC 1214

Date: 20200714

Docket: S194929

Registry: Vancouver

Between:

0116064 B.C. Ltd.

Plaintiff

And

Alio Gold Inc., Mark Backens, Jose Alberto Vizquerra Benavides, George Brack, Bryan Coates, Stephen Lang, Gregory McCunn, Paula Chizuko Rogers, Lynette Gould, and Collette Rustad

Defendants

Brought pursuant to the Class Proceeding Act, RSBC 1996, c. 50

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for Plaintiff:

T.A. Hakemi

B. Brock

M. Turcott, A/S

Counsel for Defendants:

O. Ahmed

K. Rogerson

Place and Date of Hearing:

Vancouver, B.C.

July 13-14, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 14, 2020

- [1] THE COURT: This is a class action proceeding that, as matters presently stand, is still in its infancy. The substance of the plaintiff's allegations arise from an arrangement agreement between the defendant Alio Gold Inc. ("Alio") and Rye Patch Gold Corp. ("Rye Patch") that was completed in 2018 under the Business Corporations Act, S.B.C. 2002, C-57.
- [2] The arrangement agreement between Alio and Rye Patch provided that Alio would acquire the Rye Patch shares and that the Rye Patch shareholders would acquire shares in Alio using a certain value ratio. The plaintiff alleges that Alio's gold production was over stated or misstated such that the valuation that was applied to the Alio shares in the arrangement was substantially higher than what it should have been, and "[it] did not receive fair value for [its] Rye Patch shares in the [a]rrangement [agreement]".
- [3] In the present application, the defendants apply to strike all of the claims in the plaintiff's pleading against the defendants other Alio (the "Individual Defendants"). As such, while Alio is also an applicant, the relief sought is only in relation to the Individual Defendants. The application to strike the plaintiff's pleading was brought in conjunction with the plaintiff's application to certify the class action. For practical reasons, I have decided to proceed with the strike application in the first instance.
- [4] The plaintiff opposes the defendants' application.

The Pleadings

- [5] On April 25, 2019, the plaintiff filed its notice of civil claim (NOCC).

- [6] In the NOCC, all of the present defendants were named. At the start, the claim describes the parties in the usual fashion. In particular, at paras. 17-25, the Individual Defendants are named and described as to their occupation, status within Alio and address: they are all described as business people; they are all described as being, at all material times, a director or officer of Alio' and, they are described as an "influential person" as defined in the Securities Act, R.S.B.C. 1996, c. 418.
- [7] At paras. 26-28, the NOCC describes the plan of arrangement. At paras. 29-43, the NOCC refers to certain misrepresentations arising from various news releases and an information circular in the spring 2018. Finally, at paras. 44-46, the NOCC refers to what the plaintiff describes as the disclosure of the true state of affairs in Alio's public filings on August 10, 2018.
- [8] The plaintiff alleges that, arising from the August 2018 disclosure, the share price of Alio decreased, by which the plaintiff and the proposed class members have suffered loss and damage. The relief sought in the NOCC is certification of the class action, damages (general, special, punitive and aggravated), interest and costs.
- [9] The legal basis of the claim was outlined in the NOCC as arising under the primary market and secondary market provisions of the Securities Act. In addition, the legal basis in the NOCC refers to common law misrepresentation arising as either fraudulent misrepresentation or negligent misrepresentation.
- [10] What it is important for today's purposes, however, is that after the identification and description of the Individual Defendants in the NOCC (paras. 17-25), there is absolutely no mention or reference to any of them individually or collectively throughout the remainder of the NOCC.
- [11] On October 21, 2019, the NOCC was amended. The references to the defendants, including the Individual Defendants, remained unchanged. The only addition to the pleading in this amendment was the inclusion of paras. 56.1-56.3 to refer to various insider trading allegations (as quoted below).
- [12] Accordingly, in the amended NOCC, beyond the reference at paras. 17-25 to the Individual Defendants, as described above, there is no reference specifically to them, including in the new insider trading allegations.
- [13] Finally, I come to the present pleading. On October 31, 2019, the plaintiff filed a further amended notice of civil claim (FANOCC). There were various minor amendments, however, again, nothing relating to the Individual Documents. The major change in the FANOCC was the deletion of the claims with respect to the primary and secondary market allegations under the Securities Act. The insider trading and misrepresentation claims remained as before.

[14] Accordingly, as of October 31, 2019, the claims in the FAN OCC related to the insider trading and the fraudulent/negligent misrepresentation allegations.

[15] As with the prior two pleadings, there is absolutely no mention or reference to the Individual Defendants in the FAN OCC after having identified all of them as directors or officers and "influential persons" as defined in the Securities Act.

Applicable Law and Test

[16] The law relevant to a consideration of an application to strike a pleading is well known and not in dispute.

[17] Supreme Court Civil Rule 3-1(2) provides:

(2) A notice of civil claim must do the following:

- (a) set out a concise statement of the material facts giving rise to the claim;
- (b) set out the relief sought by the plaintiff against each named defendant;
- (c) set out a concise summary of the legal basis for the relief sought;

...

[18] This application to strike is brought pursuant to Supreme Court Civil Rule 9-5(1)(a) and (d):

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,

...

or

- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[19] I do not propose to address this application with respect to the allegation that the FAN OCC is an abuse of process. I do propose to deal with it on the basis of the Rule 9-5(1)(a) test as to whether the FAN OCC has or has not failed to disclose a reasonable cause of action against the Individual Defendants.

[20] The leading authority is found in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42. There, the Court discusses the objective of pleadings in that pleadings are intended to define the issues between the parties. Importantly, one of the objectives of a pleading is to provide clear notice to defendants as to the allegations made against them and the case that they are required to defend.

- [21] Counsel have referred me to a number of authorities on the applicable test under Rule 9-5(1) (a). It must be plain and obvious that the pleading discloses no reasonable cause of action: Imperial Tobacco at para. 17. The matter is to be considered on the basis of the pleading only. The Court is not to consider any evidence.
- [22] The other relevant principle that I accept is as cited by the plaintiff and set out in authorities such as *Horton Bay Holdings Ltd. v. Wilks*, [1991] B.C.J. No. 3481 (BCCA). Further, in *Health Sciences Association of British Columbia v. Hewitt Associates Corp.*, 2019 BCSC 208, the Court formulated the test as follows:
- [60] The test that applies on an application to strike a pleading on the grounds that it discloses no reasonable claim is not in dispute. That test assumes the facts pleaded, or that might reasonably be pleaded by amendment, are true and asks whether it is plain and obvious that the pleading fails to state a reasonable claim or defence: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980 and *Minnes v. Minnes*, 1962 CanLII 350, 34 D.L.R. (2d) 497, at p. 505 (B.C.C.A.). Another way of stating the question is to ask whether, considered in the context of the law and the litigation process, the claim (or defence) has no reasonable chance of succeeding: see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paras. 17, 21 and 25.

Discussion

- [23] The issue, as argued by the parties, can be distilled as follows.
- [24] From the defendants' perspective, there is simply no allegation at all with respect to the Individual Defendants. From the plaintiff's perspective, there is simply a pleading deficiency that provides sufficient notice of the cause of action against the Individual Defendants, but the pleading can be saved by the Court's indulgence in terms of ordering particulars.
- [25] During the plaintiff's counsel's submissions, he confirmed that the only claim advanced against the Individual Defendants are the insider trading allegations, not the fraudulent/negligent misrepresentation allegations.
- [26] However, as the defendants' counsel pointed out, this point is not evident at all from any of the two pleadings which raise the insider trading allegations. In particular, the defendants' counsel points to the notice of application filed December 30, 2019 by the plaintiff by which certification is sought. Attached as Schedule "A" to that document are "Common Issues" that the plaintiff seeks to have determined in the proposed class proceeding. Those Common Issues specifically mention the Individual Defendants in respect of the fraudulent and negligent misrepresentations allegations, in addition to the insider trading allegations.
- [27] I agree that, after having read both the amended NOCC and FANOCC, it was not clear to me what specific allegations were directed at the Individual Defendants.

[28] As stated above, the plaintiff's counsel now says that it is only the insider trading allegations that are directed at the Individual Defendants. That leads me to a consideration of specific provisions in the Securities Act relied on by the plaintiff, particularly s. 57.2(5).

[29] Relevant sections of the Securities Act, as raised by the FAN OCC, are:

1(1) In this Act:

...

"insider" means

(a) a director or an officer of an issuer,

...

3 For the purposes of sections 57.2 and 136, a person is in a special relationship with an issuer if the person

(a) is an insider, affiliate or associate of

(i) the issuer,

(ii) a person that is considering or proposing to make a take over bid, as defined in section 92, for the securities of the issuer, or

(iii) a person that is considering or proposing

(A) to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with the issuer, or

(B) to acquire a substantial portion of the property of the issuer,

(b) has engaged in, is engaging in or is considering or proposing to engage in any business or professional activity with or on behalf of the issuer or with or on behalf of a person described in paragraph (a) (ii) or (iii),

(c) is a director, officer or employee of the issuer or of a person described in paragraph (a) (ii) or (iii) or (b),

(d) knows of a material fact or of a material change with respect to the issuer, having acquired the knowledge while in a relationship described in paragraph (a), (b) or (c) with the issuer,

(e) knows of a material fact or of a material change with respect to the issuer, having acquired the knowledge from another person at a time when

(i) that other person was in a special relationship with the issuer, whether under this paragraph or any of paragraphs (a) to (d), and

(ii) the person that acquired knowledge of the material fact or material change from that other person knew or reasonably ought to have known of the special relationship referred to in subparagraph (i), or

(f) is within a prescribed class of persons.

...

57.2(1) In this section, "issuer" means

(a) a reporting issuer, or

(b) any other issuer whose securities are publicly traded.

(2) A person must not enter into a transaction involving a security of an issuer, or a related financial instrument of a security of an issuer, if the person

(a) is in a special relationship with the issuer, and

(b) knows of a material fact or material change with respect to the issuer, which material fact or material change has not been generally disclosed.

(3) An issuer or a person in a special relationship with an issuer must not inform another person of a material fact or material change with respect to the issuer unless

(a) the material fact or material change has been generally disclosed, or

(b) informing the person is necessary in the course of business of the issuer or of the person in the special relationship with the issuer.

(4) A person that is considering or proposing to

(a) make a take over bid, as defined in section 92, for the securities of an issuer,

(b) become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with an issuer, or

(c) acquire a substantial portion of the property of an issuer,

must not inform another person of a material fact or material change with respect to the issuer unless

(d) the material fact or material change has been generally disclosed, or

(e) informing the person is necessary in the course of business relating to a take over bid, business combination or acquisition.

(5) If a material fact relating to securities of an issuer or a material change with respect to an issuer has not been generally disclosed,

(a) the issuer, or

- (b) a person that has knowledge of the fact or change and
- (i) is in a special relationship with the issuer, or
- (ii) is considering whether to take, or proposes to take, one or more of the actions in subsection (4) (a), (b) or (c)

must not recommend or encourage another person to enter into a transaction involving a security of the issuer or a related financial instrument of a security of the issuer.

...

136(1) If an issuer, or a person in a special relationship with an issuer, contravenes section 57.2, a person referred to in subsection (2) of this section has a right of action against the issuer or the person in a special relationship with the issuer.

- (2) A person may recover losses incurred in relation to a transaction involving a security of the issuer, or a related financial instrument of a security of the issuer, if the transaction was entered into during the period
 - (a) starting when the contravention occurred, and
 - (b) ending at the time the material fact or material change is generally disclosed.
- (3) If a court finds a person liable in an action under subsection (1), the amount payable to the plaintiff by the person is the lesser of
 - (a) the losses incurred by the plaintiff, and
 - (b) an amount determined in accordance with the regulations.
- (4) For the purposes of subsection (1), in determining the losses incurred by a plaintiff, a court must not include an amount that the defendant proves is attributable to a change in the market price of the security that is unrelated to the material change or the material fact.

[Emphasis added.]

[30] I return to the point that pleadings are intended to clearly inform the defendants what allegations are being made against them. I accept that detailed evidence is not to be set out in the pleading.

[31] Here, in my view, the FANOCC has some significant and fundamental flaws that lead me to the conclusion that it is not simply a matter of particularization, as advanced by plaintiff's counsel.

[32] The insider trading allegations contained at paras. 56.1-56.3 of the amended NOCC (and FANOCC) are as follows:

56.1 Further or in the alternative, the plaintiff and the Class plead and rely on sections 57.2 and 136 of the Securities Act.

56.2 At the time Alio entered into the Arrangement Agreement, and at the closing of the Arrangement, Alio knew of material facts and material changes with respect to Alio which had not been generally disclosed.

56.3 The plaintiff and the Class suffered a loss relating to the closing of the Arrangement, which was a transaction involving the shares of Alio.

- [33] Firstly, I would note that para. 56.1 simply refers to s. 57.2 of the Securities Act (and s. 136). However, there are five subsections contained in s. 57.2, three of which refer to people in "special relationships with the issuer". Only on this application has plaintiff's counsel confirmed to the Court what is truly meant by the plea with respect to the Individual Defendants. He now states that the allegations against the Individual Defendants are said to engage s. 57.2(5) and not the other subsections. This is not apparent from any plain reading of the FAN OCC.
- [34] There are disputes between the parties as to the elements of the cause of action under s. 57.2(5).
- [35] A review of s. 57.2(5) of the Securities Act reveals that there are a number of elements involved:
- a) Firstly, it must be alleged and proven that a "material fact" relating to securities of Alio as the issuer or a "material change" with respect to Alio has not been generally disclosed. I will accept for the purposes of this application that this allegation could be distilled from the recitation of the various news releases throughout 2018 in the FAN OCC;
 - b) Secondly, under s. 57.2(5)(b), there are two possible scenarios. Plaintiff's counsel now confirms that only s. 57.2(b)(i) is relevant in that it is alleged that the Individual Defendants were in a "special relationship" with Alio. That is not stated in the FAN OCC; however, for the purpose of this application, I will accept that, having pled that the Individual Defendants were officers and directors of Alio, and given the statutory provisions (particularly s. 3 of the Securities Act), that might be discernable from the FAN OCC;
 - c) Under s. 57.2(5)(b)(i), it must be alleged that the person in the "special relationship" with Alio, in this case allegedly the Individual Defendants, had knowledge of the fact or change. The FAN OCC does not include any allegation that the Individual Defendants had knowledge of the "material fact" or "material change" that is referred to in the first part of s. 57.2(5); and
 - d) The final point under s. 57.2(5) is that what be alleged and proven in order to impose liability under s. 136 of the Securities Act is that the person who has the knowledge of the fact or change must have recommended or encouraged another person to enter into a transaction involving a security of the issuer, namely, Alio. Again, nowhere in the FAN OCC it is alleged that the Individual Defendants recommended or encouraged the plaintiff or other members of the class to enter into the transaction, which, apparently is alleged to be the arrangement agreement concluded in 2018.

- [36] The above deficiencies are not trivial matters. Further, they are not matters that can be simply cured by particularization.
- [37] In *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1764, Justice Strathy (as he then was) makes the point at para. 41 that if the material facts under a Securities Act claim were pleaded "however skeletally, in the original statement of claim . . . the inquiry need go no further and the plaintiff should be permitted to flesh out the claim with particulars".
- [38] In my view, this is not simply a matter of fleshing out a claim. It is more akin to a lack of identification of a claim, let alone identifying the constituent elements of the claim.
- [39] Plaintiff's counsel submits that, once his client has plead that the Individual Defendants are officers and directors of Alio, and therefore presumably in a "special relationship" with Alio, the remainder of the requirements under s. 57.2(5) are of no consequence because those legal consequences simply flow.
- [40] I disagree. The fact that the Individual Defendants are officers and directors does not inevitably result in liability under s. 57.2(5) of the Securities Act. As I have said, there are other important constituent elements that must be proven before liability under that section arises: namely, that the Individual Defendants had knowledge of the facts or changes, and that they recommended or encouraged the plaintiff and the other class members to enter into the arrangement. One does not simply flow from the other. To use the plaintiff's counsel's own argument, in my view, the plaintiff has failed to plead the predicate facts of what is needed to be proven to attract liability under s. 57.2(5).
- [41] Notice of the true details of the claim advanced against the Individual Defendants was not given to them or their counsel until the plaintiff filed its application response to this strike application on July 10, 2020.
- [42] The application response sets out, in some detail, a fulsome description of the insider trading allegations against the Individual Defendants. In particular, under Part 3: LEGAL BASIS, as it relates to "Liability under the Securities Act", the document reproduces s. 57.2(5) and refers to the provisions in the Securities Act which include the definitions of "special relationship", "material fact", "material change" and "general disclosure" and s. 136.
- [43] Later, in that same section of the application response, the plaintiff states:
11. The Individual Defendants fall within the "special relationship" requirement of s. 57(2) of the Securities Act. The Individual Defendants were all either officers or directors of Alio during all relevant times.

12. The Individual Defendants, as the directors, officers, controlling minds of Alio, possessed knowledge of material information with respect to Alio's anticipated gold production for 2018 that was not generally disclosed to the market, and recommended or encouraged the Respondent [the Plaintiff] and the class to enter into Arrangement Agreement. This conduct constitutes a violation of s. 57.2(5) of the Securities Act and attracts liability to the Individual Defendants for their actions pursuant to s. 136 of the Securities Act.
- [44] It is a complete mystery to me why these two paragraphs in the application response could not have been simply put in the amended NOCC in October 2019 when the insider trading allegations were first advanced. Be that as it may, I can only deal with what is before me in the face of the defendants' application having been brought forward in late June 2020. To this day, the plaintiff has held fast to the position that no further particulars of the claim were required and that the strike application should be dismissed.
- [45] Inevitably, during the course of this application, the question arose as to whether there could possibly be some further amendment to the pleading. As noted by the plaintiff's counsel in their arguments, the usual approach of this Court is to avoid the significant and perhaps prejudicial result of striking a claim. Ideally, the claim should proceed on its merits after having been properly framed in the pleadings.
- [46] The usual course is to permit the litigant to seek leave to amend the pleading: *Yi Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCSC 2197 at para. 85 and *Interville Development Limited Partnership v. The Owners, Strata Plan BCS2313*, 2017 BCSC 1947 at para. 38.
- [47] I agree that that is usually the course of action taken by the Court to avoid significant prejudice. However, in the face of this application having been brought, the plaintiff took no alternative position with respect to seeking leave to amend the FANOC.
- [48] What plaintiff's counsel did, at approximately 2:30 p.m. on the second day of this hearing, was hand up an unfiled affidavit of his legal assistant in support of his oral leave application. Attached to that affidavit was a proposed further amended notice of civil claim. This document included substantial amendments to para. 56.1 of the FANOC, and does refer to the various matters that arise from the Securities Act, including the elements of s. 57.2(5).

Conclusion and Disposition

- [49] Despite this proposed further amendment, I have concluded that it is not appropriate to consider this amendment.
- [50] Firstly, as was the Court, the defendants' counsel was seeing this amendment for the first time immediately after the affidavit was passed up to the Court at approximately 2:30 p.m. In my view, it would be unfair and prejudicial to put the defendants to the task of responding to this proposed amendment immediately. This is particularly so when the issue was raised by the defendants some weeks ago and was even raised during yesterday's hearing.

[51] Secondly, as the defendants' counsel pointed out, there may be other issues put forward with respect to any application by the plaintiff to further amend its pleading. There has been reference to various limitation issues, and I simply would note that those issues are hotly contested at this point. I do not intend to deal with them and I make no comment about the validity or lack of validity of any arguments in respect of those issues. They have simply been raised as matters that might be properly raised on an application by the plaintiff to seek leave to amend. I appreciate that there are complications that arise in terms of the certification application, but again, those can be addressed by the judge who is hearing that matter.

[52] Accordingly, my decision arising from the application today is as follows. I am striking the FANOC as against the Individual Defendants. The plaintiff will have leave to seek to amend its claim. I would like to set a deadline for that to happen, although I will hear both parties on the point. Secondly, I am ordering that the certification hearing will be adjourned and reset for another time. We did not even start on that application to any degree. Finally, I will hear from both parties with respect to costs.

[SUBMISSIONS RE COSTS and TIME FRAME FOR APPLICATION TO LEAVE]

[53] THE COURT: Firstly, I am not going to set a deadline. In particular, I say that because the plaintiff's counsel does not have instructions yet.

[54] Secondly, with respect to costs, I am ordering costs payable pursuant to s. 37(2)(b) of the Class Proceedings Act, R.S.B.C. 1996, c. 50. I do consider that this was an unnecessary application. The deficiency in the pleadings should have been recognized and addressed some time ago. I do not accept that the defendants' counsel is somehow to blame for failure to request particulars because particulars presumes that he knows what the claim is.

[55] I am not going to repeat my reasons, however, I will stress that, in my view, the plaintiff did not even identify a claim against the Individual Defendants and caused confusion; frankly, by reason of all these various claims being advanced without properly delineating what is being advanced against who. This confusion was more than apparent from the plaintiff's proposed Common Issues that were put forward on the certification issue at this hearing and which were contrary to the clarification from plaintiff's counsel to the Court yesterday and today. The costs will be for the two-day hearing of the application.

"Fitzpatrick J."

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