

CANADA / JUDGMENT

Adroit Resources Inc. v. Tres-Or Resources Ltd.

2008 BCSC 1211

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1211 Adroit Resources Inc. v. Tres-Or Resources Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Adroit Resources Inc. v. Tres-Or Resources Ltd.,

2008 BCSC 1211

Date: 20080905

Docket: S062281

Registry: Vancouver

Between:

Adroit Resources Inc.

(formerly known as Rock Resources Inc.)

Plaintiff

And:

Tres-Or Resources Ltd.

Defendant

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

R.D. Holmes

J.W. Bilawich

Counsel for the Defendant:

J.C. MacInnis

Date and Place of Trial/Hearing:

June 23-25, 2008

Vancouver, B.C.

INTRODUCTION

- [1] This case involves a dispute between two public mining companies that share an interest in mineral claims in the Temagami District of North Eastern Ontario (the "Claims"). The defendant Tres-Or Resources Ltd. originally staked the Claims, and between 2002 and 2004 Tres-Or and the plaintiff Adroit Resources Inc. entered into agreements concerning the Claims. The parties have each brought a number of motions before the Court.
- [2] The defendant applies to sever the trial in order to determine, as a preliminary issue, whether the plaintiff is barred from proceeding with a significant portion of its claim (the "First Stage Issues"). If the trial is severed, the defendant also seeks an order limiting the scope of examination for discovery to those matters relevant to the First Stage Issues.
- [3] Both parties seek further production of documents. Some of those applications are now to go by consent.
- [4] With respect to the production of documents remaining in dispute:
- the plaintiff seeks electronic copies of Tres-Or's emails and other documents which have already been produced by Tres-Or in TIFF format.
 - the defendant seeks production of Adroit's internal records relating to its treatment of flow-through funds and debt-for-share arrangements.
- [5] The defendant also applies to strike those parts of the statement of claim in which Adroit advances claims in defamation, slander of title, interference with economic relations, malicious prosecution and abuse of process.

BACKGROUND

- [6] Adroit made property payments and funded exploration of the Claims. Tres-Or was the Operator responsible for planning, carrying out and paying for exploration, and billing Adroit. Adroit was effectively in a financial support role, raising money through the public market to fund exploration of the Claims.

- [7] The parties entered into a number of agreements concerning the Claims. The first four were option agreements made in 2002 and 2003. Under the Option Agreements, Adroit was to meet certain financial obligations and in return would obtain a two-thirds interest in the Claims.
- [8] The financial obligations of Adroit under the Option Agreements fell into four categories:
- (i) property payments and management fees;
 - (ii) the purchase of shares from Tres-Or;
 - (iii) delivery of shares in Adroit to Tres-Or; and
 - (iv) expenditures on exploration.
- [9] Adroit experienced significant financial difficulties and was unable to meet its obligations to Tres-Or under the Option Agreements. By December 2004 Tres-Or says that Adroit owed it approximately \$87,000 for expenditures made by Tres-Or on Adroit's behalf and, further, that Adroit had failed to make two \$50,000 property payments as required under the Option Agreements.
- [10] In February 2005 Tres-Or issued a notice of default to Adroit.
- [11] Adroit disputes that the payments were due and says that its financial difficulties were caused by its inability to raise money from investors because it did not have the technical data and information on the Claims that Tres-Or should have provided to Adroit and for which Adroit had paid.
- [12] In April of 2005 the parties executed two agreements to be effective as of January 2005: a "Pre JV-Agreement" and a "JV Agreement" (collectively the "Joint Venture Agreements"). Under these agreements the parties became co-owners of the Claims: two-thirds to be owned by Adroit and one-third by Tres-Or.
- [13] Adroit says that between 2002 and 2005 it advanced to Tres-Or \$1.2 million in cash and shares-for-debt and also pledged shares in Tres-Or that Adroit owned (the "Adroit Advances"). Adroit claims that Tres-Or did not spend the Adroit Advances on exploration but instead paid itself some of that money based on fabricated invoices for exploration services that never occurred. Adroit also claims Tres-Or conspired with exploration service providers to charge more to Adroit in exchange for discounts to Tres-Or for work to be done on its other claims in the area.
- [14] In addition, Adroit claims that Tres-Or abandoned its obligations as Operator for the joint venture and focused instead on overseeing exploration of its other claims.

- [15] All of this, says Adroit, amounts to breach of fiduciary duty and breach of duty of care during the "Option Period" (2002 to 2004) and the "Joint Venture Period" (January 1, 2005 to September 8, 2005, when the Joint Venture relationship broke down), as well as breach of the Joint Venture Agreements. Adroit seeks a constructive trust over all benefits and profits acquired by Tres-Or and an accounting of the same, as well as an accounting of the Adroit Advances and the data and information concerning the Claims that it says it has paid for.
- [16] Tres-Or submits that the Joint Venture Agreements were intended by the parties to restructure their business relationship: Tres-Or gave up its rights based on Adroit's default of the Option Agreements, and Adroit acquired the two-thirds interest in the Claims that it had not been able to acquire under the Option Agreements. Tres-Or says that Adroit has no right to sue on matters arising before the Joint Venture Agreements were made as this was part of the renegotiated deal under these Agreements. It points to Article 8.4 of the Pre-JV Agreement:

This Agreement constitutes the entire agreement between the parties hereto and supersedes all other negotiations, communications, agreements and arrangements, whether oral or express or implied, heretofore existing between the parties in respect of the Properties, and for greater certainty, no party to this Agreement shall have any liability or obligation to the other party to this Agreement pursuant to any agreement or arrangement, whether oral or written, express or implied, heretofore existing between the parties in respect of the Properties.

- [17] Tres-Or takes the position that Article 8.4 precludes Adroit from suing for breaches of the Option Agreements or for any breaches arising out of obligations created by those agreements. It says that the consideration for the parties entering into the Pre-JV Agreement was their agreement to rescind the Option Agreements and release one another from all prior obligations arising from prior agreements or arrangements.
- [18] Adroit agrees that Article 8.4 precludes it from suing for breach of the Option Agreements, and it has abandoned that part of its claim. But Adroit says that Article 8.4 does not bar it from advancing claims against Tres-Or in fiduciary duty and duty of care arising out of the defendant's conduct during both the Option Period and the Joint Venture Period.
- [19] Adroit asserts that Article 8.4 could only foreclose claims in negligence and equity by express reference, and asserts that a bar to suing for breach of contract in the Option Period does not preclude it from raising claims in negligence and equity.

ANALYSIS

A. Should the trial be severed?

- [20] The issue that Tres-Or wants decided before the rest of the trial proceeds is whether Article 8.4 bars any of Adroit's claims during the Option Period. Tres-Or says the trial should be severed because a determination that Article 8.4 bars claims (whether in contract, fiduciary duty, or tort) prior to January 2005, when the Joint Venture Agreements took effect, will

substantially narrow the scope of Adroit's claims and the complexity of the issues to be addressed at trial. Tres-Or says severance will also enhance settlement, given that most of the damages relate to claims in the Option Period. The defendant further submits that discovery, document production and experts' reports will all be limited to a five-month period rather than a four-year period with significant savings to the parties in time and legal expense.

- [21] In support of its position, Tres-Or points out that Adroit is seeking an accounting of the full \$1.2 million it advanced to Tres-Or under all of the agreements from 2002 - 2005. Tres-Or says that if Article 8.4 has the meaning proposed by Tres-Or, Adroit would at most be entitled to an accounting of the \$296,000 it advanced during the Joint Venture Period, \$103,000 of which has not even been spent by Tres-Or and is held in a segregated bank account. In the result, severance could mean that the parties at trial would be addressing what was done with \$193,000 as opposed to \$1.2 million.
- [22] This action was commenced in April 2006. Adroit originally grounded its claims for breaches during the Option Period in breach of contract. In April 2008 Adroit substantially amended its statement of claim to abandon claims for breach of the Option Agreements, and to include claims based in fiduciary duty and breach of duty of care.
- [23] The trial is currently set to commence on November 24, 2008 for 15 days. The parties agree there is no reasonable prospect that they can complete discovery on all issues by then and that it is unlikely that the action could be tried on all issues within 15 days.
- [24] Tres-Or says that severing the trial will therefore have the additional beneficial effect of preserving the trial date.
- [25] The parties spent a significant part of the three-day hearing of these applications addressing the proper interpretation to be given to Article 8.4, but of course I do not have to decide that question on this application; it is the very issue that would be dealt with at the First Stage if a severed trial is ordered.
- [26] The starting point in consideration of Tres-Or's application to sever is Rule 39(29) of the Rules of Court, B.C. Reg. 221/90:

The court may order that one or more questions of fact or law arising in an action be tried and determined before the others, and upon the determination a party may move for judgment, and the court, if satisfied that the determination is conclusive of all or some of the issues between the parties, may grant judgment.

- [27] In *Nguyen v. Bains* (2001), 11 C.P.C. (5th) 177, 2001 BCSC 1130 Martinson J. set out at paras. 10 and 11 the test to be applied when considering an application to sever a trial:

Rule 1(5) sets out the overall object of the Supreme Court Rules. That object is 'to secure the just, speedy and inexpensive determination of every proceeding on its merits.' Rule 39(29) must be interpreted with that object in mind.

Courts have considered the question of when some issues should be tried before others. These are some of the points that have been made:

- a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
- b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
- c. Severance is most appropriate when the trial is by judge alone.
- d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
- e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
- f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

[28] In support of its application to sever, Tres-Or relies on the potential for significant savings in time and expense if the First Stage Issue is determined before the other issues in the case.

[29] Tres-Or says that this case is similar to *Order of the Oblates of Mary Immaculate (British Columbia) v. Dohm, Jaffer & Jeraj* (2007), 75 B.C.L.R. (4th) 323, 2007 BCSC 1412. In that case, serious allegations had been made by the plaintiff against the defendant lawyers and their firm arising from what were alleged to be excessive, improper and wrongful billing practices. Prior to the litigation, the plaintiff had written to the law firm, proposing a 30% reduction in two substantial accounts. The offer was accepted and the accounts reduced and paid. The plaintiff then terminated the retainer and commenced litigation, for breach of fiduciary duty, breach of contract and other claims arising from the very issues the parties had engaged on in advance of the plaintiff's offer of settlement.

[30] In that case the defendant sought severance of the trial to have two issues resolved on a preliminary basis. The first issue concerned the nature of the retainer: was it based on hourly rates or a fair fee? The second issue concerned the question of whether a settlement had been reached and, if so, what the scope of the settlement was.

[31] Ross J. summarized the plaintiff's opposition to the application to sever as follows at paras. 83 and 84:

The plaintiff opposes severance. It is the plaintiff's contention that severance is not appropriate in these circumstances. First, the plaintiff submits, there will be no saving of time or expense. Much of the evidence that will be utilized with respect to the two issues that the defendants seek to sever, particularly settlement, will be required for the remainder of the trial. There would be the added expenses for scheduling a second hearing, booking courtrooms for more than one occasion and having counsel prepare for trial on two separate occasions. Furthermore,

memories of relevant events may fade between the time of the two trials. Witnesses and the Judge would have to be available on more than one occasion. It is of note that some of the plaintiff's witnesses are elderly.

In addition, the plaintiff submits that the issues in the proposed separate trials are interwoven. For example, the defendants allege a settlement was in place. The plaintiff submits, among other things, that even if a settlement was in place, it is unenforceable due to lack of disclosure by the defendants. These issues and this evidence would play out during both sets of trials.

[32] These concerns mirror the concerns raised by Adroit in the case at bar:

...those issues [concerning clauses 8.4 and 22.05] will not put an end to the whole of the litigation and evidence of the parties' relationship and dealings will nonetheless have to be gone through at the trial of what would remain.

[33] Ross J. ordered severance in *Order of the Oblates of Mary Immaculate* because she was of the view that it would give rise to significant savings and result in a more efficient and manageable trial.

[34] Tres-Or also relies on *Enterprising Minds Technology Consultants Inc. v. Lululemon Athletica Inc.*, 2006 BCSC 1168. In that case Gerow J. ordered that the issue of whether the defendant had repudiated a contract and whether the plaintiff had accepted that repudiation be severed from other issues in the lawsuit. She said at para. 39:

Once it is determined whether the Agreement is in effect, the parties and the court will know the time frame which applies to the determination of damages. This will allow the parties to focus on and lead evidence, including expert evidence, that is directly relevant to the proper time frame, rather than having to lead evidence to deal with a number of potential theories of damages based on different time frames.

[35] Tres-Or submits that the severance of the action in this case will bring similar focus to the proceedings and result in judicial economy and reduced costs. It says that if the issue of the scope of the plaintiff's claims is not determined before the other issues in the case, Tres-Or will be required to prepare for and present to the Court evidence which must take into account "a multiplicity of theories of liability and damage".

[36] Tres-Or raises as an example of the difficulty it will face, the following:

In the period 2002 to 2004 [the Option Period], Adroit was in significant financial difficulty. In its 2005 Audited Financial Statement, for example, it represented to its shareholders that the Company had incurred an accumulated deficit in 2004 alone of \$17,577,706. In order to maintain its financial solvency, Adroit wrote down debts owing to Tres-Or and paid shares to Tres-Or as compensation for debt. The Court will have to consider the impact of Tres-Or's agreement to take 'pennies on the dollar' in the form of shares for debt arrangements in any accounting between the parties. Should the totality of Adroit's debt obligations be reinvigorated in consideration of the period 2002 to 2004, or should Adroit have the benefit of the debt forgiveness and subsequent

releases?

[37] Tres-Or also notes that quite apart from the difficulties associated with instructing accounting experts on the basis that both the Option Agreement and the Joint Venture Agreements may apply, there would be no need at all for the parties to engage in the expense associated with an accounting exercise under the Option Agreements if those claims are barred in any event by the contractual agreement expressed in Article 8.4.

[38] Adroit's opposition to severance of the trial rests on four grounds:

1. The issues Tres-Or proposes as First Stage Issues are not simple, they are interwoven with other issues and resolution of them would not bring an end to the action;
2. Resolution of First Stage Issues would not lead to a shorter trial;
3. Tres-Or has not met the burden of tendering evidence and information regarding savings in expense and court time; and
4. Tres-Or has delayed unduly in bringing this application.

1. The First Stage Issues are interwoven with other issues

[39] Adroit argues that the issues Tres-Or wants tried first are complex and so interwoven with the other issues in the case that there would be little savings in terms of the evidence required to determine some as opposed to all of the issues. Adroit says further that determining some issues first would not conclude the action in any event.

[40] In support of its position Adroit asserts that, in order to address the question of whether Article 8.4 bars it from pursuing claims in equity and tort in the Option Period, it would have to lead all of the same evidence that it would lead on a full trial of those issues. That is so, says Adroit, because the Court must know what pre-existing breaches were known to the parties when they entered into the Joint Venture Agreements before the Court can determine what the parties intended to include in the release.

[41] In support of that submission, Adroit relies on *K.R.M. Construction Ltd. v. British Columbia Railway Co.* (1982), 40 B.C.L.R. 1, 18 C.L.R. 159 (C.A.) and *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1997), 145 D.L.R. (4th) 729, 36 B.C.L.R. (3d) 155 (C.A.), which held that general language in a release will only release matters that were in the contemplation of the parties at the time the release was given.

[42] Adroit also relies on *Hannan v. Methanex*, [1998] 7 W.W.R. 619, 46 B.C.L.R. (3d) 230 (C.A.) which found that the language of a release cannot be considered in a vacuum and that the Court must look at the specific context in which the release was executed in order to determine what the parties were really contracting about.

[43] I accept that the First Stage Issues could not be determined in an evidentiary vacuum, and that it would be necessary for the parties to address the context in which the Joint Venture Agreements were entered into. However, in my view it is likely that determining what

breaches were known to Adroit at the time it entered into the contract will entail a more limited review of evidence than would be required for Adroit to prove breaches by Tres-Or based on all of the defendant's conduct in 2002, 2003, and 2004 that may become known to Adroit through the discovery process in these proceedings. Further, Adroit's concern that there will be unnecessary duplication of evidence if the trial is severed can be addressed by having the same judge hear both parts of the trial and by ordering that the evidence in the first part applies to the second part.

2. Resolution of First Stage Issues would not lead to a shorter trial

- [44] Tres-Or says that if Article 8.4 is found to bar the fiduciary and tort claims in the Option Period, it will not be necessary for evidence to be led to deal with the appropriateness of Tres-Or's use of the Adroit Advances of close to \$900,000 during the Option Period. Not so, says Adroit, because the Joint Venture Agreement gives Adroit the right to know how that money was spent, quite apart from its claims in fiduciary duty and negligence during the Option Period. In support of that submission, Adroit relies on Article 7.09 of the Joint Venture Agreement which it says requires Tres-Or to account for all of the exploration costs incurred prior to the Joint Venture Agreements being entered into (defined as the "Prior Exploration Costs" in the Joint Venture Agreement).
- [45] However, without deciding that issue at this point, it would appear that there is a real question as to whether Article 7.09 gives Adroit the right to a review of how Tres-Or spent the Adroit Advances during the Option Period.
- [46] Tres-Or argues that Article 7.09 is only triggered if an Approved Exploration Program is in place and one party elects not to contribute to it, neither of which applies on the facts of this case.
- [47] In conclusion on this point, I am of the view that a preliminary determination of the scope of Article 8.4 and Article 7.09 could have the effect of significantly reducing the length of the trial.
- [48] Tres-Or also seeks to have the Court determine as a First Stage Issue whether Article 22.05 of the Joint Venture Agreement bars Adroit from advancing claims for special or consequential damages. Article 22.05 provides:

The Operator shall not be liable to any other party nor shall any party be liable to the Operator in contract, tort or otherwise for special or consequential damages, including, without limiting the generality of the foregoing, loss of profits or revenues.

- [49] I agree with Adroit's submission that there is little to be gained in terms of savings if this question is addressed as a First Stage Issue. In my view, the issue of whether Article 22.05 limits Adroit's claim for damages should be heard when the Court has before it the full scope of the particular damages claimed. I note as well that Tres-Or led no evidence of any savings that would result if this question were to be determined first.

[50] Tres-Or also asks the Court to determine as a First Stage Issue whether Article 8.4 of the Joint Venture Agreement bars Adroit's claim based on Article 1.6 of the Pre-JV Agreement. Adroit argues that it is nonsensical that Article 8.4 of the Pre-JV Agreement, which Tres-Or says wipes away all claims predating the Pre-JV and JV Agreements, could also bar claims arising out the JV Agreement itself. Article 1.6 relates to what the parties have described as the Aero-Tem Expenditures and whether Tres-Or made misrepresentations about those Expenditures which occurred after January 1, 2005. In my view, this issue would be more efficiently dealt with during that part of the trial dealing with events during the Joint Venture Period.

3. Tres-Or has not provided the Court with information with which to assess whether a savings would result

[51] Adroit says that the applicant bears the onus of satisfying the Court that there is a real likelihood of significant savings in time and expense if the trial is severed.

[52] Adroit relies on *Nguyen v. Baines* at para. 12, where Martinson J. says the following:

The Court should be told what specific issues, evidence or legal arguments would be avoided and why, as well as how much time and money would likely be saved as a result.

[53] Adroit says that Tres-Or has simply asked the Court to accept its bare assertion that there would be a real likelihood of a significant savings in time and expense, but has failed to tender any evidence about how long the trial of the entire action would require, how long the trial of the proposed First Stage Issues would require, and what such a trial would involve in terms of evidence, witnesses and the like.

[54] Adroit argues that Tres-Or's failure to provide the information necessary for the Court to assess whether there would be savings is fatal to its application to split the trial.

[55] There is some merit to this submission. Tres-Or has not specified with any degree of particularity how much time and money would likely be saved by severing the trial. However, Tres-Or has identified the specific issues and evidence that would be avoided if severance is ordered and a finding favourable to Tres-Or is made: much of the evidence relating to conduct and accounting for the Adroit Advances in the three years prior to January 1, 2005.

[56] In the circumstances of this case, I am of the view that Tres-Or has, by identifying the potential for eliminating issues and evidence, provided enough information to satisfy the Court that there is a real likelihood of a sufficient savings in time and expense. While Tres-Or has not identified the number of days of trial that could be avoided, that is due in part to the fact that the parties have yet to agree on the number of days they expect will be required to hear the case as it is currently framed -- they have agreed only that 15 days is no longer sufficient.

4. Tres-Or has delayed unduly in bringing this application

- [57] Adroit says that Tres-Or's delay in bringing this application is another significant factor to be considered. Adroit submits that Tres-Or could have brought this application any time after the action was started, but chose instead to delay until just nine months prior to the scheduled trial date, and has not offered an explanation for this delay. It is apparent, submits Adroit, "that Tres-Or's primary motivation for this application to sever the trial is to delay and frustrate resolution of Adroit's claims, not to promote their efficient resolution".
- [58] On the latter point, I note that Adroit acknowledges that the parties cannot be ready to proceed to full trial on November 24, 2008. Counsel for Adroit has also indicated that he is no longer available on that date. Tres-Or's proposal to sever the trial would make it possible to get some of the key issues between the parties resolved making use of at least a portion of the 15 days currently set aside for trial. Tres-Or's counsel is available throughout that period. In the circumstances, it does not appear to be the case that Tres-Or brings the application to sever in order to delay the trial.
- [59] Nor do I find that Tres-Or has delayed unduly in bringing its application. Adroit did not give notice of its intention to amend its statement of claim to include breach of fiduciary duty and breach of duty of care until February 2008. Tres-Or opposed that motion and took the position in the alternative that the trial should be severed.
- [60] In conclusion on this issue, I am of the view that there is a real likelihood of significant saving in time and expense if the issues in the trial are severed, and I so order.

B. How should the First Stage Issues be framed?

- [61] I agree with Adroit's submission that the First Stage Issues proposed by Tres-Or should be revised to better reflect the questions to be addressed by the Court. The questions relating to Articles 8.4 and 7.9 should be consolidated as follows:
1. Does Article 8.4 of the Pre-JV Agreement bar Adroit from advancing claims for breach of fiduciary duty relating to the period 2002 to 2004 and if so, which ones?
 2. Does Article 8.4 of the Pre-JV Agreement bar Adroit from advancing claims for negligence relating to the period 2002 to 2004 and if so, which ones?
 3. Does Article 8.4 of the Pre-JV Agreement bar Adroit from advancing claims for misrepresentation relating to the period 2002 to 2004 and if so, which ones?
 4. Does the Pre-JV Agreement or the Joint Venture Agreement entitle Adroit to seek an accounting of "Prior Exploration Costs" as defined in Article 7 of the Joint Venture Agreement?

5. Does the Pre-JV Agreement or the Joint Venture Agreement contain an express or implied term by which Tres-Or agreed and represented to Adroit that it had fairly and correctly charged Adroit for Prior Exploration Costs and that it had applied the Adroit Advances to January 1, 2005 as reasonable expenses in respect of the Claims and would account to Adroit in due course for those funds as alleged in paragraph 17 of the Amended Statement of Claim?

[62] I also direct the following, subject to the directions of the trial judge or further order:

- (a) the First Stage Issues will be tried on the dates set for the trial of this matter to commence November 24, 2008 (the "First Stage Trial");
- (b) the trial judge in the First Stage Trial will be the trial judge in the trial of the remaining issues (the "Second Stage Trial");
- (c) judgment in the First Stage Trial will not be entered until judgment has been granted in the Second Stage Trial; and
- (d) the evidence given at the First Stage Trial will be evidence at the Second Stage Trial.

[63] Adroit's counsel indicated that he is no longer available for trial on November 24, 2008. If counsel cannot agree either on a portion of the currently scheduled three-week period or another date, that issue will have to be addressed in chambers.

C. Should examination for discovery be limited to First Stage Issues?

[64] Tres-Or has abandoned its application to have production of documents restricted to First Stage Issues, and I therefore dismiss that part of Tres-Or's motion.

[65] Tres-Or applies for an order limiting the scope of examinations for discovery to matters relevant to the First Stage Issues until completion of the First Stage trial or further direction of the Court.

[66] Counsel for Adroit opposes an order restricting scope of examinations for discovery given that some witnesses are out of province and out of country.

[67] In my view, it is unlikely that all discovery could be completed in one block. If the parties are to be prepared to proceed on the November 24, 2008 trial date, examinations for discovery should be restricted to the First Stage Issues.

D. Should the parties produce further documents?

1. Adroit documents relating to flow-through shares and debt consolidation

[68] Tres-Or seeks an order requiring Adroit to produce all documents relating to the issuance of flow through shares for the 2002-2005 period, and all documents relating to debt consolidation and payment of shares for debt arrangements in the years 2002-2004. Adroit vigorously opposes production on the basis of relevance.

[69] These documents related to the Option Period only, which is the period within which Tres-Or seeks to bar Adroit from pursuing claims. Examination for discovery is now limited to First Stage Issues. I therefore adjourn this part of Tres-Or's application until the First Stage has been addressed.

2. Adroit's internal emails

[70] Tres-Or points out that Adroit has produced only one internal email and says this is less than full production given that Adroit's principals reside in Belgium, Vancouver and Toronto, and regularly communicate by email.

[71] During the hearing, counsel for the parties agreed to resolve this issue by way of counsel for Adroit providing written confirmation that all relevant emails have been sought from Adroit and its principals, reviewed and considered for production.

[72] The parties also agree that in respect of any claims of litigation privilege over communications arising prior to commencement of litigation, they will list each communication separately in a Part 3 list by date and author/recipient.

[73] In light of these concessions, I am not at this point prepared to order the parties to swear affidavits verifying production of documents.

3. Tres-Or's electronic version of documents

[74] Adroit applies for an order compelling Tres-Or to deliver electronic copies of documents. Adroit says that it wants have to discovery of electronic copies of emails and other electronic source documents to help it assess whether the paper documents produced are authentic. Adroit says this is necessary because a number of email documents produced by Tres-Or demonstrate that two of Tres-Or's principals fabricated time sheets to lend the appearance of legitimacy to accounts rendered by Tres-Or to Adroit.

[75] Adroit's application for production of electronic copies of Tres-Or's emails and other documents is not an application for new documents. All of these documents have been produced by Tres-Or in hard copy and in TIFF format.

[76] Tres-Or says that it has produced approximately 1,600 emails in this litigation to date. That production, it says, was an enormous undertaking requiring compilation of both electronic and paper documents and the conversion of those documents to TIFF format so that the necessary redactions for privilege could be carried out. Tres-Or asserts that 70 hours were spent by support staff dealing with document production, apart from the substantial additional time spent by counsel reviewing documents for privilege and relevance.

[77] Tres-Or argues that its production conforms with Chief Justice Brenner's July 1, 2006 Practice Direction concerning electronic evidence. That direction makes TIFF format the "default" format for image documents in electronic materials. Tres-Or points out that Adroit's image documents have also been scanned into TIFF format.

- [78] Tres-Or says that if electronic versions of the emails are ordered, it would effectively be sent "back to the drawing board" with respect to document production because Tres-Or used TIFF format copies of its documents to review for privilege, duplicates and irrelevant documents. The required redactions for privilege are burned into the TIFF images. Tres-Or says that if original electronic documents must be produced, the entirety of this review must be undertaken afresh.
- [79] In addition Tres-Or submits that a substantial portion of the emails sought cannot be provided in their original format without a breach of solicitor-client privilege because it is not possible to redact meta data from the electronic documents.
- [80] In my view it is not appropriate to order Tres-Or to produce electronic versions of all of its documents. Emails documenting the process of apparent doctoring and fabrication of invoices have been produced by Tres-Or. The plaintiff therefore has the evidence it needs to prove fabrication from the hard copies produced by Tres-Or. This does not appear to be a case in which a party is trying to cover up its conduct.
- [81] Adroit argued that electronic versions of spreadsheets may contain useful information about how the documents were created and that electronic data from surveys would be of assistance to its experts in preparing reports. There is merit to these submissions and I therefore order that Tres-Or produce survey data and spreadsheets in electronic format. Adroit is not precluded by this order from applying for production of other specific documents if there is a particular reason for such production in electronic format.

E. Should portions of the amended statement of claim be struck out?

- [82] The test for striking pleadings under Rule 19(24)(a) requires the Court to determine whether it is plain and obvious that the statement of claim discloses no reasonable cause of action. As set out in *MacNaughton v. Baker*, [1988] 4 W.W.R. 742, 28 C.P.C. (2d) 49 (B.C.C.A.), on a motion to strike a pleading under this rule, the Court must proceed on the assumption that all facts pleaded are true.
- [83] Tres-Or seeks to strike out paragraphs 25(b) and (t), 28(p) and (t), 36-51 and 83-89 of the amended statement of claim.
- [84] Paragraphs 36-51 pertain to what the parties refer to as the "Royalty Group Claim" in which it is alleged that Tres-Or failed to do the work necessary to keep some of the Claims in good standing: conducting exploration work and filing assessment reports with the Ontario government. These paragraphs allege that when Adroit moved to restake the Claims so that they would not be lost, Tres-Or encouraged individuals (who would have been entitled to receive a small royalty from the claims that had lapsed) to initiate proceedings against Adroit with the Mining Commissioner in Ontario.

[85] Adroit points out that paragraphs 36-51 cannot be struck out even if the claims for defamation and slander are, because they are incorporated by reference in two other parts of the amended statement of claim which Tres-Or has not sought to strike out: paragraph 25(o) incorporates paragraphs 36-51 as particulars of Adroit's breach of fiduciary duty claim, and paragraph 28(o) incorporates by reference paragraphs 36-51 as particulars of Adroit's breach of the Pre-JV and JV Agreements.

[86] I agree with Adroit's submission that paragraphs 36-51 cannot be struck in these circumstances. However, the particular claims based on paragraphs 36-51 are capable of being struck. Tres-Or says that the particulars pleaded at paragraphs 36-51 and 83-89 of the statement of claim do not support Adroit's claims for defamation, slander of title, interference with contractual relations, abuse of process and malicious prosecution.

[87] At paragraph 49 Adroit complains that:

Tres-Or has, by its words and conduct to the Royalty Group and others, including the Ontario Mining Commissioner, defamed and injured Adroit and slandered Adroit's right, title and interest in and to the Adroit claims, including falsely and wrongfully asserting that the Adroit claims are within the area of mutual or common interest under the Pre-JV Agreement and the JV Agreement and that Adroit has acted wrongfully in relation to the staking thereof or by words or conduct to like effect.

[88] Paragraphs 83-89 of the amended statement of claim set out facts relating to a news release put out by Tres-Or contradicting Adroit's assertion that it had replaced Tres-Or as Operator. The news release also stated that Adroit was in default under the Joint Venture Agreement both because it failed to make a \$50,000 payment and because it had staked claims in the Joint Venture area:

The Company advises that, contrary to the recent news release disseminated by Adroit Resources Inc., ("Adroit"), the Company has not been replaced as operator of the Temagami Diamond and Precious Metals Joint Venture, nor has a Management Committee meeting being convened to appoint an alternate operator. Although Adroit acquired a two-thirds interest in the claims comprising the Joint Venture project, the Company has been appointed operator for the first two years of the project pursuant to the terms of the Joint Venture Agreement. While the Company may resign under certain circumstances, it may not be removed from its position.

Adroit and the Company have recently held discussions concerning a number of issues, including Adroit's failure to make a \$50,000 payment on June 30, 2005, as provided for under their agreement, and regarding proceedings initiated by third-party royalty holders of certain Joint Venture claims concerning staking activities by Adroit within in [sic] the Joint Venture area of mutual interest.

1. Defamation

[89] Tres-Or submits that the words complained of do nothing more than describe a civil dispute and Tres-Or's view that:

- (a) Adroit had staked claims belonging to the Joint Venture; and
- (b) Tres-Or had not been removed as the Operator of the Joint Venture. Tres-Or says that these acts and words are not capable of being construed as defamatory and that this part of Adroit's claim should be struck.

[90] In reply, Adroit says that Tres-Or acted with the Royalty Group and issued the news release knowing and intending that this would injure Adroit, its efforts to advance the Joint Venture, and Adroit's efforts to raise equity and other financing for exploration and development of the Claims. Adroit claims that the statements made in the news release and to the Royalty Group injured Adroit's reputation in the mining and investment community by suggesting that Adroit was unreliable and made false statements.

[91] It is not that plain and obvious in the context of two public mining companies that the words complained of could not be reasonably capable of being defamatory.

2. Slander of title

[92] With respect to slander of title, Adroit says that Tres-Or's statements to the Royalty Group and its news release had the effect of casting a pall of uncertainty and confusion over the Claims as well as Adroit's claims by falsely suggesting that Adroit had been staking within the Joint Venture area of interest.

[93] Tres-Or submits that the claim for slander of title must fail because there is no pleading or particularization of special damages which are a requisite element of this cause of action. Adroit says that it has pleaded special damages including the legal costs incurred to defend the Royalty Group proceedings in Ontario. Tres-Or argues that Adroit's legal costs do not constitute special damages because it was awarded costs in the Ontario proceedings. It follows, says Tres-Or, that if Adroit thought it was entitled to full reimbursement of legal expenses, it should have asked for that in those proceedings.

[94] It is not plain and obvious that Adroit's claim cannot succeed at trial in relation to the proof of some special damages, and accordingly I would not strike out Adroit's claim for slander of title at this stage.

3. Interference with economic relations

[95] Adroit relies on paragraphs 36-51 and 83-89 to support its claim for interference with contractual relations. Tres-Or noted that "unlawful means" is an essential element of a claim for intentional interference with economic interests. Tres-Or argued that if the claims in defamation and slander of title are struck out, there are no "unlawful means" to support this tort, and therefore the claim for intentional interference with economic interests should also fail.

[96] As I have not found that the claims for defamation and slander of title should be struck out, it follows that the claims for intentional interference with economic interest should remain in the pleadings to be addressed at trial.

4. Abuse of process

[97] Adroit claims that Tres-Or initiated the Royalty Group proceeding for a "collateral and improper purpose", i.e. Tres-Or encouraged the Royalty Group to sue Adroit so that Tres-Or could avoid its own liability to the Royalty Group and shift that liability onto Adroit when Adroit had no liability. Tres-Or says that pleading improper purpose is not enough to establish abuse of process; the plaintiff must also plead the second essential element of "a definite act or threat, in furtherance of a purpose not legitimate in the use of the process".

[98] Tres-Or relies on the Ontario case of *WestJet Airlines Ltd. v. Air Canada*, [2005] O.J. No. 2310 (Sup. Ct. J.), in which Nordheimer J. held at para. 12:

The elements of the cause of action can be found, however, in cases such as *Metrick v. Deeb* (2003), 16 C.C.L.T. (3d) 298 (Ont. C.A.), where the court, at para. 3, cited with approval the following quotation from *Fleming on Torts* (4th ed., 1971) at p. 548:

The essential elements of abuse of process are: first, a collateral and improper purpose, such as extortion, and secondly, a definite act or threat, in furtherance of a purpose not legitimate in the use of the process. Some such overt conduct is essential, because there is clearly no liability when the defendant merely employs regular legal process to its proper conclusion, albeit with bad intentions.

[99] However, it is unclear in British Columbia whether an act or threat in furtherance of an improper purpose is an essential element of the tort of abuse of process: *Border Enterprises Ltd. v. Beazer East Inc.* (2002), 4 B.C.L.R. (4th) 1, 2002 BCCA 449, paras. 59-62. The British Columbia Court of Appeal in *Border Enterprises Ltd.* directed at para. 62 that the debate over the essential elements of this tort should take place during the trial. Therefore, I would not strike this claim on the basis that Adroit has failed to plead the second element.

5. Malicious prosecution

[100] The elements of a claim for malicious prosecution were described by Ross J. in *G.(F.) v. F. (R.)* (2003), 18 C.C.L.T. (3d) 82, 2003 BCSC 1136 at para. 34:

- (a) the initiation of criminal or disciplinary proceedings by the defendant against the plaintiff;
- (b) the termination of those proceedings in favour of the plaintiff;
- (c) the absence of reasonable and probable cause; and
- (d) malice or an improper purpose.

[101] Adroit says that the pleading is sufficient to establish a claim for malicious prosecution because:

- i. Adroit has pleaded malice (paragraph 50);
- ii. Adroit has pleaded an absence of reasonable and probable cause, i.e. that there was never any basis for Tres-Or's initiation and promotion of the Royalty Group proceedings or its assertion that Adroit staked mineral claims including Royalty Group Claims within the area of common interest under the Joint Venture Agreement;
- iii. Adroit has pleaded that the Ontario proceedings were determined in favour of Adroit: they were transferred from the Mining Commissioner to Ontario Superior Court and subsequently dismissed as abandoned; and
- iv. Adroit has pleaded specific damage: its legal costs.

[102] Tres-Or makes three submissions in support of its argument that the pleadings do not set out the requisite elements of malicious prosecution. First, it says that the tort applies only to criminal and disciplinary proceedings, and notes that the Royalty Group claim before the Ontario Mining Commissioner was an administrative proceeding in which nothing was "prosecuted".

[103] Second, Tres-Or emphasizes that the proceedings were not initiated by Tres-Or, but rather by Royalty Group. Tres-Or, like Adroit, was a respondent in those proceedings.

[104] Third, Tres-Or says that the proceedings were not terminated in favour of Adroit, and points to Adroit's pleadings, which state:

- 43. On November 6, 2006, the Ontario Superior Court ordered that the Royalty Group Proceedings be transferred to that court and that the Royalty Group and Tres-Or to pay [sic] Adroit court costs.
- 44. The Royalty Group thereafter failed or neglected to prosecute their claims against Adroit in the Ontario Superior Court action.
- 45. On or about June 5, 2007, the Ontario Superior Court ordered that the Royalty Group's claims against Adroit were dismissed as abandoned.

[Emphasis added]

[105] Tres-Or also relies on the reasoning of Ross J. in *G(F) v. F.(R)*, at para. 35:

Thus one necessary element of such a claim is that the proceedings were terminated in favour of the plaintiff. The policy which underlies this element is that an action for malicious prosecution is not a forum to retry the prosecution, see Kim Kreutzer Work, *Remedies in Tort*, Volume I, ch. 15, at para. 14.

[106] I am of the view that the plaintiff's amended statement of claim does not support a claim for malicious prosecution and that this claim should be struck. Actions for malicious prosecution arising from civil proceedings have historically only been available in the area of bankruptcy and professional discipline: Linda Rainaldi, ed., *Remedies in Tort*, looseleaf (Toronto: Carswell, 1987) at chp. 15 § 8-8.1. Further, Adroit does not plead that the Ontario case was heard and decided on the merits in Adroit's favour.

[107] The deficiencies in relation to the malicious prosecution claim cannot be corrected by amending the pleadings.

SUMMARY

[108] The trial will be severed so that the following issues will be addressed in the First Stage:

1. Does Article 8.4 of the Pre-JV Agreement bar Adroit from advancing claims for breach of fiduciary duty relating to the period 2002 to 2004 and if so, which ones?
2. Does Article 8.4 of the Pre-JV Agreement bar Adroit from advancing claims for negligence relating to the period 2002 to 2004 and if so, which ones?
3. Does Article 8.4 of the Pre-JV Agreement bar Adroit from advancing claims for misrepresentation relating to the period 2002 to 2004 and if so, which ones?
4. Does the Pre-JV Agreement or the Joint Venture Agreement entitle Adroit to seek an accounting of "Prior Exploration Costs" as defined in Article 7 of the Joint Venture Agreement?
5. Does the Pre-JV Agreement or the Joint Venture Agreement contain an express or implied term by which Tres-Or agreed and represented to Adroit that it had fairly and correctly charged Adroit for Prior Exploration Costs and that it had applied the Adroit Advances to January 1, 2005 as reasonable expenses in respect of the Claims and would account to Adroit in due course for those funds as alleged in paragraph 17 of the amended statement of claim?

[109] I direct the following, subject to the directions of the trial judge or further order:

- (1) the First Stage Issues will be tried on the dates set for the trial of this matter to commence November 24, 2008 (the "First Stage Trial");
- (2) the trial judge in the First Stage Trial will be the trial judge in the trial of the remaining issues (the "Second Stage Trial");
- (3) judgment in the First Stage Trial will not be entered until judgment has been granted in the Second Stage Trial; and
- (4) the evidence given at the First Stage Trial will be evidence at the Second Stage Trial.

[110] Tres-Or's application to limit document discovery to First Stage Issues is dismissed by consent.

- [111] Examinations for discovery are limited to matters relevant to the First Stage Issues until completion of the First Stage Trial.
- [112] Tres-Or's application to require Adroit to produce documents relating to flow-through shares, debt consolidation and payment of shares for debt is adjourned until completion of the First Stage Trial.
- [113] Each party is to separately list by date and author/recipient any communications, arising prior to the commencement of these proceedings over which litigation privilege is claimed.
- [114] Tres-Or is to produce documents sought by Adroit in paragraphs 1(a)-(f) of its notice of motion dated February 20, 2008 by consent.
- [115] Tres-Or is to produce electronic versions of spreadsheets and data from surveys.
- [116] The parties' cross-applications for affidavits verifying lists of documents are dismissed.
- [117] Adroit's claim in malicious prosecution is struck from paragraph n(s) of the prayer for relief in the amended statement of claim.
- [118] The parties are at liberty to apply with respect to the procedures necessary to give effect to this order.
- [119] The costs of this application will be in the cause.

The Honourable Madam Justice L. A. Fenlon

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