

CANADA / JUDGMENT

Capital Resource Group Inc. v. Coronado Resources Ltd.

2008 BCCA 408

COURT

British Columbia Court of Appeal

DECIDED

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2008 BCCA 408 Capital Resources Group Inc. v. Coronado Resources Ltd. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Capital Resource Group Inc. v. Coronado Resources Ltd., 2008 BCCA 408 Date: 20081017 Docket: CA035478 Between: Capital Resource Group Inc. Respondent (Plaintiff) And Coronado Resources Ltd. and Eugene Larabie Appellants (Defendants) Before: The Honourable Chief Justice Finch The Honourable Madam Justice Levine The Honourable Mr. Justice Frankel J.G. Shatford Counsel for the Appellants E.G. Wong Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia September 22, 2008 Place and Date of Judgment: Vancouver, British Columbia October 17, 2008 Written Reasons by: The Honourable Madam Justice Levine Concurring in by: The Honourable Chief Justice Finch The Honourable Mr. Justice Frankel Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

- [1] The appellant, Coronado Resources Ltd., was ordered to pay the respondent, Capital Resource Group Inc., \$43,250 plus interest and costs for breach of a contract to provide option rights in respect of 100,000 shares of Coronado.
- [2] Coronado claims that the trial judge erred in awarding damages for a contract that the plaintiff did not plead. Capital says that this Court can remedy that omission by ordering that the pleadings be amended to conform with the evidence.
- [3] If the pleadings are found to be sufficient or are amended, Coronado claims that the trial judge erred in granting damages because Capital had no vested options at the relevant time, and in assessing damages on the wrong date.
- [4] I would not allow the appeal on the ground that the pleadings were insufficient. The trial judge erred, however, in assessing damages for the breach of contract on the wrong date. I would therefore allow the appeal to the extent of varying the order of the trial judge as set out below.

Background

- [5] On or around November 15, 2005, Capital, whose principals were Mr. Chandler and Mr. Smith, and Coronado, through its principal, Mr. Larabie, negotiated a contract for Capital to provide "investor services" to Coronado. According to an undated memorandum prepared by Mr. Chandler, Capital was to receive \$3,000 per month and 50,000 shares of Coronado for a "box account" (which is not in issue in this appeal), and "Coronado will set up an option agreement with [Capital] for a total of 100,000 shares of Coronado at a price to be determined by Eugene Larabie."
- [6] Capital provided services to Coronado commencing December 1, 2005, and Coronado paid Capital's invoices for \$3,000 dated December 1, 2005, January 1, 2006 and February 1, 2006.
- [7] In January 2006, Coronado commenced issuing stock options under its stock option plan at the price of \$0.47 per share. It notified Capital that it would grant it an option to acquire 60,000 shares.
- [8] Coronado terminated Capital's service contract on January 31, 2006.
- [9] On March 2, 2006, Capital purported to exercise its right to acquire 100,000 shares of Coronado from Mr. Larabie and 60,000 shares of Coronado from Coronado. Coronado responded that Capital had no valid stock options. The Pleadings
- [10] Capital commenced the action against Coronado and Mr. Larabie on June 30, 2006. In its statement of claim, it pleaded that on or about December 1, 2005, Capital and Coronado reached an oral agreement whereby "Capital was to provide consulting services to Coronado (the 'Agreement'), in exchange for consideration from both Coronado and Mr. Larabie personally." With respect to the option to purchase 100,000 Coronado shares, Capital claimed that "Mr. Larabie would provide Capital with an option to purchase 100,000 Coronado shares from his personal holdings at a price of \$0.26 CDN per share (the 'First Option')." With respect to the option to purchase 60,000 shares, Capital claimed: In or about January 13, 2006, Mark Aplas, Coronado's Controller, advised Capital on behalf of Coronado, that Coronado would provide Capital with an additional option for 60,000 shares of Coronado, at a price of \$0.47 CDN per share (the "Second Option") .The Second Option was subsequently confirmed by Mr. Larabie for Coronado.
- [11] In September 2006, the shares of Coronado were split two-to-one.
- [12] Capital sought the following relief: A. An order that Mr. Larabie convey to Capital 200,000 shares of Coronado at a price of \$26,000 CDN; B. An order that Coronado convey to Capital 120,000 shares of Coronado at a price of \$28,200 CDN; C. Damages in the alternative; D. Costs; and E. Such further and other relief this Honourable Court shall deem to be meet.
- [13] In the statement of defence, Mr. Larabie said that "at no time did he ever agree to provide [Capital] with an option to purchase 100,000 Coronado shares at the price of \$0.26 per share as alleged." Coronado and Mr. Larabie pleaded further that any option to purchase shares of

Coronado had to comply with the rules of the TSX Venture Exchange and the stock option plan approved by the directors of Coronado, and that Capital was aware that Coronado and the TSX Venture Exchange had never approved the granting of any stock options to Capital. Both Coronado and Mr. Larabie denied that Coronado "ever agreed to provide [Capital] with an additional option for 60,000 at a price of \$0.47 per share as alleged or at all." Coronado and Mr. Larabie said further that "if any agreement to grant a stock option [to Capital] was given, which is not admitted but specifically denied," Capital failed to exercise its option as required. If Capital had given proper notice, which was specifically denied, Coronado and Mr. Larabie said that "no options had vested in [Capital] or in the alternative only 25% of the Options claimed by [Capital] had vested at the time of termination." Trial Judge's Reasons for Judgment

- [14] The trial judge (whose reasons for judgment may be found at 2007 BCSC 1488) set out three issues for determination (at para. 13). The second, relating to the "box account" is not relevant to this appeal. The first and third issues were:
1. Did Mr. Larabie agree to provide Capital an option to purchase 100,000 Coronado shares from his personal holdings at a price of \$0.26 Canadian per share?
 3. Did Coronado agree to provide Capital an option to purchase an additional 60,000 shares of Coronado at a price of \$0.47 per Canadian share?
- [15] With respect to the first issue, the trial judge found (at para. 15) that Mr. Larabie had not agreed to grant Capital an option to purchase shares from his personal holdings, and dismissed Capital's claim against him (at para. 24).
- [16] Based on the written memorandum, the trial judge found that Coronado had agreed to provide an option to purchase 100,000 of its shares (at paras. 15-18). He went on to conclude that the option agreement to be entered into was to be in accordance with TSX Venture Exchange policy and the terms of Coronado's stock option plan (at paras. 19-20), and the steps taken in January 2006 to provide Capital with an option to purchase 60,000 shares was the beginning of the process of fulfilling that agreement (at para. 23).
- [17] In his consideration of the third issue, the trial judge found that Coronado had agreed to set up an option agreement with Capital for 100,000 shares of Coronado, and as it had not done that, it was in breach of its agreement (at para. 44) and Capital was entitled to damages for the breach (at para. 46). Whether Capital had properly exercised its rights to acquire the shares was irrelevant, because Coronado had not issued the options and Capital had nothing to exercise (at paras. 46-47). He found further that under the rules of the TSX Venture Exchange and Coronado's stock option plan, had Coronado not breached the agreement to provide an option to purchase 100,000 shares, Capital would have been entitled, as of the termination of the investor services contract on January 31, 2006, to exercise an option to acquire 25,000 shares (at paras. 54-55). The shares closed at \$2.20 per share that day. Capital was entitled to purchase 25,000 shares at \$0.47 per share. Thus its losses were determined to be \$43,250. Pleadings

- [18] There is no question that the trial judge granted Capital a remedy it had not claimed for a contract it had not pleaded. Capital, for its own reasons, took the position throughout the trial that its agreement for 100,000 shares was not with Coronado, but with its principal, Mr. Larabie, and that it had a second contract with Coronado for an additional 60,000 shares. No doubt it sought to increase its damages by pleading two separate contracts, instead of one.
- [19] The trial judge found there was no contract with Mr. Larabie, and dismissed Capital's claim against him. The trial judge found that the alleged second contract, with Coronado, was actually part of the first, and awarded damages on the basis that the first contract had been breached.
- [20] While the contract which the trial judge found to have been breached for which he awarded damages was not pleaded, its formation, terms, and interpretation were fully explored at the trial. Appellant's counsel (who was counsel at the trial) conceded that no further evidence would have been adduced if the contract had been pleaded, and the record shows that he made submissions to the trial judge on the issues raised on the appeal.
- [21] In these circumstances, it would not be in the interests of justice to allow the appeal on the ground that the pleadings were insufficient. That would likely lead to a new trial on matters that have been decided, which would not be an efficient use of the parties' or judicial resources. It would have been prudent for Capital to have pleaded the contract with Coronado in the alternative, either at the outset or during the course of the trial. Further, it would have been prudent for the trial judge to require such an amendment before deciding the case on a basis that was not pleaded. Nonetheless, from the record it is clear that the pleadings were sufficient to raise all of the issues considered by the trial judge and raised on the appeal.
- [22] I would not accede to this ground of appeal. Assessment of Damages
- [23] Coronado claims that the trial judge erred in assessing damages for breach of the agreement to provide stock options because first, none of the options had vested in Capital when the investor services contract was terminated, and second, if there were any vested share options, Capital suffered no breach until it sought to exercise the options on March 2, 2006, not on January 31, 2006 as the trial judge found. Vesting
- [24] The trial judge decided (at para. 54) that had Coronado granted the stock options to Capital as promised, Capital would have been able to exercise the option to acquire 25,000 shares of Coronado by the date of termination of its investor services contract on January 31, 2006, and could not have acquired any further options after that.
- [25] Under the provisions of the rules of the TSX Venture Exchange and Coronado's stock option plan, options granted to consultants performing investor relations activities "must vest in stages over twelve months with no more than one-quarter of the Options vesting in any three month period" (emphasis added). On termination, any vested options must be exercised within 30 days, and any unvested options are cancelled.

- [26] Coronado argues that the trial judge failed to consider the evidence of Mr. Smith, who "conceded" on cross-examination that no options could vest until three months after January 13, 2006, the date Capital claimed they were granted, and that no options of Coronado had vested in Capital prior to the termination of the investor services contract.
- [27] Capital maintains that Mr. Smith's "concession" was in response to questions relating to a stock option agreement between Capital and Xemplar Energy Corp., another company that was also subject to the rules of the TSX Venture Exchange. The stock option agreement between Capital and Xemplar expressly provided that the options would vest "three months following the grant date and every three months thereafter".
- [28] The trial judge said (at para. 48) that under the agreement with Xemplar, "Capital was to receive a stock option package from Xemplar, with 25% of the grant vesting every three months" (emphasis added). He did not refer to Mr. Smith's "concession". He does not appear to have drawn a distinction between the stock option agreement between Xemplar and Capital, and the vesting provisions of the rules of the TSX Venture Exchange and Coronado's stock option plan.
- [29] If the stock option agreement between Capital and Coronado had contained the terms included in the agreement between Capital and Xemplar, no options of Coronado would have vested in Capital as its services were terminated before three months after the date the options should have been granted (which the trial judge found should have been January 13, 2006 (at para. 51)). However, no stock option agreement was concluded between Capital and Coronado, and Coronado claimed only that the rules of the TSX Venture Exchange and its stock option plan applied. Those rules provided for vesting "in any three month period". They did not restrict vesting to "three months following the grant date".
- [30] Thus, the trial judge did not err in concluding that Capital was entitled to vested options for 25,000 shares of Coronado in any three month period, including the two month period of the investor services contract. Date of Assessment of Damages
- [31] The trial judge found that if Coronado granted the options as promised, Capital would have been in a position to exercise them on January 31, 2006.
- [32] Coronado argues that the trial judge erred by ignoring the evidence that Capital actually purported to exercise its options on March 2, 2006. It says that until the holder of an option chooses to exercise it and acquire the shares, the option has no value and the holder neither realizes any gain nor suffers any loss. It cites in support of its argument cases in which the court held that the holder of an option must exercise the option in accordance with its terms in order to claim any breach of the option agreement: see *Baughman v. Rampart Resources Ltd.* (1991), 4 B.C.A.C. 143 and (1995), 4 B.C.L.R. (3d) 146 (C.A.); *Hadary v. Micrologix Biotech Inc.*, 2003 BCSC 404 at paras. 44-46. These cases are factually distinguishable, but stand for the principle that it is only on the exercise of an option that the holder indicates its intention to accept the offer of the grantor to sell the shares, and therefore it is only then that damages from a breach of that contract can be measured. That principle is applicable here.

- [33] I therefore find that the trial judge erred in assessing Capital's damages by reference to the closing price of Coronado's shares on January 31, 2006. The damages should be assessed with reference to the closing price on March 2, 2006. The evidence in the record shows that the closing price of the shares of Coronado on March 2, 2006 was \$1.10 per share. Thus, Capital's damages were \$0.63 per share, the difference between the closing price of \$1.10 and the option price of \$0.47, or \$15,750 for 25,000 shares.
- [34] I would allow the appeal to the extent of varying the order of the trial judge by substituting damages in the amount of \$15,750.
- [35] I would order that the appellant is entitled to its costs of the appeal. "The Honourable Madam Justice Levine" I AGREE: "The Honourable Chief Justice Finch" I AGREE: "The Honourable Mr. Justice Frankel"

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