

CANADA / JUDGMENT

First Majestic Silver Corp. v. Santos

2014 BCSC 1564

COURT

Supreme Court of British Columbia

DECIDED

18 August 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCSC 1564 First Majestic Silver Corp. v. Santos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

First Majestic Silver Corp. v. Santos,

2014 BCSC 1564

Date: 20140818

Docket: S078106

Registry: Vancouver

Between:

First Majestic Silver Corp.,

First Silver Reserve Inc.,

and Minera el Pilon, S.A. de C.V.

Plaintiffs

And

Hector Davila Santos and

Minerales y Minas Mexicanas, S.A. de C.V.

Defendants

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Plaintiffs:

H. Shapray, Q.C.

B. Cramer

Counsel for the Defendants:

D.P Church, Q.C.

M.W. Buhler

Place and Date of Hearing:

Vancouver, B.C.

April 15-16, 2014

July 17, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 18, 2014

INTRODUCTION

- [1] This case is a dispute over the defendants' acquisition of the Bolaños mine in Mexico. In this application, both sides apply to vary the terms of a post-judgment Mareva injunction relating to the mine.

GENERAL BACKGROUND

- [2] The defendant Mr. Santos is a Mexican citizen. He indirectly purchased the Bolaños mine through his control of the defendant company, Minerales y Minas Mexicanas ("MMM"). The defendants have no assets in British Columbia.
- [3] Mr. Santos had previously negotiated to purchase the Bolaños mine on behalf of the plaintiff companies, First Silver Reserve Inc. ("First Silver") and its Mexican subsidiary Minera el Pilon ("el Pilon"), where he was president, CEO, and a director. MMM's purchase of the Bolaños mine occurred about one year after Mr. Santos resigned from these positions and sold his shares in First Silver to the plaintiff company First Majestic Silver Corp. ("First Majestic").
- [4] The trial judge found that Mr. Santos breached his fiduciary duty to First Silver by taking an opportunity that belonged to the plaintiffs: *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717. The trial judge also found that Mr. Santos engaged in misrepresentation, misconduct, and wrongful acts by undermining First Silver's efforts to acquire the Bolaños mine. The plaintiffs were awarded \$93.84 million in compensation.

- [5] On June 25, 2013, the trial judge issued supplemental reasons: 2013 BCSC 1126. He ordered Mr. Santos to partially satisfy the trial judgment using the \$14.85 million held in his lawyers' trust account from First Majestic's purchase of his First Silver shares. The plaintiffs received this money on June 27, 2013. The remaining debt is approximately \$81 million.
- [6] The defendants appealed the trial decision on May 23, 2013.
- [7] That appeal was dismissed as abandoned on June 5, 2014, when the defendants failed to comply with an order to post security for the trial judgment: 2014 BCCA 214. The defendants have since applied to the Supreme Court of Canada for leave to appeal and expect the application to be heard before the end of 2014. The status of the appeal proceedings is relevant to this application because under Mexican law the plaintiffs cannot execute on the trial judgment until all appeals are determined.

BACKGROUND TO THE MAREVA INJUNCTION IN ISSUE

- [8] Within weeks of the defendants filing an appeal from the trial decision, the plaintiffs applied for a post-judgment Mareva injunction to prevent the defendants from disposing of or diminishing the value of the Bolaños mine. Madam Justice Dickson heard that application on June 13 and 14, 2013. The primary concern was that the defendants might try to sell or transfer the Bolaños mine. Dickson J. granted an interim injunction at the hearing which preserved the status quo pending her reserved decision on the application. She subsequently granted the Mareva injunction on June 24, 2013, on substantially the same terms as the status quo order but denied some of the ancillary relief sought by the plaintiffs: 2013 BCSC 1209.
- [9] The parties could not agree on the Mareva injunction's terms and the matter came back before Dickson J. to settle the order. The plaintiffs sought to prohibit the defendants from taking any steps that would diminish the value of the mine but the original status quo order provided that the defendants were not to diminish the mine's value "except for in the ordinary course of business". The plaintiffs wanted the reference to the ordinary course of business removed.
- [10] Dickson J. ultimately acceded to the defendants' submission that removing that term was too broad a measure because it would prevent "any type of operation of the mine even if de minimis in nature": 2013 BCSC 1212 at para. 6. She therefore ordered that the defendants were not to "diminish (save and except in the ordinary course of business)" the Bolaños mine's value.
- [11] Dickson J. nonetheless recognized that including this phrase could undermine the Mareva injunction's intended effect, stating at paras. 7-9:
- [7] According to the plaintiffs continued inclusion of reference to the "ordinary course of business" in the June 24 Order would create a lacuna in its intended effect, which is to preserve the value of the Bolaños mine. This is so because it is theoretically possible the

injunction in its present form could last for years. Unless those words are deleted, however, there is nothing to stop the defendants from engaging in long term high-grade mining (which extracts the best part of the ore body), retaining the proceeds, and eventually reducing the mine to a mere shell. If this occurs the value of the Bolaños mine will be diminished well beyond the de minimis level and the intended benefit of the injunction - to provide security for the judgment - will not be achieved.

- [9] Despite counsel's able submissions, I am not persuaded the reference to the "ordinary course of business" should be deleted from the June 24 Order, at least at this juncture. In my view, it would be unduly cumbersome and inconvenient to require the defendants to seek a variation in order to permit the conduct of mining operations of any kind. Although I accept there is a theoretical possibility the injunction could continue well into the future, that is by no means certain or even a substantial likelihood. If, however, the plaintiffs' concerns are borne out and the defendants operate the mine in a manner that diminishes its value beyond the de minimis level an application to vary the June 24 Order can be made.

[Emphasis added.]

- [12] The plaintiffs took up this invitation and applied to vary the Mareva injunction on September 4, 2013. They sought to remove the words "save and except in the ordinary course of business" and to impose on the defendants the burden of applying to court for leave to carry out any operations at the Bolaños mine. Madam Justice Griffin heard this application on September 4, 2013.
- [13] The plaintiffs had second hand evidence suggesting that as much as 800 tonnes of ore per day was being extracted from the Bolaños mine, processed and sold. There was also evidence that at that rate it would take approximately two years for the defendants to high grade two of the mine's key deposits, stripping those veins and considerably reducing the value of the mine. The defendants said they were not high grading the mine, but admitted they were mining approximately 400 to 500 tonnes of ore per day.
- [14] Griffin J. concluded that there was insufficient evidence to determine whether this level of mining would significantly affect the value of the mine as security for the plaintiffs' judgment against the defendants: 2013 BCSC 1704 at para. 59. As an interim solution, she allowed the defendants to carry on "at the level which the defendants say is their current level of operations, 400 to 500 tons of ore per day" (para. 60) but ordered the defendants to provide the plaintiffs with information about the mine's operations and cash flow, and to preserve all Net Cash Flow in a location and place disclosed to the plaintiffs (para. 73).

ISSUES ON THIS APPLICATION

- [15] The plaintiffs say that this increased mining is significantly diminishing the Bolaños mine's value. They therefore apply to vary the existing Mareva injunction to:

- a) Remove the defendants' right to mine in the ordinary course of business, with liberty to the defendants to apply for leave to engage in mining at any level;
 - b) Freeze the defendants' worldwide assets, not just the Bolaños mine;
 - c) Require the defendants to provide the plaintiffs with underlying documents and records to verify the accounting records produced to date;
 - d) Require Mr. Santos to attend an examination in aid of execution in Vancouver;
 - e) Compel the defendants to produce documents relating to their worldwide assets and sources of income; and
 - f) Require the defendants to swear an affidavit of assets worldwide.
- [16] The defendants acknowledge they have not complied with the existing order. They offer no explanation other than that the mine is "uneconomical" operating at a production level of 500 tonnes per day. They seek to vary the existing order to:
- a) Increase the cap on mining operations to a monthly average of 1,200 tonnes of ore per day;
 - b) Remove the requirement that the defendants preserve Net Cash Flow;
 - c) In the alternative:
 - i. to provide that the obligation to preserve "Net Cash Flow" does not apply to processing of any material other than ore mined from the Bolaños mine;
 - ii. to provide that MMM may use Net Cash Flow to pay ongoing "Operating Cash Outlays";
 - iii. to include as an "Operating Cash Outlay", a salary to Hector Davila Santos of 200,000 pesos per month;
 - d) To add an express term that the plaintiffs are not permitted to disclose, or otherwise make use of, any documents or information that the defendants are required to produce pursuant to the Mareva Order or under examination in this action, outside of this action, or without further leave of the Court.
- [17] A preliminary issue is whether the Court should hear the defendants' application at all given their non-compliance with the Court's earlier orders.

ANALYSIS

1. The basis for varying a Mareva injunction

- [18] Both the basis for granting a Mareva injunction and the basis for varying it must be borne in mind when determining whether to vary a Mareva injunction. As to variation, the applicant must establish that a significant change in circumstances has occurred since the injunction was granted: *Powder Resort Properties Ltd. v. Friday et al.*, 2001 BCSC 577 at para. 26.

[19] The Court's jurisdiction to order a Mareva injunction is found in Rule 10-4 of the Supreme Court Civil Rules and s. 39(1) and (2) of the Law and Equity Act, R.S.B.C. 1996, c. 253, as well as the Court's inherent jurisdiction. Dickson J. thoroughly canvassed the law relating to Mareva injunctions in granting the original injunction at issue here: 2013 BCSC 1209 at paras. 35-42. Mareva injunctions are governed by the same three-part framework applied on any injunction application: (i) is there a serious question to be tried? (ii) is there irreparable harm? (iii) does the balance of convenience favour the injunction? See: *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at paras. 30-34.

[20] Where the plaintiffs have obtained judgment against the defendants, as here, there is no need to ask whether there is a fair question to be tried. The real issue on a post-judgment application for a Mareva injunction is where the balance of convenience lies, and in particular whether either side will suffer irreparable harm: the plaintiff if the injunction is not granted and the defendant if it is.

[21] The judge hearing the Mareva injunction application should adopt a flexible approach. In *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335, 1994 CanLII 1779 (S.C.), Huddart J. stated:

By this approach, the ultimate question becomes, is it fair and just that the applicant should have the right to monitor the movement or expenditure of capital assets by the respondent during the course of the proceedings between them?

Along the route to an answer, the court must consider whether and to what extent the justification put forth in a particular case permits that right. This question directs attention to the value underlying the court's examination of whether there is real risk of dissipation of domestic assets and/or foreign assets, whether that analysis is performed as part of the three-pronged test that predominates at the ex parte stage or of the underlying "fit and just" test likely to be given flesh only at the inter partes continuation hearing.

Implicit in the framing of this question is the view that Mareva injunctions are available not only to restrain the active dissipation of assets, but also as a form of security. In my view it is only fair to state directly what courts are doing in fact.

[22] Once judgment has been obtained, the law is also settled that "there is no objection in principle to the judgment debtor being required to give disclosure of his assets worldwide": *Babinaft International v. Bassatne* (1988), [1989] 1 All E.R. 433, [1990] Ch. 13 (C.A.).

[23] In broad terms, the original Mareva injunction "froze" the Bolaños mine but permitted operations to continue in the "ordinary course of business". Dickson J. had no evidence about the actual level of mining operations but, based on the defendants' submissions, she understood those operations were occurring at a level that would have a de minimis effect on the mine's value. She reasoned that, in light of the 13-year life span of the mine predicted by the plaintiffs' experts at trial, the mine itself continued to be adequate security for the entire \$81 million judgment held by the plaintiffs, even if execution on the judgment was delayed by the appeal process.

2. Should the Mareva injunction prohibit all mining?
- [24] Whether pre- or post-judgment, the plaintiff bears the burden of proving that a Mareva injunction is just and convenient, though the burden may be more easily met in a post-judgment context: *First Majestic Silver Corp. v. Davila*, 2014 BCCA 11 at para. 44.
- [25] Madam Justice Griffin's order was intended to expand the evidentiary record available to the plaintiffs to meet the burden of establishing that it is just to prohibit mining operations in order to preserve the Bolaños mine as a form of security. She outlined the plaintiffs' task on this application to vary at para. 59: Have the plaintiffs presented evidence to permit the Court to fairly draw conclusions as to whether current mining operations materially impair the security available to satisfy the plaintiffs' judgment?
- [26] The defendants submit that the plaintiffs have failed to do so. They argue that First Majestic has tendered no expert evidence regarding the impact of MMM's first year of mining on the overall value of the Bolaños mine. They say that this is particularly striking given that MMM has provided First Majestic with monthly reports that detail the mining operations occurring at the Bolaños mine.
- [27] It is correct that the plaintiffs have not tendered expert evidence about the effect of one year's mining on the Bolaños mine's value. They say the defendants' document production has been inadequate. The plaintiffs continue to refer to the expert evidence at trial valuing the mine at \$62.5 million and assuming production commencing in 2012 and continuing for thirteen years. That sum reflects the net present value of post-tax discounted future revenues but is simply an approximation, since the actual value of the mine will fluctuate depending on the price of silver and the other metals mined.
- [28] However, the plaintiffs have led uncontradicted evidence that the defendants have been mining twice the amount of ore they represented to Griffin J. in September 2013. The defendants produced documents in accordance with Griffin J.'s disclosure order that show that despite informing this Court that they were extracting 400 - 500 tonnes per day, they have in fact been removing well in excess of that tonnage since August 2013. Indeed, in the first month following the order capping extraction at 500 tonnes per day, the defendants mined an average of 983 tonnes per day and have continued to consistently mine over 900 tonnes per day in ongoing contravention of Griffin J.'s order. They also have plans to further increase production in the short term to 1,200 tonnes per day.
- [29] The plaintiffs further argue that removing this volume of ore is a far cry from the de minimis level of mining contemplated by Dickson J. in June 2013. They say they cannot assess the impact of this mining on the Bolaños mine's value because the defendants have failed to comply in full with the Griffin J.'s order for production of financial information.

- [30] The defendants acknowledge they are removing ore at a much higher rate than they represented to Griffin J., but they submit that 1,000 tonnes of ore per day is well within the "ordinary course of business" since the plaintiffs' expert assumed production at that level in valuing the mine at trial.
- [31] However, the question before me is neither what level of mining falls within the definition of the "ordinary course of business" nor what tonnage amounts to de minimis mining. Rather, the issue is whether the defendants' operations have significantly diminished the mine's value and thereby the plaintiffs' security for their judgment.
- [32] In this regard the defendants assert that they have increased the mine's value. Mr. Santos states in his affidavit:

Since the trial, MMM has continued to focus its efforts on rehabilitating and improving the Bolanos mine and surface infrastructure, so as to make the Bolanos mine a fully functioning, high-efficiency mine. Since MMM began mining ore from the Bolanos mine in March 2013, MMM has used funds generated from its mining and processing operations at Bolanos to pay down the outstanding amount of the purchase price to Grupo Mexico, and to refurbish and improve the Bolanos mine and surface infrastructure. In doing so, MMM's goal has been to increase the value of the Bolanos property, not diminish it. Given that MMM has taken what was a non-functioning, vandalized and cannibalized mining property and turned it into an operation that can mine and process ore to produce both lead and zinc concentrates in an increasingly efficient mill, it is my opinion that MMM has succeeded in increasing the value of the Bolanos property, not diminishing it.

- [33] Thus I have before me contradictory evidence about the effect of the defendants' mining operations on the Bolaños mine's value.
- [34] In assessing that conflicting evidence, I am mindful that the defendants have not been forthright about their production levels and intentions in the past. Mr. Santos' sworn statements are often unsupported by documentary evidence. The Court of Appeal observed in relation to the defendants in 2014 BCCA 214 at para. 61:
- [61] Mr. Davila Santos is a Mexican national so his assets and those of his company are beyond the jurisdiction of this Court. He has ignored the respondents' requests for an examination in aid of execution and financial disclosure. He has failed to file proper material or follow the proper processes. He has failed to provide proof of assets or presented himself to be examined on his available assets. He has demonstrated a total disregard for the Canadian legal system, disobeying a court order, violating an injunction, and flouting the Act and Rules in both the Supreme Court and the Court of Appeal.

- [35] In addition, Mr. Santos and MMM acknowledged before me that they have not complied with two of this Court's orders: the cap on production at 500 tonnes per day, and the order to hold all Net Cash Flow in a separate account. They explain these flagrant and ongoing breaches by merely asserting that ignoring the Court orders suited them from an economic point of view. I therefore approach Mr. Santos' evidence with some skepticism.
- [36] Further, while Mr. Santos now says that current production levels at the mine are not materially affecting the mine's value, he swore an affidavit for the Court of Appeal stating that "most of the value of a mining company is in the ore in the ground".
- [37] I am satisfied that the plaintiffs have established that there is a real risk that the defendants' activities are diminishing the mine's value.
- [38] The plaintiffs may be unable to execute on their judgment in Mexico for a considerable period of time while the appeal process is being determined here. Although the Court of Appeal dismissed the defendants' appeal on June 5, 2014, the defendants have applied for leave to appeal to the Supreme Court of Canada. That application is likely to be heard in October 2014 at the earliest, and possibly not until the end of the year. If leave is granted, a year could pass before a hearing at the Supreme Court of Canada, with potential for remittance back to the Court of Appeal, and then a further appeal to the Supreme Court of Canada from that decision. Even once all appeal proceedings in Canada have been exhausted, the plaintiffs must still submit to the homologation process in Mexico to have this Court's judgment recognized.
- [39] It appears that the defendants intend to continue operating at full production. Assuming one year's production to date and the conservative prospect of one more year of mining at capacity until the plaintiffs can execute on the judgment, that represents two of the thirteen years of production assumed by the plaintiffs' expert, or 15% of the mine's operating life. Using the mine's valuation at trial, 15% of \$62.5 million represents a decrease in value of more than \$9 million. Even if the defendants comply with the existing production cap of 500 tonnes per day, which they are not doing, and do not conduct any high grade mining, there is still a significant impact on the mine's value.
- [40] Having concluded that the defendants' current level of ore extraction materially impairs the Bolaños mine's value as security for the plaintiffs' judgment, the question remains: does the balance of convenience favour varying the order as the plaintiffs seek?
- [41] The plaintiffs argue that the best way to preserve the mine's value is to shut down operations altogether, with leave to the defendants to apply to take particular steps or operate at particular levels. The plaintiffs point out that the defendants have an outstanding judgment against them for about \$81 million, with rapidly accruing post-judgment interest, and have done absolutely nothing to satisfy it. The plaintiffs further note that under the existing Mareva order the defendants have the option of posting security for the judgment and dealing with the mine as they like.

- [42] The defendants oppose a cease mining order by saying that they will suffer irreparable harm if that occurs. They point to a number of factors.
- [43] First, MMM employs 400 people; 20 in the office and 380 on its mining operations. It is reasonable to assume that terminating production entirely will negatively affect those workers.
- [44] Second, Mr. Santos attests to expenses the mine must meet whether it is in production or not. MMM must pay duties of \$202,500 on the Bolaños mineral concessions to the Mexican Government in January and July each year. MMM asserts that there is a risk that the Mexican Government will cancel the concessions if it cannot pay the duties, which would mean a loss of the very property that the Mareva order is intended to preserve.
- [45] Third, MMM still owes approximately \$4.1 million to Grupo Mexico for the purchase of the Bolaños mine.
- [46] Fourth, MMM needs to generate revenues to pay its existing trade creditors.
- [47] Fifth, if the mine were shut down and placed on care and maintenance, MMM would not have the funds to pay for that and the mine would begin to deteriorate.
- [48] Finally, the defendants assert that MMM will become insolvent if they cannot mine.
- [49] The plaintiffs rely on the evidence of Ramon Davila, a mining engineer, who reviewed the documents produced by the defendants. He says that the defendants have not provided documents relating to MMM's overall financial ability to make payments to Grupo Mexico, other trade creditors, or the Mexican Government. He says it is not possible to determine whether MMM in fact has the funds to pay for workers and materials necessary to take care of the mine and infrastructure, or to meet any of the obligations they rely on to assert irreparable harm if the mine is shut down.
- [50] This argument supports the additional financial information sought by the plaintiffs as a term of the variation, but it does not meet the defendants' assertions of irreparable harm if all mining is precluded.
- [51] Based on the evidence before me, I cannot conclude that prohibiting mining operations altogether will not irreparably harm the defendants and their employees, including potentially losing the mine itself. That may not be so if the defendants have other revenue sources to meet the mine's financial obligations, but more information is required to ascertain whether such resources exist.
- [52] I conclude that the plaintiffs have not established that the balance of convenience on this issue favours granting the prohibition order they seek.
- [53] In summary on this issue, I dismiss the plaintiffs' application for the relief sought in paragraphs 1(a) and 1(b)(3) of Schedule A to the notice of application.

- [54] Although the defendants assert that a cap of 500 tonnes per day causes them to lose money, and will eventually lead to the same result as a full and immediate closure of the mine, there is no way to assess the validity of that statement on the evidence the defendants have provided to date. Further, the defendants acknowledge that the tailings, which belong to Mr. Santos, can be processed at the mill on the Bolaños site and constitutes a revenue source independent of the mine itself.
- [55] Both the Mareva injunction and the cap are short term orders to preserve the plaintiffs' security. Preservation of the mine's value is inherently antithetical to the defendants' desire to exploit the mine and derive maximum profits from it. In other words, it is to be expected that a Mareva injunction will to some extent restrict a judgment debtor's capacity to use the asset. This Court has already decided that the plaintiffs are entitled to an injunction freezing the Bolaños mine as security for the plaintiffs' judgment against the defendants. The question before me is the extent to which that injunction should be strengthened, not whether it should have been granted in the first place.
- [56] While the plaintiffs have not convinced me that the mine's operations should be shut down entirely, I am satisfied that the balance of convenience favours granting much of the other relief sought.
- [57] It is convenient at this point to address the defendants' submission that the plaintiffs' application for additional security should be denied because they misled this Court in earlier applications.
- [58] The defendants argue that the plaintiffs failed to inform this Court of the existence of Notarial Preventive Notices, or First Majestic's intention to obtain them. These notices were in effect before Dickson J. settled the terms of the original Mareva order and at the time of First Majestic's application to vary that order before Griffin J. The defendants assert that those notarial certificates, which were registered against the Bolaños mining concessions in the Mexican mining registry, provided the very protection that the plaintiffs told the Court that they needed: protection against the sale and transfer of the Bolaños property.
- [59] The defendants made the same submission to the Court of Appeal who rejected their argument and expressed no criticism of the plaintiffs. The Court of Appeal stated in 2014 BCCA 214 at para. 63:
- [63] The second matter Mr. Davila Santos raises concerns the two Notarial Preventive Notices the respondents filed in the Mining Registry in Mexico against Bolaños. The first Notice took effect on July 5, 2013, and the second was filed on August 30, 2013. The effect of the Notices prevents any transfer of the Bolaños mining concessions for 40 days. Mr. Davila Santos asserts the respondents' failure to disclose the Notices misled the Court because they claimed they were unable to execute against the judgment until the appeal process is complete. However, Mr. Davila Santos has known about these Notices since December 2013 but chose not to raise his concerns until now. Further, the filing of what amounts to, at best, a 40-day caveat on the transfer of the mining concessions, that apparently can be easily set

aside, is not an execution against judgment as suggested by Mr. Davila Santos. [Emphasis added.]

[60] I find nothing untoward about the plaintiffs' conduct in failing to inform the court about the registration of temporary notarial certificates in Mexico.

3. Should the Mareva injunction extend to the defendants' worldwide assets?

[61] The defendants argue that the plaintiffs cannot take the position that the Bolaños mine does not fully secure the unpaid portion of the trial judgment. They point to Dickson J.'s finding that the mine fully secures the trial judgment even with mining in the ordinary of business. They also note that the plaintiffs failed to appeal that order.

[62] It is true that the plaintiffs' expert valued the mine at \$62.5 million and the judgment outstanding is \$81 million, so in a sense there has always been a gap between the judgment debt and the mine's value. I agree that the gap itself is not a new circumstance that justifies varying the injunction order. However, I have already found that there is a real and substantial risk that the defendants' ongoing mining operations could significantly affect the mine's value. It is that change in circumstances that justifies varying Dickson J.'s order, which was made in the absence of any evidence about extraction levels.

[63] The defendants also argue that the mine's value should be based on the value of the resources in the ground, a value that far exceeds \$62.5 million; the plaintiffs' expert valued those resources at up to \$250 million pre-tax. The defendants further argue that if the plaintiffs were to acquire the mine on execution, they could fully recover the judgment over several years of mining, which is something they can easily do since they are a mining company that employs thousands of workers in Mexico.

[64] I do not accept that submission for two main reasons. First, the \$250 million figure is meaningless in the context of security for the trial judgment. There are costs associated with extracting, processing, and selling the resources. The realizable value of the resource must be determined net of those costs, which include approximately \$100 million in taxes payable to the Mexican Government. The mine's value as security must also take into account the significant fluctuations in mineral prices.

[65] Second, the relevant question for execution purposes is what the mine can be sold for, not what sums might be collected if the plaintiffs mine the property over thirteen years. The plaintiffs are owed a judgment debt of \$81 million which is due now, not in instalments over thirteen years. The best evidence of the mine as an asset is \$62.5 million.

[66] Dickson J. determined that a Mareva order should be granted because the plaintiffs established a strong prima facie case and a real risk of irreparable harm. She said in 2013 BCSC 1209 at para. 52:

- [52] In reaching this conclusion I have borne in mind the fact that a substantial judgment award has been made, there are insufficient assets in this jurisdiction to satisfy it and Mr. Santos has failed to attend a scheduled examination in aid of execution without adequate explanation.
- [67] In freezing the Bolaños mine, Dickson J. intended "to provide security for the entire amount of the outstanding judgment award" and understood that her order did just that: 2013 BCSC 1209 at para. 51. She therefore declined to issue a freezing order against the defendants' worldwide assets. Since the mine was the only asset subject to the Mareva order, she also concluded that a listing and valuing requirement was not necessary to breathe life into the Mareva injunction - the plaintiffs knew enough about the mine to be able to execute against it.
- [68] On this variation application, I find there is a real risk the plaintiffs will suffer irreparable harm since the mining operations appear likely to significantly reduce the mine's value. I therefore conclude that it is just to extend the freezing order to the defendants' worldwide assets and to require them to swear an affidavit of assets worldwide. The list and value of the defendants' worldwide assets is necessary to breathe life into the Mareva injunction because without it the plaintiffs will have no knowledge of the assets subject to the extended freezing order.
- [69] The defendants raised concerns before Dickson J. about the inherent complexity of valuing assets. However, an expert evaluation of each asset is not required. Rather, the affidavit need only state the approximate value of each asset based on the defendants' knowledge.
- [70] In summary on this issue, I grant the orders sought in paragraphs 1(b)(4) and 4(a) through (e) of Schedule A to the plaintiffs' notice of application.
4. Should the defendants produce further internal accounting records?
- [71] The defendants say that they have complied with Griffin J.'s order to produce internal accounting records. They oppose the relief sought as unnecessary and burdensome. The defendants submit that the plaintiffs' application amounts to the Court auditing MMM's financial records and would require MMM to copy and ship approximately twelve boxes of records from Mexico to Vancouver. They further submit that the detailed examination of financial records is unnecessary given that MMM's financial records are audited annually by PricewaterhouseCoopers.
- [72] The plaintiffs say that they are not asking the Court to expand the scope of production ordered by Griffin J., but simply to compel the defendants to comply with that order.
- [73] Paragraph 1(c) of Griffin J.'s order requires the defendants to preserve all Net Cash Flow as defined. Paragraph 2 of the order requires the defendants to provide the plaintiffs with internal reports each month containing sufficient detail to enable the plaintiffs to verify the scale and type of mining, the Net Cash Flow and the location of the preserved Net Cash Flow. The plaintiffs acknowledge that the defendants have provided adequate information

about the scale and type of mining but they say that the documents provided by the defendants are bare summary sheets of tonnage inventory and income statements that do not allow the numbers to be verified. For example, the plaintiffs assert that they also require complete monthly statements showing the income statement, the balance, the sales analysis and the cash flow analysis, as well as the operating costs reports, including mine, mill, and indirect costs with all necessary attachments.

[74] As Griffin J. wrote in 2013 BCSC 1704 at para. 74:

[74] To be clear, the purpose of the orders I have made is to require the defendants to provide information which would enable the plaintiff to verify the degree of mining activity at the Mine and its value, and to locate and trace any profits generated as a result of those activities. [Emphasis added.]

[75] The defendants admit that they have not preserved Net Cash Flow. They say in part that there is no cash available to set aside as the order contemplates. The defendants also assert that the current level of mining operations is necessary in order to generate funds to pay MMM's creditors and to meet other obligations.

[76] I conclude that the order sought by the plaintiffs in order to assess the defendants' description of its financial affairs should be made. In any event, as Griffin J. noted, the plaintiffs would be entitled to these documents on examination in aid of execution.

[77] The defendants' complaint about the need to ship twelve bankers' boxes of documents in order to comply with the plaintiffs' request is easily overcome. The plaintiffs say it is not necessary to send the documents to Vancouver. Rather, they will send four First Majestic staff members in Mexico to MMM's Guadalajara office to review the information over seven days.

[78] In summary on this issue, I grant the relief sought at paragraph 2 of Schedule A to the plaintiffs' notice of application.

5. Should Mr. Santos attend an examination in aid of execution in Vancouver?

[79] The defendants argue that the examination in aid should occur in Guadalajara, Mexico. They submit that Mr. Santos' age (81), the location of documents at MMM's Guadalajara office, and the need for Mr. Santos to have to resort to operational and financial personnel in order to respond properly and promptly to all questions, all favour conducting the examination in aid in Mexico. The defendants rely on a number of this Court's decisions which have held under Rule 7-2(27) that a non-resident party is entitled to be examined at his place of residence: e.g. *Bronson v. Hewitt*, 2008 BCSC 1269.

[80] A different approach was taken in *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.* (17 September 2007), Vancouver Registry No. S022713 (S.C.). As summarized in Frederick M. Irvine, *McLachlin & Taylor British Columbia Practice* (3d ed.), vol. 1, loose-leaf (updated to July 2014) (Vancouver: LexisNexis Canada Inc., 2006) at 7-216:

[T]he chambers judge held that despite the discretion under Rule 7-2(27) to order that a non-resident party be examined at his or her place of residence, the default provision that governs the place where a party is to be examined is Rule 7-2(11). Given that by definition (in Rule 1-1(1)), the "registry" is in British Columbia, the starting point for analysis is that a non-resident party is to be examined within the province, although if it is just and convenient, the court can order otherwise.

- [81] I conclude that the approach in *Le Soleil Hotel & Suites Ltd.* should be followed since the impact of the definition of "registry" was not brought to the presiders' attention in the opposing line of cases. I therefore start from the presumption that Mr. Santos should be examined in British Columbia unless there are circumstances which make it just and convenient to order the plaintiffs to conduct the examination elsewhere.
- [82] I am not persuaded that I should exercise my discretion to depart from the usual practice in this case. Mr. Santos failed to attend an examination in aid of execution set in Vancouver one year ago. He raised no objection at that time on the basis of his age, the location of documents, or the need to access personnel at MMM. Rather, he relied on an unauthenticated letter, purportedly written by a Mexican doctor who described himself as the "Biomedical of celebrities, world champions and Olympic gold medallists" attesting to Mr. Santos' inability to travel because of ongoing treatments for "renal insufficiency".
- [83] The location of the documents is also not a compelling factor since the plaintiffs can review those documents in Mexico, thus reducing the volume of documents that must be transported. As for Mr. Santos' need to obtain information from MMM's employees, telephone and Skype access between Vancouver and Guadalajara should suffice.
- [84] It is at this point convenient to address one of the defendants' applications. The defendants seek an express term prohibiting the plaintiffs from using information and documents obtained as a result of production orders or the examinations in aid of execution without first providing notice to the defendants and obtaining leave of the Court.
- [85] This extraordinary request is based on the defendants' view that the plaintiffs acted contrary to law in filing the Notarial Prevention Notices, thereby demonstrating that court oversight is required. I have already concluded that the defendants' allegation of impropriety in relation to the filing of the notarial certificates is unfounded. I therefore dismiss the defendants' application for this relief.
- [86] In summary on these issues, I grant the relief sought at paragraph 3 of Schedule A to the plaintiffs' notice of application with the clarification that the documents are to be made available for review and copying by the plaintiffs in Guadalajara. The examination in aid of execution is to take place in Vancouver. The plaintiffs are to pay Mr. Santos \$3,200 in witness fees at the conclusion of his attendance for examination in aid of execution.

[87] Before turning to the defendants' applications, I note for clarity that I deny the relief sought at paragraph 5 of Schedule A to the plaintiffs' notice of application (seeking liberty to reapply) as unnecessary.

THE DEFENDANTS' APPLICATIONS

[88] The defendants seek a number of orders which I identified earlier. The plaintiffs object to the Court hearing the defendants' application while the defendants remain in breach of earlier court orders.

[89] While the Court has discretion to refuse to hear an application when a party is in breach of a court order, the Court equally has discretion to hear the application if it is in the interests of justice to do so: *Dickie v. Dickie* (2006), 78 O.R. (3d) 1, 2006 CanLII 576 (C.A.) at paras. 85-86 and 89, *aff'd* by 2007 SCC 8.

[90] The defendants' ongoing breach of this Court's orders, simply on the basis that the orders conflicted with the defendants' plans for efficient mining operations, raises a real question as to whether this Court should hear the defendants. However, I decline to address the preliminary objection at this point because I have concluded that, in any event, the defendants' remaining applications should be adjourned generally until the defendants have complied with the variation orders I have granted the plaintiffs. I reach that conclusion because the appropriateness of granting the relief sought by the defendants will depend to a large extent on the true financial picture of both MMM and Mr. Santos: Is MMM likely to lose the Bolaños mining concessions or become insolvent if it cannot operate as it seeks to? That assessment cannot be meaningfully conducted until the documents, examination in aid of execution, and affidavit of assets worldwide are available to the plaintiffs and the Court.

COSTS

[91] The plaintiffs are largely successfully on this application and are entitled to their costs at Scale B.

The Honourable Madam Justice L.A. Fenlon

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/14/15/2014BCSC1564.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/first-majestic-silver-corp-v-santos-2014-bcsc-1564>

Prepared on 26 October 2026 · Esheria