

CANADA / JUDGMENT

## Shepherd v. Lundin Gold Inc.

2020 BCSC 258

COURT

Supreme Court of British Columbia

DECIDED

3 March 2020

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2020 BCSC 258 Shepherd v. Lundin Gold Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shepherd v. Lundin Gold Inc.,

2020 BCSC 258

Date: 20200303

Docket: S169450

Registry: Vancouver

Between:

Charles Carter Shepherd

Plaintiff

And

Lundin Gold Inc. and Lundin Mining Corporation

Defendants

Corrected Judgment: This judgment was corrected on the front page on March 5, 2020

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiff:

R. Hungerford

M. Manolis

Counsel for the Defendants:

R. Millen

D. Urquhart

J. Hutchinson

D. Luca

Place and Date of Trial/Hearing:

Vancouver, B.C.

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Place and Date of Judgment:

Vancouver, B.C.

March 3, 2020

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## Introduction

- [1] The plaintiff, Mr. Charles Carter Shepherd ("Carter Shepherd" or "Carter"), seeks payment of a finder's fee relating to the purchase of a gold mine in Ecuador. He says he made an oral agreement with Mr. William Rand, a director of Lundin Mining Ltd. He says the terms of that agreement provided that he would represent a group of companies and lobby on their behalf to the government of Ecuador in relation to the purchase of the mining concession. If successful, he would receive a finder's fee. He says he took steps to promote those companies. One of the companies in the group did obtain the approval to purchase the mining concession. The plaintiff says that he carried out his side of the agreement and he is entitled to receive the finder's fee, which, he says, was 5% of the purchase price of the mine. The mining concession was purchased for \$240,000,000US. The plaintiff seeks damages of \$12,000,000US for breach of contract. In the alternative, the plaintiff seeks damages on a quantum meruit basis.
- [2] Lundin Mining Corporation ("Lundin Mining") and Lundin Gold Inc. (Lundin Gold") are the named defendants. They are two companies within a group of companies known as the "Lundin Group". Lundin Gold ultimately acquired the concession. The main force of the defence is a denial of any agreement with the plaintiff. In the alternative, the defendants submit that, if a contract exists, then it was not breached. They further submit that the plaintiff has no claim in quantum meruit. The defendants' counterclaim alleges that Carter

Shepherd and his father committed the tort of passing off on the name and logo of Lundin Mining.

- [3] For the reasons set out below, I dismiss the plaintiff's claims and the defendants' counterclaim.
- [4] I start these reasons with a description of the main players and their relationships, followed by a review of the facts from each party's perspective. I then discuss credibility and the legal issues engaged.

The Parties, Significant Witnesses, and Corporate Entities

### **Fruta del Norte, Kinross, and the Government of Ecuador**

- [5] The facts of this action revolve around a gold deposit in Ecuador known as the Fruta del Norte ("FdN"). The FdN is recognized in the mining industry as one of the most valuable gold deposits in the world in both "size" and "grade". "Size" relates to the total amount of gold in the concession. "Grade" refers to the concentration of gold in the concession. The FdN deposit was discovered in 2006 by an Ecuadorian company, Aurelian Resources Inc. ("Aurelian Resources").
- [6] Aurelian Resources was an exploration company, not a mining company. It needed a partner to extract the gold. In 2008, Kinross Gold Corporation ("Kinross"), a publicly traded Canadian mining company, acquired Aurelian Resources. The two companies structured the deal such that the Ecuadorian company, Aurelian Resources, continued to hold the rights to the concession and Kinross owned a controlling interest in Aurelian Resources.
- [7] During the period from 2008 to 2013, Kinross negotiated with the government of Ecuador in an attempt to reach an agreement whereby it would be profitable for Kinross to develop the FdN project and bring the mine into production. The government, led by then-President Rafael Correa, demanded royalties and taxes on both the revenues and the profits from the mine. The government's demands meant that Kinross could not see any way to develop the mine profitably.
- [8] On June 10, 2013, Kinross issued a press release indicating that it would not proceed any further with the development of the FdN project. The press release specifically mentioned that Kinross had been unable to reach an agreement with the government of Ecuador on an appropriate royalty structure. This press release was significant news in the mining industry worldwide. As described below, after June 10, 2013, Kinross set about attempting to sell its interest in the project.

### **Carter Shepherd and Scott Shepherd**

- [9] Carter Shepherd is 30 years old. He completed high school in Vancouver in 2007, and then attended St. Andrews University in Scotland where he studied international relations and Spanish, graduating in 2010. He speaks fluent Spanish. He worked as an intern at a bank in

Vancouver for the summers of 2007-2009. After university, the bank hired him as an analyst in its commercial division. In early 2011, he transferred to the bank's public companies division where he worked in business development. In mid-2012, he obtained an eight-month internship in the trade finance division of a bank in Munich, Germany. In 2013, he returned to Vancouver and started working for his father's company in the business development department with a focus on Latin American business. He had no experience in the mining industry.

- [10] Mr. Charles Scott Shepherd ("Scott Shepherd" or "Scott") is Carter's father. He is a successful executive with a long history in international trade. During the period of time material to this action, he was the Chief Executive Officer of Northstar Trade Finance Inc. ("Northstar"). Northstar was in the business of arranging loans to foreign countries that purchase goods and services from companies in Canada. Northstar had business interests in Ecuador. Northstar's other major shareholders were Canadian banks and the Province of British Columbia. Scott had no experience in the mining industry.
- [11] In order to distinguish between father and son, these reasons refer Carter Shepherd as "Carter" and his father as "Scott". I mean no disrespect by using their middle names.

### **William Rand, Lukas Lundin, and the Lundin Group**

- [12] Mr. William Rand ("Bill Rand" or "Mr. Rand") is a businessperson and former lawyer. He obtained his law degree from Dalhousie University in 1966. He practised law, primarily in the area of securities and corporate finance, until 1992. At that time, he ceased practising law and began operating an investment firm. His investment firm is operated in partnership with Mr. Brian Edgar. He has a long association with the Lundin family, initially as legal counsel and later acting as a director of one or more of the Lundin-related companies. At the times material to this action, he was a director of Lundin Mining. He was not a director of any other company within the Lundin Group.
- [13] Lukas Lundin is a mining magnate and a member of the Lundin family. His family has been involved in the mining industry for more than a generation. His family, and its family trust, are significant shareholders in 11 publicly traded mining companies that operate around the world. Those companies market themselves as the Lundin Group of companies, although each company has its own management and governance. The only relationship they have to each other is that the Lundin family has significant involvement as shareholders, or in management. Each company in the group is involved in a different aspect of mining; petroleum, base metals, diamonds, uranium, or precious metals.
- [14] The witnesses called by the defendants testified that mining companies are differentiated by the type of ore or petroleum they mine. Investors are interested in different market sectors. In other words, an investor may be interested in precious metals, but not base metals. Hence, a base metal company would not mine for precious metals.

- [15] Lundin Mining is a company primarily involved in the extraction of base metals. Mr. Paul Conibear, the current CEO, testified about Lundin Mining's involvement, or lack thereof, in the facts of this case.
- [16] Lundin Gold is a member of the Lundin Group. In 2013, it was a shell company, publicly traded under the name Fortress Minerals Corp. ("Fortress"). Prior to 2013, it had been involved in two gold mining projects. It sold those projects and, as of 2013, the company was looking for further opportunities. In 2014, Fortress changed its name to Lundin Gold Inc. The defendants called the following witnesses from Lundin companies: Lukas Lundin; Ron Hochstein, the current CEO of Lundin Gold; Paul Rockandel, formerly of GMP Securities LP and now an executive with Lundin Gold; and Rodrigo Borja, a Chilean lawyer who was involved in the deal. They testified about the steps taken to obtain the FdN concession from Kinross and the lobbying of the Ecuadorian government. The defendants also called Mr. Dominic Channer, who worked for Kinross in Ecuador. Mr. Channer testified about the breakdown of the relationship between Kinross and the Government of Ecuador, and the steps taken by Kinross to sell the concession and obtain government approval for the transfer of the concession.

### **Ecuadorians Who Were Involved**

- [17] Members of the Government of Ecuador played a large part in the transactions that are the backdrop to this lawsuit. However, no representatives of the government testified. Government officials involved in the FdN acquisition included: Rafael Correa (President), Jorge Glas (Vice President), Dr. Vinicio Alvarado (at various times, the Minister of Tourism and the Minister of the National Secretariat of Public Administration), Pedro Merisalde (Minister of Non-Renewable Natural Resources), and Rafael Poveda (Minister of Coordinating Strategic Sectors).
- [18] In addition, Carter had a number of friends and business associates in Ecuador. Again, they did not testify. They were: Alejandro Apolo (an Ecuadorian resident who was Carter's roommate at St. Andrews), Hector Apolo (the brother of Alejandro Apolo), Richard Saa (an entrepreneur in Ecuador), and Julio Alvarado (the brother of Dr. Vinicio Alvarado).

### **Background Facts**

- [19] Scott Shepherd and Bill Rand are executives in Vancouver. They became friends after meeting each other while sitting as Directors on the Board of the private school attended by their daughters. The two men had lunch once or twice a month. They often had dinner together with their respective spouses and families. The Rands invited the Shepherds to their yearly Christmas party. The Shepherds had stayed as guests at Mr. Rand's farm in Italy. By any definition, they were good friends.
- [20] Carter Shepherd attended university in Scotland from 2007 to 2010. While there, he roomed with Alejandro Apolo, a young man from Ecuador.

- [21] In April 2013, Carter Shepherd travelled to Ecuador on business for Northstar. While there, he took the opportunity to visit his university roommate. In turn, Alejandro Apolo introduced Carter to a group of people including his brother, Mr. Hector Apolo, and his friends, Mr. Richard Saa and Mr. Julio Alvarado.
- [22] This first trip to Ecuador occurred before the press release from Kinross regarding FdN. Carter had general discussions with Mr. Saa about the prospects for Canadian mining companies in Ecuador. Carter informed Mr. Saa that he knew people in the mining business in Canada.
- [23] After Carter returned to Vancouver, he exchanged a few messages with Mr. Saa. In July 2013, Mr. Saa phoned him regarding the FdN project. According to Carter, Mr. Saa informed him about the developments with Kinross. Mr. Saa asked whether Carter knew any contacts in Canadian mining companies because, in Mr. Saa's opinion, there was an opportunity to purchase the FdN project from Kinross.
- [24] Carter testified that, at the time he received this call, he was with his father. Carter suggested to his father that Mr. Rand might be interested in FdN. They both knew that Mr. Rand was a director of Lundin Mining.
- [25] Carter and Scott Shepherd both testified that, on the day that Carter received the call from Mr. Saa, Scott phoned Bill Rand. Scott informed Mr. Rand about the opportunity in Ecuador. Following that phone call, Carter testified that it was his understanding that Mr. Rand had stated that the FdN was a "great asset" and the call "got his attention." However, Carter and Scott both testified that Mr. Rand expressed significant concerns about the political situation in Ecuador.
- [26] Scott Shepherd's evidence about his discussions with Mr. Rand during this period was imprecise. It does not accord with the details in Carter's testimony. That imprecision and those inconsistencies are not surprising given the effluxion of time. However, I find that Scott's evidence has evolved over time to fit the narrative of his son's case. I discuss his testimony about this, and subsequent phone calls and meetings, below.
- [27] Mr. Rand testified that he does not recall this telephone call.
- [28] Carter testified that, after Scott's first call with Mr. Rand, he phoned Mr. Saa to inform him that Lundin Mining was interested in the project, but that he (Carter) had further work to do.
- [29] During the first part of August 2013, Carter and Mr. Saa started working on drafts of a letter that they planned to send to President Correa of Ecuador regarding the FdN project. Carter exchanged those drafts with Mr. Saa and Mr. Hector Apolo. The three men refined the wording during the month. Several drafts were introduced into evidence. The first drafts did not mention Lundin Mining or any other specific mining company.

[30] As discussed below, the alleged contract that is the subject of this action, if it exists, was formed on August 28, 2013, during a meeting between Carter and Mr. Rand. Whether relevant or not, I note that drafts of the letter to President Correa, prepared before August 28, 2013, included references to Lundin Mining.

[31] The first drafts of the letter contained language indicating that the authors of the letter had formed a "sociedad" or "society" that would manage the development of the FdN project. The August 22, 2013 draft stated, in part:

There have been too many examples of foreign mining companies not acting in the best interest of the nations where they operate, and this has led to many communities' resentment and hostility towards foreign mining companies. We are certain that the best solution is a partnership which maintains Ecuadorean ownership and direction over the project, while at the same time implementing the very best technology and expertise from an international mining company to ensure that production reaches its maximum potential.

[32] This draft predated the alleged meeting involving Mr. Rand. The corporate structure proposed by the authors was the formation of a company that would obtain the rights to the FdN concession. That company would then contract with a mining company to extract the ore. The ownership of the concession, as the draft states, would be Ecuadorean. The August 22, 2013 draft did not mention Lundin Mining.

[33] A draft of the letter created by Mr. Hector Apolo on August 27, 2013, named Lundin Mining and Northstar Trade Finance and displayed their logos. That draft indicated that Scott Shepherd would be signatory. The letter was drafted under the letterhead of "United Mining Ecuador". The letter stated that United Mining Ecuador was a "filial" (or subsidiary) of Lundin Mining. Again, this version pre-dated any alleged meeting with Mr. Rand.

[34] No entity named United Mining Ecuador ever came into existence.

[35] At some point in August 2013, Scott Shepherd phoned Mr. Rand to request that he meet with Carter. Scott testified:

A Yeah, I had two calls with Bill, one with Carter sitting with me on the -- or standing with me, actually, on the patio, and then a second one just prior to Carter going over and having the meeting with him where I gave him more details. I said, more than ever, Bill, I said, this is a really terrific opportunity for Lundin; I think the asset can be repointed within the Lundin Group, and I honestly think you should spend some time and hear Carter out. So Carter then met with Bill.

Q And did you tell -- what did you tell Carter regarding your call with Mr. Rand?

A Prior to his meeting with Bill?

Q Yes.

A Yeah. So I told Carter that Bill was pessimistic regarding Ecuador. I told him that he needed a few more details, but I think he was very fairly disposed for the opportunity because he didn't think that, frankly, anybody was looking at it yet, and it may be a good opportunity. So ...

Q Okay.

A It was a very positive result.

[36] Despite his testimony that there were "two calls with Bill", Scott later testified about a third call with Mr. Rand. Further, it is clear from the draft letters exchanged between Carter, Mr. Saa, and Mr. Apolo that their proposal involved the ownership of the FdN concession by an Ecuadorian entity. Hence, there was no opportunity to "repoint" the asset within the Lundin Group. Again, I find that Scott Shepherd's evidence on this point has evolved to fit the plaintiff's narrative.

[37] There is conflicting evidence regarding whether Carter actually met with Mr. Rand. Mr. Rand has no recollection of such a meeting.

[38] During the course of the litigation, in answering a demand for particulars, Carter responded that the meeting occurred on August 18, 2013. Mr. Rand's calendar established that he was not in Vancouver during that week. Carter later revised his response to indicate that he believed the meeting occurred on August 28, 2013. He produced contemporary emails indicating that he was walking to Mr. Rand's office on that date. He produced another email from the following week indicating that he had met with Mr. Rand.

### **The Meeting Involving Carter and Mr. Rand**

[39] As noted, Mr. Rand says he does not have any recollection of a meeting with Carter at any point in August 2013. There is no documentary evidence of any meeting apart from Carter's contemporary emails noted above. There are no documents that evidence any alleged agreement, or even a discussion, between Mr. Rand and the plaintiff. Further, there are no emails, letters, or phone calls between Carter and Mr. Rand after the alleged meeting.

[40] Carter says that the following happened on August 28, 2013:

- a) There was an email exchange between Carter and Mr. Rand's daughter that occurred between 11:49 a.m. and 12:12 p.m. Carter asked for Mr. Rand's office address. The emails indicate that Mr. Rand was leaving for Europe on Friday, August 30. From these emails, it can be determined that any alleged meeting could not have occurred before noon on August 28, nor later than the close of business on August 29, 2013.
- b) There is another email sent the next week from Carter to Mr. Rand's daughter wherein Carter advised that he had met with her father. The plaintiff submits that these contemporaneous emails prove that a meeting occurred.

- c) Carter went to Mr. Rand's office in the HSBC Building. Carter described Mr. Rand's office and the circumstances of the meeting in significant detail. He says the meeting lasted about 25 minutes. He understood at the time that Mr. Rand was a lead director of Lundin Mining.
  - d) After the two men exchanged "niceties", Carter brought up the subject of the FdN project. According to Carter, Mr. Rand acknowledged that he was aware of the FdN discovery, and stated that he had great concerns about the Ecuadorian government.
  - e) Carter told Mr. Rand that he had connections in Ecuador, and he would like to try to secure the FdN asset for Lundin Mining. He asked for authority to represent Lundin Mining with the government of Ecuador. Carter testified, "[t]o which Mr. Rand looked me in the eye, and he said yes. He said yes."
  - f) Carter then raised the issue of compensation. Mr. Rand stated that the type of compensation Carter was seeking was a "finder's fee" and the industry standard for such a fee was between 5% and 7%. Mr. Rand offered 5% and Carter accepted.
  - g) Mr. Rand indicated that he and Lundin Mining would look after the negotiations with Kinross. Mr. Rand noted that he was a good friend of the Chief Financial Officer ("CFO") at Kinross and would contact him. It is noteworthy that Carter was able to name the CFO of Kinross, and that person is, in fact, a good friend of Mr. Rand's.
  - h) Following this meeting, Carter returned to Northstar's offices. He reported the subject matter of the meeting to his father.
- [41] Scott Shepherd testified that when Carter returned to his office and told him about the meeting with Mr. Rand, he immediately phoned Mr. Rand to confirm Carter's information. This would be his third call with Mr. Rand. He testified that he confirmed the terms of the "finder's fee" agreement because he did not want Carter committing time and effort to a venture without any basis for doing so.
- [42] Again, I find that Scott's testimony was imprecise on this point. His description of the topics that he discussed with Mr. Rand on this third call are significantly more detailed than Carter's. For example, Scott says that he discussed with Mr. Rand three possible structures, private ownership, public ownership, or private/public partnership. Carter's evidence, discussed below, indicates that he had not discussed those three options with Mr. Rand. Again, I find that Scott Shepherd's recollection of this phone call, if it occurred, has evolved over time to accord with the plaintiff's allegations.
- [43] Both parties agree that if an agreement was reached between Carter and Mr. Rand, it was reached at the meeting on August 28, 2013.
- [44] As noted, Mr. Rand denies any recollection of any meeting at his office with Carter. He also says that if Carter had asked him for authority to represent Lundin Mining, he would have sternly refused such an entreaty. He says that he would have remembered such a conversation if it had occurred, and he denies that it occurred.

- [45] The defendants called a number of witnesses. Most of them had knowledge of Canadian corporate governance. They all testified that a director of a public company does not have the authority to contract on behalf of the company, either orally or in writing. Further, Mr. Rand testified that the standard rate for a finder's fee in the mining industry is never 5% on this type of deal. Instead, he testified that any such fee would be in the range of 0.5%. These issues are discussed in more detail later in these reasons.
- [46] In the notice of civil claim, the terms of the alleged representation agreement are described as follows:
- a. Shepherd would travel to Ecuador as a representative of Lundin Mining and its affiliates, including Lundin Gold;
  - b. Shepherd would, with the assistance of his contacts and colleagues in Ecuador, introduce Lundin Mining and its affiliates, including Lundin Gold, to key government officials and persons in the mining industry in Ecuador;
  - c. Shepherd would advise these officials and persons of the interest of Lundin Mining or one [sic] its affiliates, including Lundin Gold, in acquiring the Fruta del Norte project;
  - d. Lundin Mining and its affiliates, including Lundin Gold, would not circumvent the efforts undertaken by Shepherd by contacting these officials and persons directly without informing Shepherd; and
  - e. In the event the Lundin Mining or one of its affiliates, including Lundin Gold, acquired the Fruta del Norte project, Shepherd would be paid a standard rate finder's fee, which standard rate was, at all material times, 5% of the acquisition price.
- [47] At trial, the plaintiff's testimony and submissions argued the existence of an agreement with those terms.

### Events Subsequent to the Alleged Formation of the Contract

- [48] As noted above, the parties do not agree on whether Carter met Mr. Rand. There is a similar lack of agreement relating to the facts that transpired after August 28, 2013. Put simply, the parties proceeded down different roads and did not cross paths, except as discussed below.
- [49] Both parties agree that at no time did Mr. Rand take any steps indicating that he believed that that he had contracted with Carter on behalf of Lundin Mining or any entity. Mr. Rand did not contact the CFO of Kinross. He did not report Carter's proposed actions to anyone at Lundin Mining nor any other company in the Lundin Group. There is no evidence that Mr. Rand spoke to anyone within the Lundin Group about the FdN project at all.
- [50] The plaintiff adduced evidence to establish that he pushed forward on the understanding that he had authority to represent Lundin Mining and that he was effective in lobbying the Ecuadorian government.

[51] Carter Shepherd's actions between August 2013 and October 2014 fall into five broad time frames:

- a) drafting the initial letter and the consequences flowing;
- b) trip to Ecuador in November-December, 2013;
- c) hosting Ecuadorians in February 2014;
- d) trip to Ecuador in July 2014; and
- e) trip to Ecuador in August 2014.

[52] I discuss the steps taken in each period below.

#### August-October 2013: Drafting the Letter and its Consequences

[53] Following the alleged August 28, 2013 meeting, Carter continued to work on draft letters with Mr. Saa.

[54] There is no evidence that, upon leaving Mr. Rand's office on August 28, 2013, Carter communicated to any of his friends in Ecuador that he had secured an agreement to represent any Lundin company. Given that such agreement was necessary for the purpose of the letter to the President, it is reasonable to expect that, having extracted such an agreement from Mr. Rand, Carter would have immediately notified his friends that he had achieved that goal.

[55] The final version of the letter was sent on September 4, 2013 (the "September 4 Letter"), under the letterhead of "EcuaCondor Unidad Minera" which translates as "EcuaCondor Mining Unit" ("EcuaCondor"). Mr. Saa signed the letter. It contained the logo of Lundin Mining. This fact is relevant to the counterclaim.

[56] Mr. Saa addressed the September 4 Letter to President Correa of Ecuador. The letter proposed the creation of a new entity consisting of EcuaCondor in a public/private partnership with the state of Ecuador. The new entity would hold the exclusive right to develop FdN. It stated that Lundin Mining was a strategic partner of EcuaCondor. It contained several other terms and proposals. Carter testified that Mr. Saa sent the letter upon his (Carter's) instructions.

[57] Carter did not provide a copy of the September 4 Letter to Mr. Rand.

[58] Scott Shepherd and his wife visited at Mr. Rand's farm in Italy at some point around September 11, 2013. Scott testified that he reported to Mr. Rand that the September 4 Letter had been delivered. Mr. Rand has no recollection of any conversation regarding that letter or the FdN project.

[59] On September 13, 2013, Mr. Saa sent a second letter to the President of Ecuador (the "September 13 Letter"). Mr. Saa drafted and signed the September 13 Letter on the letterhead of EcuacCondor. It included the logo of Lundin Mining. It translates as follows:

EcuacCondor Unidad Minera Nacional is proposing to our country Ecuador a revolution of freedom which would permit us to be the conquerors of classic neocolonialism, which, in decades past was led by the USA and in the present time it is the Chinese who want to take control. EcuacCondor proposes to carry out and fulfill the development of our country, thinking always in an Ecuador for the Ecuadorian people!

Together with you and your vanguard politics we could create a national mining revolution. It would serve as an example to neighbouring countries.

[60] Although the exact meaning of this letter is unclear, it is impossible to read the letter as being favourable to mining companies like Lundin. It was a nationalist plea to keep the ownership of mining resources within Ecuadorian hands. It was inconsistent with the prospect of a Lundin company purchasing the FdN concession.

[61] When asked whether Mr. Rand had authorized him to send such a letter, or to propose the involvement of an entity like EcuacCondor, Carter answered:

Q You believe that Lundin Mining wanted to be represented in this fashion?

A I believe Lundin Mining would be -- wanted to be represented in the fashion -- whatever fashion would be appropriate in helping it to secure the asset in question, which was the Fruta del Norte gold asset, which they eventually did acquire with permission from Dr. -- Mr. Jorge Glas.

Q Let me break that down a bit. First of all you said "whatever fashion would be appropriate." You thought that this fashion was appropriate?

A I was not advised otherwise.

Q You didn't seek any input from Lundin Mining on this particular letter, though?

A I thought that this was appropriate.

Q So it was whatever fashion you determined to be appropriate; correct?

A I was not advised, so I felt that this was -- was appropriate. And the wording was appropriate.

Q Only in your view, not in the view of anyone from Lundin Mining; correct?

A I believe that I was speaking on behalf of Lundin Mining as a whole.

Q And you just stated a moment ago that you believed Lundin Mining would be represented -- wanted to be represented in the fashion -- whatever fashion would be appropriate in helping it to secure the asset in question, which was the Fruta del Norte gold asset, which they eventually did acquire. That's what you said?

A That's what I just said, yes.

- [62] In cross-examination, Carter testified that he chose the wording of the September 13 Letter and directed Mr. Saa to send it. However, there are no emails between Mr. Saa and Carter wherein they exchanged drafts of that letter. Further, Mr. Saa sent the letter just nine days after the first letter to the President and before the President's office had responded to the first letter.
- [63] As noted above, at paras. 41-42, Scott testified that he confirmed with Mr. Rand that the proposal would use one of three types of ownership structure. It is clear from Carter's testimony that he does not assert that he had explained any possible structures to Mr. Rand. Instead, Carter believed that he had the ability to represent Lundin Mining in whatever manner he felt was appropriate. As he noted, Mr. Rand had not put any restrictions on him. Scott Shepherd's testimony regarding the details of his alleged third phone call with Mr. Rand does not accord with the rest of the evidence.
- [64] On September 18, 2013, Mr. Saa received a letter from the office of the President (the "President's Letter") indicating that the September 4 Letter had been forwarded to the General Secretary of the Vice presidency of the Republic. At that time, the Vice-President was Mr. Jorge Glas. All parties agree that, following a change in government, Mr. Glas was convicted on corruption charges and is currently serving a prison sentence.
- [65] There is no evidence that Carter informed Mr. Rand about the President's Letter.
- [66] On September 24, 2013, Carter sent an email to his father copying an article from The Economist magazine and asking his father to get Mr. Rand's attention on the subject. The article related to Ecuador proposing to cut mining royalties. Carter did not email the article directly to Mr. Rand.
- [67] By emails exchanged on October 2, 2013 Mr. Saa and Carter developed drafts of a letter to Dr. Vinicio Alvarado in his capacity as the Minister of Tourism. They drafted the letter under the letterhead of EcuCondor. It discussed the prospects for tourism in Ecuador. When asked about this letter, the plaintiff testified that he had little interest in tourism and that he was focussed on FdN. He said that he was sometimes frustrated with Mr. Saa because Mr. Saa was not always focussed on the FdN project.
- [68] On October 7, 2013, the office of the President sent a second letter to Mr. Saa, indicating that they had forwarded the September 4 Letter to Mr. Pedro Merizalde, the Minister of Non-Renewable Natural Resources.
- [69] Carter and Scott Shepherd went to dinner at the Rands' house on November 10, 2013. Carter and Scott say that they discussed the FdN project. Carter says that he told Mr. Rand at that meeting that he intended to travel to Ecuador. Mr. Rand has no recollection of that discussion.

**November-December 2013: Trip to Ecuador**

- [70] Carter testified that, as of October 2013, his plan was to travel to Ecuador to meet with Dr. Vinicio Alvarado and any other government officials to lobby on behalf of Lundin Mining. Carter's friends Julio Alvarado and Richard Saa lived in the industrial centre of the nation, the city of Guayaquil. Vinicio lived in the capital city, Quito.
- [71] During this period, Carter was a full-time employee of Northstar. He says that he sought from his father, and received, authorization to continue his work in Ecuador as a side project, as long as it did not affect his work with Northstar. Scott Shepherd confirmed this evidence.
- [72] Carter travelled to Ecuador from November 28 to December 15, 2013. His father paid for the flight. He testified that the purpose of his trip was to meet with Dr. Alvarado to further his work on behalf of Lundin Mining. However, it is evident from his testimony that no such meeting had been arranged before he departed from Vancouver. Carter appears to have been relying on statements made by Julio Alvarado that he would attempt to arrange a meeting with his brother Vinicio. Hence, Carter was travelling with the intention of meeting with Mr. Saa and Julio Alvarado.
- [73] While in Ecuador, Carter spent some time in Guayaquil meeting with Julio and Mr. Saa. He then travelled to Quito, and to the Galapagos Islands, to view an eco-resort. Upon arrival back in Guayaquil, Carter heard from Julio Alvarado that a meeting had been arranged with Vinicio in Quito. That meeting required Carter to fly from Guayaquil to Quito by himself. It is indicative of Carter's lack of experience that his father would not let him travel to Quito without an Ecuadorian to escort him. Mr. Saa travelled to Quito and stayed with Carter at his hotel.
- [74] Carter had a lunch meeting near Quito with Dr. Vinicio Alvarado. Also in attendance were Mr. Saa and Julio Alvarado. Carter testified that Julio advised him that Vinicio was, at that time, the Minister of the Public Administration and an influential decision maker in the government. Carter was also informed that Vinicio held the additional post of Minister of Tourism at some point. However, there was no indication from the President's Letter to Mr. Saa that Dr. Vinicio Alvarado would be involved with decision-making on the FdN concession.
- [75] Carter testified that at the lunch meeting with Vinicio, he lobbied on behalf of Lundin Mining. He says that the only topic discussed was the FdN project. He testified that he advised Vinicio that:
- a) he represented Lundin Mining and spelled the company name for Vinicio;
  - b) his family had close ties to a director at Lundin Mining and he had spoken "to people" at Lundin about FdN;

- c) Lundin Mining was very interested in reaching an agreement with the government of Ecuador;
  - d) Lundin Mining has an excellent track record in other jurisdictions; and
  - e) Lundin Mining was willing to work cooperatively to come to solutions together.
- [76] As of the date of this lunch meeting, points c) and e) were not true on any version of the facts.
- [77] Mr. Saa and Julio Alvarado were at the lunch meeting. They had no interest promoting Lundin Mining.
- [78] Carter phoned his father to report on the meeting. He returned home on December 15, 2013.
- [79] Carter made no written record of the meeting with Dr. Vinicio Alvarado.
- [80] Carter and Scott testified that they reported on this meeting to Mr. Rand at Mr. Rand's Christmas party on December 20, 2013. Carter and Scott both testified that they pulled Mr. Rand aside at the Christmas party for about 10-15 minutes to discuss the developments in Ecuador. They both testified that Mr. Rand continued to express concerns about the economic policies of the government in Ecuador. However, they both testified that Mr. Rand expressed that it was "great news".
- [81] Mr. Rand has no recollection of such a conversation at his 2013 Christmas party.

### February 2014: Hosting Ecuadorians

- [82] Carter testified that, following his return to Vancouver, he stayed in contact with Julio Alvarado, and they decided that they needed to see each other again.
- [83] In late 2013 and into 2014, Carter discussed with Julio Alvarado the possibility of opening an Ecuadorian trade and tourism office in Vancouver. Julio and Carter discussed the possibility of incorporating a company to provide services in that regard. They referred to that proposal as the general sales agency ("GSA"). Their efforts toward the GSA were unrelated to the FdN.
- [84] Julio made plans to travel to Vancouver from February 13-15, 2014. He travelled with another man who was primarily interested in improving tourism links between Canada and Ecuador.
- [85] Scott Shepherd's company, Northstar, was involved in international trade and would have been a helpful ally in tourism and trade discussions. Scott planned to be away during this period in February. As a result, Scott asked Mr. Tenzin Kangsar to be involved in the meetings to assist Carter. Mr. Kangsar was the representative of the Province of British Columbia on the Board of Northstar. Mr. Kangsar testified that Carter asked him to be involved with the planned meeting in Vancouver. Carter briefed Mr. Kangsar on the FdN project and the prospect of opening an Ecuadorian trade office in Vancouver. At the time,

Mr. Kangsar was looking for a business opportunity of his own.

- [86] The meetings in Vancouver consisted of a dinner, then drinks on the first evening. Carter testified that he only discussed the FdN project when Julio's associate was away from the table.
- [87] The men then met again at the office of Northstar the following day. At the second meeting, they discussed tourism and the prospect of an Ecuadorian trade office in Vancouver. During the times that Julio's associate was out of the boardroom, the men discussed the FdN project. Carter testified that he expressed his view that it would be important to get a meeting with the Vice-President, Mr. Jorge Glas.
- [88] Carter met with Julio again in the lobby of Julio's hotel on the evening of February 14. During this meeting, Carter was given to understand that Julio had been in contact with Vinicio.
- [89] Mr. Kangsar exchanged several emails both before and after the meetings with Julio. None of those documents referenced the FdN project or Lundin Mining. The documents exchanged after the meeting discuss eco-tourism in the Galapagos Islands, air travel between Canada and Ecuador, and the prospect of opening an Ecuadorian trade office in Vancouver.
- [90] Mr. Kangsar testified that he understood, following the meetings in Vancouver, that Julio was encouraging Carter and Mr. Kangsar to travel to Ecuador to further the discussions regarding the FdN project.
- [91] Although Mr. Kangsar testified about promoting Lundin for the FdN project, he did not testify that he knew of any agreement that Carter had with Lundin or Mr. Rand for a finder's fee. Again, Mr. Kangsar's interest in the meeting was to discover whether there was any potential business opportunity for himself. Carter did not advise him of the prospect of a finder's fee and did not offer to compensate him for his efforts relating to FdN.
- [92] Although Julio was visiting Vancouver from Ecuador, Carter made no attempt to introduce him to Mr. Rand. Nor did he report this meeting to Mr. Rand.

### July 2014: Trip to Ecuador

- [93] Following the meeting with Julio in February 2014, Carter and Scott Shepherd set about attempting to obtain a meeting with government officials in Ecuador.
- [94] In April 2014, Carter and Scott worked on drafts of a letter to Dr. Vinicio Alvarado. Those drafts were on Northstar letterhead and were to be signed by Scott. The final version of the letter did not mention either FdN or Lundin Mining. It sought a meeting to discuss "strategic projects in Ecuador." Carter and Scott testified that that phrase meant the FdN project. For context, it is important to recall that Scott was CEO of Northstar, a company that was involved in international trade. Hence, the fact that government officials were willing to

arrange a meeting with him was not surprising.

- [95] Scott sent the final version of the letter on May 1, 2014, on Northstar letterhead (the "Northstar Letter").
- [96] Neither Carter nor Scott provided a copy of the Northstar Letter to Mr. Rand.
- [97] On the same day Scott mailed the Northstar Letter, Carter sent a copy of it to Mr. Saa by email. Mr. Saa responded, "Bien monstrito" which translates as "good little monster". I discuss below the inference to be drawn from the fact that Carter copied the letter to Mr. Saa on the same day it was sent, but did not report its existence to Mr. Rand.
- [98] Carter and Scott received responsive emails from the office of the National Secretary commencing on June 9, 2014. That office sought information about the dates that Scott Shepherd would be available for a meeting and requested a list of the subjects that he wished to discuss.
- [99] In subsequent emails to the office of the National Secretary, Scott Shepherd arranged for meetings to be held in late August 2014. He also arranged for Carter to attend as his translator.
- [100] Carter travelled to Ecuador from July 8-14, 2014. He testified that he made that trip in order to make sure that arrangements were going smoothly for the meeting with Mr. Glas.
- [101] During this trip, Carter did not have any official meetings with any government officials. However, he did watch the 2014 World Cup soccer final at Julio Alvarado's home with Dr. Vinicio Alvarado and Mr. Saa. During the game, Carter says that he talked to Vinicio about Lundin Mining. He also placed a call to his father and introduced him to Vinicio over the phone.
- [102] As discussed below, the plaintiff submits that this was another meeting that laid the groundwork for Vinicio promoting Lundin Mining within the government. Again, the inference to be drawn from the fact that Carter travelled to Ecuador to meet with Julio Alvarado and Mr. Saa, without having set up any meetings with government officials is discussed below.
- [103] Carter left Ecuador on July 14, 2014.
- [104] Carter says that after returning from Ecuador, he had a further meeting with Mr. Rand at the coffee bar in Mr. Rand's office building in July 2014. Carter says that he bumped into Mr. Rand and they discussed the FdN and Carter's efforts on behalf of Lundin Mining for 10-15 minutes.
- [105] Mr. Rand does not recall any meeting with Carter at the coffee bar.
- [106] Carter produced no documents relating to the coffee bar meeting with Mr. Rand.

[107] Although Carter's alleged reporting to Mr. Rand during this period was limited to the coffee bar meeting, Scott Shepherd testified that he reported Carter's progress to Mr. Rand on several occasions. Mr. Rand does not recall those interactions.

### August 2014: Trip to Ecuador

[108] As noted above, Scott Shepherd was in email communication with the office of the National Secretary. Starting June 2014, the office of the National Secretary began requesting Scott's available dates for a meeting and an outline of the topics to be discussed at the meeting.

[109] After several emails, they agreed that Scott Shepherd would travel to Ecuador and be available for meetings from August 27-29, 2014.

[110] On August 18, 2014, Scott sent a three-page "aide memoire" to the office of the National Secretary with the discussion topics. That document mentions four main topics: resources, transportation and tourism, retirement opportunities, and export opportunities for Ecuadorian products. It does not mention the FdN project or Lundin. However, the document does discuss the opportunity to move "a number of projects forward" and the wish to "discuss and investigate some new solutions". Scott testified that those phrases were veiled references to the FdN. Scott also sent his Northstar curriculum vitae.

[111] In August 2014, Scott and Carter travelled to Ecuador. They arrived on August 25, 2014. A government vehicle picked them up at the airport in Quito.

[112] Carter and Scott spent the next day in a boardroom with Julio Alvarado and Mr. Saa. Scott described the meetings as intense briefings to bring him fully up to speed for the meeting with Mr. Glas.

[113] Again, Mr. Alvarado and Mr. Saa were not involved in the lobbying efforts on behalf of Lundin; they were pushing the proposal that EcuCondor obtain the FdN concession. The inference to be drawn from their involvement in a long briefing of Scott Shepherd is discussed below.

[114] Scott and Carter met with Dr. Vinicio Alvarado and the Vice-President, Julio Glas, on August 26, 2014, in the late afternoon at a national government building. Carter acted as translator for his father. The main participants in the meeting were Scott Shepherd and Julio Glas. According to the testimony of Carter and Scott, the meeting was primarily about the promotion of Lundin Mining to the government of Ecuador. Scott testified that he lobbied on behalf of Lundin Mining and lauded the company's track record of positive social engagement and environmental stewardship. Scott testified that he told the truth about Lundin Mining's record.

[115] Carter and Scott prepared a "Contact Report" following the meeting. At his Examination for Discovery, Scott Shepherd described the document as a "precise" description of the meeting. The Contact Report describes five topics that were discussed, the first of which was "Solution for Ecuador for the Mining Industry". Carter and Scott testified that this

heading referred to their discussions regarding FdN. Carter and Scott testified that they did not mention FdN or Lundin in the Contact Report because they wanted to keep the discussion confidential. However, the Contact Report was solely for their use. Nobody else would see it.

- [116] The plaintiff did not call any evidence from any government officials in Ecuador. At trial, the plaintiff argued that certain statements allegedly made in Spanish by Vice-President Glas, and translated by Carter to his father, should be accepted for their truth. The plaintiff submitted that, although the statements were pure hearsay, a principled approach to the hearsay rule would allow the Court to admit the statements into evidence.
- [117] I declined to admit the statements of Mr. Glas into evidence for their truth. I noted that one of the statements involved Mr. Glas apparently imploring Scott Shepherd to help him find someone to develop the FdN project because he had no one. As discussed below, if Mr. Glas made that statement on August 26, 2014, it was clearly not true. Further, if Mr. Glas made that statement on that date, it would suggest that the Vice-President was seeking a purchaser for FdN other than Lundin Mining, the company that Scott Shepherd was promoting.
- [118] It is clear that Scott Shepherd made a positive impression on the government officials. They asked Scott and Carter to attend further meetings with the Canadian ambassador. At those meetings, they reviewed a draft consultant's report about potential mining royalty structuring. Scott Shepherd provided his thoughts on that topic.
- [119] On August 28, 2014, Carter and Scott attended a dinner with several other guests at Dr. Vinicio Alvarado's home.
- [120] Carter and Scott flew home on August 30, 2014. Scott testified that he met with Mr. Rand soon after his return, reported on his meeting with the Vice President and provided Mr. Rand with the draft consultant's report on mining royalties. He recalled that Mr. Rand was still very negative about the prospect of doing business in Ecuador because of the way its government had treated Kinross.
- [121] Carter Shepherd did not have any communication with Mr. Rand after this trip to Ecuador.
- [122] Mr. Rand has no recollection of any meeting with Scott during this period, and he has no recollection of receiving the draft consultant's report. Further, as discussed below, if Scott Shepherd's recollection is correct, and if Mr. Rand continued to express significant concerns about dealing with the government of Ecuador in September 2014, it establishes that Mr. Rand was unaware of any steps taken by Lukas Lundin before September 2014.
- [123] Scott Shepherd's meeting with Mr. Rand in September 2014, if it occurred, was the last step that Carter alleges that he took in furtherance of his agreement to represent Lundin Mining or the Lundin Group.

[124] As noted above, the plaintiff does not allege that Mr. Rand took any steps in furtherance of the alleged agreement. Further, according to the testimony of the Shepherds, Mr. Rand remained negative to the idea of conducting business in Ecuador throughout their meetings.

[125] As discussed below, there had been significant steps taken by the Lundin Group without the knowledge of Carter Shepherd, Scott Shepherd, or Mr. Rand.

#### Summary of the Efforts of Carter Shepherd

[126] The efforts of Carter Shepherd toward lobbying on behalf of Lundin with the government of Ecuador, consist of:

- a) drafting the September 4, 2013 letter with Mr. Saa and Julio Alvarado;
- b) travelling to Ecuador in November-December 2013 and meeting for lunch with Vinicio and Julio Alvarado, and Richard Saa. At that lunch, he informed Vinicio that Lundin Mining was interested in FdN;
- c) hosting Julio Alvarado in February 2014 in Vancouver where they discussed the steps necessary to move the FdN project ahead as well as tourism between Canada and Ecuador;
- d) travelling to Ecuador in July 2014 when he watched the World Cup final with the Alvarado brothers, Mr. Saa, and others; and
- e) travelling to Ecuador in August 2014 with his father. During this trip, his father ran the meeting with Vice-President Glas. Carter acted as a translator. To prepare for that meeting, Carter and Scott met with Mr. Saa and Julio Alvarado for the entire day.

[127] I noted above the various points at which Julio Alvarado and Richard Saa were involved in Carter's efforts. It is evident from the summary above that the two men were involved at every step.

[128] I now turn to the events that occurred on the Lundin side of the ledger.

#### Developments from the Lundin Side

[129] The defendants called the following witnesses regarding the process that ultimately led to Lundin Gold purchasing the concession for the FdN project from Kinross: Mr. Dominic Channer, Mr. Peter Rockandel, Mr. Lukas Lundin, and Mr. Ron Hochstein.

[130] There is no dispute regarding the chronology of events relating to the developments leading to the sale from Kinross to Fortress (later Lundin Gold):

- a) Following the June 10, 2013 announcement that Kinross had terminated negotiations with the Ecuadorian government, Kinross set about trying to find a buyer for the FdN concession. Any such sale had two necessary components: Kinross would have to agree to a sale price, and the purchaser would have to come to an agreement with the government of Ecuador.

- b) As of May 2014, Dominic Channer worked for Kinross. He was the President of Aurelian Resources (which held title to the FdN concession) and Vice-President, Ecuador for Kinross. He testified that prior to May 2014, there were several approaches to Kinross and the government of Ecuador by potential purchasers. Most suitors were either not serious or not qualified. One company was qualified, but negotiations broke off in April or May 2014.
- c) In May 2014, Mr. Peter Rockandel, then a Vice-President with GMP Securities LP, arranged a lunch meeting between Lukas Lundin and executives from Kinross including President and CEO Paul Rollinson, and Executive Vice-President and Chief Legal Officer Geoff Gold. Mr. Rockandel was a friend of both Mr. Lundin and Mr. Gold. He knew that Fortress Minerals (a company in the Lundin Group) was looking for a gold mining project. He also knew that Kinross was seeking a buyer for the FdN project. Mr. Rockandel was interested in arranging a deal between the two mining companies because he expected that GMP Securities would be an advisor to Fortress on the purchase and obtain the contract on the issuance of shares to raise the capital that would finance the purchase.
- d) Following that lunch meeting, Mr. Lundin asked Mr. Hochstein, then the president of another company in the Lundin Group, to put together a team to conduct due diligence at Kinross. That work was substantial.
- e) Lukas Lundin and the group decided that it would be very important to travel to Ecuador for two reasons: to meet with the appropriate government officials in Ecuador and to view the mine site. Because Kinross owned the concession, Kinross was responsible for setting up meetings with the government. Kinross assigned Mr. Channer to that task. Mr. Channer had a Chilean lawyer on retainer, Mr. Rodrigo Borja, to deal with government relations for Kinross. Kinross first notified the Ecuadorian government that a Lundin company was a prospective purchaser in mid-June 2014.
- f) On June 27, 2014, Mr. Lundin, Mr. Hochstein, and others from Fortress travelled to Quito and met with Pedro Merizalde, the Ecuadorian Minister of Non-renewable Natural Resources. They went through a PowerPoint presentation outlining the positive attributes of companies in the Lundin Group. It is obviously notable that Mr. Lundin personally met with the government officials to promote his companies and indicate their interest in reaching an agreement on royalties and taxation.
- g) Mr. Lundin, Mr. Hochstein, and other executives from Fortress then travelled to the FdN site to examine it.
- h) Upon returning to Quito, the Fortress group met with Minister of Co-ordinating Strategic Sectors, Mr. Poveda, on June 30, 2014. The Fortress group then returned to Canada.

- i) As of this point in time, Carter Shepherd's efforts with the government of Ecuador consisted of contributing to the original September 4 Letter (from EcuCondor) and having the lunch meeting with Dr. Vinicio Alvarado in December 2013. In addition, Scott Shepherd had sent the Northstar Letter on May 1, 2014, but that letter did not mention the Lundin Group or FdN.
- j) As of the beginning of July, there were two issues for Lundin to resolve with Ecuador, one large and one small. The big issue related to the length of time that Ecuador would allow Fortress to conduct a feasibility study. Fortress needed that period of time to be as long as possible. The smaller issue was the name of the company. The government wanted a "Lundin" company to be involved. That request eventually led to the name change from Fortress Minerals to Lundin Gold.
- k) In addition, Kinross and Fortress/Lundin Gold had to negotiate the final terms of the agreement. Any sale was, of course, subject to obtaining the approval of the government of Ecuador.
- l) Between July 1-9, 2014, Fortress and Kinross drafted a joint letter with a proposal to the government of Ecuador. The final version was sent on July 9, 2014 (the "Fortress/Kinross Letter").
- m) The government of Ecuador provided a written approval of the Fortress/Kinross Letter on August 27, 2014. Notably, that was the day after the meeting between Scott Shepherd and Julio Glas. The plaintiff puts significant importance on that timing.
- n) However, during the period between July 9 and August 27, the representatives of Kinross were in near-constant contact with representatives of the government. Kinross regularly updated Fortress on the information they received from the government. On August 22, 2014, Kinross advised Lundin that President Correa had reviewed the matter and that the government had given a "verbal green light" to Fortress' acquisition of FdN. The Lundin witnesses testified that this "verbal green light" was the key to moving forward with the deal.
- o) During this period, Kinross' counsel, Mr. Borja, was exchanging drafts of the government approval letter that was finally sent on August 27.
- p) After the government approval on August 27, Lundin Gold still had to negotiate final terms with the government and with Kinross. Those negotiations occurred over the Labour Day weekend, and the parties agreed in principle on September 4, 2014. At that point, the length of the period for the feasibility study was still in unresolved.
- q) The negotiations continued between Kinross, Fortress, and the government of Ecuador until October 2014.
- r) On October 21, 2014, both companies announced the share purchase agreement. In the same news release, Fortress announced that it was changing its name to Lundin Gold.

- s) Lukas Lundin and Mr. Rockandel then travelled to several countries to raise the financing necessary for Lundin Gold to complete the FdN deal. They raised the necessary capital by November 6, 2014.
- [131] It is evident from this chronology that the work of lobbying the government of Ecuador was significant, lengthy, and complex. It was carried out by mining executives who were at the top levels of management at Kinross and Fortress/Lundin.
- [132] It is also evident that Lundin Gold's interest in FdN was an interest in owning the concession. It was not seeking to be a sub-contractor to another entity.
- [133] Further, although Carter believes that he lobbied on behalf of the Lundin Group to the government of Ecuador, I accept that in the summer of 2014, Lundin was the only possible purchaser for FdN. Therefore, while Fortress required the approval of the government of Ecuador, the government of Ecuador had no other option or prospects. Ecuador was not choosing Fortress over other suitors. Fortress was the only suitor. The only issue was whether the government and Lundin could agree to a workable royalty structure and period for the feasibility study.

### **October 2014 Meeting between Scott Shepherd and Bill Rand**

- [134] There was a further meeting between Scott Shepherd and Mr. Rand on October 20, 2014. During that meeting, Scott advised Mr. Rand that he had heard rumours of a Lundin company purchasing the FdN concession. He told Mr. Rand that if those rumours were true, it would be very disappointing for Carter, who had been doing a lot of work promoting Lundin to the government of Ecuador.
- [135] According to Scott Shepherd's testimony, Mr. Rand responded that he did not think that there was any basis for the rumours. He had no knowledge of any Lundin company expressing interest in, or taking steps to acquire, the FdN project. Mr. Rand told Mr. Shepherd that Mr. Lundin was too busy with another acquisition in South America.
- [136] Mr. Rand has no recollection of that conversation. However, it was true that Lundin Mining was working on a large acquisition in South America at that time. As discussed below, it is likely that the two men did have the discussion described by Scott Shepherd. From this evidence, I also accept that on the day before Fortress announced the FdN deal, Mr. Rand was completely unaware of any steps that had been taken by Lukas Lundin to pursue the FdN concession.

### **Steps Taken by Carter Shepherd After the FdN Announcement**

- [137] Carter Shepherd alleges that he entered into a representation agreement with Mr. Rand, to be the representative of Lundin Mining or Lundin Gold. Further, he alleges that the defendants breached that agreement when Lundin Gold purchased the FdN concession and did not agree to pay the "finders fee" of \$12,000,000 US to the plaintiff. The defendants argue

that Carter's actions following the announcement of the FdN acquisition do not demonstrate that he believed that there had been a breach of any contract by any Lundin entity.

- [138] First, the defendants note that following the October 21, 2014 announcement, neither Carter nor Scott contacted Mr. Rand to request payment on the agreement. There is no letter from Carter to Mr. Rand indicating that Carter believed he was entitled to payment. It would be reasonable to expect such a letter if Carter believed that he was entitled to compensation under the alleged agreement.
- [139] Second, despite the alleged breach of contract, Scott Shepherd continued to have social engagements with Mr. Rand, including attending Mr. Rand's 2014 Christmas party and a small New Years' dinner. The two men continued to exchange friendly emails over the next year. Scott explained his actions on the basis that he thought that he would be able to accomplish a better result by keeping up a good relationship with Mr. Rand.
- [140] Third, in November and December 2014, Scott and Carter Shepherd emailed Julio Alvarado to inquire whether there were services that could be provided to Lundin Gold in respect of relations with the government of Ecuador. This email from Scott does not indicate that he and Carter were upset with Lundin or that they felt there had been a breach. Instead, it indicates that the Shepherds were working on some form of service agreement to assist Lundin in dealing with the government of Ecuador after Lundin acquired the FdN concession.
- [141] Fourth, although Scott Shepherd admits that he did not approach Mr. Rand after their October 20, 2014 lunch, Scott says that he had a discussion with Mr. Rand's business partner, Brian Edgar, at Mr. Rand's Christmas party in December 2014.
- [142] During that discussion, Mr. Edgar agreed to meet with Scott and Carter to discuss Carter's concerns. The date of that meeting is not recorded, but it was in early 2015. Mr. Edgar described it as a meeting where one friend, Scott, was asking another friend, Mr. Edgar, for a favour in influencing a connection within Lundin Mining. Mr. Edgar testified that Scott did most of the talking at the meeting because Carter was visibly upset. Of note, Mr. Edgar testified that it was clear that the Shepherds understood that there was some kind of arrangement and that Carter had taken the necessary steps to earn a fee. However, the Shepherds did not mention the concept of a 5% finder's fee at that meeting.
- [143] The first written communication alleging a representation agreement involving a finder's fee was the notice of civil claim filed in October 2016.
- [144] On the basis of these facts, the defendants submit that none of Carter's actions following the October 21, 2014 FdN announcement indicate that he believed that he had a representation agreement that had been breached by a Lundin company.
- [145] I now turn to analyse the factual issues and credibility.

Was a contract formed between Bill Rand and Carter Shepherd?

[146] In this action, the onus lies on the plaintiff to establish his claim. In most cases based in contract, the onus on the plaintiff is to prove the terms of the contract and that there was a breach of those terms. The plaintiff in this action has the onus of establishing, on a balance of probabilities that:

- a) a contract existed;
- b) if a contract existed,
  - i. who were the parties?
  - ii. what were its terms?
  - iii. did the plaintiff satisfy the terms necessary to trigger an obligation to pay the compensation?
  - iv. did the defendants breach the terms by failing to pay the compensation?

[147] As noted above, there are no documents evidencing any agreement between the plaintiff and Mr. Rand on behalf of any Lundin company. As a result, I must determine the answers to the issues listed above based on the testimony of the witnesses, the documents admitted into evidence, and the actions of the parties subsequent to the alleged creation of the contract.

[148] It is evident from the events described above that each party had no idea about the steps taken by the opposing party. After the alleged meeting between Carter and Mr. Rand on August 28, 2013, the only interactions occurred at social events, including one meeting at a coffee bar. Although Mr. Rand recalls that he had conversations with Scott, he testified that he does not recall any discussions relating to FdN or Lundin's possible involvement.

[149] The determination of whether there was a contract must be decided by credibility findings relating to the Shepherds and Mr. Rand. If the Shepherds are believed, then there was a contract. If they are not, there was no contract. I have set out below my assessment of the credibility of the witnesses. By necessity, that discussion is based upon my findings of what occurred and the motives of each party.

[150] I note, before commencing this discussion, that the plaintiff raised no real concern regarding credibility of the defence witnesses apart from Mr. Rand. The plaintiff accepts that Mr. Lundin and Fortress were unaware of any steps taken by Carter or Scott Shepherd. The plaintiff does not dispute that Lundin and Fortress took the steps they did. He argues, however, that his efforts assisted in obtaining the approval of the government of Ecuador and, as a result, he met the requirement for compensation in the alleged agreement.

[151] The court assesses credibility in the vast majority of trials. Determinations are not made simply on the demeanor of witnesses. The courts have long adopted the reasoning in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.) at 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[152] The reasoning in *Faryna* was updated in *Bradshaw v. Stenner*, 2010 BCSC 1398:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[153] The reasoning in *Bradshaw* and *Faryna* is that credibility assessments should be based, in large part, on whether the testimony is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

[154] On that basis, I have set out below a review of elements that are relevant to the possible existence of the contract. In my review, I set out my determination of the credibility and reliability of each witness's testimony. The areas I will review are:

- a) Making of the agreement,
  - i. What did Carter know and what did he want to achieve?
  - ii. What would Mr. Rand have done if he remembered that he had been at these meetings?

- b) What were the terms of the alleged agreement and what terms would be expected based on "commercial reality"?
- c) What steps did Carter take in pursuance of any Agreement?

[155] If an agreement exists, it was formed on August 28, 2013. I examine below the state of knowledge, the motives, and the steps taken by the parties before, during, and after that meeting.

### The Making of the Agreement

### Carter Shepherd's Motives for Meeting with Mr. Rand

[156] The first question to address relates to the probable motives of Carter Shepherd when seeking to arrange a meeting with Mr. Rand in August 2013.

[157] It is clear that Mr. Rand did not seek any meeting with Carter. If the meeting occurred, it was at Carter's request. The obvious question is: Why was Carter seeking a meeting with Mr. Rand? Carter says that he sought the meeting so that he could obtain authorization to act on behalf of Lundin Mining for the acquisition of the FdN concession. For the reasons set out below, I find that that was not Carter's motive.

[158] Carter's motives can be discerned in the evidence relating to Mr. Saa.

[159] In June 2013, Mr. Saa learned that the FdN concession was available. He contacted Carter to see whether Carter had any contacts in the Canadian mining industry. Mr. Saa did not take that step in order to provide a benefit to a lucky Canadian mining company. Mr. Saa had a personal profit motive. That profit motive became clear in the draft letters exchanged between Carter and Mr. Saa prior to the alleged meeting with Mr. Rand and in the September 4 Letter. Those letters proposed a public-private partnership between an Ecuadorian entity (ultimately "EcuCondor") and the Ecuadorian government. The letters indicate that EcuCondor had some form of relationship with a Canadian mining company, identified in later drafts as Lundin Mining.

[160] In order for Mr. Saa's plans to move forward, he needed a legitimate mining company to be involved. Hence, he contacted Carter to provide that link.

[161] That was Carter's state of knowledge in late August 2013.

[162] When Carter approached Mr. Rand, the only reasonable explanation is that he was attempting to obtain some authorization to put forward the name of Lundin Mining as a company associated with Mr. Saa's EcuCondor venture. The September 4 Letter (from EcuCondor) to President Correa makes it clear that EcuCondor would be the entity owning the FdN concession. Even on Carter's evidence, that concept or structure was never suggested to Mr. Rand. More to the point, the prospect of a Lundin company directly purchasing the FdN concession would defeat the goal that Mr. Saa was trying to achieve.

- [163] I find that Carter did meet with Mr. Rand on August 28, 2013. I noted above that Carter knew the name of the CFO at Kinross. It is reasonable to infer that he learned that man's name at the meeting with Mr. Rand. Hence, they must have discussed Kinross and the FdN concession.
- [164] I further find that at the time Carter approached Mr. Rand, he was only aware of the existence of Lundin Mining. He was not aware that there were other Lundin-related companies. He did not distinguish between "gold mining" and "base metals mining" companies. He had no experience in the mining business. As a result, the logo of Lundin Mining was included on the September 4 Letter.
- [165] Carter and Scott Shepherd testified about the agreement that, they say, was negotiated on August 28, 2013. Scott testified that he confirmed the terms of that agreement in a subsequent phone call with Mr. Rand on August 28, 2013. In the aftermath of the events that have transpired, both Carter and Scott may now have the recollection that the goal from the outset was that Carter would take steps to represent Lundin Mining (or another Lundin company) in the pursuit of the purchase of the FdN concession. However, the draft letters make it clear that that was not the object in August 2013. Instead, Carter's friends in Ecuador needed the name of a legitimate mining entity to attach to their third-party proposal. That is the only reasonable inference for Carter's approach to Mr. Rand.
- [166] It does not make any sense that Carter would approach Mr. Rand and offer to lobby on behalf of Lundin Mining with the government of Ecuador, when Lundin Mining had not indicated any interest in purchasing the FdN concession. However, it would make sense for Carter and Mr. Rand to discuss a proposal akin to the one that was ultimately set out in the September 4 Letter. That proposal was for a third party such as EcuaCondor to obtain the FdN concession. If that proposal were successful, then EcuaCondor would agree to subcontract the actual mining to Lundin Mining.
- [167] The most probable version of the facts is that, at best, Carter asked Mr. Rand whether he could attach the Lundin Mining name to the EcuaCondor proposal. There was never any intention that Lundin would be involved unless or until EcuaCondor obtained the rights to the concession.
- [168] That version of the narrative is also consistent with the continued involvement of Julio Alvarado and Mr. Saa through August 2014. According to Carter's testimony, neither Mr. Saa nor Julio Alvarado was to be paid under the alleged finder's fee agreement with Carter Shepherd.
- [169] It stands to reason that Mr. Saa and Julio Alvarado were not lobbying on behalf of Lundin Mining out of the goodness of their hearts. They had a profit motive. That profit motive involved EcuaCondor having an ownership interest in the FdN concession. Carter was cross-examined about the involvement of Mr. Saa:

Q I take it you didn't enter a confidentiality agreement with Mr. Richard Saa with respect to his work for you and Lundin Mining.

A No, I did not.

Q Ecuacondor was the company that was seeking the Fruta del Norte concession; correct?

A No. Lundin Mining was the company that was seeking the concession. Ecuacondor was an Ecuadorian entity that was used in the letter for protocol purposes as -- one of the key arguments was that Ecuadorian participation should be an important aspect in this project.

Q You never secured Lundin Mining approval to make that proposal on its behalf.

A I did secure that approval from Mr. Rand.

Q In that first meeting?

A Mr. Rand authorized me to promote Lundin Mining in Ecuador, to go down to Ecuador and open the door for Lundin Mining to essentially -- with the end to acquire the Fruta del Norte asset.

Q And so you took that to mean that you could make the proposal involving Ecuacondor and an Ecuadorian company; correct?

A He authorized me to do so, yes.

[170] Although Carter's answer to those questions was based on the concept of Ecuadorian ownership, as noted above, the concession was, and is, owned by Aurelian Resources, an Ecuadorian company. In the Kinross transaction, ownership of Aurelian Resources was transferred to Lundin Gold. The ownership was always Ecuadorian.

[171] The September 4 Letter, signed by Mr. Saa, went out under the letterhead of "Ecuacondor". When asked about the relationship of that company to any agreement on the FdN project, Carter Shepherd provided the following testimony:

Q You and Mr. Saa were intending to establish Ecuacondor as a company that could partner with the Ecuadorian government; correct?

A From my understanding, Ecuador -- Ecuacondor would be -- had already been established and would be a vehicle that could be used to -- yes, to represent the government or some other fashion provide an Ecuadorian content to this solution.

Q You had not worked out the specific details of that?

A Ecuacondor was to be -- no, we had. We had worked out the specific details.

Q What were those specific details, then?

A They were that Ecuacondor was to be the -- an entity that would provide Ecuadorian content on this project in tandem as a strategic partnership with Lundin Mining.

- [172] I set out above the provisions of the alleged agreement between Carter and Mr. Rand. It is evident from these passages of testimony that Carter's interpretation of the meeting was that he could take any steps that he thought appropriate in order to promote the interests of Lundin Mining. I discuss below the concept of commercial reality as a part of the test of whether a contract was formed. However, it is clear that, whatever may have transpired between Carter and Mr. Rand, at no time did Mr. Rand have any knowledge of Mr. Saa, nor did he agree to a "strategic partnership" with an entity called EcuCondor. Further, the structure that Mr. Saa proposed was significantly less beneficial for the Lundin Group than the ultimate agreement reached between Lundin Gold and the government of Ecuador.
- [173] Despite Carter's testimony that he was directing Mr. Saa to write letters, the September 13, 2013 Letter, which contained the wording about "classic neo-colonialism" and "vanguard politics" appears to have been written by Mr. Saa without any other input. It bears no resemblance to anything written by Carter Shepherd. There was no evidence of Carter having input into that wording. It was not written for the benefit of Lundin Mining.
- [174] Although Carter testified that he directed Mr. Saa to sign and send the letters, I do not accept that evidence. The only reasonable explanation for Carter taking steps to promote Lundin Mining is that he was working either for, or with, Mr. Saa and Julio Alvarado to obtain the FdN concession, or an interest in it, for EcuCondor.
- [175] I draw the inference from Carter Shepherd's testimony, and from the continued involvement of Mr. Saa and Julio Alvarado, that, while Carter did, in fact, promote the involvement of Lundin Mining for the FdN project, he did so in furtherance of the object of obtaining the rights to the FdN concession for EcuCondor. He did that for the benefit of his friends Mr. Saa and Julio Alvarado and for himself. Hence, I draw the further inference from the correspondence between Carter and Mr. Saa that Mr. Saa requested that Carter take certain steps and Carter obliged.

### Mr. Rand's Position

- [176] Mr. Rand, as discussed above, testified that he has no recollection of any meeting with Carter, nor any subsequent discussion regarding his progress. I do not accept Mr. Rand's evidence as being truthful.
- [177] I have discussed above two pieces of evidence that support the Shepherds' assertion that there were meetings and discussions with Mr. Rand. Specifically, Carter learned the name of the CFO at Kinross at the August 28, 2013 meeting. That piece of information supports the existence of that meeting and a discussion about FdN. Further, Mr. Rand's statement to Scott Shepherd on October 20, 2014, that Lundin was too busy with another transaction in South America to be involved in the FdN discussion. That information turned out to be true. Lundin Mining announced the purchase of a large mining concession within months of that lunch. The fact that Scott knew that information indicates that the two men did discuss the FdN project on that date.

[178] I do not accept Mr. Rand's testimony that he does not remember these meetings and discussions. I infer that Mr. Rand was nervous about conceding that he had any discussion with Carter or Scott. He did not want to give any credence to their allegations. As a result, he claimed at trial that he does not recall any of these conversations.

Was there an Agreement between Carter and Mr. Rand?

[179] Based on that evidence, I find that it is more likely than not that the August 28, 2013 meeting did occur between Carter and Mr. Rand. Thereafter, Carter and Scott did report on Carter's progress as alleged.

[180] I have also outlined above my finding of what the two men discussed and agreed at that meeting. Mr. Rand and Carter discussed the FdN project and a possible role for Lundin Mining. However, that potential role for Lundin Mining would only be triggered if the EcuCondor entity acquired the right to develop the FdN concession.

[181] Based on that finding, it is reasonable to infer that Mr. Rand informed Carter that if Carter's group managed to obtain the FdN concession and if that group then contracted with Lundin to extract the ore, Carter would be entitled to a "finder's fee".

[182] It follows from these inferences that Mr. Rand probably did have a discussion with Carter that rises to the level of having contractually binding effect. However, the conditions precedent to any contractual obligations did not come into being. Carter's group did not obtain the rights to the FdN concession.

[183] It further follows that Carter understood that he had some degree of authority to use the name and logo of Lundin Mining in the EcuCondor proposal.

[184] Despite not accepting Mr. Rand's testimony in respect of the meetings that occurred, my finding regarding what did happen does not translate into the agreement alleged by the plaintiff.

[185] I also note that Mr. Rand testified that if Carter had requested authority to represent Lundin Mining in Ecuador, Mr. Rand would have strongly refused that request. Based on the testimony of other witnesses, I infer that Mr. Rand would have rejected that type of approach from Carter. However, he had no reason to reject the approach that did occur. That approach was along the lines of "my friends in Ecuador want to obtain the rights to the FdN concession. Can they use the name of Lundin Mining in their proposal? And if they get it, and if Lundin Mining gets the contract to extract the ore, would there be a finder's fee in it for me?"

[186] I find that that type of discussion is the only logical discussion that could have taken place on August 28, 2013.

[187] I further find that Mr. Rand was an experienced and knowledgeable director of public companies. He was aware that he did not have the authority to bind Lundin Mining, or any other company to an oral contract without management or board approval. However, he was not entering into a contract for Lundin Mining. He was simply fielding a proposal that could have resulted in future work for that company.

[188] I turn now to examine the terms of the alleged representation agreement.

What were the terms of the Agreement and what terms would be expected based on "commercial reality"?

[189] The next issue is the commercial reality of the alleged meeting between Carter and Mr. Rand. Whatever Carter's motives in the period leading into that meeting, the meeting itself should have had the earmarks of a professional business meeting.

[190] According to the plaintiff, his father had asked Mr. Rand to take a meeting with Carter. There is no record of such a request. Further, there is no record of Carter booking time with Mr. Rand. The only written evidence of the meeting is contained in emails from Carter to Mr. Rand's daughter.

[191] According to the plaintiff, the meeting lasted approximately 25 minutes. He provided detailed testimony about the meeting, including his interactions with the receptionist and Mr. Rand. However, it is clear that Mr. Rand had no forewarning about the subject matter of the meeting. Carter did not attend with a memo or agenda setting out the nature of his proposal. According to Carter's testimony, it was Mr. Rand who identified that Carter was seeking a "finder's fee" and proposed the rate at five percent.

[192] Although the plaintiff recited those provisions of the alleged agreement in his testimony, there were a number of obvious terms about which there was no evidence including: the term of any agency agreement, payment of expenses, reporting requirements, performance definitions, and any restrictions on representations that Carter could make on Lundin's behalf. If the two men reached the representation agreement that Carter alleges, I would expect those terms to have been included in it.

[193] I noted above the fact that one of the alleged implied terms of the contract was that the executives at the various companies in the Lundin Group would not take steps that would interfere in Carter's representations to the government of Ecuador. No evidence of that alleged term was adduced at trial.

[194] This finding would be sufficient to defeat the plaintiff's claim.

[195] Based on the analysis above, while I have found that there was a meeting between Carter and Mr. Rand, I find that there was no agreement as alleged by the plaintiff. For the sake of completeness, I have analysed below the terms of the alleged representation agreement and the commercial reality thereof.

- [196] The alleged terms of the representation agreement are set out in the notice of civil claim (as reproduced in para. 46 of these reasons).
- [197] Each of those alleged terms bears review to see whether there is an air of commercial reality to it.
- [198] First, Carter was to travel to Ecuador as a representative of Lundin Mining and its affiliates, including Lundin Gold. In that respect, the following evidence was adduced at trial:
- a) All witnesses on behalf of Lundin Mining and Lundin Gold testified that they would not use outside consultants for that type of work. The job of representing the company and lobbying foreign governments was extremely important.
  - b) The testimony of every witness involved in international mining was that Canadian mining companies do not use consultants to work with foreign governments. According to those witnesses, the entire concept of a representation agreement goes against the standards and protocols of Lundin Mining, Lundin Gold, and Kinross. The risk of corruption and kickbacks is too high. Senior management wants to control the message imparted to foreign governments.
  - c) For the same reason, these companies do not provide success-related incentives in any such contracts. All of the companies under the Lundin umbrella have anti-corruption rules and protocols in place. Mr. Rand knew about those rules and protocols. The prospect that Mr. Rand, in these circumstances, would have entered into a contract with any consultant to lobby on behalf of any Lundin company does not have an air of commercial reality.
  - d) The testimony of the Lundin representatives was confirmed by the fact that Lukas Lundin himself was involved in both the initial meetings with Kinross and the meetings with government officials in Ecuador. Further, Mr. Lundin did not bring a lobbyist for those meetings. He brought Mr. Hochstein, the CEO of another company in the Lundin Group who had decades of experience in the mining industry. Mr. Lundin and the senior executives also travelled to the FdN mine site.
  - e) Further, because Kinross had the existing relationship with government officials, and because Kinross needed to sell the FdN concession, Kinross was responsible for setting meetings and lobbying the government.
  - f) With respect to the concept that Carter would act as a representative of Lundin Mining "and its affiliates", the evidence was clear that the companies in the Lundin Group are not "affiliated". Each company in the group is publicly traded and has its own management and executive suite. Each has reporting requirements. Further, as I found above, there is no supportable evidence that Carter was aware of the different companies in the Lundin Group. He was aware that Mr. Rand was the lead director of Lundin Mining. He had no knowledge beyond that. He did not understand that the companies were differentiated by the type of mining they do.

Considering this evidence, I find that there is no air of commercial reality to the alleged term that Carter would travel to Ecuador as a representative of Lundin Mining and its affiliates.

[199] The second term provided that Carter would, with the assistance of his contacts and colleagues in Ecuador, introduce Lundin Mining and its affiliates, including Lundin Gold, to key government officials and persons in the mining industry in Ecuador. In that respect, the following evidence was adduced at trial:

- a) Carter did have contacts and colleagues in Ecuador. It is reasonable to think that he would have introduced Lundin Mining to those people. Carter took those steps through the drafting of the September 4, 2013 Letter.
- b) It is also reasonable to believe that Carter would have been expected to take steps to introduce Lundin Mining to government officials in Ecuador. He knew Mr. Julio Alvarado whose brother Vinicio was a Minister in the government. Hence, this term makes commercial sense from Carter's point of view. These relationships were the connections that he was offering to Lundin Mining.
- c) From Lundin Mining's point of view, however, it is clear that the Lundin Group would not retain outside representatives for lobbying efforts, as discussed above.

I find that this term does not have the air of commercial reality from Lundin's standpoint.

[200] The third term was that Carter would advise these officials and persons of the interest of Lundin Mining or its affiliates, including Lundin Gold, in acquiring the FdN project.

- a) As discussed above, Carter did advise officials in the Ecuadorian government that Lundin Mining was interested in being involved in the FdN project. He first provided that advice in the September 4, 2013 Letter.
- b) There are two significant problems with Carter advising the government of Lundin's interest in the FdN project in September 2013:
  - i. First, no Lundin Group company expressed any interest in the project until, at the earliest, May 2014.
  - ii. Second, the September 4, 2013 Letter expressed that EcuACondor, not Lundin, was interested in acquiring the concession.

As a result, to the extent that there was any commercial reality to this provision, it was not reflected in the actual proposal made by Carter and his friends from Ecuador.

[201] Fourth, the plaintiff alleges that it was an implied term Lundin Mining and its affiliates would not circumvent his efforts by contacting government officials directly. Thus, the plaintiff alleges that, not only did he have a contract with the defendants, he had an exclusive representation agreement. Despite the exclusive nature of that retainer, the exclusivity was implied and not express. This term has no air of commercial reality for the following reasons:

- a) First, there was no prior dealing between Mr. Rand and the plaintiff from which a pattern of conduct could possibly be implied. The plaintiff led no evidence to suggest that exclusivity was in the mind of either party.
- b) As noted above, Lukas Lundin was obviously a key player in this transaction. He would become the major investor in this venture. He was personally involved in the process from the initial lunch with Kinross through the meetings with the government.
- c) This implied term would have prevented Mr. Lundin and senior management officials from any company in the Lundin Group from contacting government officials in relation to any prospective deal involving the purchase of the FdN project by Lundin.
- d) Lundin Mining or any other Lundin-related company, would have been in breach of the alleged agreement, and liable to pay damages to the plaintiff if Mr. Lundin or other management personnel became involved in such an approach to the government.
- e) According to this alleged term, Mr. Lundin, who had a generation of experience in mining around the world, agreed that he would park his own ability to lobby the government of Ecuador on behalf of any company in the Lundin Group. Instead, Mr. Lundin passed that task on to the plaintiff, a recent university graduate who spoke Spanish and who knew people who knew people in the government. Further, Mr. Lundin, and all of the Lundin Group companies, agreed to this exclusive representation arrangement, for an indefinite period, without receiving anything in return except the prospect that Carter would be able to achieve a result that (apparently) no group of executives in the Lundin Group could achieve.
- f) Still further, we know from the evidence of Mr. Channer, Mr. Borja, and Mr. Hochstein that the arrangement of meetings with government officials was the purview of the Kinross officials. Kinross was the party hoping to sell the FdN asset. Kinross would receive the benefit of the purchase price. Hence, Kinross had to convince the government that the purchaser would be a good corporate citizen.

For these reasons, this alleged term has no air of commercial reality.

[202] Finally, the alleged agreement called for a finder's fee of 5%. On this point, the following evidence was adduced at trial:

- a) While there was scant evidence about the usual basis of a finder's fee, Mr. Rand's evidence was that, if a finder's fee is engaged, the usual rate was in the range of 0.5% which would be 10% of the amount claimed by the plaintiff.

- b) I summarized the significant amount of work performed by many different people to facilitate the deal FdN deal. It is evident from that work the prospect of contracting with the plaintiff to pay 5% of the purchase price of the FdN project bears no resemblance to commercial reality.
- c) Put another way, there were other people, who had substantially more education, experience, and control than the plaintiff, who put in substantially more effort than the plaintiff, and did not receive compensation anywhere near the amount that he is claiming.
- d) If the plaintiff's allegations were accepted, and if there was a binding representation agreement, then Lundin Gold would have been required to raise an additional \$12,000,000US on top of the \$230,000,000US they did raise, in order to pay for the lobbying work done by Carter Shepherd.

On that basis, I find that the alleged compensation of 5% is not in line with commercial reality.

[203] Based on the analysis above, I find that the plaintiff's alleged oral agreement with Mr. Rand does not have the air of commercial reality. His allegation of an agreement with Mr. Rand, without any documentary evidence, would fail on this ground alone.

[204] One final issue arises regarding the commercial reality of the alleged agreement from Lundin's perspective: Mr. Rand's authority.

[205] According to the plaintiff's theory of the case, he entered into an oral contract with Mr. Rand because Mr. Rand was a lead director of Lundin Mining.

[206] At best, the plaintiff could rely on a theory of "apparent authority" and the "indoor management rule" to argue that Mr. Rand's actual authority was not Carter's concern.

[207] The plaintiff argues that he understood that Mr. Rand was a senior advisor to Mr. Lundin and advised him on all matters. Hence, his influence exceeded his formal role as a lead director of Lundin Mining.

[208] Even if I accepted that argument, the plaintiff's theory of the case would fail. Mr. Rand was a lead director of Lundin Mining. There is no evidence that he had authority to bind any other specific company. The FdN concession was purchased by Fortress Minerals which was renamed Lundin Gold. Mr. Rand had no authority to bind those companies. It is clear from the evidence of Scott Shepherd's meeting with Mr. Rand on October 20, 2014, that, even on the day before it was made, Mr. Rand was not aware of the impending announcement of the FdN deal.

[209] Even if I were to accept the plaintiff's case as alleged, Lundin Mining is not responsible to pay any damages. Even if it entered into a representation agreement with Carter, it did not breach that contract. It received no benefit. It cannot be called upon to pay a finder's fee for something that it did not find.

- [210] Lundin Gold, on the other hand, did not know of the existence of Carter Shepherd. Conversely, Carter did not know of the existence of Lundin Gold.
- [211] Both Carter and Scott Shepherd are educated in business. I can find no legal theory that would support the plaintiff's allegation that either Lundin Mining or Lundin Gold would be liable to pay damages for breach of contract, even if I accepted the plaintiff's allegations.
- [212] On this basis, the alleged representation agreement lacks any air of commercial reality. This factor would be fatal to the plaintiff's case in the absence of the other factors discussed in these reasons.

### Conduct Subsequent to the Alleged Meeting

- [213] I further find that the plaintiff's actions following the alleged meeting with Mr. Rand are not confirmative of the allegation that the two men reached a representation agreement. Instead, Carter's actions are consistent with the concept that his group would attempt to obtain the FdN concession for themselves.
- [214] First, there is no email from Carter to Mr. Saa, indicating that he had obtained the authorization to represent Lundin Mining. If Carter had secured an agreement that would have been important to the venture, I would have expected that Carter would have reported this development to Mr. Saa.
- [215] Next, in the chronology, Carter did not report to Mr. Rand about the September 4 Letter from Mr. Saa, on behalf of EcuCondor, to the President of Ecuador. If Carter had been authorized to represent Lundin Mining, one would expect that a significant step, such as correspondence with the President of Ecuador, would be reported to the principal. However, if Lundin's involvement would not be triggered unless or until EcuCondor obtained the rights to the FdN concession, there was no reason to keep Mr. Rand apprised of every development.
- [216] The same reasoning holds true for the correspondence received from the President's office.
- [217] Eight months later, when Scott Shepherd sent the Northstar Letter dated May 1, 2014, to Dr. Vinicio Alvarado, Carter copied that letter to Mr. Saa by email. He did not copy Mr. Rand. Mr. Saa responded by email, "Bien monstrito" or "good little monster". The inference from that exchange is that Carter was taking steps that benefited Mr. Saa.
- [218] During the period from September 1, 2013, through October 20, 2014, Carter did not send a single email to Mr. Rand. At best, he relied upon his father to report any progress that he made. At most, he says he had one meeting in a coffee bar in Mr. Rand's building. He also discussed his progress at social events.
- [219] Further, at no time did Carter inquire of Mr. Rand about any developments on the Lundin side of the equation. If Carter's version of the agreement was accurate, then his efforts to lobby the government would have meant nothing if Lundin Mining was not interested in

acquiring the FdN concession. Carter did not inquire of Mr. Rand because Carter wanted to obtain the FdN concession with his friends. Further, the Shepherds conceded that during the entire period, Mr. Rand continued to express doubts about dealing with the government in Ecuador. Mr. Rand never expressed any interest in obtaining the FdN concession.

[220] Carter's lack of inquiry about the Lundin side of the equation only makes sense if Lundin Mining was going to be used to extract the ore and not to purchase the FdN concession. If the EcuaCondor venture was going to partner with the government, then Carter did not need to report to Mr. Rand unless or until EcuaCondor was successful in obtaining some entitlement to the FdN concession.

[221] In final submissions, the plaintiff argues that there must have been a representation agreement in place for Carter; otherwise, he would not have put substantial effort into lobbying on behalf of Lundin Mining. However, Carter's efforts were more consistent with promoting the bid of EcuaCondor than promoting Lundin Mining. Carter and his friends needed to convince the government that they were associated with a viable mining company to legitimize their proposal. Hence, Carter's promotion of Lundin Mining makes sense as a corollary to EcuaCondor proposal. It also explains why Mr. Saa and Julio Alvarado were involved in every meeting on the project.

#### Summary of Findings Regarding the Breach of Contract Claim

[222] As set out above, I find the following:

- a) Carter and Mr. Rand did meet on August 28, 2013, and they did discuss the FdN project.
- b) However, Carter did not propose that he would represent Lundin Mining, or any other Lundin Group company, toward the goal of purchasing the FdN concession.
- c) Instead, Carter sought Mr. Rand's authority to use the name of Lundin Mining to provide legitimacy to the proposal of Carter's friends, Mr. Saa and Julio Alvarado, as proposed in the September 4 Letter sent by EcuaCondor. Mr. Rand provided that limited authority.
- d) Thereafter, Carter's efforts were aimed at promoting the proposal of EcuaCondor to acquire the FdN concession.
- e) Since EcuaCondor did not obtain the concession for FdN, no contractual obligations were triggered.

[223] It follows that the plaintiff's claim in breach of contract is dismissed for all of the reasons discussed above. I now turn to the plaintiff's claim in quantum meruit.

#### Quantum Meruit

[224] The plaintiff argues that, should I find that there was no contract between the parties, then his claim should be valued on a quantum meruit basis. The plaintiff cites *Malik (Estate of) v. State Petroleum Corporation*, 2009 BCCA 505 [Malik].

[225] The plaintiff submits that:

- a) Lundin Gold was enriched as a consequence of the efforts and positive representations of Carter and Scott Shepherd toward the government of Ecuador;
- b) Carter suffered deprivation in terms of time, effort, and expenditures made for that purpose; and
- c) there is no juristic reason that Lundin Gold should be enriched at Carter Shepherd's expense.

[226] The plaintiff argues that he made a "material contribution" to Ecuador's approval of Lundin Mining's acquisition of the FdN concession. He submits that he need only show that he was "a cause", not necessarily "the cause" or the "the effective cause", of the ultimate transaction: Malik at para. 39.

[227] The plaintiff values his contribution to the acquisition in the range of \$1,750,000US-\$2,750,000US.

[228] The defendants submit that the plaintiff has no claim in quantum meruit.

[229] With respect to the claim in restitutionary quantum meruit, the defendants say that the plaintiff must establish:

- a) that he provided services to the defendant;
- b) a benefit to the defendant;
- c) that the defendant requested, encouraged, or acquiesced in the provision of, the services; and
- d) that there was no legally enforceable contract.

[230] The defendants submit that Lundin Gold had no knowledge of Carter Shepherd. It neither requested, nor acquiesced in, his efforts. Further, they say that there is no evidence that any work by Carter provided a benefit to Lundin Gold. In that regard, they note that the "verbal green light" was given by President Correa on August 22, 2014. Scott and Carter did not meet with Vice-President Glas until August 26, 2014.

[231] The defendants further argue that there is no evidence from any member of the government of Ecuador that Carter's efforts made any difference to Lundin Gold. As noted, Lundin Gold was the only suitor. The government did not choose Lundin Gold in preference to another mining company.

- [232] The defendant also relies on the reasoning in the Malik case. There, the plaintiff acted as intermediary between buyer and seller. In contrast to the facts in this case, both the buyer and seller understood Mr. Malik would be compensated on some calculation of a "finder's fee" if the transaction completed. There was, however, no formal contract setting out the method of calculating the plaintiff's fee.
- [233] I accept the defendants' arguments regarding the quantum meruit claim.
- [234] First, based on my findings above, Carter was pursuing a project of his own. He and his friends were promoting the concept of EcuaCondor purchasing the FdN concession. As a collateral effect of that concept, Carter promoted Lundin Mining. However, the promotion of Lundin Mining served to provide legitimacy to the EcuaCondor proposal. Hence, any expenditures of money or time by Carter were spent in pursuance of a different goal. If EcuaCondor had obtained the concession, Carter and his friends would have benefited. Further, at that point, they would have spoken to Lundin Mining about contracting to extract the ore.
- [235] Second, I can find no factual basis for the plaintiff's claim that Carter's efforts were "a cause" of the eventual success of the acquisition. In order to reach that conclusion, I would need some evidence from a member of the government of Ecuador indicating that the efforts of Carter or Scott had some degree of impact. No such evidence is before me.
- [236] The fact that the EcuaCondor transaction did not pan out, and the Lundin Gold transaction did, does not mean that Carter is entitled to compensation from Lundin Gold.
- [237] It follows from my reasoning above that the plaintiff's claim in quantum meruit is dismissed.

## Counter Claim

- [238] The defendant Lundin Mining counterclaims against Carter and Scott Shepherd for the tort of passing off. Put simply, Lundin Mining says that the Shepherds, together, used the Lundin Mining name and logo to legitimize their proposal to the government of Ecuador.
- [239] Lundin Mining submits that the test for passing off, whether at common law or under the Trademarks Act, R.S.C. 1985, c. T-13 consists of three elements: the existence of goodwill, deception of the public by a misrepresentation, and actual or potential damage to the plaintiff.
- [240] It follows from my findings above that the second element does not exist in this case. Lundin Mining has the onus of establishing that the public (or the government of Ecuador) was deceived by a misrepresentation that the Shepherds and the EcuaCondor proposal were affiliated with Lundin Mining. There is no evidence before me to suggest that such a deception occurred.

[241] I have found above that the only logical discussion at Carter's August 28, 2013 meeting with Mr. Rand was Carter requesting, and Mr. Rand granting, some degree of authority to use the Lundin Mining name.

[242] It is probable that the two men had different understandings of the meeting. Carter left with the impression that he could use the Lundin Mining name in the EcuCondor proposal. Conversely, Mr. Rand understood that, if Carter's friends' proposal was successful, they would contract with Lundin Mining to extract the ore from FdN. Either way, there was an understanding of some relationship and some authority to use the Lundin Mining name.

[243] On that basis, I dismiss the counterclaim of Lundin Mining.

### Summary and Costs

[244] In summary, I find that the plaintiff has failed to establish on a balance of probabilities that he entered into an agreement with Bill Rand wherein Lundin Mining agreed to pay a finder's fee if any company in the Lundin Group obtained the rights to the FdN concession.

[245] The plaintiff's claim fails on several grounds:

- a) I find that Carter and Mr. Rand did meet on August 28, 2013, and they did discuss the FdN project. However, Carter did not propose that he would represent Lundin Mining, or any other Lundin Group company, toward the goal of purchasing the FdN concession.
- b) Instead, Carter sought Mr. Rand's authority to use the name of Lundin Mining to provide legitimacy to the proposal of Carter's friends Mr. Saa and Julio Alvarado, as proposed in the September 4 Letter sent by EcuCondor.
- c) In the event that Carter's group would have obtained the FdN concession, they would contract with Lundin Mining to extract the ore.
- d) On that basis, Mr. Rand provided some limited authority to use the Lundin Mining name in the group's proposal.
- e) Since EcuCondor did not obtain the concession for FdN, no contractual obligations were triggered.
- f) The contractual terms alleged by the plaintiff do not have an air of commercial reality.
- g) Carter is not entitled to compensation on a quantum meruit basis. His efforts in promoting Lundin Mining were driven by his profit motive in attempting to obtain the FdN concession with his friends. Hence, there was a juristic reason for any deprivation he undertook. There is no evidence of a benefit to Lundin Mining or Lundin Gold from Carter's actions.
- h) The counter claim fails because, as I have found, Mr. Rand gave Carter some degree of authority to use the Lundin Mining name in the EcuCondor proposal.

[246] The defendants have been largely successful in this action. I will hear submissions on Costs.

"A. Ross J."

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