CITATION: Wong v. Pretium Resources, 2017 ONSC 3361
COURT FILE NO.: CV-13-00491800-CP
DATE: 20170720

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: David Wong, Plaintiff / Moving Party

AND:

Pretium Resources Inc. and Robert A. Quartermain, Defendants/ Responding Parties

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Andrew J. Morganti, Matthew M.A. Stroh and Peter W. Neufeld* for the Plaintiff

R. Paul Steep, Andrew B. Matheson, H. Michael Rosenberg and Hakim Kassam for the Defendants

HEARD: May 29 and 30, 2017 and written submissions

DECISION ON LEAVE MOTION

[1] The plaintiff seeks leave under s. 138.8 of the Ontario *Securities Act*[1] ("OSA") to commence an action under s. 138.3 for secondary market misrepresentation. He says he purchased shares in the defendant mining company and then saw the share price plummet when the defendant corrected a material fact that had not been disclosed. The plaintiff says he and other similarly situated shareholders sustained losses.

[2] Leave to commence an action under s. 138.3 of the OSA for secondary market misrepresentation will be granted if the court is satisfied that the action is brought in good faith and there is "a reasonable possibility that the action will be resolved at trial in

[1] *Securities Act*, R.S.O. 1990, c. S. 5 ("OSA").

favour of the plaintiff."[2] Good faith is not an issue. The only question is whether the plaintiff can show a reasonable possibility of success at trial.

[3] For the reasons set out below, the motion for leave is granted. The defendants may still prevail on the certification motion or when the matter is litigated in full. However, I am satisfied at this stage that the plaintiff has cleared the leave hurdle. He has established a reasonable possibility of success at trial.

The Brucejack project

[4] Pretium Resources is a mineral exploration company based in Vancouver. Its shares trade on the TSX and the NYSE. Pretium is currently developing the Brucejack Project, a significant gold mine in north-western British Columbia. The development remains on schedule and commercial production is scheduled for later this year. Robert Quartermain, at all material times, was the CEO and Chairman.

[5] The events in question took place over a three-month time period in 2013, more particularly July 23 to October 21. To understand the context, one must go back to 2011

[6] Over the course of 2011 and 2012, Pretium conducted a mineral exploration program at Brucejack that involved surface mapping and exploratory drilling. It hired Snowden, a well-known mining consultant, to review the results and produce a mineral resource estimate. Snowden did so and produced the November 2012 Mineral Resource Estimate ("the Mineral Resource Estimate") which was used by another contractor as the basis for the June 2013 Feasibility Study. The Feasibility Study concluded that Brucejack contained economically recoverable mineral reserves capable of supporting a successful bulk-mining operation. However, the validity of the Feasibility Study was dependent on the validity of the underlying Mineral Resource Estimate on which it was based, including the unique style of mineralization in the Valley of Kings ("VOK") section of the Brucejack mine.

The bulk sample program

[7] In order to test and verify the validity of its Mineral Resource Estimate (and by extension the Feasibility Study) Snowden recommended that Pretium extract a 10,000 ton bulk sample (the "Bulk Sample Program") for milling and testing. Pretium agreed and

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[2] OSA, *supra*, note 1, s. 138.8.

retained Strathcona Mineral Services, another well-known mining consultant, to oversee the excavation of the 10,000 ton sample and report on the test results.

[8] Had things progressed as planned, the entire bulk sample would have been milled and tested, the results would have proven positive (as indeed they were) and the Mineral Resource Estimate would have been validated with room to spare. There would have been no allegations of misrepresentation and no need for this proposed class action.

[9] But things did not progress exactly as planned. The original plan was to process the bulk sample in its entirety at a custom mill because this was the most reliable means of determining the mineral content. But Pretium also agreed to use a sample tower. The idea of using a sample tower arose because Pretium had difficulty finding a custom mill that was available. By the time space had been secured at a custom mill in Montana, Strathcona had already procured a sample tower that would process and test a portion of the bulk sample before it was shipped for milling.

The sample tower

[10] The problems that gave rise to this lawsuit can be traced to Strathcona's use of the sample tower testing method. The sample tower method is faster and less costly than milling the entire bulk sample but only a tiny fraction of the mined material is tested. The reliability of a sample tower therefore depends on the representativeness of the sub-sample. The less representative the sub-sample, the less reliable is the result. Because the Brucejack deposit showed extreme variability (almost all of the gold was in tiny fractions and veinlets of rock) it was an open question whether a sample tower could reliably estimate the grade of the bulk sample.

[11] Pretium was skeptical about the sample tower but saw little downside in adding this additional testing method. As its Chief Exploration Officer explained:

> It's hard to say how meaningful the data from the sampling tower will be, but we have to crush the material before shipping so why not try it and see what happens. We all agree the final recoveries from processing the sample will likely be the best test of the bulk sample. If nothing else, this will be a good measure of the effectiveness of the sampling tower and the underground grade control sampling.

[12] As far as Pretium was concerned, the true measure of the bulk sample would be the Montana mill results. Pretium announced the start of the Bulk Sample Program at the end of May, 2013.

Strathcona voices concerns

[13] Starting in mid-July, 2013 Strathcona, who had considerable experience in the use of the sample tower, began to voice concerns. These concerns were reiterated as the weeks went by. Over the three months of the proposed class period, from July 23 to October 21, 2013 Strathcona repeatedly advised Pretium that the sample tower test results were failing to confirm the validity of the Mineral Resource Estimate and by extension the validity of the Feasibility Study. Also, Strathcona repeatedly urged Pretium's executive team in emails and letters to publicly disclose these facts to the market. Here is one example:

> [T]he results of sufficient drill-hole and bulk-sample assay data that show that the resource block model developed and reported on in the Snowden [November 2102 Mineral Resource Estimate], and used for the recent Feasibility Study…is not reliable. The resource model greatly over-estimates the gold grade of the bulk-sample area …
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> … the Feasibility Study, issued just two months ago, is no longer valid, and since this represents a material change for Pretium, we strongly recommend that Pretium make these findings known to the public so that investors are no longer relying on the invalid results of the Brucejack Feasibility Study and the November 2012 mineral resources technical report.

[14] Over the three months in question, Strathcona warned the defendants that the information contained in the Mineral Resources Estimate was "materially inaccurate" and "unreliable" and that the results of the (sampling tower) program were "drastically different from the Feasibility Study." Strathcona consistently urged immediate public disclosure.

[15] Pretium did not agree that Strathcona's concerns were material and none of the recommended public disclosures were made.

[16] Having made no headway with Pretium, Strathcona resigned from the Bulk Sample Program on October 7, 2013, forwarding a lengthy letter that contained the following excerpts:

> It has become apparent that there is a substantial difference between what information on the VOK program that Pretium believes should be disseminated to public markets, and what emphasis there should be on the interpretation of results, as compared with that which Strathcona believes to be appropriate. As a consequence, we at Strathcona find ourselves in an increasingly uncomfortable position given that Pretium has chosen not to follow any of the recommendations for public disclosure that we made in July, August and September …

> As we have summarized in earlier sections of this letter, we have expressed our views on the implications of the various phases of the bulk sample program on the Snowden resource model. The underground diamond drilling, the assays from the bulk sample derived from the underground mine development, and the new interpretation of the geological constraints on the distribution of gold mineralization have made it clear that the Snowden resource model is no longer valid …
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> As a consequence, at this time, there are no valid gold mineral resources for the VOK Zone, and without mineral resources there can be no mineral reserves, and without mineral reserves there can be no basis for a Feasibility Study. Therefore, the above statements included in all recent press releases, about probable mineral reserves and future gold production over a 22-year mine life are erroneous and misleading …
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> In the 40 years that Strathcona has been providing services to the mining industry, we have had some unusual assignments, including the Bre-X saga, etc., but never one such as this assignment with Pretium, whereby we are having to make a plea to Pretium to follow the basic principle to which we have always adhered, which is to tell it like it is and not to hold back on any material facts that should be in the public domain…
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> We do not think it appropriate and in accordance with good governance standards in the mining industry in the post-Bre-X era that investors should be trading Pretium shares in Toronto and New York without knowledge of the material changes that have occurred as a result of the bulk sample program.

[17] In a news release on October 9, Pretium announced Strathcona's resignation and in a further news release on October 22, Pretium summarized the reasons provided by Strathcona for its withdrawal and then added its own views that these concerns were unfounded. Over these 13 days in October, Pretium share prices plummeted by more than 50 per cent from $7.01 to $3.45.

[18] The plaintiff, who resides in Richmond Hill, Ontario, had purchased 1000 shares on August 21, 2013. He says he sustained losses over the time period in question and commenced this proposed class action

The alleged misrepresentations

[19] The essence of the plaintiff's claim is that Strathcona's findings and concerns about the sample tower test results were material facts that should have been disclosed to the market. The plaintiff points to the seven times during the July 23 to October 21, 2013

class period when Pretium issued material change reports, MD&As and press releases containing what the plaintiff says were misrepresentations by omission.

[20] It was only after Strathcona resigned that Pretium issued a press release explaining why Strathcona resigned and why its concerns were unfounded. The plaintiff says this should have been done from the outset – that Pretium should have disclosed Strathcona's concerns each time they were voiced, adding its own explanation why in Pretium's view these concerns were unfounded.

[21] Pretium's position is that the defendants acted properly throughout. The Pretium team discussed Strathcona's emails and letters both internally and with Snowden. They decided there was no obligation to disclose Strathcona's concerns because these concerns were premature and unreliable (because they were based on sample tower data) and being unreliable were not material. The only accurate and reliable test method was in milling the entire 10,000 ton bulk sample and assessing the results. As it turned out, Pretium was proven right. The mill results were positive and confirmed the validity of the Mineral Resources Estimate with room to spare.

[22] The defendants say they disclosed all material facts and, in any event, are not liable under the reasonable investigation defence set out in s. 138.4(6) of the OSA. The defendants ask that this motion for leave be dismissed with costs.

Analysis

[23] The leave test that in my view best encapsulates the recent spate of appellate case law,[3] is whether the plaintiff's case so weak or has been so successfully rebutted by the defendant that it has no reasonable possibility of success.[4]

[24] As I explain in the analysis that follows, I am unable to find that the plaintiff's case so weak or has been so successfully rebutted by the defendants that it has no reasonable possibility of success. On the contrary, the plaintiff has affirmatively established a reasonable possibility under s. 138.8(1) of the OSA that the action will be resolved at trial in his favour. This possibility has not been negated by the defendants' assertion of a reasonable investigation defence.

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[3] The recent decisions are discussed and summarized by the Court of Appeal in *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641 at paras. 41 to 45

[4] Tracking the language of Strathy J, as he then was, in *Green v Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 at para. 374.

[25] I will deal first with the misrepresentation by omission issue and then the reasonable investigation defence.

(1) Misrepresentation by omission

[26] The question is whether there a reasonable possibility that the plaintiff's submission - that Strathcona's concerns were material and should have been disclosed - will succeed at trial.

[27] I accept that Pretium genuinely believed that Strathcona's concerns were based on faulty (sample tower) data and, in Pretium's judgment, were inherently unreliable. I also accept that Pretium was proven right. As already noted, the fully-milled 10,000 ton bulk sample validated the Mineral Resource Estimate with room to spare. And, as a result, the Brucejack gold mine remains on schedule and will begin commercial production later this year.

[28] Nonetheless, in my view, the plaintiff has established a reasonable possibility that its submission - that Strathcona's concerns were material and should have been disclosed when they were voiced - will succeed at trial.

[29] The OSA defines a misrepresentation as "(a) an untrue statement of material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it is made".[5] "Material fact" is defined in s. 1(1) of the OSA as "...a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".[6]

[30] The Supreme Court in *Sharbern Holdings*[7] added the following to our understanding of materiality:

- The materiality standard calls for the disclosure of information that a reasonable investor would consider important in making an investment decision;

[5] OSA, s. 1(1) ["misrepresentation"].

[6] OSA, s. 1(1) ["material fact"].

[7] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd*, 2011 SCC 23.

- A fact may be considered material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest and at what price;

- Materiality is determined objectively from the perspective of a reasonable investor … the subjective views of the issuer do not come into play when assessing materiality;

- Because disclosure is a matter of legal obligation, the business judgment rule should not be used to qualify or undermine the duty of disclosure.[8]

[31] I pause here to ask this question: Even if Pretium genuinely believed that Strathcona's findings and concerns were based on unreliable (sample tower) data, how can it be that the findings and concerns of an experienced and respected mining consultant is not information that a reasonable investor would consider important? Recall what was said by the Supreme Court in *Sharbern Holdings*[9] - that materiality is determined objectively from the perspective of a reasonable investor. Here, in my view, the following circumstances must be considered from the perspective of a reasonable investor.

[32] First, Pretium publicly announced the fact that Strathcona was hired to oversee and report on the Bulk Sample Program and described Strathcona as a "reputable firm" and a "recognized expert." Pretium continued to tout Strathcona's involvement in press releases dated January 9, March 5, May 8, May 29, June 6, June 19, July 23, August 1, August 15, September 9, September 23, and October 3, 2013. Strathcona's involvement in the Bulk Sample Program was obviously newsworthy.

[33] Next, the fact Pretium itself confirmed in its MD&A of August 1, 2013 that the sample tower was an integral part of the testing procedure:

> The 10,000-tonne bulk sample is being excavated in 100-tonne rounds. Each round is crushed and run through a sample tower on site. The sample tower has been designed and constructed to extract two 30-kilogram representative samples from each 100-tonne round processed by the sample tower. The representative samples extracted by the sample

[8] *Ibid.*, at paras 43, 48, 51, 54 and 61.

[9] *Ibid.*

> tower will be assayed, and the assay results will be reported by Strathcona in their report on the [Bulk Sample] Program.

[34] I accept Pretium's submission that it was their expectation (as the excerpt above confirms) that the sample tower data would be included in Strathcona's report when the bulk sample was fully milled and would not be released prematurely. However, as Strathcona explained to Pretium, it was not prepared to sit on its hands waiting for the custom milling results:

> [H]ad the differences between the Snowden block model and the bulk sample results been relatively minor, publication of the results following the completion of the bulk sampling program as planned by Pretium would have been appropriate. Since the results of the bulk sample program are drastically different from the Feasibility Study, Pretium should make public, without further delay, this very material change of the gold grade and gold content of the VOK deposit as a result of the very obvious conclusions to be drawn from the bulk sample program.

[35] Finally, the fact that Strathcona, a well-known mining consultant (indeed a "recognized expert" according to Pretium) genuinely believed in the integrity and reliability of the sample tower testing method. Indeed, in a letter dated September 5, 2013 Strathcona reassured Pretium that that the sample tower results were so reliable that the milling of the entire 10,000 bulk sample was not even needed:

> [T]he results are reliable within the sample error and are not in need of further confirmation by processing of the bagged bulk sample material at a mill in Montana … We have used sampling towers and sampling protocols comparable to the one applied to the VOK bulk sampling program in several similar gold-ore sampling programs with good results. In one case, the crushed rejects of a coarse-gold project were subsequently custom milled with the mill head grade being within the variance predicted by the FSE calculation for this material (mill-head grade: 15.1 g/t; bulk sample grade: 15.5 g/t) .

[36] As already noted, the debate between Pretium/Snowden on the one side and Strathcona on the other was a debate that would eventually be won by Pretium when the bulk sample was fully milled and tested. However, during the time period in question, it cannot be said, in all the circumstances, that the unreliability of the sample tower date was so obvious and self-evident and Strathcona's concerns so wrong-headed that Strathcona's findings and views were not material and that no reasonable investor would want to know what Strathcona was saying.

[37] In my view, by any objective measure, reasonable investors would have considered it material that two respected mining consultancies retained by Pretium -

Snowden and Strathcona – fundamentally disagreed as to whether there were valid mineral resources in the VOK zone of the Brucejack mine, a question that went to the very heart of Pretium's entire business model.

[38] Pretium should have disclosed Strathcona's concerns when they were voiced, adding its own views about the unreliability of the sample tower results if they wanted to do so. This was the approach advocated by the Supreme Court in *Danier Leather* when determining how to reconcile the business judgment rule with an issuer's continuous disclosure obligations at trial.[10]

[39] It is noteworthy that when Strathcona resigned Pretium did exactly what it should have done months earlier – it disclosed Strathcona's concerns followed by its own comments on Strathcona's findings. In its October 22, 2013 press release, Pretium said this:

> Strathcona withdrew from the Program on October 8, 2013 before any results from the processing of the bulk sample were available. In withdrawing from the Program, Strathcona advised Pretium that "...there are no valid gold mineral resources for the VOK Zone, and without mineral resources there can be no mineral reserves, and without mineral reserves there can be no basis for a Feasibility Study." They also advised that "...statements included in all recent press releases [by Pretium] about probable mineral reserves and future gold production [from the Valley of the Kings zone] over a 22-year mine life are erroneous and misleading."
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> Snowden maintains its stance that the November 2012 Mineral Resource Estimate remains valid, and has taken steps to involve a third party peer review in its up- coming mineral resource update. …
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> Both Pretium's management and Snowden share a number of significant concerns with respect to Strathcona's conclusions. They contend that the Strathcona conclusions are based on: (a) the interpretation of preliminary data, (b) the interpretation of too few data, and (c) the incorrect interpretation and application of preliminary local data for comparison to the resource estimate model. Pretium management and Snowden also share significant concerns that the sampling tower approach for the Valley of the Kings deposit may be flawed.

[10] *Kerr v. Danier Leather*, 2007 SCC 44, at para. 55.

[40] In my view, given that the primary goal of the OSA is investor protection,[11] given that the surrounding circumstances as set out above in paragraphs 32 to 35 and viewed objectively favoured disclosure, and given that Pretium could very easily have satisfied both the statutory disclosure obligation and its own desire to make clear that Strathcona's findings were unfounded by doing (in each of the seven releases) exactly what it did in the October 22 news release, I find there exists a reasonable possibility that the plaintiff's submission - that Strathcona's concerns were material and should have been disclosed - will succeed at trial.

[41] I am satisfied that the plaintiff has cleared the leave hurdle in s. 138.8 of the OSA.

(2) The reasonable investigation defence

[42] Section 138.4(6) of the OSA provides that a person or company is not liable in an action under s. 138.3 if that person or company proves two things: one, that it conducted or caused to be conducted a reasonable investigation before the document containing the misrepresentation was released, and two, that at the time of the document's release, it had "no reasonable grounds to believe that the document … contained the misrepresentation."

[43] The defence of reasonable investigation is usually mounted at trial and if so then the onus is on the defendants to prove the defence on a balance of probabilities. However, if the defence is raised at the leave motion, as it is here, then as the Court of Appeal noted in *Green*, the test is "whether there is a reasonable possibility that the defendants will not be able to establish one or both branches of the reasonable investigation defence."[12] If there is a reasonable possibility that the defendants will not be able to establish one or both branches of this defence at trial, the motion for leave must be granted.

[44] As I have already noted, I am prepared to accept that Pretium took Strathcona's concerns seriously and discussed them both internally and with Snowden. In other words, I am prepared to find that the defendants conducted a reasonable investigation into the reliability of Strathcona's findings and concerns and have thus satisfied the first branch of s. 138.4(6).

[45] In my view, however, there still remains a reasonable possibility that the defendants will not be able to satisfy the second branch - that at the time that each of the

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[11] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 63.

[12] *Green, supra*, note 7, at para. 94, agreeing with Strathy J. in the court below, who in turn had adopted Justice van Rensburg's language in *Silver v. Imax*, [2009] O.J. No. 5573 at para. 256.

impugned documents was released, the defendants had "no reasonable grounds to believe that the document … contained the misrepresentation." That is, that they had no reasonable grounds to believe that the omission about Strathcona's findings and concerns was an omission of a material fact that a reasonable investor would find important and would reasonably want to know.

[46] In the context of this leave motion, the question (stated somewhat inelegantly) is whether there is a reasonable possibility that the defendants will not be able to establish at trial that when they decided to omit Strathcona's findings and concerns they had no reasonable grounds to believe that this was an omission of a material fact that a reasonable investor in all the circumstances already noted would find important.

[47] I repeat what was said above at paragraph 40. Given that the primary goal of the OSA is investor protection, that the surrounding circumstances as set out above in paragraphs 32 to 35 and viewed objectively favoured disclosure, and that Pretium could very easily have satisfied both the disclosure obligations in the OSA and its own desire to make clear that Strathcona's findings were unfounded by doing (in each of the seven releases) exactly what it did in the October 22 news release, I find that there is a reasonable possibility that the defendants will not be able to establish the second branch of the reasonable investigation defence at trial.

[48] I therefore find that the reasonable investigation defence does not succeed at this stage of the proceedings.

Disposition

[49] The plaintiff's motion for leave under s. 138.8 of the OSA is granted.

[50] The plaintiff may advance an action under s. 138.3 of the OSA relating to the defendants' alleged misrepresentations dated July 23, August 1, August 15, September 9, September 23, October 3 and October 9, 2013.

[51] If costs cannot be resolved by the parties, I would be pleased to receive brief written submissions – within 14 days from the plaintiff and within 14 days thereafter from the defendants. The defendants are reminded that if they intend to challenge the reasonableness of the plaintiff's time dockets they should provide a certified copy of their own dockets.

[52] I am obliged to counsel on both sides for their assistance and for the quality of their written and oral advocacy.

Justice Edward P. Belobaba

Date: July 20, 2017