Case Name:

Gold Reserve Inc. v. Rusoro Mining Ltd.

Between
Gold Reserve Inc., and
Rusoro Mining Ltd. and Endeavour Financial International Corporation

[**2009**] **O.J. No. 1442**

251 O.A.C. 127

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Divisional Court File Nos. 065/09 and 066/09

Court File No. CV-08-7904-00 CL

Ontario Superior Court of Justice
Toronto, Ontario

D.E. Bellamy J.

Heard: April 2, 2009.
Judgment: April 6, 2009.

(24 paras.)

Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Injunctions -- Circumstances when granted -- Motion by defendants for leave to appeal interlocutory injunction restraining them from proceedings with hostile takeover dismissed -- Motions judge alive to all issues and applied well-established law -- Motions judge aware of defendants' submissions that order resulted in final determination but found serious issue test was sufficient and plaintiff had prima facie case -- While motions judge unhelpfully quoted 16 pages of dissenting reasons, he did not state agreement or reliance on them -- Motions judge examined all facts before finding a fiduciary duty owed -- No reason to doubt correctness of decision and not issue of general importance.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 62.02(4) (b)

Counsel:

Robert S. Harrison, Berkley D. Sells and Shelley Babin, for the Plaintiff/Respondent.

R. Seumas, M. Woods and Bryn Gray, for the Defendant/Moving Party Rusoro Mining Ltd.

Eliot N. Kolers and Alexander D. Rose, for the Defendant/Moving Party Endeavour Financial International Corporation.

ENDORSEMENT

1 **D.E. BELLAMY J.**:-- The moving parties seek leave to appeal a decision of Cumming J. dated February 10, 2009 and reported at [2009] O.J. No. 533 (Sup. Ct. J.), in which he granted an interlocutory injunction to Gold Reserve Inc. ("Gold Reserve").

2 That interlocutory injunction restrained Rusoro Mining Ltd. ("Rusoro") from proceeding with any hostile takeover bid to acquire the shares of Gold Reserve until the end of the trial, and restrained Endeavour Financial International Corporation ("Endeavour") from having any involvement at all, including any involvement on behalf of Rusoro, with any hostile takeover bid to acquire the shares of Gold Reserve until the end of the trial. Neither of the moving parties seeks leave to appeal the third term of the injunction which requires them both to return to Gold Reserve its confidential information and anything produced from that information. That term has now been fulfilled.

3 The moving parties seek leave to appeal under rule 62.02(4)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 which reads as follows:

> (4) Leave to appeal shall not be granted unless,
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

4 Both Rusoro and Endeavour submit the motions judge erred for the following reasons:

(a) He failed to recognize the order as a final determination which necessitated an analysis more stringent that merely "a serious issue to be tried";
(b) He made a finding of fiduciary duty based on a dissenting opinion in *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.) ("*Lac Minerals")*;
(c) He reversed the onus, effectively requiring the moving parties to disprove a breach of confidence; and
(d) He incorrectly concluded that Gold Reserve had adduced evidence of irreparable harm.

5 Rusoro submits the motions judge erred for the following additional reasons:

(e) He failed to properly balance and consider the respective harm to the Gold Reserve shareholders;
(f) He failed to apply the equitable defences of laches and acquiescence; and
(g) Even if the motions judge was correct in granting an injunction, the order he made was overly broad and punitive because he failed to limit the length of the injunction to a period proportionate to the alleged unfair timing advantage gained.

6 The motions for leave to appeal are dismissed. The motions judge was very much alive to all the issues raised by the moving parties and, in conducting his analysis, he carefully analyzed the facts, then applied well-established principles of law. In granting this discretionary remedy, he made no error that would result in my doubting the correctness of his order.

7 The moving parties first contend that the motions judge used an inappropriate test on the merits. They submit that he failed to recognize this interlocutory order as one that results in a final determination of the issue, and is therefore an exception to the general rule that the moving party must only establish there is a serious issue to be tried. Rather, the motions judge was required to undertake an extensive review of the merits of Gold Reserve's case and to apply a test establishing a strong *prima facie* case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R 311 at 337-339 ("*RJR-MacDonald"*).

8 The motions judge was aware of the defendants' submissions but concluded that proof of a serious issue for trial was sufficient. However, having said that, he went further and said at para. 64, "it is also my view that Gold Reserve has established a *prima facie* case." He then proceeded to engage in a lengthy, meticulous and careful examination of the evidence and the merits of the case. The end result is that he conducted a much more extensive examination of the merits than he was required to conduct had he been following the more general approach suggested in *RJR-MacDonald* where the Supreme Court of Canada said at p. 337 that "[A]prolonged examination of the merits is generally neither necessary nor desirable." The motions judge's wide-ranging, detailed review

covered not only the merits of the plaintiff's case but also that of the defendants. In the final analysis, he concluded that the first prong of the *RJR-MacDonald* test had been established. I cannot say that he was in error in so concluding.

9 The moving parties assert also that the motions judge decided that a fiduciary duty will arise based solely upon the disclosure of confidential information, and that he based his reason for that proposition on the dissenting opinion of La Forest J. in *Lac Minerals.*

10 The motions judge, in citing *Lac Minerals,* unhelpfully refers to sixteen pages (page 28-44) of part of La Forest J.'s lengthy discussion regarding fiduciary duty. It is true that La Forest J.'s dissenting conclusion is contained in that part, but it is not clear to me that the motions judge was agreeing with that conclusion. Because he did not specify what in the sixteen pages he was agreeing with, the motions judge could equally have been referring to other propositions contained in the citation: for example, that a fiduciary relationship does not normally arise between arm's length commercial parties, or that it is a question of fact in each case whether the relationship between the parties creates a fiduciary relationship. Or, as the responding party suggests, the reference to the very lengthy analysis of La Forest J. was intended to indicate the nature of the analysis that the motions judge had conducted in reaching his conclusion. That is equally plausible. It simply is not clear to me from the motions judge's reasons that this very experienced judge was citing a 20-year old seminal case to stand for the reverse of its *ratio*.

11 What is clear, though, is that the motions judge did recognize that "the law of fiduciary relations does not ordinarily apply to parties involved in commercial negotiations" (para. 73), that it is not necessary to have a confidentiality agreement to trigger a fiduciary obligation (para. 72), and, importantly, that it is necessary to thoroughly examine the facts to determine whether they demonstrate the existence of a fiduciary duty. In my view, that is exactly what the motions judge did. He conducted a painstaking examination of the facts and, at para. 74, concluded that "the <u>particular circumstances</u> of the <u>specific factual situation at hand</u> give rise to the fiduciary duty of loyalty on the part of Endeavour" [emphasis added].

12 The motions judge's comments do not stand for the proposition that all financial advisors who provide advice to clients and who have signed a confidentiality agreement are necessarily in a fiduciary relationship. His findings, made after he had fully examined the unique relationship between the parties, were clearly limited to the ample evidence of the indicia of a fiduciary relationship facing him. Having found a fiduciary relationship between Gold Reserve and Endeavour, he then concluded that Rusoro was equally liable as a knowing and willing recipient of services in breach of the existing contract and of Endeavour's duties to Gold Reserve. Again, I cannot say the motions judge erred in his conclusions.

13 Next, the moving parties assert that the motions judge reversed the onus, effectively requiring the moving parties to disprove a breach of confidence. I do not agree. Clearly the onus of satisfying the three-part test from *RJR-MacDonald* rests with the plaintiff and nothing in the motions judge's

reasons suggest that he thought otherwise or that he applied the evidence in a way that derogated from that onus. The motions judge reviewed all the evidence. He referred to actions and beliefs of both the plaintiff and the defendants. He also drew inferences based on that evidence. In doing so, he did not reverse the plaintiff's onus or disregard evidence.

14 The moving parties also submit the motions judge concluded incorrectly that Gold Reserve had adduced evidence of irreparable harm. In my view, there was ample evidence before the motions judge to support his findings, especially as Gold Reserve's only significant asset was a gold project in Venezuela whose future is uncertain, and Rusoro was fully aware of this. He correctly noted that Endeavour had expressly acknowledged in its contract with Gold Reserve that any breach of its obligations of confidentiality might not be fully compensated by monetary damages. He also correctly observed that the nature of the harm caused to Gold Reserve could not be quantified. There was evidence to support his conclusions with respect to irreparable harm.

15 As mentioned above, Rusoro submitted there were three additional errors.

16 First, Rusoro submits that the motions judge failed to consider the harm to shareholders. The motions judge did consider the impact on Gold Reserve's shareholders. He also considered the prospect of an auction and decided that the actions of Endeavour and Rusoro made it impractical for Gold Reserve to arrange an auction for competing bids or to otherwise maximize value for Gold Reserve shareholders. While another judge might have come to a different conclusion, it was not an error for him to reach this one.

17 Second, Rusoro submits that the motions judge does not appear to have taken into account its argument with respect to the equitable defences of laches and acquiescence, and that this is potentially an error because Rusoro does not know whether the motions judge considered its argument. While it might have been preferable for the motions judge to specifically refer to this argument of Rusoro's, his failure to do so is not an error of such proportion that would warrant sending this matter for appellate review. In any case, the motions judge certainly grasped the chronological significance of this argument. He knew, for example, that Gold Reserve did not object to Rusoro using Endeavour as its financial advisor in the context of a friendly offer. When the offer became hostile, though, Gold Reserve immediately objected, and the evidence disclosed that Gold Reserve considered Endeavour's involvement in a hostile takeover bid as being a conflict with their Second Advisory Agreement. It was open, therefore, to the motions judge to conclude that there had been no acquiescence on Gold Reserve's part to have Endeavour act as a financial advisor to Rusoro on this hostile bid and that there had been no delay in bringing its opposition to the moving parties' attention.

18 Finally, Rusoro argues that the order is overly broad and punitive because it fails to limit the length of the injunction to a period proportionate to the alleged unfair timing advantage gained. It submits that by granting an injunction to restrain any hostile bid until trial, the motions judge has overcompensated Gold Reserve. It suggests that if the motions judge were going to grant relief, he

should have limited it to no more than 30 days. This decision was entirely within the motions judge's discretion and, on the basis of the unique facts he had before him, the injunctive relief seems appropriately tailored to these facts. I cannot say that he erred.

19 Finally, and perhaps more importantly given the exceptional fact situation here, even if I were to conclude that the motions judge's decision was open to serious debate, it would still be necessary for the moving parties to demonstrate under the second part of rule 62.02 (4)(b) that the proposed appeals involve matters of such importance that leave to appeal should be granted. This conjunctive test requires both parts to be satisfied. They have not both been satisfied.

20 The value of the proposed appeals is limited to the distinctive facts involving these three corporate entities, with no broad conclusions or questions of principle. Rusoro and Endeavour are extremely closely linked. The motions judge listed numerous illustrations of how significantly intertwined their relationship was and how, because of this cohesive and entangled relationship, both stood to gain financially from the hostile takeover bid. As a result, these proposed appeals do not transcend the immediate interests of the parties in this case and raise no issues of general public interest.

21 The motions judge had before him the uncontradicted expert opinion of Mr. Stanley M. D. Beck, former Chair of the Ontario Securities Commission. In that opinion, Mr. Beck colourfully observed that "Endeavour now appears as Rusoro's agent in making a hostile bid for Gold Reserve while pregnant with the information it obtained from Gold Reserve." In illustrating just how unique the facts of this case are, he went on to say the following:

> I am not aware of any case in which the financial advisor of a company, who is subject to a confidentiality agreement, has subsequently appeared as the financial advisor to a hostile bidder for that same company. If such a thing were to occur, the commercial expectation would be that the hostile bidder would be bound by its financial advisor's confidentiality agreement with the target company. Accordingly, the bidder would not make use of the confidential information, including for the purposes of making a hostile bid, at least during the normal standstill period.

22 In my view, this is a further manifestation of how the proposed appeals do not transcend the interests of the parties and would not affect this industry's standards. The unique fact-specific nature of this case does not necessitate the establishment or clarification of legal principles requiring appellate review.

23 As a result, the motions for leave to appeal are dismissed. There is no reason to doubt the correctness of the order and, in any event, the appeals do not involve matters of such importance that leave to appeal should be granted.

24 If the parties are unable to agree on the issue of costs, they will make brief written

submissions to be delivered to my office by April 24, 2009.

D.E. BELLAMY J.

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