COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Bolivar Gold Corp. v. Scion Capital,***
2006 YKCA 001

Date: 20060228
Docket: YU0555

IN THE MATTER OF AN APPLICATION FOR APPROVAL OF AN ARRANGEMENT UNDER SECTION 195 OF THE *BUSINESS CORPORATIONS ACT* OF THE YUKON TERRITORY, R.S.Y. 2002, C. 20 AND AMENDMENTS THERETO

Between:

Bolivar Gold Corp.

Respondent
(Petitioner)

And

Scion Capital, LLC, Scion Qualified Value Fund, A Series of Scion Qualified Funds, LLC, Scion Value Fund, A Series of Scion Funds, LLC, The Clinton Group, and Arnhold and S. Bleichroeder Advisers, LLC

Appellants
(Respondents)

AND

IN THE MATTER OF BOLIVAR GOLD CORP. A CORPORATION INCORPORATED PURSUANT TO THE LAWS OF THE YUKON TERRITORY AND IN THE MATTER OF SECTIONS 124, 243 AND 249 OF THE *BUSINESS CORPORATIONS ACT* OF THE YUKON TERRITORY, R.S.Y. 2002, C. 20 AND AMENDMENTS THERETO

Between:

Scion Capital, LLC, Scion Qualified Value Fund, A Series of Scion Qualified Funds, LLC, Scion Value Fund, A Series of Scion Funds, LLC, The Clinton Group, and Arnhold and S. Bleichroeder Advisers, LLC

Appellants
(Petitioners)

And

Serafino Iacono, Miguel De La Campa, Jose Francisco Arata, Robert Doyle, Peter Volk, and Perry Dellece, Bolivar Gold Corp.

Respondents
(Respondents)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

Oral Reasons for Judgment

E. Babin L. Sarabia K.C. Bourchier	Counsel for the Appellant
C.E. Hinkson, Q.C. R. Ryan Bell	Counsel for the Respondent, Bolivar Gold Corp
K.L. Kay	Counsel for Goldfields Ltd.
M.A. Gelowitz	Counsel for Respondents, S. Iacono, M. De La Campa, J. F. Arata, R. Doyle, P. Volk, P. Dellelce
Place and Date of Hearing:	Vancouver, British Columbia 27 February 2006
Place and Date of Judgment:	Vancouver, British Columbia 28 February 2006

[1] **FINCH, C.J.Y.T.**: The appellants, dissident security holders, appeal from two orders pronounced by the Supreme Court of the Yukon Territory on 17 February 2006. In proceeding number 05-A0151, the court made an order approving a plan of arrangement entered into between the respondent petitioner Bolivar and Gold Fields Ltd. Under the plan Gold Fields agreed to purchase all of the shares and other securities in Bolivar for prices agreed to, as set out in the arrangement agreement announced 1 December 2005, and later increased on 11 January 2006. The arrangement was approved by the requisite percentage of share, warrant and option holders at a special meeting on 12 January 2006. The court's approval of the arrangement was required, and given, pursuant to the provisions of s. 195 of the ***Yukon Business Corporations Act***.

[2] The second order, made in proceeding number 05-A0182, dismissed the petition of the dissenting security holders for the oppression remedy provided for under s. 243 of the ***Act***. The relief sought included removal of Bolivar's officers and directors, and the setting aside of the plan of arrangement.

[3] The judge pronounced the orders prior to the giving of reasons because the plan of arrangement provided that 28 February 2006 was the final date for approval. After pronouncing the orders on 17 February, the learned judge provided his reasons for judgment on 24 February 2006.

[4] On 21 February, a judge of this Court granted a stay of the orders appealed from until 27 February, when it was anticipated the appeal could be heard. The appeal was heard on an expedited basis because of the term of the plan requiring

that final approval be obtained on or before 28 February. The stay was extended to the time judgment is pronounced.

[5] In general terms, the dissenting security holders alleged that the plan was both procedurally and substantially unfair, and that its effect was to permit sale of the securities in Bolivar at prices which are unreasonably low and therefore unfair. The appellants also alleged that the plan allows those directors who have management positions in Bolivar to receive substantial benefits as a result of the proposed sale, as a result of which they were in positions of conflict.

[6] The learned chambers judge described the test for approving an arrangement at paragraph 63 of his reasons:

> [63] The test for approving an arrangement is well settled in the case law. The court must be satisfied that:
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> (1) The statutory provisions have been complied with;
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> (2) The class was fairly represented;
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> (3) The arrangement must be such as a person of business would reasonably approve; and
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> (4) The arrangement must be compatible with the section under which it is to be approved.

[7] It is not disputed that this is the correct test. The judge said there was no dispute as to the second and fourth parts of the test set out above. He said the real issues were whether there had been compliance with the statute, and whether the arrangement was one that a business person would reasonably approve.

[8] In concluding that Bolivar was entitled to an order approving the plan, the judge found:

1. The management directors were not in positions of conflict (paras. 89-90);
2. The process leading to the plan of arrangement was not unfair (paras. 91-93);
3. The management of Bolivar provided adequate disclosure of matters material to the plan of arrangement;
4. The special meeting on 12 January 2006 was not manipulated by the amendments to the plan on January 10 and 11 (paras. 100-102);
5. The special meeting on 12 January 2006 was not manipulated by the conduct of the chairperson (paras. 104-109); and
6. The arrangement agreement was substantially fair (paras. 110-115).

[9] The judge therefore concluded that the plan of arrangement and the arrangement agreement were both procedurally and substantially fair. Accordingly, he approved the plan and authorized its implementation.

[10] As to the oppression proceeding, the judge said the allegation that Gold Fields acted in an oppressive manner was not supported by the evidence.

[11] As to the conduct of Bolivar and the individual respondents, the judge concluded that a plan of arrangement that was procedurally and substantially fair could not be oppressive (para. 118). Accordingly, he dismissed the dissenting shareholders' petition.

[12] On this appeal, the appellants repeat the substance of the arguments advanced to the chambers judge. Counsel submitted that the judge erred in finding

that the management directors were not in positions of conflict. He said they could not avoid that conflict because their contracts of employment provided for generous severance payments on completion of any arrangement that resulted in change of control of Bolivar. Counsel also asserts that the directors failed to provide any mechanism to guard against the potential for the management directors to act in their own interests, rather than in the interests of the security holders. That potential is inherent in the choice between maintaining Bolivar as a stand alone operating company and bringing about a change of control.

[13] As to the unfairness of the process, the appellants allege that the directors failed to make disclosure of material information, including information contained in a letter agreement of 21 November 2005, entered into between Bolivar and Gold Fields, and Bolivar's press release of the same date, which the appellants say was incomplete and misleading.

[14] The appellants also say the prices agreed to for the various securities were substantially unfair because they were based on an evaluation given on 30 November 2005. The appellants say there were significant developments after that date, and before the arrangement agreement was voted on, that pointed to a much higher valuation. Those developments included a substantial increase in the price of gold and favourable political developments in Venezuela where Bolivar's properties are located.

[15] Counsel for the appellants maintained the position that the management directors' conflicting interests, and their support for the proposed arrangement,

amounted to oppression, entitling the appellants to the oppression remedies under the ***Yukon Business Corporations Act***.

[16] I have not been persuaded that the chamber judge erred in holding that the management directors were not shown to be in positions of conflict. The chambers judge said:

> [89] It is my view that the benefits that will accrue to the management directors have been in place for some time and were not created overnight in anticipation of the Gold Fields offer. They are fully disclosed in the Management Information Circular and thus it was open to the security holders to determine whether they are excessive or putting management in a position of conflict.
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> [90] I reject the submission of Scion about the activities of Coalcorp. The employment contracts clearly permit the management directors to be involved in Coalcorp. More importantly, it is a collateral issue that has no evidentiary connection to the sale of Bolivar to Gold Fields. It would truly sidetrack this fairness hearing to begin to interpret employment contracts and outside interests that have only a speculative connection to the transaction with Gold Fields.

[17] It is clear that the directors have a financial interest dependent on completion of the arrangement. Those interests arise from their contracts of employment, entered into long before the negotiations that led to the arrangement. The security holders, including those who dissent, were aware of those interests. But those interests are not in conflict with the interests of the security holders. Their interests are aligned or coincide with those of the security holders. A significant part of the benefits the directors will obtain on completion depend directly on the consideration received by the security holders under the arrangement. The remainder of the benefits are routine severance benefits.

[18] In any event, the financial benefits the management directors will receive were fully disclosed in the information circular. It was for the security holders to decide, after hearing the arguments of the dissenters, whether the arrangement was acceptable to them. Those who disapproved, whether because they considered the benefits to the directors were excessive, or for any other reason, were free to vote against the arrangement. Some, including the appellants, did. The requisite majority, however, exercised their judgement by voting in favour of the arrangement.

[19] In my respectful opinion, the chambers judge did not err in concluding that the interests of the management directors did not place them in a position of conflict.

[20] Turning to the issue of disclosure, the chambers judge said:

> [95] As I have stated earlier there is no obligation on Bolivar to give the complete corporate history of Bolivar and its management in the Management Information Circular. It must, rather, include material interests of the directors of the corporation and the effect of the arrangement on those interests. It must also explain the effect of the arrangement. In my view, these objectives were achieved by the Management Information Circular.
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> [96] As to the specific issues of alleged non-disclosure by Scion in regards to items (a), (b) and (c), I find that the termination fee was fully explained. The role of the Independent Committee was also explained in a detailed manner.
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> [97] I have found no support for the allegations that there were previous offers as set out in (d) and (e).

[21] The issues of whether adequate disclosure was made, and whether any disclosure was misleading, were essentially questions of fact. In my view, the chambers judge addressed these questions adequately. There is evidence in the

record to support his conclusions. I see no basis on which this court could properly intervene on that issue.

[22] The appellants' main complaint appears to be that the arrangement resulted in an offer that was too low, and provided insufficient value to the security holders. The chambers judge did not accept this argument. He said:

> [112] On the one hand, Scion's view is supported by its expert valuators. However, Scion was in a position to place its valuations, obtained after the Special Meeting, before Bolivar security holders to defeat the plan of arrangement. It did not see fit to do so. Scion will have every opportunity pursuant to its Dissent Notice under s. 193 of the Y.B.C.A. to establish fair value for its share.
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> [113] On the other hand, the price of gold continued to rise after the Sprott valuation. There is no statutory obligation to Bolivar to provide a more current valuation to Bolivar security holders. Indeed the Interim Order sets a tight time frame to avoid events overtaking the plan of agreement.
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> [114] The expert valuations discuss a range of shares prices based upon their respective assumptions and opinions. I am satisfied that the Sprott Securities valuation was reasonable and within the range of values.
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> [115] Moreover, one of the important indicators that the share value is in the range of fair value is the business judgment of the security holders at the special meeting. A substantial majority in both classes have voted to approve the plan of arrangement. The business judgment of security holders should prevail.

[23] In my opinion, the chambers judge did not err in giving substantial weight to the business judgement of the security holders. Certainly his conclusion on the fairness of the offer cannot be said to be palpably wrong.

[24] The appellants advanced a number of other arguments, but in my view none of them would permit this court to intervene. The chambers judge set out his

findings of fact at paras. 8-57. I did not understand the appellants to challenge any of those basic facts, and indeed, in my view they are all amply supported by the evidence.

[25] No breach of statutory duty by the directors has been shown. The chambers judge applied the correct test on the application to approve, and found the arrangement agreement to be fair both procedurally and substantively.

[26] I would dismiss the appeal from the order approving the arrangement.

[27] I would similarly dismiss the appeal against the order dismissing the appellants' claim for the oppression remedy. The appellants essentially disagree with the business judgement of the directors and of the security holders. The chambers judge's conclusion that the management directors were not in a position of conflict, a conclusion which was open to him on the evidence, is effectively an end to the allegation of oppression. The reasonable expectations of the security holders were met. The interests of the appellants were not oppressed, unfairly prejudiced or disregarded. The chambers judge did not err in dismissing the appellants' claim for relief under s. 243 of the ***Yukon Business Corporations Act***.

[28] **HUDDART, J.A.**: I agree.

[29] **LOW, J.A.**: I agree.

"The Honourable Chief Justice Finch"