

CITATION: Carom v. Bre-X Minerals Ltd., 2011 ONCA 392

DATE: 20110520

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COURT OF APPEAL FOR ONTARIO

MacPherson, Armstrong and Karakatsanis JJ.A.

BETWEEN

Donald Carom, 3218520 Canada Inc., 662492 Ontario Limited and Osamu Shimizu

Plaintiffs/Moving Parties (Appellants)

and

Bre-X Minerals Ltd., Bresea Resources Ltd., now known as Sasamat Capital Corporation,
John B. Felderhof, Jeanette Walsh, Estate Trustee of the Estate of David G. Walsh,
deceased, Jeanette Walsh, personally, T. Stephen McAnulty, Nancy Jane McAnulty, John
B. Thorpe, Rolando C. Francisco, Hugh C. Lyons and Paul M. Kavanagh

Defendants/Respondents (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

Paul J. Pape and Shantona Chaudhury, for the appellants

Alan J. Lenczner, Q.C., for the respondents

John B. Felderhof, acting in person by factum only and not appearing

Heard: May 17, 2011

On appeal from the decision of Justice Paul M. Perell of the Superior Court of Justice,
dated November 17, 2010.

ENDORSEMENT

[1] The appellants, the representative plaintiffs in a certified class action, sought to amend the list of common issues, by adding two questions to the 15 common issues already certified:

- Are T. Stephen McAnulty, Nancy Jane McAnulty, John B. Felderhof, Jeanette Walsh, Estate Trustee of the Estate of David G. Walsh, deceased and Jeanette Walsh, personally or any of them, liable to account and disgorge to all or any of the Class Members, on a restitutionary basis, all or any part of the proceeds of the sale of their Bre-X shares and Bresea shares? If so, in what amount and for whose benefit is the accounting and disgorgement to be made?
- Are T. Stephen McAnulty, Nancy Jane McAnulty, John B. Felderhof, Jeanette Walsh, Estate Trustee of the Estate of David G. Walsh, deceased and Jeanette Walsh, personally, or any of them, constructive trustees for all, or any, of the Class Members for all, or any part of, the proceeds of the sale of their Bre-X shares and Bresea shares? If so, in what amount and for whose benefit are the proceeds held?

[2] In a decision dated November 17, 2010, the motion judge, Perell J., dismissed the motion. He concluded that, against the backdrop of common issues that had been settled since 1999, it would not be fair in 2010 to add these two questions to the common issues at trial. The appellants appeal this decision, except as it relates to Nancy Jane McAnulty.

[3] The starting point is recognition that the original certification order by Winkler J. contemplated a two-stage process in the class action. At the first stage, a common issues

trial would determine questions of liability. At the second stage, with the agreement of all parties including the plaintiffs, “individual trials will be necessary for a final determination of the claims of each class member, in particular to determine issues of causation, reliance and damages arising from the claims”: see *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.), at para. 88.

[4] As the years went by, the class proceedings stalled, principally because the parties were waiting for the result of the defendant John B. Felderhof’s criminal trial (he was acquitted). By the time the appellants had restarted the engine in the class proceedings, they had reformulated their thinking in two respects – first, they thought that, potentially, the remedies of constructive trust and disgorgement might be more effective than the remedy of damages; and second, they thought that it would be more efficient to deal with these remedies in the common issues trial rather than later in the second stage remedy-focused part of the trial. Hence their motion, which Perell J. dismissed.

[5] At the oral hearing of the appeal, two separate but related issues were in play. It soon became clear that on one of those issues – the more important one – the parties present were in fact in agreement.

[6] The first issue is whether the remedies of constructive trust and disgorgement are potentially available to the appellants if they are successful in the common issues trial in establishing some wrongful conduct (conspiracy, fraudulent misrepresentation, negligent misrepresentation) on the part of the respondents.

[7] As the oral hearing proceeded, it became clear that there is no dispute on this issue. The remedies of constructive trust and disgorgement are asserted in the Amended Fresh Statement of Claim. Counsel for the respondents explicitly acknowledged that it would be open to the appellants to seek these remedies after liability is determined at the common issues trial (if it is reached). There is nothing in the motion judge's reasons that suggests otherwise. These remedies, and the potential application of s. 24 of the *Class Proceedings Act*, S.O. 1992, c.6, are live issues in these proceedings.

[8] The second issue relates to whether the proposed common issues should have been permitted in order to create another basis of liability by adding waiver of tort as an a cause of action.

[9] Again, as the oral hearing unfolded, it became clear that the key concern of the appellants was to preserve the availability of constructive trust and disgorgement as alternative remedies without the need to resort to individual trials if they choose to forego damages. However, counsel also sought to preserve the ability to argue waiver of tort as an independent cause of action. Counsel for the respondents, relying on the fact that questions of remedy had been postponed, on consent since 1999, to after the result in the liability-focused common issues trial is known, submitted that it was unfair to add a potential new basis of liability at this late stage.

[10] In the end, we see no reason to interfere with the motion judge's decision that it was unfair to add a common issue for a potential new cause of action at this late stage of

these class proceedings. His decision permits the appellants to seek remedies that are expressly sought in their statement of claim, but it keeps that issue where it has always been, in the second stage of the proceedings where it can be addressed through legal argument and, possibly but not necessarily, additional evidence.

[11] The appeal is dismissed. No costs.

“J. C. MacPherson J.A.”

“Rob P. Armstrong J.A.”

“Karakatsanis J.A.”