Citation: Fischer et al
v. Delgratia et al
S99-2131

Date: 19991207

Docket: C974521
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Williamson
Pronounced in Chambers
December 7, 1999

BETWEEN:

ANNE FISCHER, BETTY LAU, PETER PANOS and TWANA HARPER

PLAINTIFFS

AND:

DELGRATIA MINING CORPORATION, J. TERRENCE ALEXANDER, CHARLES A. AGER, ERIC X. LAVARACK, DAVID R. MANNING, GEOFF COURTNALL and PATRICK J. FURLONG

DEFENDANTS

Counsel for the Plaintiffs: D. Klein

Counsel for the Defendant, Delgratia Mining, J. Alexander, G. Courtnall and P. Furlong: J. Frank

Counsel for the Defendant, C. Ager: D. Lunny

[1] **THE COURT:** This is an application by the plaintiffs for a number of orders: first of all, an order certifying this action as a class proceeding and appointing one Betty Lau as representative plaintiff pursuant to s. 4 of the ***Class Proceeding Act***; secondly, an order approving the settlement which has been reached by the parties and the details of which

have been filed as required by s. 35 of the ***Act*** and are before me today; and finally, for an order approving a class counsel fee which is also pursuant to s. 38 of the ***Act***.

[2] This matter arises out of a an action that was commenced by a number of plaintiffs against a number of defendants, including the Delgratia Mining Corporation and a number of individuals. Without going into great detail about it, the statement of claim alleges that the plaintiffs, who purchased shares in the company, did so as a result of a number of representations that had been made about gold deposits on a particular property, I believe, in Nevada.

[3] It is alleged in the statement of claim that the representations upon which these purchasers of shares relied were false and misleading, that they concealed or failed to disclose misleading or adverse material, that they inaccurately represented certain assay information and that they failed to disclose the relationship between some of the principals of some the companies that were involved.

[4] I am told, and the material shows that in the period from November of 1996 to May of 1997, shares which were at one point valued at $5, plus or minus, rose to something over $30 and then after, it was alleged these misrepresentations had been misleading and false, the shares, of course, plummeted and I am told they went down to about twelve and a half cents. As a

result, when one adds up the investments by a number of people who purchased shares, the losses become immense indeed.

[5] There is one unusual aspect of this application and that is that there were parallel actions commenced in the United States of America. Evidently, there were eight actions commenced; five were dismissed and the three others were consolidated into one action in Nevada. As a result, the settlement that has been crafted as a result of lengthy negotiations, aside from being complicated as the settlements might be, has the added factor of having to satisfy the settling of this action in this Province of British Columbia, in Canada, as well as the action in Nevada one of the United States of America.

[6] It is apparent from reading the material, as I have this afternoon, that counsel have taken great care to craft documents which indeed deal with the requirements of both jurisdictions. I also note that the settlement and precisely the terms which are before me has been approved by the court of competent jurisdiction in the State of Nevada. That is a factor which I must take into account. Nevertheless, the fact that that court has approved the settlement does not absolve me, or this court, of the statutory obligation which rests with this court when dealing both with a certification application and with the approval of a settlement.

[7] Before I turn to the requirements for certification, I should say something about the companies because I did say that one of the allegations here is that there were a number of companies involved and there was a failure to disclose that certain changes of ownership were not at arm's length, I think, is the way to put it. It is described in an argument that has been put forward to me by the plaintiffs as follows.

[8] On November 18, 1996, Delgratia announced that it had signed an agreement with Field Gold Investments Incorporated (phonetic) to purchase 40 per cent of Field Gold's wholly owned subsidiary, Nevada Gold Corporation. Nevada Gold owned all the shares of Valley Gold, which had title to certain mining claims located in Southern Nevada, referred to as the "Nevada Gold Project" or the "Josh Project". It was assay analysis from these properties, to which I referred earlier, in which it is alleged misleading information was distributed.

[9] I add further, that counsel for the defendants, and there are two counsel for defendants here: one representing a number of defendants, including Delgratia and some of the individuals; and a second, Mr. Lunny, representing Dr. Ager. Mr. Lunny, in particular, has emphasized that something that I have to take into account here is that this is a settlement and that were settlement not reached, these allegations would be, I think, his words were "hotly contested." In other words, there is no suggestion that there would not be a hard-fought trial should this matter not settle.

[10] I turn then to the requirements for deciding if an action should be satisfied as a class proceeding and, of course, they are set out in the statute in this Province. They are set out in s. 4 of the ***Act***. They are that the pleadings must disclose a cause of action, that there is a identifiable class of two or more, that the claims of those class members raise common issues, that a class proceeding is the preferable procedure in the sense of it being a fair and efficient resolution of the common issues, and that there is a representative plaintiff available who would fairly and properly represent the other members of the class. That is a skeleton outline of those requirements.

[11] It is clear to me that there is a cause of action here, although it is one, of course, that would be contested but for the settlement. But that is to say, the allegation that there was false and misleading information or representations made, that there was a failure to disclose the lack of arm's length dealings between the various companies, which I have mentioned, and also allegations of breaches of the ***United States Security Exchange Rules*** and the ***United States Exchange Act***, so that aspect of the requirement for certification is answered.

[12] In my view also, there is a class of two or more people. There are two classes described in the materials, one class are residents of B.C., a second class are non-resident; a distinction necessary, because those who reside out of the

jurisdiction to be involved must opt in, whereas those that reside here are in, unless they opt out. Both classes are described. There is clearly a class of two or more people.

[13] I am also satisfied that there is a common issue here. That is to say, there is an issue, or maybe a number of issues, but certainly the issue as to whether there were false and misleading representations is a common issue which, if it were resolved in favour of the plaintiffs, would advance the interests of the class.

[14] Is this a fair and efficient way to proceed with these claims? I think if one takes into account the concept of judicial economy, takes into account the easier access for individual small shareholders who may not have the financial resources to pursue a claim in this court, and if one takes into account the modification of the wrongdoers' actions or the alleged wrongdoers' actions which are set out in the authorities, that one must inexorably come to the conclusion that this is a fair and efficient way to proceed.

[15] Section 4.2 of the ***Act*** lists five factors: whether the common issue is a dominant or predominant issue; whether there is evidence, and I have already commented on that - I think it is - whether there is evidence that there is some reason why individuals want might (phonetic) to assert control of this action, rather than the class.

[16] I think the fact that of, I think, some 5,000 notices that have been sent out with respect to this application, with only nine people opting out and, I am told, only four of those in Canada, suggests there is no persuasive suggestion that individuals seek to control this. There are no other proceedings, except of course the one that I have mentioned in Nevada, and there may be other means to resolve this issue; notably, going to trial. But for obvious reasons, that does not seem to be the appropriate way to proceed in this case and, certainly, there is a representative shareholder here and no evidence that she is in a conflict of interest with other people in the class. In all of these circumstances, I take into account these matters, I am satisfied that this action should be certified as a class proceeding.

[17] The settlement then, which I turn to now, takes into account the fact that as counsel has submitted, and the material discloses, that the value of the principal defendant, Delgratia Mining, has been declining precipitously over the last year. As a result, there is really very little cash left in the company and it is for that reason that this settlement is not a settlement for cash but is a settlement for shares.

[18] The settlement includes the issuing of some 3,000,000 shares which will be made available to the claimants. I am told that that is about a 20 percent increase in the number of issued shares in the company and I have had some discussion with counsel that that is a dilution, of course, of the value

of the shares, but in circumstances where there is really no money and given the possibility that once these actions are resolved that the company can recover to some extent, if it recovers at all, it would appear arguably that the claimants will be better off than if they simply pursue their action, which would probably result in the company becoming bankrupt, and even if they succeeded then they would have an empty judgment.

[19] A second aspect of the settlement is that a fund of $500,000 has been set aside to cover the disbursements that must have been extensive in this matter to date. Of course, there are counsels' fees and that is a different issue and I will deal with that in a few moments. In any case, that is basically the nature of the settlement; each by virtue of a formula when each shareholder proves his or her, or its shareholdings, there would be a formula in which the 3,000,000 shares were to be divided among the shareholders and they would therefore have the potential to have some recovery should the shares increase in value from the relatively low value at which they presently are found.

[20] What are the advantages of the settlement? It is argued by counsel that this settlement is advantageous to class members, when compared with the possibility of continuing with the litigation, because the class members will not have to face the uncertainty of proving liability which, as counsel for the defendants has pointed out, would not be easily done. Secondly,

the class members will receive what compensation they will receive far more quickly than if this matter were put over for a trial. As well, even if they succeeded at that trial, they would have to face the problems of trying to collect on a judgment in circumstances where there are very few assets. I also note that, as I said, notice of this settlement has gone out to thousands of shareholders; only nine have opted out, and there is no objection to it. In my view, when I consider the class members as a whole, I am satisfied that this settlement is fair and reasonable and in the best interests of those effected and I would approve the settlement.

[21] I turn to the other matter which is the subject of fees. The fee proposal, because as I have said there are little or no funds in this company, what is proposed for counsel is parallel to what is proposed for the shareholders; that is to say, rather than be paid in cash, counsel would also take shares in the company. In addition, as I have said, there is the $500,000 set aside for disbursements.

[22] What are the factors that one should take into account when considering whether a fee is appropriate and should be approved? Those factors are not set out in the ***Act***, but they have been considered by this court. In oral reasons pronounced on September 8, 1999, that is very recently, in the case of ***Sawatzky v. Societe Chirurgicale Instrumentarium et al*** (phonetic), at page 4, Mr. Justice Brenner said that:

> In ***Harrington v. Dow Corning Corporation*** (phonetic), Mr. Justice E.R.A. Edwards set out, at paragraph 18, the factors which ought to be considered. These include the extent of the legal work done by class counsel, the skill and competence of class counsel, the complexity of the matter, the importance of the matter to the class, the result achieved, the individual claimants' contribution to the fee as a portion of their recoveries and the fee expectation of the representative plaintiff and others who signed the contingency agreements.

Mr. Justice Brenner agreed with that list put forward by Mr. Justice Edwards and I concur in that agreement.

[23] I note that Ms. Lau, the representative claimant plaintiff, had a contingency agreement with counsel at 33 and one-third percent, which is just slightly more than the percentage of shares that would go to counsel, so there is some consistency there. I am satisfied it is apparent from the material, which is complicated, and, I might say very well organized, that it is evidence of the difficulty of the work and the skill and competence of counsel.

[24] There is no doubt that this is a very important matter to the class, and the result achieved in the circumstances, to be blunt about it, gives them an opportunity which in all probability would not exist; that is, the probability of some recovery if this matter were not approved. In the circumstances, in my view, the fee is an appropriate one, and taking into account the factors listed by both Mr. Justice Edwards and Mr. Justice Brenner, I would approve the fee.

[25] I think the only thing I have not dealt with, counsel, is the appointing of Betty Lau as the representative plaintiff which I meant to do at the beginning. I am satisfied on the material before me that there is a common issue here, that she is not in a conflict with any other of the class members and that it is appropriate that she be appointed as the representative plaintiff.

[26] In the circumstances, having reviewed the material and for the reasons stated, I am satisfied that this action should be certified as a class proceeding; that Betty Lau should be named as the representative plaintiff pursuant to s. 4 of the ***Act***; that the settlement should be approved as it has been submitted; that counsel fees in the amount of 30 percent of the 3,000,000 shares Delgratia is to issue, are approved.

"L.P. Williamson, J."
The Honourable Mr. Justice L.P. Williamson