IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 845 of 1997

BETWEEN:

DELOITTE & TOUCHE, INC., TRUSTEE OF THE ESTATE OF BRE-X MINERALS LTD., A BANKRUPT

Plaintiff

AND: **(1) JOHN B. FELDERHOF**
(2) INGRID FELDERHOF
(3) SPARTACUS CORP
(4) BANK OF BUTTERFIELD INTERNATIONAL (CAYMAN) LIMITED

Defendants

Appearances: **Mr. Mac Imrie and Ms. Jane Clarkson of Maples and Calder for the Plaintiff**

Mr. Alan Lenczner Q.C. instructed by Mr. David Dinner of Bodden & Bodden for the 2nd and 3rd Defendants

Before: **Hon. Justice Henderson**

Heard: **December 2 & 3, 2009**

JUDGMENT

1. On this application, I am called upon to review for the first time a worldwide Mareva Injunction granted *ex parte* by this Court twelve years ago. No cause of action has been pleaded in the Cayman Islands against the present applicant. The Plaintiff says that the injunction is necessary for the preservation of assets here which may become available to satisfy any judgment obtained in Canada against the first defendant, John Felderhof.

Facts

2. The plaintiff ("the Trustee") is the Canadian trustee of the estate in bankruptcy of Bre-X Minerals Ltd. ("Bre-X"), a company incorporated in Alberta, Canada whose shares were traded publicly on the Toronto, Alberta and Montreal stock exchanges and NASDAQ.

3. Bre-X was in the business of exploration and mining, particularly for gold. John Felderhof, the first defendant, is a geologist residing in the Cayman Islands. Until May, 1997 Mr. Felderhof was the Vice Chairman and Senior Vice President of Bre-X, responsible for

supervising, exploring and developing its mining claims in Indonesia. Bre-X had development rights in respect of properties located on the island of Kalimantan, Indonesia, in a remote area known as Busang.

4. On May 10th, 1993 the shares of Bre-X were trading at about 50 cents per share. On that date, a Bre-X press release announced to the world that it had acquired an 80% working interest in a gold project in Kalimantan. A steady stream of press releases throughout the period from May, 1993 to December, 1995 announced increasingly impressive drilling results and predictions based on them. By December 29, 1995 Bre-X shares were trading at $53 CAD per share. The trend continued in early 1996. As excitement among investors grew, Bre-X's share price rose to $286.50 CAD on May 22nd, 1996. On that date the shares split 10 for 1.

5. By October, 1996 concerns were being voiced publicly about the nature and extent of Bre-X's entitlement to the mineral deposits in question. In March, 1997, a third party questioned the accuracy of Bre-X's drilling results. Bre-X retained Graham Farquharson,

President of Strathcona Mineral Services Limited, to perform a technical audit of Bre-X's exploration work. On the same day (March 19), Bre-X announced that Michael De Guzman, a geologist employed by Bre-X, had fallen from a helicopter to his death on his way to the Busang properties.

6. By March 26th, 1997, Mr. Farquharson and Strathcona had formed the view that Bre-X's drilling samples had been tampered with. The conclusion was that the samples had been "salted" by the addition of gold particles obtained elsewhere. The bubble burst; the share price declined to virtually nothing. Bre-X eventually ceased trading and subsided into bankruptcy.

7. The Trustee says that Mr. Felderhof, who by virtue of his position would have had intimate and early knowledge of the drilling results, engaged in the insider trading of Bre-X shares on a large scale. It is alleged that while he was in possession of undisclosed material information affecting the value of the shares, Mr. Felderhof sold Bre-X shares between December, 1994 and September, 1996 for a total sale price of some CAD $71 million

dollars. Many of these shares had been acquired at relatively low prices per share.

A number of actions arising from the collapse of Bre-X have been commenced, including:

i. A class action in Ontario against Bre-X, Mr. Felderhof, other directors, officers and employees of Bre-X, and two brokerage houses;

ii. a class action in Ontario against Mrs. Felderhof and Spartacus Corp.;

iii. a class action in Texas against Mr. Felderhof and other officers, directors and employees together with several brokerage and engineering firms;

iv. a derivative action in Ontario in the name of Bre-X brought by a group of investors against Mr. Felderhof and other Bre-X officers and directors; eventually, the Trustee assumed conduct of this action;

v. charges against Mr. Felderhof under the Ontario Securities Act.

8. On December 19, 1997 the Trustee brought this action in the Cayman Islands. The endorsement on the writ of summons claims damages from Mr. Felderhof for breach of his fiduciary duty and negligence in his capacity as a director, general manager and chief administrative officer of Bre-X.

9. No cause of action is asserted against the 2nd, 3rd and 4th defendants. Ingrid Felderhof, the second defendant, is the former wife of John Felderhof. The endorsement alleges that she owns three pieces of real property and a boat as nominee or bare trustee for Mr. Felderhof and, alternatively, that any beneficial interest she may have in those assets should be set aside because the transfers to her were carried out with the intention of defeating obligations owed by Mr. Felderhof to his creditors. The writ also alleges that assets in the name of Mrs. Felderhof will be available to satisfy any judgment obtained by the Trustee against Mr. Felderhof. The third defendant, Spartacus Corporation, is no longer in existence. The fourth defendant also is joined for the purpose only of attaching assets which may be available to satisfy any judgment against Mr. Felderhof.

10. No statement of claim has ever been filed in the Cayman Islands action. On December 18, 1997, the date before the filing of the writ, the Trustee obtained from this Court a worldwide Mareva Injunction freezing the assets of the first, second and third defendants up to a value of CAD $3 billion. The injunction was obtained *ex parte*. The terms of the injunction were relaxed by

subsequent court order to permit Mr. and Mrs. Felderhof the sum of CI $66,000 per month for living expenses and funds for legal representation. Thereafter, no real effort was made to advance the litigation in the Cayman Islands.

11. In March, 1998 Mr. Felderhof's then attorney in Canada advised the Trustee that he preferred to meet the various claims in a single trial in one jurisdiction; he asked that the substantive claims be determined by a court in Ontario and acknowledged that if the Trustee obtained judgment then enforcement and tracing proceedings in the Cayman Islands would be "required" (first affidavit of Trent Morris, paragraph 6.5).

12. Mr. Joseph Groia, who was counsel to Mr. Felderhof in February, 1999, wrote at that time to the Trustee's counsel setting out his understanding of how this multiplicity of actions would be handled:

> "My understanding of the Trustee's position had been that it intended to proceed with all of these allegations in Ontario, thereby creating a single omnibus action that we would defend in Ontario. As well, we had understood that the Cayman action would not be proceeded with except insofar as it might be necessary for enforcement or collection purposes should the Trustee be successful on its claim in Ontario.

> If the intention is now to proceed on both fronts simultaneously, could you please advise me and we will take such remedies as may be open to us in order to bring about what we consider to be the only fair result for all concerned; a single law suit in Ontario to adjudicate on all of the various matters between your client and ours."

13. The Trustee agreed that the Cayman action would not be proceeded with "except insofar as it might be necessary for enforcement or collection purposes." In her written argument, Mrs. Felderhof provides a detailed "timeline" of the procedural history but makes no mention at all of Mr. Groia's expressed position concerning the Cayman action.

14. The class action against Mrs. Felderhof and Spartacus was stayed in 1998 "pending a determination of the claim against Mr. Felderhof;" that stay has now been lifted. The class action and the derivative action initiated in Ontario have been the subject of case management and are to be heard together in the Commercial Division in Toronto.

15. On May 2nd, 2003 I granted a consent order staying this proceeding "pending the outcome of either or both of the Ontario derivative action … and/or the Carom class action …". My order of that date

confirmed that the Mareva Injunction would remain in force notwithstanding the stay. All parties were given liberty to apply to discharge or vary the injunction. When she consented to the stay of proceedings, Mrs. Felderhof was aware of a commitment by the Trustee (given in an affidavit sworn December 20th, 2002) that it would move expeditiously to bring the Ontario derivative action on for trial. The Trustee has agreed that the stay of proceedings currently in effect may be lifted for the limited purpose of this review hearing.

16. The Ontario actions have progressed slowly. Certification for the Texas class action has not been obtained, so that action is at an end. Mr. Felderhof has been found not guilty of the charges under the Ontario Securities Act.

17. As I have said, no cause of action is asserted against Mrs. Felderhof (or, for that matter, against the third and fourth defendants). The claim advanced against Mrs. Felderhof is that she owns property which will be available to satisfy any judgment the Trustee may obtain against Mr. Felderhof. This is the so called *Chabra* jurisdiction, which has expanded significantly in recent

years. I had occasion to review and summarize the existing decisions in this area in my recent judgment in *Ahmad Hamad Algosaibi and Brothers Company v. Saad Investments Company Limited et al* (unreported), cause 359/09, November 17, 2009. After reviewing the state of the law, I said (at paragraph 51):

> "From these decisions, I draw the following conclusions:
>
> i. The *Chabra* jurisdiction is a part of the law of the Cayman Islands;
>
> ii. The jurisdiction is most often exercised where there is a good arguable case that a cause-of-action defendant is the beneficial owner of assets in the possession of a non-cause-of-action defendant, but it is not confined to that situation;
>
> iii. The jurisdiction is available against a non-cause-of-action defendant where a freezing order is ancillary and incidental to the effective enforcement of a prospective judgment because that defendant's assets may become available to satisfy the judgment;
>
> iv. This may be so where the non-cause-of-action defendant has become mixed up in an attempt by a cause-of-action defendant to make himself judgment-proof and the assets or their proceeds are not readily identifiable in his hands (*Yukong*, *supra*);
>
> v. The important question is whether there is good reason to suppose that the cause-of-action defendant exercises substantive control over the assets in the possession of the non-cause-of-action defendant (*Dadourian Group, supra*);
>
> vi. The law in this area is evolving significantly and it is undesirable to deprive it of the necessary flexibility to address complex corporate relationships whose

purpose (in whole or in part) may be to put assets beyond the reach of legitimate creditors (see the remarks of Robert Walker, J in *International Credit and Investment Co (Overseas) Ltd and Another v. Adham and Others* [1998] BCC 134 (Ch. D.);

vii. The limitation proposed in *C Inc, supra*, (that there must be a causal link between the cause of action and the subsequent right to claim against the non-cause-of-action defendant) has not found support in later decisions and does not represent the current state of the law;

viii. On an application of this sort, one question of importance is the degree to which those who are challenging the injunction have complied with their disclosure obligations under it;

ix. Uncertainty about the true ownership of assets or whether they might be available to satisfy a future judgment may count against an applicant where it could have, but did not, shed light upon the question of ownership by making appropriate and credible disclosure."

Analysis

18. Mrs. Felderhof asks me now, some twelve years after the injunction was obtained *ex parte*, to review the decision to issue it. Such a hearing is not akin to an appeal but is essentially a hearing *de novo* on the merits: *Wea Records Ltd. v. Visions Channel 4 Ltd. and others* [1983] 1 WLR 721 (C.A.).

19. It is fundamental to the integrity of the process by which the Court grants *ex parte* orders that such order will be reviewed *inter partes* if the party bound by the order so desires. This review is not conducted solely for resolving issues between the parties; it has an important collateral purpose, as the prospect of such a hearing serves to ensure that those who apply *ex parte* will make a truthful and complete disclosure of all relevant matters. The Court itself has an interest extending beyond the immediate interests of the parties in ensuring that *ex parte* orders will be reviewed. I mention this because, on one view of the procedural history, Mrs. Felderhof may be taken to have waived her right to a review hearing. After five years had passed from the date of the *ex parte* order, she consented to an order staying the proceedings; at that point, she had still taken no step at all to have the *ex parte* order reviewed. However, because of the policy considerations just mentioned, I would not, even after twelve years have passed and in the face of conduct which in other circumstances might amount to a waiver, stop her from proceeding with the review.

20. Clearly, however, the issues must now be approached in light of the time which has passed and the agreement between the parties in 2003.

21. The Trustee says that its intention has always been to convert the Cayman action into one which is ancillary to and in aid of the actions in Canada. It says that the Mareva Injunction here is needed to render more efficacious the Canadian proceedings and any judgments he may obtain in Canada. Since the decision of our Court of Appeal in *Telesystem International Wireless Inc. et al v. CDC/Opportunity Equity Partners LP et al* 2002 CILR note 22, applying the decision of the House of Lords in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] AC 344, it has been clear that the Grand Court has jurisdiction to issue Mareva Injunctions in aid of foreign proceedings even though the parties have no intent to litigate the substance of their dispute in this jurisdiction. In *Telesystem*, the Court of Appeal said:

> "The respondents submitted that on the basis that Brazil is clearly and distinctly the appropriate forum for the determination of the action the Mareva injunction should fall away and no new Mareva injunction should be granted. There was no dispute that in principle the court has jurisdiction to grant a Mareva injunction in aid of foreign proceedings notwithstanding that

proceedings for substantive relief in the Cayman courts have been stayed in favour of proceedings in Brazil. *In Channel Tunnel Group Ltd. v. Balfour Beatty Ltd.* [1993] AC 344, Lord Mustill laid down three conditions on which such relief may be granted: (a) the interim relief must be needed to render more efficacious the procedures and any decision favourable to the appellants that emerge therefrom; (b) the court should approach such an order with utmost caution; and (c) the court should be prepared to act only when the balance of advantage plaintly favours the grant of relief. *Evans-Lombe, J. in Phonogram Ltd. v Def American, Inc.*, The Times 7 October, 1994, applied the *Channel Tunnel* decision and held that where the cause of action is within the English court, but for reasons of *forum non conveniens* the court was inclined to stay the proceedings pending resolution in a foreign court, the English court retained jurisdiction to grant interlocutory injunctions in support of rights claimed in the foreign proceedings. He added, however, that it would be an unusual case where the English court would preempt any ruling in the foreign court by making such interlocutory orders, which the foreign court might ultimately find to be inappropriate. This matter was considered by the Privy Council in *Walsh & ors. v. Deloitte & Touche, Inc.*, Judgment of the Privy Council dated 17 December 2001. This was a case from the Bahamas and was directly concerned with the grant of a worldwide Mareva injunction. The Privy Council expressly applied the *Channel Tunnel* decision to the Mareva injunction situation where it is intended that such an injunction should be issued in aid of a foreign jurisdiction after the stay of proceedings in the domestic court. The Privy Council held that as the proceedings for a Mareva injuction of a foreign court are interlocutory, it is not necessary for the applicant to show that he is likely to succeed in establishing such a cause of action. For the purposes of the threshold requirement it is sufficient, if upon the material before the court, the appellant appears to have a good arguable case."

22. The claim advanced in the Cayman Islands must, of course, be one which is within the jurisdiction of this Court even though (as

appears here) all are in agreement that it would be more convenient to try the matter elsewhere. In addition, before granting such an injunction, this Court must be satisfied that the order is needed to support the effective enforcement of a prospective foreign judgment because the local defendant's assets may become available to satisfy that judgment. The *Chabra* principles must be considered. The Court is to approach a request for such an injunction with "utmost caution" and accede to the request only when the balance of advantage "plainly favours" that course.

23. For these reasons, I would reject the submission by Mrs. Felderhof that the Grand Court has no power to grant a free standing Mareva Injunction merely to assist a plaintiff in a foreign Court who is not pursuing his claim in this jurisdiction. In advancing this argument, she has relied upon *Bass v. Bass* 2001 CILR 317, a decision of Sanderson, J. of this Court which, in light of the *Telesystems* decision, can no longer be regarded as good law.

24. The fact that the writ of summons has never been supplemented by a statement of claim is somewhat more troublesome. Mrs. Felderhof advanced in argument a list of adverse consequences

caused by the long delay which she says has caused her prejudice. Of course, the period of time from the date of the consent order until the date upon which she commenced this application (August 4, 2009) must be removed from the analysis because it represents delay in which she has acquiesced. In any event, all of the points of prejudice (such as the unavailability of witnesses and the fading of memories) have no impact upon the limited nature of the proceeding in this jurisdiction although they may have significance at the trials in Canada.

25. Mrs. Felderhof has also asserted that her inability to invest the frozen funds in the Cayman Islands has caused financial detriment to her and says that many of the assets "have become worthless." This potentially important allegation is entirely unsupported by evidence and must be disregarded.

26. There is no evidence that the lack of a pleading has caused any prejudice to Mrs. Felderhof, who entered into the 2003 agreement leading to the consent order upon legal advice. Given the lack of prejudice, the absence of a statement of claim cannot be viewed as anything more than a procedural irregularity which, having been

the subject of adverse comment during the hearing, should now be corrected.

27. Mrs. Felderhof argues that the Trustee cannot have a good arguable case because the alleged negligence and breach of fiduciary duty by Mr. Felderhof "did not result in any loss or damage to the Plaintiff." What she has neglected to mention is that much the same argument was pressed before the Privy Council on behalf of the estate of David Walsh, former chief executive of Bre-X and a defendant in *Deloitte and Touche Inc. v. Walsh et al*, *supra*. In the course of dismissing the appeal by Mr. Walsh's estate, the Privy Council (in appeal no. 37 of 2000, December 17, 2001) said:

> "13. It appears to their Lordships to be arguable that whether or not information can be categorized as ‚property' an officer of a company owes a fiduciary duty to the company not to use his knowledge of its affairs by making a profit from dealing in what he knows to be a false market in its shares. It is likewise arguable that one of the remedies available to the company for breach of this fiduciary duty is an account of the profits he has made, despite the fact that the company itself could not have made such profits: see *Reading v. Attorney General* [1951] AC 507."

28. That is a complete and conclusive answer to Mrs. Felderhof's submission. It is arguable that Mr. Felderhof owed a fiduciary duty to Bre-X to refrain from using his insider knowledge to make a

profit from dealing in its shares, and further arguable that Bre-X's Trustee in bankruptcy may have an accounting of the profit Mr. Felderhof has made.

29. In obtaining the *ex parte* order, the Trustee relied upon the first affidavit of Mr. Ross Nelson which, in turn, relied upon a report known as the "Stracona Report" prepared by Mr. Graham Farquharson. Mr. Farquharson gave evidence at the trial of Mr. Felderhof on charges under the Ontario Securities Act. The presiding judge, Judge Hryn, rejected the evidence of Mr. Farquharson and identified numerous shortcomings in it. He preferred the evidence of other experts and, in the result, found on a balance of probabilities that Mr. Felderhof had established a defence of due diligence to the Securities Act charges. Mrs. Felderhof says that, in light of this finding, the evidence of Mr. Farquharson must be regarded as unreliable. That, in turn, leads to the conclusion that there is no longer a good arguable case against Mr. Felderhof and the injunction should be discharged.

30. The Trustee responds to this by saying that the "good arguable case" test has no application where an interlocutory injunction is

issued solely in aid of a foreign proceeding. At paragraph 2.2 of the Trustee's supplemental written submissions, it says:

> "In exercising such jurisdiction the Court need only determine whether it has power to grant the substantive relief not whether it will in fact do so. The test is whether there is a cause of action recognized by Cayman Islands' law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the Cayman Islands or some other foreign Court. See *Channel Tunnel Group Ltd.* …"

31. I cannot find, either in the decision of the House of Lords in *Channel Tunnel Group* or the decision of our Court of Appeal in *Telesystem* International, any clear indication that an application of the good arguable case test is inappropriate. This point was not before the Court on either occasion. Lord Mustill's decision in *Channel Tunnel Group* includes (at page 367 h) a reference to "the need for the Court to make a tentative assessment of the merits in order to decide whether the Plaintiff's claim is strong enough to merit protection …". At page 343 b, Lord Browne-Wilkinson refers to an English Court granting interlocutory relief "against a defendant duly served and based on a good cause of action …".

32. The first question must be whether the asserted cause of action is justiciable in this Court at all. The parties agree that it is. The

second question is whether the issuance of an injunction in this jurisdiction is likely to be of real assistance because there are assets here which may become available to satisfy a foreign judgment. I am satisfied that this is the case. Next, I must consider whether there is a risk of dissipation if the injunction is not granted. Mrs. Felderhof has not sought to argue this question, and I am satisfied that there is. Moreover, the balance of convenience is clearly tilted towards the side of the Trustee. It would be wrong, however, to uphold the injunction based solely on these findings without a consideration of whether the Plaintiff's claim, as Lord Mustill said, is "strong enough to merit protection." Since this is a *de novo* hearing, Mrs. Felderhof is entitled to a fresh assessment of that question.

33. The present state of the claims in Ontario is described in summary fashion by Mr. Clifford Lax, Q.C., a senior litigation attorney in Toronto who has given expert evidence on behalf of the Trustee. In his affidavit, Mr. Lax responds to some assertions about the validity of the claims by Mr. Paul Le Vay as follows:

> "It is my opinion that the allegations pleaded in the Statement of Claim, if proven, would be sufficient to sustain causes of action under Ontario law for breaches of both

Mr. Felderhof's fiduciary duty and his duty of care. Further, it is my opinion that the Statement of Claim discloses a valid cause of action under Ontario law for Mr. Felderhof's alleged insider trading.

i) **Mr. Felderhof's alleged breach of his fiduciary duty to Bre-X**

6.5 In Canada, a director or officer's fiduciary duty to the company is statutorily prescribed. This duty is articulated in identical language in the relevant statutes for Canada, Ontario and Alberta, and requires directors and officers to "act honestly and in good faith with a view to the best interests of the corporation". This duty requires directors and officers to "respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation": *Peoples Department Stores (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, at para. 35.

6.6 According to the Statement of Claim, Mr. Felderhof breached his fiduciary duty to Bre-X by, *inter alia*, representing to the investing public that the Indonesian properties at issue in this dispute (the "Busang Properties") held large amounts of gold. Specifically, Mr. Felderhof confirmed gold resouces of 71 million ounces, and stated that resources could top 200 million ounces based on his assessment of the drilling results to date. Mr. Felderhof also allegedly misrepresented the extent of Bre-X's ownership in the Busang Properties. Mr. Felderhof is alleged to have either known that these statements were false or misleading or was reckless as to whether they were true. He is alleged to have made these misstatements in order to benefit from his subsequent sales of Bre-X shares.

6.7 The Trustee alleges that Mr. Felderhof's breach of his fiduciary duty led Bre-X to expend more that $110,000,000 of its capital in pursuing a mining venture that had no commercial value. The Trustee further

claims that all profits made by Mr. Felderhof as a result of his sale of Bre-X shares should be deemed to be held by Mr. Felderhof in constructive trust for the Trustee.

6.8 In my opinion, these allegations, if proven, would be sufficient grounds for a cause of action for breach of fiduciary duty against Mr. Felderhof. If Mr. Felderhof knowingly or recklessly made false statements of his own private gain, and these false statements caused damage to the company, then Mr. Felderhof would have violated his duty to act honestly and in good faith with a view to the best interests of Bre-X.

6.9 In his affidavit, Mr. Le Vay raises two objections to this claim. First, he states that "a misrepresentation to the investing public, without more, simply does not establish the harm to the corporation required to sustain this type of claim in Ontario." This is because Mr. Le Vay views the fiduciary duty held by directors and officers as one which typically involves the appropriation of a corporate opportunity.

6.10 While fiduciary duty cases often involve the misappropriation of corporate opportunities, it is not necessary that they do so. For example, it is a violation of a director's fiduciary duty to engage in fraudulent acts in order to increase the corporation's revenue or fail to disclose information that may help the corporation make a business decision. The harm that occurs through the breach of a fiduciary duty need not be just a loss of a corporate opportunity.

6.11 While it is true that a misrepresentation to the public, "without more", would not establish a harm sufficient to justify an action for breach of fiduciary duty, this is not such a case. The Trustee alleges a number of consequences of Mr. Felderhof's alleged breach. First, that Bre-X unnecessarily expended its capital as a result of Mr. Felderhof's breach of his fiduciary duty. Second, that Mr. Felderhof personally gained through selling shares in Bre-X. Both damages and an accounting for profits are available remedies for the

breach of a fiduciary duty: *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1987), 62 O.R. (2d) 1 (C.A.), at para. 184.

6.12 Mr. Le Vay's second objection is that there is no nexus between Mr. Felderhof's misrepresentations and Bre-X's imprudent spending. I note first that this argument does not address the Trustee's claim for an accounting of the profits realized by Mr. Felderhof. As Mr. Felderhof is alleged to have made the misrepresentations in order to be able to sell his shares at a higher price, there is a nexus here between the breach and the requested remedy.

6.13 Second, I disagree with Mr. Le Vay that there is no nexus between Mr. Felderhof's misrepresentations and Bre-X's imprudent spending. Mr. Le Vay appears to treat the breach of fiduciary duty claim as though the only misrepresentations that the Trustee takes issue with were those concerning the extent of Bre-X's ownerships in the Busang Properties. However, it is clear from the Statement of Claim that the Trustee also claims that Mr. Felderhof's misrepresentations as to the amount of gold contained in the Busang Properties were a violation of his fiduciary duty to Bre-X.

6.14 While there may not be a nexus between Mr. Felderhof's misrepresentations as to the extent of Bre-X's ownership in the Busang Properties and Bre-X's subsequent imprudent spending, the same cannot be said for his misrepresentations as to the amount of gold contained in those properties. According to the Statement of Claim, Mr. Felderhof was "responsible for supervising, exploring and developing" the relevant properties. As a result of these misrepresentations, Bre-X expended in excess of $110,000,000 for no good and valid reason. In my opinion, if proven, these allegations are sufficient to disclose a nexus between Mr. Felderhof's breach of his fiduciary duty and the damages suffered by Bre-X.

ii) Mr. Felderhof's alleged negligence

6.15 Like their fiduciary duty, the duty of care owed by directors and officers to the corporation is statutorily prescribed. A director or officer is required to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

6.16 If the allegations in the Statement of Claim are correct, Mr. Felderhof negligently performed his corporate duties in a number of respects. As examples, he misrepresented the amount of gold in the Busang Properties, failed to follow the standard mining industry practice of having an independent expert test the Busang Properties, and failed in a number of respects to prevent the tests conducted on the Busang Properties from being fraudulently tampered with. This negligence led Bre-X to spend a great deal of capital pursuing the mining venture in the Busang Properties, which was in fact commercially worthless."

34. The several theories of liability described by Mr. Lax depend very little, if at all upon the evidence of Mr. Farquharson. In my view, the narrative of events surrounding the rise and fall of the Bre-X stock, the history of Mr. Felderhof's extensive trading in that stock, the contrast between what was said to the public about the Busang properties and what must have been known to Mr. Felderhof, and the commercial viability of those properties as a source of gold, provide a more than ample demonstration of a good arguable case. With or without the evidence of Mr. Farquharson, the Trustee has claims which are strong enough, whether they are proceeded with in Canada or in this country, to merit protection.

35. Mrs. Felderhof says that the delay in getting the claims against Mr. Felderhof to trial has been extraordinary and is itself a reason for discharging the injunction. I accept that in appropriate cases an interlocutory injunction can (and should) be discharged because of a plaintiff's failure to proceed with its claim expeditiously: see the remarks of the Privy Council on this subject in *Walsh*, *supra*. The question of delay is not really one which should be raised at a hearing to review an *ex parte* order; rather, it is a free standing reason which might justify the Court setting aside its own order. Every plaintiff accepts, at least implicitly, when obtaining an *ex parte* injunction, that it has an obligation to proceed expeditiously.

36. A delay of twelve years is extraordinary. Moreover, the Ontario actions have not yet been set down for trial; it is impossible to say when the case is likely to be disposed of. However, much of this delay has been caused by the defendants themselves and cannot be attributed to the Trustee. For example, a worldwide Mareva Injunction was obtained in the Bahamas in 1998 against Mr. Walsh and his wife, Jeannette Walsh. A term of the order was that these

defendants disclose their assets to the Trustee "at once." The issuance of the injunction was appealed to the Court of Appeal and then to the Privy Council, which dismissed the appeal in 2001. At that point Jeannette Walsh (who was by then the administrator of the estate of her late husband) disclosed for the first time that she did not know the whereabouts of any assets of the estate. The present injunction required the individual defendants to make disclosure of their assets. In response, Mrs. Felderhof provided affidavit evidence concerning "the assets of the defendants" on behalf of all defendants without any particularity concerning the ownership of individual assets. Defendants (including Mr. Felderhof) in the class actions launched a series of motions seeking to strike out the statement of claim. Motions to dismiss the Ontario derivative action were brought by some defendants. The decision to certify the Ontario class actions was appealed to the Ontario Divisional Court, then to the Court of Appeal, and then (by way of a leave application) to the Supreme Court of Canada. Mr. Felderhof was directed to attend at an oral examination for discovery in Ontario but he took the position that he should be examined in Buffalo, New York although he does not reside there. Although all proceedings against Bre-X were stayed in 1997 as a

result of its bankruptcy, Mr. Felderhof has filed a counterclaim against Bre-X for damages for wrongful dismissal and indemnity for his legal costs. He also applied (unsuccessfully) for an order setting aside the stay of proceedings to permit him to pursue his claim against Bre-X for indemnification. When that application was unsuccessful, his counsel undertook to deliver a pleading in which the counterclaim had been removed; today, some six years later, this has not been done. Because of the withdrawal of Mr. Felderhof's counsel (Mr. Groia) and the failure to obtain a replacement the Trustee was required (in 2007) to serve certain material on Mr. Felderhof personally. He was located at a hotel in Indonesia. When the process server attended in the hotel lobby and spoke with someone by telephone who identified himself as "John Felderhof", he was advised to wait in the lobby because Mr. Felderhof would come down to meet him there. Mr. Felderhof did not appear on that day or on the following day when a second, similar conversation was held on the telephone. Later in the year, Mr. Felderhof left Indonesia and said he would provide new contact information (as he was still representing himself) but has not done so. As of November, 2009, he was believed to be living

"somewhere in the Philippines." Difficulties were also experienced in arranging an oral examination for discovery of Jeannette Walsh – it took eleven months for the parties to agree upon a date and a location. (Both Mrs. Walsh and Mr. Felderhof have now been examined for discovery.)

37. As the examples above will demonstrate, the procedural history does not permit a conclusion that the delay, or any substantial part of it, can be attributed to fault or neglect on the part of the Trustee. There is not yet a justification for setting aside the Mareva Injunction because of a failure by the Trustee to prosecute its case in a timely fashion. I will, however, grant leave to Mrs. Felderhof to apply again after one year has passed for an order setting aside the injunction on the ground of delay.

38. Finally, Mrs. Felderhof seeks an order requiring the Plaintiff to fortify its undertaking as to damages by posting security. This request must be regarded as a tactical manoeuvre coming, as it does, twelve years after the issuance of the injunction. The question of fortification has not been raised before and there is no

convincing explanation presented now to explain why it has suddenly become necessary. I find no merit in that request.

Order

39. For these reasons, the application to set aside the *ex parte* order is dismissed. Mrs. Felderhof is at liberty to apply after one year has passed for an order setting aside the injunction on the ground that the Plaintiff has failed to prosecute its case expeditiously. The Trustee is directed to file a statement of claim within 28 days. The Trustee is entitled to its costs of this application.

Dated this 10th day of February, 2010

Henderson, J.
Judge of the Grand Court