THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) NO.: 132 OF 2012

IN THE MATTER OF B & A FERTILIZERS LIMITED AND IN THE MATTER OF RIO VERDE MINERALS DEVELOPMENT CORP. AND IN THE MATTER OF A PLAN OF ARRANGMENT PURSUANT TO SECTION 177 OF THE BVI BUSINESS COMPANIES ACT, 2004 (AS AMENDED)

Appearances: Miss Keisha Durham and Miss Rosalind Nicholson for the Applicants/Claimants

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2013: 16, 22 January

JUDGMENT

(Section 177, Business Companies Act, 2004 - proposed plan of arrangement involving merger of applicant companies – whether section 177 permits cancellation of rights of warrant holders for no consideration – whether arrangement to be restructured to provide for warrants to be compulsorily purchased – whether warrant holders entitled to be consulted in that event – whether warrant holders have stake in first applicant company – whether warrant holders in a position to veto merger proposals to the detriment of members of first applicant company)

[1] This is an application by B&A Fertilizers Ltd ('B&A') and Rio Verde Minerals Development Corp ('Rio Verde') seeking an order pursuant to section 177 Business

Companies Act, 2004 ('the BCA')[1] approving a proposed plan of arrangement between B&A and Rio Verde, and for all necessary determinations, directions and permissions to be made, including a determination whether any person should be permitted to dissent, pursuant to section 179, from the proposed arrangement.

[2] B&A is a wholly owned subsidiary of a Brazilian company, B&A Mineração SA ('B&A Brazil'), whose interests, like those of Rio Verde, lie in exploration for and exploitation of mineral deposits for the purposes of the manufacture of fertilizers. Rio Verde is traded on the Toronto Stock Exchange. I am told that its shares currently stand at around $0.40.

[3] B&A Brazil wishes to take over Rio Verde. That is not opposed by the Rio Verde board. Instead of making an offer to the members of Rio Verde, or, even, of proposing a merger under sections 170 to 173, B&A Brazil and Rio Verde have caused Rio Verde and B&A to promote a plan of arrangement under section 177, the effect of which, if approved, will be that each member of Rio Verde will have its shares in Rio Verde exchanged for an equivalent number of redeemable shares in B&A, which will be redeemed by B&A at a price of $0.40 per share on the next business day following the effective date of the merger. The only shareholder of the merged B&A will thus be B&A Brazil, which, by this rather sinuous route, will have achieved the takeover of Rio Verde.

[4] Although the arrangement is being promoted under section 177, its terms provide that the actual merger is to be effected in accordance with the procedures laid down in section 170.

[5] I am told that the reason why B&A Brazil does not simply make an offer to the Rio Verde shareholders and why the parties are not content to proceed under section 170 alone is that they wish the merged entity to be rid of Rio Verde's current obligations to the holders of some 18 million warrants. The holders of those warrants, whose terms recite that they were granted for value, are entitled to exercise them up to and including 28 July 2016. Upon exercise, the warrant holder becomes entitled to one Rio Verde share upon payment of (in the case of 17 million of the warrants) $0.85 per share and (in the case of the remainder) $0.65 per share). Why Rio Verde should have issued warrants at these strike prices when its shares have never traded above about $0.50 is not explained, but presumably those who acquired them (for what precise consideration I was not told) considered them to be of some value when they did so.

[6] The plan of arrangement as presented to the Court contained, as its clause 7, the following:

[1] in what follows all references to section numbers are references, unless otherwise stated, to sections of the BCA

> 'Upon the merger, each of the Warrants shall be repurchased and cancelled by [B&A] for nil consideration or for such consideration as may be determined pursuant to the exercise of any dissent rights ordered by the Court.'

[7] No notice of this application has been given to any warrant holder and none appeared or was represented at the hearing.

[8] Miss Rosalind Nicholson, who argued the warrant point on behalf of Rio Verde and B&A on the application, initially told me that the parties did not wish to include that part of clause 7 which referred to dissent rights, but wished the clause as sanctioned to provide only for the purchase of the warrants for nil consideration and their subsequent cancellation. When it was pointed out to Miss Nicholson that a purchase for nil consideration was a contradiction in terms and that what was being proposed by clause 7 as amended was nothing less than forfeiture, Miss Nicholson's response was that that did not matter, because if the merger, which was the only trigger for clause 7 of the plan to come into effect, went ahead the warrants would be wholly valueless, since were the holders to exercise their warrants following the merger, they would have to pay $0.85 or $0.65 to obtain shares which would be immediately redeemed for the sum of $0.40. The warrant holders would therefore be in no worse position if the warrants were cancelled than if they were to retain them, while B&A, on the other hand, would be benefited because it would be relieved of the need to comply with regulatory reporting requirements which could, Miss Nicholson told me on instructions, cost upwards of $100,000 a year. The affidavit in support of the application refers to unspecified 'complications' for transactions which B&A, as surviving company, might wish to enter into in the future. The nature of such complications is not explained and I disregard this alleged difficulty accordingly.

[9] The extinction of all commercial value in the warrants upon the merger is said to flow from clause 2.13(iv) of the indenture which governs the rights of warrant holders. The material parts of clause 2.13(iv) are in the following terms:

> Reclassification of Ordinary Shares, Consolidation, Amalgamation, Plan or Arrangement, Merger or Substantial Transfer of Assets. If and whenever at any time after the date hereof and prior to the Time of Expiry there shall be a reclassification of Ordinary Shares at any time outstanding or change of the Ordinary Shares into other shares or into other securities (other than an Ordinary Share Reorganization), or a consolidation, amalgamation, plan of arrangement or merger of the Company with or into any other corporation or other entity (other than a consolidation, amalgamation, plan of arrangement or merger which does not result in any reclassification of the outstanding Ordinary Shares or a change of the

> Ordinary Shares into other shares), or a transfer (other than to a subsidiary of the Company) of the undertaking or assets of the Company as an entirety or substantially as an entirety to another corporation or other entity (any of such events being herein called a "Capital Reorganization"), subject to any court order in respect of any plan of arrangement or other similar transaction to the contrary, any Warrantholder who thereafter shall exercise his right to receive Ordinary Shares pursuant to Warrant(s) shall be entitled to receive, and shall accept in lieu of the number of Subject Securities to which such holder was theretofore entitled upon such exercise, the aggregate number of shares, other securities or other property which such holder would have been entitled to receive as a result of such Capital Reorganization if, on the effective date or record date thereof, as the case may be, the Warrantholder had been the registered holder of the number of Subject Securities to which such holder was theretofore entitled upon exercise.

[10] I am far from convinced that clause 2.13(iv) necessarily has the result for which Miss Nicholson contends, but for the moment I am going to assume that it does. Even on that footing, I pointed out that there is nothing in section 177 which permits a company to promote an arrangement under which property of any person is forfeited or confiscated and that the Court could not approve an arrangement which purported to have any such effect.

[11] That prompted a revised proposal, which was for an amendment to be made to the plan, under which it was to be proposed that the warrants be compulsorily purchased by B&A upon the merger taking effect at a price of $0.0001 per warrant (and, as I understood it, regardless whether the strike price was $0.65 of $0.85). It was proposed, further, that warrant holders be granted a right to dissent for the purposes of section 179,[2] but my suggestion that this proposal should be subject to approval at a meeting of warrant holders was resisted by Miss Nicholson, on the grounds that $0.0001 was more than zero, which is all that the warrant holders would obtain under the arrangements as originally proposed, so that they could have no conceivable reason to object to being bought out on that basis.

[12] In my judgment it is contrary to all principle that a class of holders of securities should be expropriated otherwise than in accordance with the terms under which the security was issued without at the very least having the opportunity to meet and to express their views on the proposal and, if so advised, to approach the Court about its terms. Indeed, the indenture under which the warrants were originally issued expressly provides, by section

[2] although not expressly mentioned in section 179 itself, it appears from the terms of section 177(4)(c) that warrant holders, as holders of 'other securities', are within the purview of the dissentient provisions of section 179

6.3(i), that the warrant holders have power exercisable by extraordinary resolution to sanction any change in any provision of the indenture or the warrants themselves and any modification, waiver, abrogation, alteration, compromise or arrangement of the rights of the warrant holders against Rio Verde which is consented to by Rio Verde, or to sanction the release of Rio Verde from its obligations under the indenture. It seems to me that neither the general principle that property may not be forfeit except according to law nor the specific provisions of the indenture making alteration of warrant holders' rights subject to an extraordinary resolution can be overridden by a term in a section 177 arrangement providing for compulsory purchase in the absence of any opportunity of the warrant holders even to have a say in the matter. Nor, it seems to me, is the grant of a right of dissent a substitute for the right to consider and vote on the proposal and for the opportunity to make representations to the Court about it before it is approved. They are two different things.

[13] In any case, I am far from convinced that section 2.13(iv) of the indenture has the effect of making the warrants valueless on the merger taking effect. The obligation to accept, upon exercise after merger, what the warrant holder would have got had he exercised the warrant prior to merger and remained a member in respect of the exercise shares[3] as at the relevant record date of any plan of arrangement or merger which would have affected that holding, is made subject by section 2.13(iv) to any court order in respect of any such plan of arrangement or merger to the contrary. The saving appears to recognize a right in warrant holders to make submissions to the Court, on the occasion when it is invited to approve a plan of arrangement, or, so far as I can see, when a merger has been approved independently of the Court pursuant to section 170, why the provisions of section 2.13(iv) should be disapplied or varied in respect of subsequent exercise by warrant holders of their options. It would be unwise to guess what form such submissions might take or what would the response of the Court to them, but I can see the Court at least listening to an argument that section 2.13(iv) was intended to provide warrant holders, on exercise of their options, with shares in the merged entity – not the opportunity to make a crystallized loss over the whole of the remaining option period. The ability to make submissions under the section must have value. In any case, the existence of the saving provision makes the assertion that on any subsequent exercise of their options by warrant holders, they would inevitably be faced with Hobson's choice of paying $0.65 or $0.85 in return for $0.40 unsustainable.

[14] I appreciate that this conclusion differs from that reached in the opinion of Canadian lawyers provided to the applicants upon the point, but those lawyers rely on no principles peculiar to the law of Ontario or to the Federal Laws of Canada in reaching their conclusion and in those circumstances it does not seem to me that I am precluded from construing section 2.13(iv) for myself in accordance with the canons of construction

[3] described in section 2.13(iv) as 'Subject Securities'

ordinarily employed in common law jurisdictions or that I am bound by the opinion of the Canadian lawyers as to the true construction and effect of the section.

[15] For these reasons I am not prepared to approve the plan of arrangement even in the amended form proposed at the hearing on 16 January (which would in any event need to be approved by a resolution of Rio Verde's board before I could do so). I would be minded to approve an amended plan which is made subject to approval (a) by members of Rio Verde as if the arrangement was proceeding under section 170; and (b) to the extent that the proposals affect the rights of warrant holders, by warrant holders by extraordinary resolution pursuant to section 6.3 of the indenture. Affected warrant holders would be entitled to copies of the plan and of any accompanying circular and Rio Verde would be ordered to instruct the Warrant Agent to convene a meeting of warrant holders pursuant to section 6.1 of the indenture for the purposes of considering and, if thought fit, approving those parts of the plan which affect them in accordance with section 6.3 of the indenture. Any order approving any revised plan affecting warrant holders must entitle members and warrant holders of Rio Verde to dissent in accordance with the provisions of section 179.

[16] I should mention that the opinion of the Canadian lawyers to which I have made mention above expresses the view that no Court in Canada would permit persons with no economic interest in a company to be put into a position where they might be able to veto an arrangement favoured by persons having such an interest. The same principles apply in this jurisdiction. For the reasons given above, I am not satisfied that the warrant holders have no economic interest in Rio Verde. In any event, the only element of the proposals now envisaged which the warrant holders might be in a position to veto, under the regime which I have indicated I would be minded to apply on any application for approval of a revised plan affecting warrant holders, is that part of it which would involve the expropriation of or other dealing with the warrants. Whether or not the warrants are expropriated or otherwise dealt with is of no concern to the present members of Rio Verde, who are unaffected by the question of warrant holders rights and who will be able to approve the terms of the proposed merger so far as it affects them unimpeded by any objections from the warrant holders. The point is therefore a bad one. If Rio Verde or B&A is not prepared to proceed with the plan unless the warrant holders are expropriated, then the members of Rio Verde may have cause to complain about the stance taken by the boards of Rio Verde or B&A, but they can have no legitimate complaint against the warrant holders on that account.

[17] Just before I had intended to circulate this judgment in draft I was asked to hear further submissions in the case on 18 January 2013. For reasons of courtesy, I did so, but it does not seem to me to be satisfactory for the Court to be presented with a continually moving target in matters of this sort (or at all). I will therefore adjourn this application to enable a revised proposal to be put forward when the parties have had an opportunity to

consider what is said in this judgment. The application may be restored without notice, at this stage, to any other person. Upon such restored application I shall consider what, if any, orders to make under section 177(4).

[18] I might say, however, that I am not impressed by the submission made by Miss Nicholson during the exchanges of 18 January 2012 that it is not possible for the Court to direct that one element of a proposed arrangement is to be the subject of approval by those with an interest in that element while the remainder is to be subject to the approval of persons having an interest on in the remainder. If such a course is adopted, the arrangement, if approved, will have been approved by the persons whose approval the Court has directed should be obtained, which is what section 177(4) provides for.

Commercial Court Judge
22 January 2013