IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Pacific Hunter Resources Inc. v. Moss Management Inc.,*** 2008 BCSC 960

Date: 20080721
Docket: C940939
Registry: Vancouver

Between:

Pacific Hunter Resources Inc.
and Jane Rome, in her capacity as Executrix under the last Will and Testament of Bruce Rome (Deceased)

Plaintiffs

And

Moss Management Inc.

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiffs	Andrew J.P. Winstanley
Counsel for the Defendant	Timothy J. Delaney Scott W.K. Urquhart
Date and Place of Trial:	September 17-21, 24-28, December 17-21, 2007 and March 27-28, 2008 Vancouver, B.C.

INTRODUCTION

[1] This litigation arose out of an unsuccessful effort to develop and bring into commercial production certain tailings left at an abandoned mine, mill and smelter site in Anyox, British Columbia. The plaintiffs' position is that the parties entered into an enforceable agreement with respect to this development, which agreement the defendant repudiated. As a result, the plaintiffs say that they were deprived of the potential profits from the venture. In the alternative, the plaintiffs advance claims in *quantum meruit*, fraudulent misrepresentation and negligent misrepresentation.

[2] The defendant takes the position that the parties did not conclude a binding agreement and that the plaintiffs terminated the negotiations. The defendant disputes all of the other claims advanced by the plaintiffs.

THE PARTIES

[3] The plaintiff, Pacific Hunter Resources Inc. (“Pacific Hunter”), is a British Columbia corporation. Bruce Rome was the president of Pacific Hunter from its date of incorporation on May 17, 1988, until his death on April 13, 2002. Mr. Rome was a plaintiff in this action until his death, at which time his wife, Janet Rome, in her capacity as Executrix of Mr. Rome’s will, became a plaintiff in the action.

[4] The defendant, Moss Management Inc. (“Moss”), is a British Columbia corporation that was incorporated on October 3, 1989. The initial subscribing share was placed in the name of Mark Davies, a solicitor with the law firm of Richards Buell Sutton. Peter Richards, a solicitor, and Alan Wolrige, a chartered accountant, were appointed officers and directors of Moss on March 9, 1990. On that same date, they were each allotted 500 shares in Moss.

BACKGROUND

The Tailings – Acquisition by Cominco

[5] Between 1915 and 1935, Granby Consolidated Mining, Smelting & Power Company Ltd. (“Granby”) operated a concentrator, a mill and a large copper smelter in Anyox, British Columbia. The operation of the smelter generated slag, which was deposited for the most part on Lot 1295 within Land District 6, Cassiar District or into Granby Bay. The slag was residue or waste product left over from the copper smelting process and had little mineral content.

[6] The operation of the mill and its flotation cells also produced tailings. The tailings were deposited on the surface of two fee simple lots, District Lots 898 and 899 within Land District 6, Cassiar District (“the Tailings”). At various times since the mill ceased its operations, investors and potential investors have speculated that there might be a significant amount of copper left in the Tailings that could be mined, processed and sold.

[7] In 1936, Cominco Ltd. (“Cominco”) acquired the Anyox assets of Granby, including the lots on which the Tailings were located. Cominco did not develop the assets. Some preliminary exploration was done in the early 1980’s as summarized in a report by Tatsuya Takeda dated January 1982.

Involvement of Thomas Buchan and Prospectors Airways

[8] It appears that Cominco allowed certain mineral claims in the Anyox holdings to lapse. In February 1987, David Javorsky, a staking prospector, staked five mineral claims described as the Anyox Claim Group, which included Anyox Smelter, Anyox Town, Anyox Mill, Gold Leaf and Wire Gold, in the name of Thomas Buchan. This resulted in the creation of the Anyox Mill, Anyox Smelter and Anyox Town located mineral claims. These mineral claims covered the area on which the Tailings were located.

[9] An agreement dated March 31, 1987, was entered into between Cominco and Timothy Mountain Explorations Ltd. (“Timothy”) (the “Cominco Option”). Timothy was a private company controlled by Thomas Buchan’s son Steven Buchan.

[10] By the Cominco Option, Cominco and Timothy agreed to pool their interests in Anyox. The Cominco Option listed Timothy’s assets as the located claims: Anyox Smelter, Anyox Mill and Anyox Town (the “Anyox Claims”). Timothy was to acquire and add these assets to the property that was the subject of the agreement.

[11] The Cominco Option gave Timothy the right to acquire 40% of Cominco’s claims and if exercised, Cominco would acquire 60% of Timothy’s claims. Timothy was required to spend $3 million in exploration work over three years. If the option was exercised, a joint venture would be formed to explore and, if feasible, develop the property.

[12] Timothy subsequently changed its name to Prospectors Airways Consolidated Ltd. (“Prospectors”). Prospectors subsequently became a public company listed on the Vancouver Stock Exchange.

[13] By letter dated October 27, 1987, Thomas Buchan agreed to transfer the Anyox Claims to Prospectors in exchange for 1,000,000 shares of Prospectors and a net smelter return of 3% of the gross income received by Prospectors with respect to its 40% interest in the Cominco joint venture should the property be put into production. A Bill of Sale dated October 30, 1987, records the transfer of the Anyox Claims to Cominco.

[14] Pursuant to an agreement dated May 9, 1988, Thomas Buchan agreed to place into escrow 950,000 of 1,000,000 shares issued to him in consideration of the acquisition of the Anyox Claims contributed to the Cominco joint venture. The terms of the escrow agreement provided that the shares would be held by Prospectors' Registrar and Transfer Agent subject to the acceptance for filing by the Superintendent or the Vancouver Stock Exchange of material relating to the following events:

(a) 150,000 shares shall be released to Mr. Buchan in blocks of 50,000 shares each upon completion of staged exploration programs on the Anyox Properties pursuant to the agreement to earn an interest in all claims comprising Prospectors' option and joint venture agreement with Cominco Ltd. It was anticipated that all 150,000 shares would be released to Mr. Buchan on or before the date Prospectors' earned its interest in the Anyox Claims and it became subject to the joint venture provisions of the Cominco agreement; and

(b) 800,000 shares would be released to Mr. Buchan in the event the joint venture or any successor thereto placed the Property into commercial production. Commercial production from the Property had been defined to be the establishment of mining and milling facilities operating at an annualized rate of 100 tons per day over 45 out of any consecutive 60 day period. In the event commercial production was not established within 10 years of the date of the Prospectus any shares not released from escrow would be surrendered by the holder thereof by way of gift for cancellation.

[15] Steven Buchan testified that Prospectors did not issue Thomas Buchan all of the shares provided for in the October 27, 1987, agreement.

Involvement of Mr. Richards

[16] By 1989, Prospectors had expended $1.7 million in relation to its obligations under the Cominco Option. However, it had encountered difficulties and by December 1989 it was $300,000 short with respect to its obligations and faced losing the Option.

[17] Prospectors retained Richards Buell Sutton in December 1989. At that time, there was a payment due pursuant to the Cominco Option. The situation was that the Cominco Option was going to terminate at the end of the month if the payment was not made. By letter dated December 29, 1989, Mr. Richards, as solicitor for Prospectors, wrote to Cominco to advise that his firm had $350,000 in its trust account in relation to the Option.

[18] Mr. Richards testified that he had no knowledge of Prospectors prior to December 1989. When he was retained, he reviewed the Cominco Option and some material that he described as "Blue Sky" prepared by Boston Financial Group Inc. ("Boston Financial"). He stated that his principal source of information regarding the Cominco Option was Mr. Steven Buchan.

Involvement of Moss

[19] In February 1990, Mr. Richards commenced negotiations with Cominco for a contract by which Moss would take over Cominco's position in the Cominco Option. These negotiations culminated in a letter dated March 6, 1990, by which Moss purchased the Anyox Alice Arm assets from Cominco. These assets included, in Schedule "A" the agreement made March 31, 1987 between Cominco and Prospectors as well as the fee simple lands upon which the Tailings were located. In this letter, Cominco provided the following warranties:

Warranties

Cominco's warranties shall be limited to the following, namely that Cominco warrants that on closing that:

(a) the Schedules "B" and "C" assets shall be free and clear of all financial encumbrances save and except permitted encumbrances agreed to be assumed by Moss prior to the date set for completion,

(b) it is not aware of any stop-work orders and environmental orders that have not been disclosed to Moss,

(c) it has the right to transfer all of the scheduled assets subject only to obtaining the consent of Prospectors Airways Co. Ltd. ("Prospectors") to the transfer of the Schedule "A" assets,

(d) to the knowledge of Cominco, there is no litigation, administrative or governmental proceeding or inquiry pending, or threatened against or relating to Cominco's scheduled assets.

[20] The March 6, 1990, agreement called upon Moss to make payments to Cominco as follows:

(a) $25,000 upon acceptance by Cominco;

(b) $50,000 on closing;

(c) $50,000 on May 30, 1990;

(d) $375,000 on June 30, 1990;

(e) $300,000 on September 30, 1990.

[21] Prior to the contract with Cominco, Moss was a shelf company with no assets or revenue. Mr. Richards testified that Steven Buchan represented to him that Boston Financial, a company based in Calgary, had the resources to make this purchase. The contemplation at the time was that Boston Financial would provide the funding. The President of Boston Financial was Frederick Marsh.

[22] Boston Financial provided the first payment of $25,000. However, when the next instalment of $50,000 was due, Boston Financial did not provide the funds despite assurances from Mr. Buchan that it would do so. Mr. Richards stated that he made that payment from his own funds. Boston Financial did not provide funds for the May 30, 1990, payment. Mr. Richards arranged for four individuals not connected with the project to advance the funds to make the payment. Mr. Richards stated that Mr. Buchan continued to make representations that Boston Financial would cover the payments; however, it never paid. Mr. Richards testified that he renegotiated with Cominco to postpone some of the payments if interest were paid. Mr. Richards and Mr. Wolrige then paid the interest until 1992.

[23] Prospectors provided a release to Cominco dated March 12, 1990, and signed by Steven Buchan in the following terms:

RELEASE

PROSPECTORS AIRWAYS CO. LTD. ("Prospectors"), having an office at 427-470 Granville Street, Vancouver, B.C., V6C 1V5, for good and valuable consideration (the receipt and sufficiency of which payment is hereby acknowledged) does for itself, its successors and assigns, hereby remise, release and forever discharge COMINCO LTD. ("Cominco") having an office at 7th Floor, 409 Granville Street, Vancouver, British Columbia, its successors and assigns and its directors, officers, employees and agents, from any and all actions, causes of action, claims, debts, demands, and damages howsoever arising which Prospectors may now have or which hereafter it may have against Cominco by reason of any cause, act, deed, matter, thing or omission in connection with the Agreement dated March 6, 1990 relating to the Purchase of Cominco's Anyox and Alice Arm Interests and the Anyox Option and Joint Operating Agreement made as of March 31, 1987 between Cominco and Prospectors and Prospectors hereby surrenders any and all its right, title and interest in and to the assets set out in Schedules "A", "B" and "C" to that Agreement.

IN WITNESS WHEREOF Prospectors has hereunto set its hand and seal this 12th day of March, 1990.

[24] An Agreement dated March 20, 1990, was entered into between Frederick Marsh, Steven Buchan and the Schedule "A" Parties, collectively referred to as the Managers, who were Mr. Richards, Mr. Wolrige, Mr. Marsh and

Mr. Buchan (the "Management Agreement").

[25] The Management Agreement is an odd document. The preamble provides:

> A. Marsh and Buchan have acquired various interests in the Anyox-Kitsault area, Observatory Inlet, Portland Canal, British Columbia, which said interests are held both in their personal capacity and through shareholdings in public companies known as Prospectors Airways Co. Ltd. ("Prospectors"), Boston Financial Group Inc. ("Boston"), Moss Management Inc. ("Moss") and holdings in various private companies;
>
> B. Marsh and Buchan are desirous that these various interests be developed for the benefit of themselves and the shareholders of the various companies;
>
> C. Marsh and Buchan have approached the Schedule "A" Parties ("Party") with a view that they would join with them in the development of their various interests and as such, join with them in forming a management team;
>
> D. Marsh and Buchan recognize that the management of their various interests will require the devotion of the Managers to the project to the detriment of their other vocations and a loss of other opportunities;
>
> E. It is proposed that Marsh and Buchan will acquire or cause to be acquired the Amax Mill and town site at Kitsault, B.C. with Kitsault Forest Products Ltd., ("Products") which said mill and town site are necessary in order to economically develop their interests and the public companies' interests in the area as set forth on Schedule "B" ("Interests"), and such other Interests and properties as may from time to time be added to Schedule "B" and initialled by the parties hereto.

[26] One oddity is that neither Mr. Marsh nor Mr. Buchan was a shareholder in Moss. Mr. Richards's explanation for this was that the document was drafted a month before it was executed. The contemplation was that Mr. Marsh and Mr. Buchan had indirect share holdings through offshore companies that were subsequently incorporated. These offshore companies were the beneficial owners of the Moss shares. Also, Boston Financial is described as having interests in the area. Mr. Richards stated that he was aware of no interests or assets in the area held by Boston Financial.

[27] With respect to recitals C, D and E, Mr. Richards testified that Mr. Marsh and Mr. Buchan did not acquire the assets as contemplated by the agreement; namely, the Amax Mill and town site at Kitsault.

[28] Schedule "B" included the assets acquired from Cominco by Moss as described in Schedules "A", "B" and "C" of the letter written to Cominco and Moss dated March 6, 1990.

[29] Clause 21 of the Management Agreement provided:

> All decisions of the Managers shall be by a majority provided that in the event of the absence of either Marsh or Buchan then the other shall have the right to veto any decision of a majority of the Managers, providing such veto is exercised at the time such decision was made by the Managers.

[30] Mr. Richards testified that the veto was provided in anticipation of Mr. Marsh and Mr. Buchan bringing a number of assets into the deal. This, however, never came to pass.

[31] Steven Buchan testified that it was his view that the Management Agreement created a trust that was to be governed by the four Managers, two of whom, namely, himself and Mr. Marsh, held a veto. It was his testimony that the Agreement continued to be in effect after the fall of 1991.

[32] Moss entered into an agreement with Prospectors dated April 2, 1990 (the "April 2nd Agreement"). The preamble provided:

> A. Prospectors has entered into an option agreement (the "Option Agreement") dated for reference March 31, 1987 with Cominco Ltd. ("Cominco") whereby Prospectors is granted an option to earn a 40% interest in the mineral claims described therein (the "Claims");
>
> B. Moss acquired all of Cominco's interest in and to the Option Agreement from Cominco

pursuant to a letter agreement dated March 6, 1990;

C. Prospectors wishes to assign the Option Agreement to Boston Financial Group Inc. ("Boston") with the consent of Moss for the consideration set forth herein;

D. Prospectors has requested and Moss has agreed to grant a one year extension to Prospectors to conduct the balance of the expenditures required by Prospectors to exercise the option to acquire the Claims pursuant to the Option Agreement, for the considerations set forth herein.

[33] Pursuant to the April 2nd Agreement, Moss consented to the assignment of the Option Agreement and the amendment described in this Agreement to Boston. Prospectors agreed to allot and issue to Moss 3,700,000 of its shares and to grant to Moss a warrant to purchase 3,700,000 shares at a designated price for a designated period of time.

Involvement of Remida Ventures in the Tailings

[34] Richard Wilson was a principal of Remida Ventures Inc. ("Remida"), a junior mining company that traded on the Vancouver Stock Exchange. He and his partner, Eberhard Meuller, were looking for a project. They became interested in the Tailings. Their plan was to value the Tailings and with that raise funds to further the program, and then to step into drilling other properties. They hired Barry Whelan to act as consulting geologist on the project.

[35] Mr. Richards testified that it was his belief that Remida was introduced to the Tailings project by Mr. Buchan.

[36] Moss entered into an agreement with Remida dated November 27, 1990 which dealt in part with the Tailings (the "November 27 Agreement"). The November 27 Agreement granted Remida the option to earn a 50% interest in the mineralization in the Tailings upon certain conditions. These included that Remida must issue 100,000 of its free trading shares to Moss, spend at least $80,000 on testing by March 1, 1991, and spend the funds necessary to bring the Tailings, Dumps or Waters into commercial production by no later than October 1, 1993.

[37] Tailings were defined for purposes of the November 27 Agreement as follows:

(b) "Tailings" means a product of the operation of the Granby mill and floatation cells that was discharged in an area below the site of the old mill and concentrator, lying between Hidden Creek and Falls Creek (Anyox Creek) and located upon fee simple lands held by Moss.

[38] Clause 4.01 of the Agreement provided:

Remida shall have earned its right to 50% of the mineralization in the Tailings, Dumps or Waters upon having expended sufficient funds to enable a feasibility report to be prepared and issued by October 1, 1992, by such consultant as may be mutually agreed to by the parties, recommending that the Tailings, Dumps or Waters be brought into commercial production and by depositing the cost of bringing the same into commercial production in an escrow account specifically established for such purpose under the jurisdiction of the management committee as defined in Schedule "B".

[39] Remida had a number of obligations pursuant to the November 27 Agreement including:

(a) to maintain insurance in a form acceptable to Moss;

(b) to indemnify Moss with respect to any claims arising out of or in connection with all leaching operations conducted prior to the formation of the Joint Operation;

(c) to comply with all applicable regulations with respect to the extraction of the mineralization from the Tailings; and,

(d) to obtain an environmental impact report prior to obtaining a feasibility report.

[40] A samplings program was conducted on the Tailings between November 14 and November 20, 1990, for Remida under the supervision of Barry Whelan, a geologist. Mr. Whelan prepared a report titled “Sampling Program Anyox Tailings, Anyox, British Columbia for Remida Ventures Inc., November, 1990”.

[41] Mr. Whelan notes in the report that “[s]ampling of the tailings was carried out on a very limited scale in 1988 when Prospectors Airways Co. Ltd. was operating in the area under an option agreement with Cominco.” He described the sampling program conducted in 1990 as follows:

> The tailings pile was sampled between November 13th and 21st, 1990. The pile covers an area roughly lobate in shape measuring approximately 500 meters along the north-south axis and 120 meters along the east-west axis (see Figure 2). Surface weathering extends to a depth of approximately 1 meter (2.5 to 3 feet). In the weathered zone there is only minor mineralization (see Figure 3), the mineral component having been leached since the pile was emplaced in the 1920’s. Fifty-five locations were sampled by means of a vibracore unit at 10 meter spacing along grid lines (see Figure 4). The vibracore unit was effective only in unconsolidated sediments with contained fluids. When material was dry and hardpacked i.e. hardpan, there was minimal penetration, or if organic material was encountered the vibrations were damped resulting in no penetration. Penetration into the unweathered portion of the pile was obtained in 53% of the samples. The complete sample recovered from the drill pipe was bagged in 6 mil poly bags and sealed.

[42] The report concludes with a recommendation for a further sampling program, the Phase II Sampling Program. The Phase II Sampling Program was described as follows:

> It is recommended that a comprehensive sampling program utilizing a power auger mounted on a backhoe be carried out to determine the overall content of the tailings pile and the dumps. This will involve laying out a grid on the tailings, boring sample holes to a depth sufficient to test through the pile, sampling the borehole cuttings and assaying the samples.

[43] The total estimated cost for the Phase II Program was $151,500 being $124,500 for Part 1 and $27,000 for Part 2.

[44] Mr. Wilson testified that after the November 27 Agreement was signed, Remida needed an extension. By agreement dated February 14, 1991 (the “Amending Agreement”) Moss and Remida made certain amendments to the November 27 Agreement including an extension of time.

[45] Mr. Wilson testified that Remida was then not able to raise the necessary funds in the market to continue. Market conditions were not favourable to development. Remida was not able to exercise the option.

The Moly May Claims

[46] Moss and Prospectors jointly owned certain staked mineral claims that were located close to the Tailings on the Granby Peninsula. These claims were known as the Moly May claims.

[47] In April 1991, following an introduction by Mr. Buchan, Pacific Hunter entered into an agreement with Prospectors and Moss to work on the Moly May claims. The agreement is found in a document “Letter of Understanding” signed by Prospectors, Moss and Pacific Hunter. The document provides:

> LETTER OF UNDERSTANDING
>
> This is a letter of understanding between:
>
> Prospector’s Airways Co. Ltd. (Prospector’s) with an address at Suite 220, 820 West Pender Street
>
> Vancouver, B.C.
>
> and
>
> Moss Management Inc. (“Moss”) with an address at

> Suite 530, 1111 Melville Street
>
> Vancouver, B.C.
>
> and
>
> Pacific Hunter Inc. ("Hunter") with an address at
>
> Vancouver, B.C.
>
> Whereas
>
> Hunter is desirous of earning a 50% interest in the claim known as the Moly May #2 (the "Property"),
>
> and Prospector's as to 40% and Moss as to 60% are the owners of the Property,
>
> Therefore,
>
> Prospector's and Moss jointly agree that Hunter may earn a 50% interest in the Property upon the completion of the following expenditures on the Property:
>
> 1. $100,000 during 1991,
> 2. $150,000 during 1992,
> 3. $250,000 during 1993 and
> 4. $500,000 during 1994.
>
> If Hunter has not made the required expenditures by the 31st of December of the relevant year then it shall have earned no interest in the property.
>
> Physical work on the property shall commence on the property within thirty days of signing this Letter of Understanding or this Letter of Understanding is void.
>
> Formal documentation will be prepared as soon as possible.

[48] It is common ground that during the period in 1991 that is relevant to the matters at issue in this litigation, Pacific Hunter was doing work at the site of the Moly May property pursuant to the Letter of Understanding.

Involvement of Pacific Hunter in the Tailings

[49] Mr. Wilson of Remida stated that in 1991 he learned that Bruce Rome was interested in "having a go" with the Tailings. He understood that Steven Buchan had told Mr. Rome about the Tailings. Mr. Rome deposed that he had then conducted an investigation in the course of which he discussed the matter with Mr. Mueller. Mr. Rome obtained copies of Remida's documents including its maps, assays and the report prepared by Mr. Whelan dated November 1990. He also reviewed Mr. Whelan's report concerning the Tailings with Lou Manning, a metallurgical engineer. Finally, Mr. Rome made a trip to the property and took samples before May 8, 1991, as part of his investigation.

[50] An undated document executed on behalf of Remida by Mr. Mueller provided:

> By this letter Remida Ventures Inc. agrees to the assignment of the contract respecting the tailings at Anyox, B.C., between Moss Management Inc. and Remida Ventures Inc. dated the 27th of November, 1990 and amended subsequently on the 14th of February, 1991, to First Dimension Marble Company Ltd., in consideration of Remida Ventures Inc. receiving a 2% net profits interest.

[51] Mr. Wilson could not recall the circumstances under which this document was executed and had no knowledge of First Dimension Marble. He did recall a discussion with Mr. Mueller about keeping 2% net profit because of the public funds spent on the project.

[52] A document dated May 2, 1991 provided that Moss agreed to the assignment of the contract between Moss and Remida to First Dimension Marble, conditional upon Pacific Hunter having carried out a reasonable effort to

complete 1000 feet of drilling upon the Moly May claim within three weeks.

[53] The document that is central to the dispute is a letter dated May 8, 1991, from Pacific Hunter to Moss. Mr. Richards signed on behalf of Moss. The letter reads:

> May 8, 1991
>
> Moss Management Inc.
>
> Suite 530
>
> 1111 Melville Street
>
> Vancouver, B.C.
>
> V6E 3V6
>
> Dear Sirs:
>
> Re: Anyox Tailings Dumps
>
> By way of this letter Pacific Hunter Resources Ltd. ("Pacific Hunter") proposes to:
>
> 1. Settle with Remida Ventures Inc. for any and all interest it may have in the said tailings and dumps for a two percent (2%) net profit interest to come from our share of production profits.
> 2. Guarantee the expenditure of $40,000.00 to be spent prior to September 1, 1991 for the following purposes:
>   (a) to move equipment to the site, i.e. back hoe, cat, etc.;
>   (b) to extract 10 to 20 tons of tailings from the different locations and depths so as to run a bulk separating test. This will determine the method and equipment best suited to enable us to go into production;
>   (c) to rent, hire, but not purchase, a landing barge with a front ramp for easy loading and unloading of heavy equipment and supplies. This barge would operate from Anyox to Kitsault to connect with the highway;
>   (d) to retain Bacon Donaldson to run a test and advise as to metallurgy, method of production and equipment needed.
> 3. Pacific Hunter will keep you advised on progress and monies expended on a monthly basis and will supply proof that $40,000.00 is available for the purposes of paragraphs 2(a) to (d) above.
> 4. Pacific Hunter will determine the method, the feasibility and the equipment necessary to make this a profitable venture and will furnish you, by October 31, 1991, with a feasibility report.
> 5. Upon receipt of a feasibility report recommending production, Pacific Hunter shall have 60 days to elect to bring the tailings into production.
> 6. Upon electing to bring the tailings into production, Pacific Hunter shall become obligated to bring same into production prior to October 31, 1992, subject to the usual force majeure provision.
> 7. Upon Pacific Hunter having brought the tailings into production it shall have earned a 60% interest in the tailings.
> 8. Upon Pacific Hunter having brought the tailings into production it shall have the right to bring the dumps into production and the right to electrowin the waters and earn a 60% interest therein provided that you may restrict the dumps that may be processed in the event the operations on such dumps interfer[sic], or may interfer[sic] within your sole discretion, with the other mining operations being conducted upon your properties. ,

9. In order for Pacific Hunter to earn its 60% interest in the dumps and waters it must bring same into production by June 1, 1994.

10. Providing Pacific Hunter has complied with paragraphs 1 to 9 it can earn a further 10% in the tailings, dumps and waters by paying you a further one million dollars, to be paid by applying not less that [sic] 1/6 of its returns from the aforesaid operations and may prepay such amount at any time.

11. It is to be understood that your interest whether it be 40%, or reduced to 30% pursuant to paragraph 10, shall at all times be a net carried interest and that the formal document shall define net profits.

12. Our funding is to be in place by May 15, 1991 and will be administered by Barry Whelan and Bruce Rome. Work will begin three days after signing.

If this proposal is acceptable to you please indicate by signing, dating and returning to us the attached copy of this letter and we will have our solicitors prepare the formal documentation.

[54] Mr. Rome deposed that during negotiations, Mr. Richards told him that Moss owned the Tailings, that it held "100% right, title and interest" to the Tailings and owned the land under them. He stated that Mr. Richards made the statements on two occasions, once on May 8, 1991, and at a meeting two or three days earlier. He stated that Mr. Wolrige was present at the earlier meeting and heard the representations, but said nothing to contradict them.

[55] Mr. Richards testified that Mr. Buchan brought Mr. Rome's interest to his attention. On May 6, 1991, Mr. Richards met with Mr. Buchan to discuss a proposal in relation to the Tailings. They reviewed the matter again the next day. Mr. Buchan went off to revise the proposal in accord with their discussions.

[56] Then Mr. Rome came on May 8, 1991, with a document. It was Mr. Richards's understanding that Mr. Buchan and Mr. Rome had had previous discussions about the project. Certain changes were made and the document was signed. Mr. Richards stated that to the best of his recollection he only met with Mr. Rome on May 8 and had no conversation with Mr. Rome prior to that date.

[57] Mr. Richards testified that as of May 8, 1991, he was a director and an officer of Moss. He was a registered shareholder of Moss holding his shares in Moss in trust for Separ. Separ, which was an offshore company incorporated in Anguilla, was the beneficial owner of the shares on May 8, 1991.

[58] Mr. Richards testified that he did not tell Mr. Rome that he held his shares in Moss as a trustee. He said that he was authorized to enter into an agreement on behalf of Moss and that it never occurred to him to tell Mr. Rome about the offshore trust. He didn't think the offshore trust was relevant. He could recall no discussion with Mr. Rome about who owned Moss.

[59] Mr. Richards testified that throughout the negotiations with Mr. Rome and to the present, so far as he was concerned, Moss owned and still owns the Tailings. He was confident on May 8, 1991, that Moss owned the Tailings. He stated that he did not recall Mr. Rome ever asking him who owned the Tailings. He stated that on May 8, 1991, it was his belief that Moss owned both the surface and the under surface right so he gave no thought to the question of whether the ownership of the Tailings went with the fee simple or with the mineral rights.

[60] Mr. Richards believed that ownership went with the fee simple. He said that if asked, he would have said that Moss owned the Tailings by virtue of its ownership of the fee simple. It was his belief that in August 1989 Cominco owned the fee simple of the land on which the Tailings were located. It was his belief that ownership stayed with Cominco until 1990 when it went to Moss. It was his belief that Moss had acquired title to the Tailings from Cominco and that there was no cloud on that title. He made no investigation because he had no reason to think an investigation was necessary. It was his evidence that Steven Buchan indicated to him that Moss owned the Tailings without any cloud.

[61] Mr. Richards testified that in May 1991 he had no knowledge of any problem with the title to the mineral rights. He heard that there was an issue raised only in the course of these proceedings. He had never heard the name Thomas Buchan. He had no knowledge in the period of 1989 to 1991 of Thomas Buchan, or that Thomas Buchan had any interest or claim. He had no knowledge of the provisions of an escrow agreement with Thomas

Buchan.

[62] Mr. Richards stated that in 1991 he did not believe that Moss held its interest in the Tailings in trust for Prospectors. He believed that Moss held good title to the Tailings.

[63] With respect to Clause 1 of the May 8, 1991, letter requiring Pacific Hunter to settle the November 27 Agreement as amended with Remida, it was Mr. Richards's testimony that he believed that the Remida agreement was still in effect until the end of June. It was represented to him that Pacific Hunter could secure Remida's consent to an assignment that would free Moss to contract with Pacific Hunter. He stated that he did not receive any documentation to confirm that Pacific Hunter had settled with Remida.

[64] Mr. Rome's evidence given in Examination for Discovery was that he inserted the provision in order to compensate Remida for the documents concerning the Tailings that Mr. Mueller had given to him.

[65] With respect to the provision that work was to commence three days after the signing, Mr. Richards stated that it was his belief that this referred to the signing of the formal documentation.

[66] Mr. Richards agreed that he was aware that Mr. Rome had started work on the Moly May site with no formal documentation prepared. Mr. Richards stated that it was his expectation that Mr. Rome would go to the site and carry out the work outlined in the May 8, 1991, letter when the formal contract was executed.

[67] Mr. Richards testified that when he signed the Letter of Understanding regarding the Moly May claims he understood that work was to commence at the site within 30 days. He stated that on May 8, 1991, he was aware that work had already started at Anyox in relation to the Moly May project pursuant to the Letter of Understanding.

[68] Mr. Richards testified that in his view, formal documents were essential to justify going to the next stage. He stated that between May 8 and May 15, 1991, he did not receive anything either orally or in writing from Pacific Hunter to confirm that funding was in place. He received no written report regarding progress in May or June and in July received only one assay report. He received no reports of any kind relating to expenditures. It was his testimony that Mr. Rome did not tell him anything about the Tailings until their discussion in July.

[69] Mr. Rome's evidence in Examination for Discovery was that he provided oral reports in June and July. He agreed that he did not tell Mr. Richards about the funds his company had been spending on the Tailings. He said that he told Mr. Richards that he had opened the camp, which was the camp involved in the Moly May project.

[70] It is common ground that at no time did Pacific Hunter enter into an agreement or settle with Remida for 2% of Pacific Hunter's net profit interest pursuant to Clause 1 of the May 8, 1991, letter. Pacific Hunter did not keep Moss advised of progress on a monthly basis and did not supply proof that $40,000 was available pursuant to Clause 3. Bruce Rome deposed that he offered to provide such proof to Mr. Richards, but that Mr. Richards said that it was not necessary. No formal or other documentation was ever prepared.

[71] It is also common ground that in May 1991, Bruce Rome, his son Robert and Barry Whelan were at the camp in Anyox although what they were doing there is in dispute. It is common ground that work on the Moly May claim was going forward at that time.

[72] Robert Rome testified that he made two trips to Anyox in 1991, both in May. The first trip was on May 11, 1991, with his father. They returned to Prince Rupert on May 15, 1991. Mr. Whelan was already on site when they arrived, as were some workers for the Moly May project.

[73] Robert Rome recalled that Mr. Richards made a brief visit to the camp during the first trip. He stated in examination-in-chief that Mr. Richards flew in with two other men, had a brief conversation with Mr. Whelan, a brief conversation with his father, walked through the area and flew out a couple of hours later. In cross-examination, counsel directed him to the evidence his father had given in Examination for Discovery in which he said that he was out on the fishing boats at the time. Robert Rome then stated that he did not disagree with his father's evidence.

[74] Mr. Richards testified that he made a brief visit to the camp at Anyox on May 14, 1991. He didn't recall speaking with Bruce Rome. It was his testimony that Mr. Rome wasn't in camp when he arrived. He said that he was told that Mr. Rome was out on the fish boat.

[75] Bruce Rome deposed that by May 12, 1991, he had moved heavy equipment on site including a caterpillar tractor and drilling equipment. The CAT was needed, he deposed, to strip away about two feet of Tailings to

expose a cap or crust which then had to be drilled through with an augur in order to be able to take a sample down through the entire six metres.

[76] Bruce Rome deposed that "[t]here is absolutely no way Mr. Richards could have avoided seeing the camp or the work that was then in progress or the heavy equipment."

[77] Robert Rome testified that there were two CATS on site; however, there were problems with both. One could not be started. Mr. Rome brought a replacement battery with him on the first trip to camp; however, the CAT still could not be started. On the second trip, which occurred in late May, Ken Cameron came up with another battery to try to get the CAT operational. Mr. Rome testified that he never saw that CAT operational. The second CAT was stuck in a ravine. It was operational, but stuck. They were unable to get the CAT out; it remained in the ravine.

[78] Two conclusions flow from Robert Rome's testimony concerning the state of the two CATS. First, since neither CAT was operational during the first visit to camp, Mr. Richards could not have seen either of them working on his visit. Second, Mr. Bruce Rome deposed that he had moved heavy equipment to the site by May 12. However, when Robert Rome arrived at the camp on May 11 that CAT was not operational. I conclude that the CAT was not operational for sufficient time to remove the surface of the Tailings and that it did not do so.

[79] Robert Rome testified that the diamond drill was not operating at the Moly May site on his first visit. They were trying to get it to work. He stated that during his stays in the camp he shuttled the men back and forth from the camp to the Moly May site by boat every day.

[80] It was Robert Rome's testimony that he observed piles of dirt pushed up around the edges of the Tailings. It looked to him as if the top layer had been stripped off. I conclude that this impression was mistaken. He stated that he walked the Tailings area with his father and Mr. Whelan, and Mr. Whelan told him where sampling holes were to be placed.

[81] Mr. Richards agreed that he would have seen the Tailings on his trip to the site on May 14, 1991. Counsel suggested that he could see that someone had used a CAT and taken the top cap off the Tailings. He responded that he saw no indication of equipment or of work done on the Tailings. He saw no equipment in or around the area. He saw no indication of any work being done.

[82] Robert Rome testified that they brought pails of Tailings samples back with them to Vancouver after the first trip. These were not from the samples he took. He said that they were bulk samples and he didn't know where they had come from.

[83] Robert Rome stated that he took samples using a post hole digger. He stated that he dug samples at 1, 2 and 3 foot levels, according to the sites indicated by Mr. Whelan and his father. He brought these samples back with him and delivered them to Vangeochem Lab Limited for analysis.

[84] Mr. Whelan testified that Bruce Rome hired him to work at Anyox in connection with the Moly May project. He was supervising the recovery and core examination at the Moly May site. He had signing authority on the bank account. It was his testimony that he was not doing any work in connection with the Tailings in the spring and summer of 1991. He stated that Robert Rome was at the campsite taking care of the camp facilities and at the Moly May site, working on that project. It was his testimony that Robert Rome was working with the crew on the Moly May project. There were difficulties getting the diamond drill operating and he was assisting in the efforts to get the drill functional.

[85] Mr. Whelan stated that he never saw equipment at the Tailings site or work being done on the site in the spring and summer of 1991. He was not aware of Pacific Hunter doing any work on the Tailings. He was asked if Pacific Hunter was following his recommended program with respect to work on the Tailings. His response was that he was not aware of Pacific Hunter doing any work on the Tailings and if it did, it was not following the program he had proposed.

[86] Mr. Whelan reviewed the expenses of Pacific Hunter and stated that he was not able to identify any expenses that clearly related to the Tailings. There were expenses clearly related to the Moly May project, but nothing that specifically related to the Tailings.

[87] Mr. Whelan stated that there is a surface weathering layer on the Tailings of about 1 meter depth. Below

that is the layer of compacted material of about 2 feet depth, and below that is the hardpan layer. He did not know how deep the hardpan layer was because he was not able to penetrate to that layer when he did the samples in the original report. In his opinion, this was the level at which sampling needed to be conducted in the next phase of sampling.

[88] He agreed that his report called for the weathered portion of the Tailings to be stripped away as part of the Phase II Sampling Program. He did not agree that this was done in the spring of 1991. It was his evidence that if Robert Rome did sample as he stated, at the 1, 2 and 3 foot level, such samples never got below the weathered portion and did not amount to the samples called for in his report. Such samples would not have reached the compacted layer.

[89] It appears that certain samples were taken from the Tailings and forwarded to Edward Skoda as reflected in a letter dated May 30, 1991, from Mr. Skoda to Pacific Hunter, which reads in part:

> Re: Anyox Tailings
>
> This letter will serve to advise that I received the ten (10) pail bulk sample, (approximately 500 pounds), and have concluded that they contain 28-30% SO and 60-68% FE203.
>
> I have a very interested buyer who has verbally agreed to purchase these concentrates FOB Vancouver, B.C. subject to a larger bulk sample and assay at $35.00 per ton. As freight costs play a major role in the feasibility of this project I took the liberty of getting a backhaul rate from RivTow. I understand you have a rate from Wainswright Boat and Barge of a 600 ton minimum load backhaul @ $11.50 per ton – Anyox to Vancouver.

[90] Mr. Skoda testified that he was looking to set up a joint venture with Mr. Rome to see if they could process the Tailings economically. They were trying to market an iron product to a coal company in the United States that was looking for a high iron content. They had contacted RivTow regarding the possibility of barging the material out of Anyox. If the project had gone into production, it would have required loaders, trucks, conveyers, magnetic separators and a source of power. He recalled that Bruce Rome dropped the sample pails off at his place in Vancouver and that Mr. Rome told him the samples were from the Tailings.

Events in June and July 1991

[91] Mr. Richards testified that sometime after May 14, 1991, he heard from Mr. Schmidt, Pacific Hunter's solicitor. Mr. Schmidt wanted to discuss what Mr. Richards was looking for in the formal documentation. Mr. Richards said that he told him what was required and suggested that he look at the Cominco Option for sample clauses. Mr. Richards recalled a conversation with Mr. Schmidt concerning the definition of "net profit" in which he referred Mr. Schmidt to the Cominco Option for a precedent.

[92] Mr. Richards's diary notes a meeting with Bruce Rome on June 28, 1991, for one-half hour. It was his testimony that they did not discuss the Tailings and that he had not seen the assay report at that date. He stated that at some point he learned that there had been some samples taken from the Tailings, but he does not recall when or how he learned this.

[93] Mr. Richards testified that in early July 1991 he ran into Bruce Rome on the street, they had a brief conversation, went up to his office and discussed the Tailings. The conversation concluded with Mr. Rome saying he would sue. Mr. Richards then wrote a letter dated July 12, 1991, which states:

> Dear Sir:
>
> Re: Anyox Tailings Dumps
>
> I was surprised at your attitude yesterday when you left the office inferring that you would be taking action against Moss Management Inc. ("Moss") based on the proposal put forth in your May 8, 1991 letter addressed to Moss ("Letter").
>
> As of May 8, 1991 Remida Ventures Inc. ("Remida") had a valid and existing option agreement with Moss to bring the tailings into production.

> We concluded that you did not intend to proceed since Moss did not receive confirmation from you that:
>
> (a) you had concluded an agreement with Remida, as provided in paragraph 1 of the Letter, which would enable Moss to enter into an agreement with you; and
>
> (b) funding was in place by May 15th.
>
> As mentioned to you, we are still interested in concluding an agreement to bring the tailings into production and would suggest that you have your lawyer prepare the formal documentation as mentioned in the Letter. This documentation is necessary in order to, amongst other things, define net profits, referred to in paragraph 11 and provide for permitting and complying with environmental requirements, etc.
>
> Until formal documentation is prepared, and submitted to us for our consideration and an agreement concluded, we recommend that you do not proceed with the barge arrangements that you mentioned to me yesterday. If we do not receive a draft of the formal agreement, or confirmation from your lawyer that he is preparing same, by July 25, 1991, we will conclude that you are not interested in proceeding further with this project.

[94] Bruce Rome deposed that:

> From my perspective, everything was proceeding normally up until sometime between July 8th and July 10th, 1991 (I do not remember the exact date), when I met Mr. Richards by pure happenstance on the street in front of the old Terminal City Club. He told me to stop spending any money up there, I didn't have the property. I told him that I wasn't going to take that, that I would sue him.
>
> Because we were on the street, our conversation was no longer than that, and I parted very angry and determined to have nothing further to do with Mr. Richards.
>
> This confrontation represents the last time Mr. Richards and I would speak that Summer of 1991.

[95] Mr. Rome deposed further that when Mr. Richards stated in the July 12, 1991, letter that "we are still interested in concluding an agreement to bring the tailing into production" this is precisely the opposite of what he had said to him on Hastings Street.

[96] Mr. Rome deposed that:

> Faced with the lies in this letter, I knew I could no longer trust Mr. Richards, and I also knew the likelihood of the Tailings project going ahead was not high. Accordingly, I notified Bacon Donaldson to stop and I suspended all work on the project.
>
> ...
>
> I called Mr. Wolrige and I had several meetings with him. What I found is that Mr. Wolrige talked around in circles and didn't say anything. He wanted to meet with me on several different occasions, but he was never able to come up with a solution, a proposal, anything. He did not even want to discuss the Tailings. In the end, I concluded he was just stalling for time, and I was just wasting my time and money.
>
> Soon after receiving Mr. Richards' letter, I had taken it to my solicitor, Mr. William E. Schmidt ("Mr. Schmidt"), and we decided he would respond to the deadline in the final paragraph, again in the hope that something might be salvaged. He eventually did so by letter to Mr. Richards, but not before July 24, 1991.

[97] The next communication was a letter dated July 24, 1991, from Pacific Hunter's solicitor, Mr. Schmidt. Mr. Schmidt stated:

> Re: Bruce Rome and Anyox Tailings Dumps

> Further to the letter from Bruce Rome dated May 8, 1991 to Moss Management Inc. and your letter to Bruce Rome dated July 12, 1991, I confirm that I have been instructed by Mr. Rome to prepare the formal documentation in respect to the Anyox Tailings Dumps.
>
> If you have any specific definitions with respect to net profits as referred to in paragraph 11 permitting or complying with environmental requirements, etc., I would suggest that you fax any such material to ourselves so that I may consider using the definitions and provisions in respect to permitting and environmental requirements which you may find most acceptable to yourselves.

[98] There followed a meeting with Mr. Rome, Mr. Richards and Mr. Wolrige at Mr. Wolrige's office. A letter dated July 30, 1991, written by Mr. Richards summarized the discussion. Mr. Richards was not sure whether the letter was sent. At the meeting Moss's requirements were outlined with reference to the Remida agreement.

[99] Mr. Richards testified that he then wrote a letter indicating that Moss was ready and willing to enter into an agreement, but nothing further came of the discussions. He was still discussing Moly May with Mr. Rome until August 1991.

[100] Mr. Rome deposed that by the time he received the letter of July 24, 1991, "I had already given up on Mr. Wolrige. I spoke to Mr. Schmidt and I told him not to do anything further. This would have been on or about July 26, 1991."

[101] Mr. Richards stated that Moss still owns District Lots 898 and 899. The Tailings are still in the same state they were in 1991.

CONTRACT

[102] The plaintiffs submit that the letter of May 8, 1991, created a binding and enforceable unilateral contract. The contract, in consideration for Pacific Hunter making an outlay of money and labour, gave Pacific Hunter the privilege of deciding at some future time whether it would exercise its option to earn a 60% interest in the Tailings and precluded Moss from revoking the offer until the period specified in the agreement had expired. This contract was a unilateral contract that was separate and distinct from the bilateral contract that might come into existence if and when Pacific Hunter elected to exercise its option. The plaintiffs submit that in the meantime, so long as Pacific Hunter was performing its part of the bargain, Moss could not revoke the contract.

[103] The plaintiffs submit that Moss repudiated the contract either in the conversation between Mr. Rome and Mr. Richards on July 11, 1991, or in the letter of July 12, 1991. The plaintiffs submit further that Pacific Hunter was performing all of its obligations under the contract.

[104] The defendant's position is that the parties had not entered into a contract. Rather, the May 8, 1991, letter was subject to a final contract that would encompass important terms that had as of that date not been agreed upon by the parties. In the alternative, the defendant submits that it did not repudiate the contract. Rather, it was Pacific Hunter that repudiated the agreement when it instructed its solicitor to stop work on the contractual documents. Moreover, Pacific Hunter had breached the terms of the agreement and could not rely upon it.

Was There a Binding Contract?

[105] It is a question of construction whether the parties intended to be bound until the execution of formal documents. In ***Calvan Consolidated Oil & Gas Co. Ltd. v. Manning***, [1959] S.C.R. 253, Judson J. for the Court, wrote at 261:

> Whether the parties intend to hold themselves bound until the execution of a formal agreement is a question of construction and I have no doubt in this case. The principle is well stated by Parker J. in *Hatzfeldt-Wildenburg v. Alexander* [[1912] 1 Ch. 284 at 288-9, 81 L.J. Ch. 184.], in these terms:
>
> > It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a

> question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contact and the reference to the more formal document may be ignored.

[106] In ***Zynik Capital Corporation v. Faris***, 2007 BCSC 527, 30 B.L.R. 94th) 32, Tysoe J., as he then was, cited the following at para. 69 as setting out the applicable principles:

> In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), the Court discussed the situation where two business persons enter into an informal agreement and agree to have the essential provisions of the informal agreement incorporated into a formal document. The Court then summarized the applicable principles as follows at p. 104:
>
> > However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself: See, generally, *Von Hatzfeldt Wildenburg v. Alexander***,** [1912] 1 Ch. 284; *Canada Square Corp. Ltd. et al. v. Versafood Services Ltd. et al.* (1980), 25 O.R. (2d) 591 (H. Ct.), aff'd., (1981), 34 O.R. (2d) 250 (C.A.); *Bahamaconsult Ltd. v. Kellogg Salad Canada Ltd.* (1976), 9 O.R. (2d) 630 (H.C.J.), rev'd, (1977), 15 O.R. (2d) 276 (C.A.); *Chitty on Contracts*, 26th ed. (1990), at pp. 79-91; *Corbin on Contracts*, Vol. 1, (1963), § 29-30; and Treitel, *Law of Contract*, 7th ed. (1987), at pp. 42-47.

[107] In ***Canlan Investment Corp v. Gettling*** (1997), 37 B.C.L.R. (3d) 140 (C.A.), the Court of Appeal noted that the subsequent conduct of the parties will be one of the circumstances considered in determining whether a complete and binding contract had been entered into. Conduct of the parties that evidences consensus, and the business venture at issue having become operational, will be evidence consistent with the conclusion that a contract exists.

[108] The first question is what the language of the document suggests with respect to the intention of the parties. In the present case, the language of the May 8, 1991, document does not assist in resolving the issue. Rather, the language is consistent with either possibility.

[109] I turn next to the question of whether the document contains all of the essential terms. I conclude that it does not. In particular, a term concerning the calculation of profits, which I conclude is an essential term, is lacking. Indeed the May 8, 1991, letter makes specific reference to the need to define net profits in Clause 11, which states:

> It is to be understood that your interest whether it be 40%, or reduced to 30% pursuant to paragraph 10, shall at all times be a net carried interest and that the formal document shall define net profits.

[110] In addition, the May 8, 1991, letter does not provide for matters such as insurance, indemnity and environmental issues. These are additional matters that would have to be dealt with in the contract.

[111] The next consideration is whether the conduct of the parties is consistent with a binding agreement having been concluded with the signing of the May 8, 1991, letter. I conclude that the conduct of the parties is not consistent with a contract having been concluded. In particular, Pacific Hunter was not behaving as if it were performing terms of the agreement. Pacific Hunter had not settled with Remida as it was required to in Clause 1. It had not supplied proof that $40,000 was available for the purposes of paragraphs 2(a) to (d) as required by Clause

3. I find that it had not kept Moss advised on progress and monies expended on a monthly basis as also required by Clause 3. I find that Pacific Hunter had not made any efforts to involve Mr. Whelan in the administration of funds for the Tailings project, as distinct from the Moly May project, as required by Clause 12, and indeed had not even set up an account for the Tailings project.

[112] The plaintiffs have argued that Pacific Hunter was not required to settle with Remida. The plaintiffs' position is that there was no necessity to settle with Remida because as of May 8, 1991, the November 27 Agreement as amended, was lapsed due to fundamental breach. Further, the plaintiffs submit that by the May 2, 1991 letter agreement Moss agreed to the assignment of the November 27 Agreement as amended between Moss and Remida to First Dimension Marble, a company controlled by Mr. Buchan. Remida confirmed its agreement with this assignment. Therefore, the plaintiffs submit all Pacific Hunter had to do to fulfil its obligation was to conclude an agreement with Mr. Buchan's company First Dimension Marble. Mr. Buchan stated that there was nothing that stood in the way of such an agreement. That may all be true; however, the May 8, 1991, letter required Pacific Hunter to settle with Remida. Pacific Hunter had taken no steps to fulfill this obligation.

[113] The plaintiffs further submit that the time had not arisen for performance of this obligation. The letter does not state a time for performance of this obligation and it would have to wait until net profit was defined in the formal documents. This submission to my mind evidences the fact that the definition of net profit is an essential term missing from the May 8, 1991, letter. It is a term that would have to be agreed upon by the parties in order to conclude a binding agreement.

[114] The fact that Bruce and Robert Rome were at the site is not evidence of performing a contract since it is equally consistent with the ongoing work on the Moly May project. Robert Rome did take some samples; however, Bruce Rome had travelled to the site prior to May 8, 1991, and taken samples then. Therefore, the taking of samples is not evidence of performance pursuant to a contract.

[115] With respect to the behaviour of Moss, after the conversation between Mr. Rome and Mr. Richards in July, Mr. Richards wrote, in the July 12, 1991, letter that "[u]ntil formal documentation is prepared, and submitted to us for our consideration and an agreement concluded, we recommend that you do not proceed with the barge arrangements that you mentioned to me yesterday". This statement is consistent with an agreement not having been concluded.

[116] Counsel for the plaintiffs submits that this was part of Mr. Richards's deception; however, Mr. Rome did not respond at the time by writing to say that there was a concluded agreement. Instead, he had his solicitor take steps to draft an agreement. This is consistent with the view expressed in Mr. Richards's letter and by the defendant in this proceeding that an agreement had not been concluded.

[117] In the result, I conclude that the parties did not enter into a binding agreement.

REPUDIATION

[118] In the event that I am in error in this conclusion, the next question is whether Moss repudiated the agreement.

[119] In ***Fieguth v. Acklands Ltd.*** (1989), 37 B.C.L.R. (2d) 62 (C.A.), C.J.B.C. McEachern, speaking for the Court, summarized the principles to be applied as follows at 71:

> The law in this connection has recently been restated by this court in *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 16 B.C.L.R. (2d) 349, [1987] 6 W.W.R. 273, 18 C.C.E.L. 238, 43 D.L.R. (4th) 56 (C.A.), where Wallace J.A., speaking for the court, reviewed a number of authorities. At p. 357 he quoted from the opinion of the House of Lords in *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas 434, where Lord Selborne L.C. said at p. 438:
>
> > "'you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what the conduct is, so as to see whether it amounts to a *renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind*, and whether the other party may accept it as a reason for not performing his part.'"

> The foregoing statement of Lord Selborne was approved by the Supreme Court of Canada in *Thompson & Alix Ltd. v. Smith*, [1933] S.C.R. 172 at 182, [1933] 2 D.L.R. 214 [N.B.].
>
> [emphasis in original]

[120] The plaintiffs submit that Mr. Richards repudiated the agreement when he told Mr. Rome in a conversation on the street to stop spending any money up there, he didn't have the property. Such a conversation could have amounted to a repudiation; however, I find that the conversation did not occur as described in Mr. Rome's affidavit.

[121] I did not have the benefit of observing Mr. Rome give his evidence as I did Mr. Richards. However, as O'Halloran J.A. noted in a frequently cited passage from ***Faryna v. Chorny***, [1952] 2 D.L.R. 354, [1952] 4 W.W.R. 171 (B.C.C.A.) [cited to D.L.R.] at 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[122] In this case, the explanation of events that is most in harmony with the documents and the subsequent behaviour of the parties, hence with the preponderance of evidence, is that Mr. Richards did not in the conversation with Mr. Rome express an absolute refusal to perform the contract. If he had done so, his next act would not likely have been to draft the letter of July 12, 1991 stating that Moss was still interested in concluding an agreement to bring the Tailings into production and requesting that Pacific have its solicitor draft the formal documentation referred to in the letter of May 8, 1991.

[123] If Mr. Richards had told Mr. Rome that it was his intention to repudiate the contract, Pacific Hunter might have reacted with immediate litigation, or an expression of outrage, or an acceptance of the repudiation. However, it would not have responded by, for at least a short period of time, setting its solicitor at work drafting a formal agreement.

[124] It is not at all clear from the evidence what caused Mr. Rome to conclude that he had no further interest in pursuing the Tailings project. Pacific Hunter did carry on for a time on the Moly May project, suggesting that relations had not completely soured between Mr. Rome and the principals of Moss. What is clear however is that what ever did lead to the termination of relations, it was not a repudiation of the contract by Moss.

[125] It follows that the plaintiffs' claim in contract is dismissed.

QUANTUM MERUIT

[126] The next matter to be addressed is the claim made in the alternative in *quantum meruit*.

[127] The basis of a claim in *quantum meruit* was outlined in ***Bond Development Corp. v. Esquimalt (Township)***, 2006 BCCA 248 by Huddard J.A., speaking for the court, as follows:

> A claim for *quantum meruit* is for reasonable remuneration for the services provided, "the amount it deserves" or "what the job is worth" (*Ketza Construction Corp. v. Mickey*, 2000 YTCA 4 at para. 13). Thus, the trial judge was correct when he noted at para. 102 that, "[q]uantum meruit involves consideration of the amount and value of the services rendered, not potential profit." The amount to which a plaintiff is entitled on the basis of unjust enrichment is the value of the benefit obtained by the defendant, and not the loss to the plaintiff assessed as if the contract were fulfilled. If Bond is entitled to restitution it is to be for the value of benefit it conferred upon Esquimalt; that is, the market value of the development services it provided. That value must be determined from the evidence.

[128] In ***Ketza Construction Corp. v. Mickey***, 2000 YKCA4, 139 B.C.A.C. 161, Southin J.A., for the court described the ways in which such a claim can arise as follows at para. 12:

> In so concluding, he relied upon *Keating on Building Contracts*, 6th ed. (London: Sweet & Maxwell, 1995) at 84, in which the learned authors noted that a claim on *a quantum meruit* may arise when there is (a) an express agreement to pay a reasonable sum; (b) there is a contract but no price is fixed; and (c) there is a quasi-contract which may occur if work is carried on while negotiations are underway but the negotiations fail to result in a contract.

[129] In the present case there was no agreement to pay a reasonable sum to Pacific Hunter for its expenditures on the property. I have found that there was no contract to pay Pacific Hunter for work performed. The circumstances do fall within the third category, described above, that is work performed during negotiations which fail to result in a contract.

[130] The difficulty comes with respect to a consideration of the amount and value of the services rendered. The plaintiffs' claim has been argued on the basis of what it is alleged Pacific Hunter spent in relation to the Tailings project. That, however, is not the basis for recovery of a *quantum meruit* claim as ***Bond Development Corp.*** makes clear.

[131] Even if that were the basis for recovery, the evidence is wanting with respect to the amount expended by Pacific Hunter in relation to the Tailings project. Pacific Hunter did not maintain separate accounts or keep a separate ledger for the Tailings project. The expenses and expenditures for the Moly May and Tailings projects were in no way segregated.

[132] The plaintiffs have not demonstrated the amount of services rendered in relation to the Tailings Project as opposed to the Moly May project. In reaching this conclusion I have not ignored the testimony of Robert Rome that his efforts were devoted to the Tailings. However, he later acknowledged that he also did work in relation to the Moly May project. In addition, Mr. Whelan's testimony was to the effect that he was not aware of any work being done in relation to the Tailings. Yet under the terms of the May 8, 1991, letter, he was to be one of two administrators of the project.

[133] The plaintiffs have likewise failed to establish the value of their services rendered or that the defendant obtained a benefit from the services. Moss already had the benefit of Mr. Whelan's first stage report. Pacific Hunter did not undertake the second stage study that was identified as the next step in that report. Robert Rome took some samples and provided Moss with an assay report for gold, which was not of interest and of no real value to Moss. What the plaintiffs did not provide Moss was information that Moss did not already have. Whatever work was done by Pacific Hunter was of no value to Moss.

[134] Accordingly, the plaintiffs' claim for recovery based on *quantum meruit* is dismissed.

MISREPRESENTATION

[135] The plaintiffs' pleadings with respect to the allegations of misrepresentation are:

> In order to induce the plaintiff Pacific to enter into the said agreement, Moss made the following representations:
>
> (a) that it was solely and rightfully owned by Richards and Wolrige, and
>
> (b) that it held "100% right, title and interest" to the Tailings,
>
> (c) or, alternatively, that it was the sole and rightful owner of the Tailings by virtue of being the owner of the lands upon which the Tailings were located.
>
> These representations were made orally to the former plaintiff Rome by Richards, acting within the scope of his authority, express or implied, as agent of his principal Moss, at the meeting where the May 8, 1991 agreement was signed and at a meeting two or three days earlier.
>
> Wolrige, acting within the scope of his authority, express or implied, as agent of his principal Moss,

was present at the earlier meeting, heard these misrepresentations made by Richards and, by keeping silence, tacitly adopted them as his own and on behalf of Moss or tacitly confirmed Richards' error as truth.

In addition, the representation that it was the owner of the Tailings by virtue of being the owner of the lands upon which the Tailings were located was made

(a) expressly, in the prior option agreement dated November 27, 1990 between Moss and Remida Ventures Inc. for an interest in the Tailings, which document was drafted by or at the direction of Richards; and

(b) impliedly, in the November 1990 report entitled "Sampling Program, Anyox Tailings" prepared for Moss by Barry L. Whelan, geologist, which documents were given to the former plaintiff Rome by Moss on or prior to May 8, 1991.

These representations or non-disclosures were, and each of them, was false and untrue.

[136] The plaintiffs submit that as a matter of law, title to the Tailings went not with the fee simple, but with the mineral rights. Therefore, the representation that Moss owned the Tailings because it owned the fee simple was false.

[137] The owner of the Tailings was therefore, in the plaintiffs' submission, the owner of the Anyox Claims. The plaintiffs submit that until such time as he was paid by Prospectors, which had not occurred at the relevant times, Thomas Buchan was the beneficial owner of the Anyox Claims pursuant to a resulting trust with Prospectors. Therefore, the representation that Moss "held 100% right, title and interest" to the Tailings was false.

[138] Finally, the plaintiffs' submit that Mr. Richards and Mr. Wolrige held their shares in Moss as trustees. Therefore, the representation that Moss was "solely and rightfully owned" by them was false.

Fraudulent Misrepresentation

[139] In ***Hoole v. Advani***, [1996] B.C.J. No. 731 (QL) (S.C.), Romilly J. summarized the elements of fraudulent misrepresentation as follows at para. 49:

> The elements of fraudulent misrepresentation to be proved are:
>
> (a) the representation must be made by the wrongdoer to the victim;
>
> (b) the representation must be of a fact which is false;
>
> (c) the wrongdoer must know the representations to be false at the time that he makes them or have made them recklessly without knowing whether they were true or false;
>
> (d) the victim must have been induced by the representations to enter into the contract and suffered detriment as a result of consequently altering his position;
>
> (e) the representation must be a statement of fact, rather than a promise or "a mere commendatory puff"; and,
>
> (f) the claimant need not rescind the contract upon discovering the false representation; he could elect to affirm the contract and sue for damages.
>
> See United Shoe Machinery Company v. Brunet, [1919] A.C. 330 (P.C.); Derry v. Peek, supra; Redican v. Nesbitt, [1924] S.C.R. 135; Semkuley et al v. Clay (1982), 140 D.L.R. (3d) 489 at pp. 492-3.

[140] The first issue is what representations were made by Mr. Richards to Bruce Rome. Mr. Rome deposed that Mr. Richards told him that Moss was owned by Mr. Richards and Mr. Wolrige and that Moss held "100% right, title and interest" to the Tailings and owned the land under them.

[141] Mr. Richards's testimony was that he could not recall Mr. Rome asking him who owned the Tailings or about the nature of his ownership of his shares. Mr. Rome was introduced to the idea of a Tailings project by Steven Buchan. He then sought out Mr. Richards regarding the possibility of entering into an agreement to develop the Tailings. Mr. Richards's testimony is consistent with how the relationship was initiated – Mr. Rome approached him, he asked few questions and Mr. Richards did not volunteer any information.

[142] Having had the benefit of seeing Mr. Richards give testimony, and hearing his patterns of speech, I conclude that it is not likely that he would use the phrase "100% right, title and interest". That simply doesn't sound like the way Mr. Richards speaks. By his words and conduct, he clearly did represent that Moss was in a position to enter into binding agreements with respect to the Tailings. I find that he made no representations about his share holdings beyond the representation that he was authorized to enter into agreements on behalf of Moss. I find further that he made no representation that Moss owned the Tailings because it owned the land.

[143] The next question is whether the representations that were made were true and I conclude that they were. At trial, the plaintiffs conceded that Moss was the legal owner of the Tailings and that it was able to enter into binding agreements with respect to the Tailings. It is further common ground that Mr. Richards was authorized to enter into agreements on behalf of Moss. Indeed, these matters are the foundation of the plaintiffs' claim in contract. Mr. Richards represented that Moss was the legal owner of the Tailings and that it was able to enter into binding agreements concerning the Tailings. He represented that he was authorized to enter into agreements on behalf of Moss. These representations were all true. It follows that there was no misrepresentation. That is sufficient to dispense with the claim in fraudulent misrepresentation.

[144] The entitles alleged by the plaintiffs to have a beneficial interest in the Tailings - Thomas Buchan and Prospectors - are not parties to the litigation. I am reluctant to make findings with respect to interests they might assert in their absence, particularly where it is not necessary to do so in order to deal with the matters that are at issue in this proceeding. However, with respect to the trusts alleged, I note that Mr. Richards testified that prior to the litigation he had never heard of Thomas Buchan and had no knowledge of any claim of Mr. Buchan to the Tailings. He did not believe that Moss held its interest in the Tailings in trust for Prospectors. He was satisfied that Moss had obtained good title to the Tailings from Cominco. With respect to the Management Agreement, he testified that with respect to the veto provided under that agreement to Steven Buchan and Mr. Marsh, they were to have brought a number of assets into the agreement; however, that never happened. I found his testimony credible. He had no reason to question that Moss had received good title from Cominco. In my view, the plaintiffs have not established that Mr. Richards made representations that he knew to be false or that he was reckless with respect to their truth.

[145] In addition, it appears to me that Thomas Buchan was not an unpaid vendor. He received the consideration for his interests. His claim, if any, would be against Prospectors for failure to release the shares from escrow. Such a claim would not create a trust relationship with Moss.

[146] Plaintiffs' counsel described the management agreement as central to the misrepresentation claim. However, it appears that Mr. Marsh and Mr. Buchan did not acquire the assets as contemplated by the Agreement. The Agreement appears not to have ever become operational. Even if it did, however, I fail to see how pursuant to the Agreement, Moss holds its interest in the Tailings in trust for either Prospectors – not a party to the Agreement or Mr. Buchan and Mr. Marsh. Thus it does not appear to be on the evidence that the plaintiffs established the various trusts that have been alleged.

[147] Mr. Richards did not disclose that he and Mr. Wolrige held their shares in Moss as trustees. Mr. Rome deposed that had he known of this, he would have asked many more questions. However, absent circumstances not present in the case at bar, silence cannot constitute a fraudulent misrepresentation. As Romilly J. stated in ***Hoole*** at para. 70:

> …the issue arises as to whether silence can constitute fraudulent misrepresentation. I am satisfied, having reviewed the case law, that, in the circumstances, it cannot. In Sorensen v. Kaye Holdings [B.C.], [1979] 6 W.W.R. 193 (B.C.C.A.), Lambert J.A. stated [at p. 225]:
>
> > The first question is whether silence constituted a misrepresentation. This is not a contract of utmost good faith, nor was there a fiduciary relationship between the parties. In the absence of such a special contract or relationship, it is not deceit for a vendor to fail to decry his own

wares unless he makes some positive assertion that becomes distorted by the failure.

[148] In the result, the claim in fraudulent misrepresentation is dismissed.

Negligent Misrepresentation

[149] The elements of a claim of negligent misrepresentation were summarized by Humphries J. in ***Regional District of Okanagan-Similkameen v. Blackwell Stores Ltd.***, 2000 BCSC 425, aff'd 2001 BCCA 369, as follows at para. 59:

> For negligent misrepresentation, Blackwell must show:
>
> - a false (untrue, inaccurate or misleading) statement negligently made
> - a duty of care on the person making the statement to the recipient. A duty of care does not arise unless
>   - the person making the statement is possessed of special skill or knowledge on the matter in question, and
>   - the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment
> - reasonable reliance on the statement by its recipient, and
> - loss suffered as a consequence of the reliance.
>
> (See ***Kingu v. Walmar Ventures Ltd.*** (1986), 10 B.C.L.R. (2d) 15 (B.C.C.A.)).

[150] For the reasons set out above, I have concluded that there was no false statement negligently made with respect to Moss's ownership of the Tailings. Mr. Richards did not disclose that he and Mr. Wolrige held their shares as trustees; however, I find that in the circumstances he was under no duty to make such disclosure. To impose such a duty would, in my view, be contrary to the decision of the Supreme Court of Canada in ***Martel Building Ltd. v. Canada,*** 2000 SCC 60, [2000] 2 S.C.R. 860, in which the Court concluded that, as a general proposition, no duty of care arises in conducting negotiations.

[151] Finally, the plaintiffs have not established that loss was suffered as a consequence of the reliance. Mr. Rome deposed that if he had known that Mr. Richards and Mr. Wolrige held their shares as trustees, he would have asked a lot more questions and would not have permitted Pacific Hunter to invest until those questions were answered. This does not, in my view, meet the plaintiffs' burden to establish causation.

[152] In the result, the claim in negligent misrepresentation is dismissed.

Disposition

[153] The plaintiffs have failed to establish the claims brought in contract, *quantum meruit* or misrepresentation. The action is dismissed. The parties are at liberty to make further submissions with respect to the issue of costs.

"Ross J."