SUPREME COURT OF YUKON

Citation: *Fuerstner v Foote*, 2023 YKSC 70

Date: 20231207
S.C. No. 23-B0005
Registry: Whitehorse

BETWEEN:

MAX LEOPOLD FUERSTNER

PLAINTIFF

AND

GAIL MARIE FOOTE

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff — Andre Duchene (by telephone)

Counsel for the Defendant — Paul Di Libero

This decision was delivered in the form of Oral Reasons on December 7, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The plaintiff, Max Fuerstner, and the defendant, Gail Foote, are former common-law partners. They began living together in the fall of 2015 and lived together in the Yukon Territory from October 15 to December 2021. In December 2021, they moved to British Columbia. According to Mr. Fuerstner, they lived together as a common-law couple in British Columbia between December 2021 and April 2022. According to Ms. Foote, she ended the relationship in October 2021, they

moved to British Columbia as friends, and did not live together while in British Columbia. In April 2022, Mr. Fuerstner returned to the Yukon to work, and he states the relationship ended in June 2022.

[2] The major legal issue between the parties is whether and how assets should be divided between them. Ms. Foote owned real property in Whitehorse, Yukon, before she moved to British Columbia, which she sold. She owns real property in Marsh Lake, Yukon, and in Mission, British Columbia. She is also the sole shareholder of a corporation, Golden Ram Inc. Mr. Fuerstner was not and is not on title to any of the real property and he was never a shareholder of Golden Ram. He is claiming an interest in all the real property and in Golden Ram.

[3] On April 19, 2023, Mr. Fuerstner filed a statement of claim against Ms. Foote in the Yukon seeking a division of assets. He also obtained a certificate of pending litigation for the Marsh Lake property. He then commenced proceedings in British Columbia.

[4] In the British Columbia proceedings, on August 15, 2023, the Court granted him a without notice order prohibiting Ms. Foote from disposing or otherwise dealing with property which Mr. Fuerstner might have an interest in, including any property owned or related to Golden Ram. No further steps have been taken in the British Columbia proceedings.

[5] Ms. Foote has filed an application in these proceedings seeking that she be permitted to sell the Marsh Lake property, along with ancillary orders to facilitate the sale.

[6] Mr. Fuerstner, in turn, is seeking that the Supreme Court of Yukon decline jurisdiction of the proceedings. In the circumstances, if Mr. Fuerstner is successful, this would require some form of stay of the Yukon proceedings.

[7] The issues that arise on this application therefore are:

a. What is the appropriate jurisdiction for the family law proceedings?; and

b. Should Ms. Foote be granted permission to sell the Marsh Lake property?

a. What is the appropriate jurisdiction for the family law proceeding?

[8] The first issue that arose is whether I should use the law for British Columbia or the law from the Yukon to determine jurisdiction. In British Columbia, the test for determining jurisdiction in family law matters is contained in the *Family Law Act*, SBC 2011, c 25 (the "*Family Law Act*") and applies to both common-law and married couples. In the Yukon, the test for determining jurisdiction and property disputes between former common-law partners is found in the *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7 ("*CJPTA*"/the "*Act*"). The tests are similar but do have differences.

[9] Counsel to Mr. Fuerstner submits that I should apply British Columbia law in determining the issue of jurisdiction. However, he did not explain why I should, nor did he provide any case law or principles that would help me decide this issue.

[10] I can see no reason why I would use extra-territorial legislation in determining the question of jurisdiction. I will therefore apply the law as set out in the *CJPTA*.

[11] The test, as set out in the *CJPTA*, for determining jurisdiction is twofold. First, under s. 3 of the *Act*, the Court must determine if it has territorial competence. If the

Court concludes that it does have territorial competence; on the second part of the test, it may decline to exercise its jurisdiction if there is any other clearly more appropriate forum.

[12] Territorial competence is established includes where there is a:

> … substantial connection between the Yukon and the facts on which the proceeding against that person is based (s. 3(e) of the *Act*).

[13] In the case at bar, there is no real issue that the Yukon Territory has territorial competence. Mr. Fuerstner lives in the Yukon; two of the real properties in contention are in the Yukon; and the company in dispute is registered in the Yukon and conducted most, if not all, its business in the Yukon.

[14] That leaves the second part of the test, being whether the Court should decline to exercise jurisdiction because there is another clearly more appropriate forum.

[15] Section 11 of the *CJPTA* sets out a non-exhaustive list of factors that the Court may consider when deciding whether to decline to exercise jurisdiction. These address the cost and convenience to the parties and the witnesses, the law to be applied in the proceeding, avoiding multiplicity of proceedings, the enforcement of eventual judgments, and fairness and efficiency of the Canadian legal system as a whole. The Court may also use other factors, such as the jurisdiction where the factual matters arose or the residence of the parties in determining this issue.

[16] The Court exercises discretion in determining the appropriate forum. The weight of each factor depends on the context of the case but no factor is determinative. Generally, it is only in exceptional circumstances that the Court will decline jurisdiction (*Ferrari v Feurer*, 2020 YKSC 29 at para. 26).

[17] In the case at bar, many of the factors are neutral. These include the desire to avoid multiplicity of proceedings, and fairness and efficiency of the Canadian legal system as a whole. As well, the ability to enforce eventual judgments is a neutral factor. If the matter were tried in British Columbia, there may be some extra steps needed to be taken to enforce judgment over property owned in the Yukon. The same may occur, however, if the matter were tried in the Yukon, as there is also real property owned in British Columbia.

[18] In my mind, the factors that are most important are where the parties spent most of their time and where most of the assets are located. The parties lived in the Yukon for approximately six years. In contrast, if Mr. Fuerstner's evidence is accepted, the parties lived in a common-law relationship in British Columbia for approximately four months. As the parties lived together in the Yukon for six years, it is not surprising that many of the assets at issue are also located in the Yukon. Mr. Fuerstner claims an interest in the proceeds from a home Ms. Foote sold that was located in Whitehorse, the real property in Marsh Lake, and the business that is incorporated and operated in the Yukon. On the other hand, there is one asset in contention in British Columbia.

[19] Flowing from these factors is that the bulk of the witnesses and evidence are located in the Yukon. Ivan Thompson sold the Marsh Lake property to Ms. Foote. He also had loan arrangements concerning the property with Mr. Fuerstner. The parties also borrowed from another individual, Donna Novecosky. The terms of the loans and repayment to both individuals will likely be at issue. These arrangements were all made in the Yukon. Evidence about the business will also be located in the Yukon.

[20] In addition, while neither the Yukon nor the British Columbia proceedings are particularly advanced, more steps have been taken on the Yukon file than in British Columbia. Aside from the current application, and perhaps because of it, Yukon counsel for Ms. Foote is actively engaged in the matter. If the matter proceeds in British Columbia, Ms. Foote will likely expend more money than necessary for her counsel in British Columbia to understand the matter as counsel in the Yukon currently does.

[21] Mr. Fuerstner seeks to litigate the proceedings in British Columbia because he claims a juridical advantage in British Columbia. Under the British Columbia legislation, common-law partners are presumptively entitled to an equal division of family property, whereas in the Yukon Territory common-law principles of unjust enrichment and constructive trust apply. Juridical advantage to the plaintiff, where there is a real and substantial connection to the jurisdiction chose by the plaintiff, is a factor to be considered by the Court.

[22] In this case, however, this factor is complicated by the fact that it is the plaintiff who is now asking the Court to refuse to exercise the jurisdiction. Moreover, the Court is not to give juridical advantage undue weight (see *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para. 112).

[23] The strength of the links between the facts and the proceedings in the Yukon provide good reason for continuing the proceedings in the Supreme Court of Yukon. The costs and convenience also favour the Yukon. The links between British Columbia and the facts underlying the action are somewhat weak. Ultimately, British Columbia is not clearly the more appropriate forum.

[24] I therefore conclude that the Supreme Court of Yukon should exercise jurisdiction over the proceedings.

b. Should Ms. Foote be granted permission to sell the Marsh Lake property?

[25] Ms. Foote seeks that the Court permit her to sell the Marsh Lake property pursuant to Rule 46 of the *Supreme Court Rules*. She submits that the sale is necessary. Mr. Fuerstner submits the sale is not necessary and should not be ordered, as he wants to retain the property at the conclusion of the family law proceedings.

[26] I have not found case law from the Yukon that considers the legal principles of Rule 46 in the context of family law proceedings. There is an equivalent rule in the *Supreme Court Civil Rules*, BC Reg 168/2009, however, and there is case law about that rule as applied to family law matters. The principles associated with the British Columbia rule can be summarized as follows.

[27] First, in the context of family law, if a sale is not necessary, it will only be expedient if it is in the interest of both parties (see *Reilly v Reilly*, 1992, 99 DLR (4th) 47 ("*Reilly*")). Factors that may be used to determine whether to order a sale include: whether the sale will have the effect of promoting early settlement; whether the sale will defeat the spouse or common-law partner's claim for reapportionment; the effect of the sale on children, if there are any; and whether selling the property will be inevitable or whether the spouse or common-law partner may be able to retain the property once the assets are divided (see *GJU v JLU*, 2017 BCSC 1352, at para. 57).

[28] While the courts will at times favour the *status quo* if there are any doubts about whether the sale should be ordered on an interim application, the courts must also consider whether:

> … The status quo for one spouse may be the perpetuation of an injustice for another. …
>
> (*Reilly* at para. 35)

[29] The case law I found from British Columbia dealt with property that was owned jointly or where there was no question that both parties had a legal interest in the property. It may be that the principles are not exactly the same where the parties' legal interests have not yet been established. Arguably as well, where a party's legal interest has not been established, the strength of their claim may be a factor the Court considers in its determination about whether to order the sale of property. However, this was not argued during the application. A more nuanced consideration of the application of Rule 46 in cases where a party's legal interest in the property has not been established will therefore wait for another day.

[30] What was argued in the case at bar was whether it was necessary to sell the property and whether Mr. Fuerstner would be able to retain the property upon the distribution of the assets. I will therefore consider these two questions.

[31] First, it is clear that the parties have significant debt and are without the present means to pay for it. The parties owe roughly $180,000 to a private individual, Donna Novecosky. Ms. Foote attests that in October 2022, she could not meet her debt obligations to Ms. Novecosky. In 2023, she was able to give $12,000 to Ms. Novecosky. However, she was unable to do much more. Thus, to provide Ms. Novecosky with some assurance that the debt obligations would be met, Ms. Foote registered Ms. Novecosky

as a mortgagee to the property in June 2023. On October 6, 2023, she and Mr. Fuerstner received further reprieve from Ms. Novecosky in the form of a six-month forbearance agreement.

[32] Mr. Fuerstner attests that he is willing to make periodic mortgage payments as soon as he knows what those payments are. If this is the case, then it would not be necessary to sell the Marsh Lake property. His actions up until this point, however, suggest caution in accepting that Mr. Fuerstner will make mortgage payments. He has not, until now, paid any of the debt he and Ms. Foote owe to Ms. Novecosky. He has another outstanding debt of $20,000 to Ms. Novecosky. There is no evidence he has paid any of that debt. He also owes about $122,000 to Ivan Thompson, who is the person from whom Ms. Foote bought the Marsh Lake property. Mr. Fuerstner has not given Mr. Thompson any money for the loan. Mr. Fuerstner says that he instead gave Mr. Thompson a trailer and excavator. He does not explain why he has not simply paid Mr. Thompson instead. It leads to concerns that Mr. Fuerstner did not have the cash to pay Mr. Thompson.

[33] I accept that Mr. Fuerstner wants to make mortgage payments. I cannot conclude that he will do so. I therefore conclude that the parties need a source of funds to pay off their debts. To that end, Ms. Foote is seeking to sell the Marsh Lake property.

[34] Mr. Fuerstner, however, submits that it is not necessary to sell the Marsh Lake property because the parties can pay their debt by selling a Caterpillar D10 bulldozer that the parties own instead. He estimates that the machine is worth $200,000 to $300,000. He proposes to sell it privately in Whitehorse or, absent that, to auction it through a company in Edmonton, Alberta. The auction date is December 14, 2023.

Mr. Fuerstner also submits that he would like to retain the Marsh Lake property upon the conclusion of the proceedings.

[35] Ms. Foote is not against selling the D10 but is concerned that Mr. Fuerstner's plan will not come to fruition. She submits that selling the Marsh Lake property is the better plan. Ms. Foote attests that she has an interested buyer for the Marsh Lake property. She attests that she is concerned that if she and Mr. Fuerstner wait too long to sell the property, however, the potential buyers will cease to be interested. She is also concerned that there will be no other potential buyers within the next six months, especially as winter is a low season for selling real estate.

[36] I conclude that the sale of the Marsh Lake property is both necessary and convenient. While I agree with Mr. Fuerstner that selling the D10 and preserving the Marsh Lake property until the question of entitlement and division of assets is completed would be ideal, there is insufficient evidence that the D10 will be sold before the forbearance agreement is up. There are holes both in the plan to sell the D10 locally and in the plan to sell it at auction.

[37] Locally, Mr. Fuerstner has identified leads but nothing more. There are no guarantees that the D10 can be sold in the Yukon. There may be more certainty that the D10 would be sold at auction. The difficulty with that proposal, though, is that there are no firm plans for getting the D10 to Edmonton for the auction. Mr. Fuerstner states in his affidavit that one contractor has offered to move the D10. He does not state, however, that the contractor will be able to move the D10 in time for the auction.

[38] In an email to Ms. Foote's counsel, which was attached as an exhibit to his affidavit, moreover, his counsel indicates that it is difficult to procure even one

contractor willing to move the D10 to Edmonton. He also explains that there may be few opportunities to move the D10 to Edmonton. It is not a simple task then to move the D10. Mr. Fuerstner has provided no evidence about who would transfer the D10 or that it will be transported in time for the auction in Edmonton.

[39] The evidence shows that Mr. Fuerstner feels that his ability to sell the D10 has been frustrated by Ms. Foote. I agree that the parties' mistrust of each other has made cooperation in selling the equipment more challenging and has likely made it at least more difficult for Mr. Fuerstner to sell the D10 locally. However, Mr. Fuerstner has failed to provide an adequate proposal even for the elements in his control, such as how and when the D10 could be moved to Edmonton.

[40] In addition, I do have some concerns about whether the proceeds of the sale would be sufficient to cover the debt. Mr. Fuerstner estimates that the D10 can be sold for $200,000 to $300,000, but this valuation is based on his own assessment and he provides little evidence to support it. Additionally, he has not provided an estimate of the costs of moving the D10 to Edmonton. It is therefore not possible to assess how much the parties would have ultimately after selling a D10 in Edmonton. The lack of detail in Mr. Fuerstner's proposal indicates that it is still in the planning stages and should not be depended on.

[41] Meanwhile, Ms. Foote's proposal is ready to be executed. There is a group of purchasers who, her realtor confirms, is willing to submit an offer that is above fair market value. It would be willing to purchase the property "as is, where is" and with the understanding that some of the heavy equipment on the property might remain on-site upon possession. The group's willingness to purchase the property with the heavy

equipment on-site is a benefit as it is unclear whether it would be able to be removed before the group obtains possession.

[42] Mr. Fuerstner's counsel takes issue with relying on the statements by the realtor, as it is contained in a letter and not in affidavit form. It would have been better to have an affidavit. However, as I stated above, Mr. Fuerstner himself has provided nothing more than his own estimation of the worth of the D10. The Court makes decisions on the available evidence before it. In assessing the quality of the evidence, I prefer Ms. Foote's evidence because it comes from a professional third-party.

[43] Mr. Fuerstner also submits that, if neither the property nor the D10 is sold, then the parties will be able to satisfy the debt to Ms. Novecosky through the mortgage on the Marsh Lake property. However, in the meantime, the parties would continue to accumulate interest at 10% per year. Moreover, forfeiting the mortgage would mean that the parties would lose control over disposition of the property. Forfeiture is not a viable fallback option.

[44] I am also not convinced that Mr. Fuerstner will be able to retain the Marsh Lake property at the conclusion of the proceedings. As already discussed, in addition to his joint debt with Ms. Foote to Ms. Novecosky, Mr. Fuerstner has an additional debt he owes solely to Ms. Novecosky.

[45] With regard to the debt to Mr. Thompson, Mr. Fuerstner attests that he gave Mr. Thompson machinery to pay off the debt. Ms. Foote disputes this, indicating Mr. Thompson does not want some of the equipment, that Mr. Fuerstner still owns one of the pieces of machinery he gave to Mr. Thompson, and that he does not own the other equipment he gave to him. Mr. Fuerstner's own evidence was that the agreement

provided for repayment through money, not equipment. He has not provided evidence that Mr. Thompson accepts Mr. Fuerstner has repaid him by giving him equipment.

[46] Mr. Fuerstner has provided no information about how much he expects to earn in 2023 to give a sense of what he is able to afford. From the evidence provided, he may have difficulty qualifying for a mortgage. Instead, he relies on a potential division of assets as providing the means by which he can retain the Marsh Lake property. In doing so, he estimates his entitlement based on British Columbia legislation. He does not address the likelihood of a division of assets if Yukon law were applied.

[47] Based on the evidence provided, I cannot conclude that it will be possible for Mr. Fuerstner to retain the Marsh Lake property. I therefore conclude that it is necessary to sell the Marsh Lake property. I also conclude that, given the debts both parties owe and the prospects of otherwise having to transfer the property to Ms. Novecosky, it is convenient for both parties to sell the Marsh Lake property.

[48] My orders are follows.

1. The Supreme Court of Yukon shall have jurisdiction of the proceedings of *Max Leopold Fuerstner v Gail Marie Foote*, Supreme Court No. 23-B0005.
2. The plaintiff shall vacate 1087 Caribou Lake Road, Yukon, Lot 1087, Quad 105/09 2012-0049 LTO YT (the “Marsh Lake property”).

   [DISCUSSIONS]
3. The plaintiff shall remove the Marsh Lake property as his address for service and delivery of documents and in the course of business and personal affairs as mailing address; and the defendant shall not be responsible for forwarding mail from this address to the plaintiff.

4. The plaintiff shall be enjoined from having any future access to the Marsh Lake property or interfering in the sale of the Marsh Lake property.
5. The certificate of pending litigation shall be removed from the Marsh Lake property without delay and the plaintiff shall take all steps necessary to remove the certificate of pending litigation.

   [DISCUSSIONS]
6. The plaintiff shall cease involvement and holding himself out as an agent of the defendant or of Golden Ram Inc, and be liable for any fraudulent misrepresentation from his involvement or for holding himself out as agent.

   [DISCUSSIONS]
7. I am prepared to provide a stay until January 15, 2024.

   [DISCUSSIONS]

   Anything else, Mr. Di Libero?

[49] MR. Di LIBERO: As far as my friend's comments about removing machinery from the property, my understanding is that the D10 is on the property right now and I think there should be an order made about disposition of that property without my client's consent. The property is not owned by Mr. Fuerstner. He has moved the property into Whitehorse, but I think that particular piece of machinery and associated equipment should be — there should be explicit written consent from my client before that property is moved or relocated by Mr. Fuerstner. There's also a history on this file of Mr. Fuerstner removing other property, like the light tower, for example, that was owned by my client. Those comments are just giving rise to some concern about what

Mr. Fuerstner would be disposing of or removing from the property without consent of my client.

[50] THE COURT: Mr. Duchene, any thoughts on that?

[51] MR. DUCHENE: I think this in with respect to the machinery that he had prior to the parties' relationship. Certainly the order could be limited to that. The concern I have with respect to the D10 is my friend has not been particularly easy to work with with respect to disposing of the D10, although I'm not sure if that nothing turns on that anymore. Previously, my concern would have been the D10 would have been useful to satisfy the debt to Ms. Novecosky, but to the extent that that's no longer an issue at this time, I think it's fine for order to go forward that says there must be consent from Ms. Foote to do anything further with the D10.

[52] MR. Di LIBERO: And I would just add with the D10 or any other property belonging to Ms. Foote, owned by Ms. Foote or Golden Ram Inc.

[53] THE COURT: Okay. All right. Is there any issue with Mr. Fuerstner removing property that he owned from before the relationship?

[54] MR. Di LIBERO: Not to my knowledge, no.

[55] THE COURT: Okay. All right.

8. So that is permitted. The order with regard to the D10 and any other property that is Ms. Foote's solely, or that of Golden Ram Inc, was as you both stated, but I will let you do the wording on that.

   [DISCUSSIONS]

9. Forty-eight (48) hours notice is to be provided to Mr. Fuerstner. It would be appreciated if he would vacate, but it is expected that Ms. Foote and any

agent for Ms. Foote would be able to attend and do what they needed to do with the property.

[56] Again, that can be brought back if there are any issues with implementation of that order.

[DISCUSSIONS]

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WENCKEBACH J.