

SUPREME COURT OF YUKON

Citation: *Pishon Gold Resources Inc. v 45622 Yukon Inc.*,
2022 YKSC 43

Date: 20220922
S.C. No. 20-A0137
Registry: Whitehorse

BETWEEN:

PISHON GOLD RESOURCES INC.

PLAINTIFF

AND

45622 YUKON INC.

DEFENDANT

Before Justice K. Wenckebach

Appearing on behalf of the Plaintiff

Aimin Liao

Counsel for the Defendant

Grant Macdonald, K.C.

REASONS FOR DECISION

Overview

[1] The plaintiff, Pishon Gold Resources Inc., is suing the defendant, 45622 Yukon Inc., for money it says 45622 owes it under contract and for a loan. 45622 denies that it owes Pishon Gold any money.

[2] Pishon Gold and 45622 are in the business of placer mining. Aimin Liao is the director of Pishon Gold and Joseph Barnes is the director of 45622. In 2018, Mr. Liao and Mr. Barnes entered into a contract allowing 45622 to work on Pishon Gold's gold claim during that year's mining season.

[3] Mr. Barnes did spend the mining season on Pishon Gold's claim and he did try to mine for gold. However, two issues arose out of the contract. First, there is a dispute

about who should pay for some fuel costs. Mr. Barnes arrived at the claim in early April 2018. From then until late June 2018, he used the fuel that was already at the site. He did not pay Mr. Liao for the fuel he used. After late June 2018, he paid for all the fuel he used. Mr. Liao says that Mr. Barnes is responsible for the costs of fuel between April and June 2018. Mr. Barnes says he is not.

[4] Second, Pishon Gold loaned \$15,000 to 45622. Mr. Liao says that the loan is outstanding. Mr. Barnes says that he repaid the loan by giving Mr. Liao 5.5 ounces of gold and by giving Mr. Liao a gold jig.

[5] For the reasons below, I conclude that 45622 does not owe Pishon Gold money for the fuel. I also conclude that 45622 repaid the money it owed Pishon Gold by giving Mr. Liao the gold and the gold jig.

Issues

- (a) Who is responsible for fuel costs between April and late June 2018?
- (b) If Mr. Barnes is responsible, how much does he owe for fuel costs?
- (c) Did Mr. Barnes repay Mr. Liao for the \$15,000 loan?

Analysis

- (a) Who is responsible for fuel costs from April until late June 2018?

[6] I conclude that Mr. Liao is responsible for fuel costs from April to late June 2018.

[7] The parties negotiated the terms of the mining contract by phone in early 2018. Mr. Liao then confirmed the terms of the contract by email.

[8] Mr. Liao says that, under the contract, Mr. Barnes was a contractor. Mr. Barnes would receive 70% of the gold mined from the property and would be responsible for all costs associated with mining the claim.

[9] Mr. Barnes, in contrast, says that there were two phases to the contract. In the first phase, he was an employee. His job was to maintain and repair mining equipment. Mr. Liao agreed to pay him \$25 per hour, and would be responsible for all expenses, except food. Later, when mining commenced, he was a contractor. From then on, he received 70% of the gold mined from the property and was responsible for the costs arising from mining. The terms about the first phase were not in the written contract, but were agreed to over the phone.

[10] The first question, then, is whether I should look only at the written contract, or if I should also take into account what the parties said by phone to determine the terms of the contract.

[11] Generally, when a contract is in writing, the court must look only at the words of the contract, and contextual factors where appropriate, to determine its meaning. It is not permitted to take into account other evidence that would add or subtract to, or vary or contradict terms of the contract.

[12] However, there are exceptions to this rule, including when the contract is ambiguous. Where an exception applies, the court can take into consideration other evidence about what the parties intended when coming to agreement.¹

[13] Thus, here I must first look only at the written contract to interpret the impugned terms. If, however, the written contract is ambiguous, I can also consider the evidence about the telephone call.

¹ *King v Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at paras. 35-36.

Interpretation of the Terms of the Written Contract

[14] I conclude that the terms of the written contract do not clearly explain Mr. Barnes' role, nor who was responsible for the costs of fuel. I cannot, therefore, interpret the contract by looking at the email alone.

[15] Mr. Liao submits that the written contract is clear: Mr. Barnes was to be a contractor, responsible for all expenses, for the duration of the contract. I do not agree.

[16] The beginning of the contract states that Mr. Barnes was to "start to work on [Mr. Liao's claim] in Summit Creek from the end of Mar 2018 [as written]". It does not define the work Mr. Barnes was to perform at the end of March. It does not state that Mr. Barnes would be a contractor from that point on.

[17] Later, the contract does state that Mr. Barnes would be a contractor and states that Mr. Barnes would be responsible for all costs associated with mining the claim. However, the contract does not link the paragraph defining Mr. Barnes as a contractor with the paragraph stating when he would start work. Based on the wording of the contract, it could be that the parties intended that Mr. Barnes was to be a contractor throughout the mining season, or that he was to be an employee first and then a contractor.

[18] A complicating factor is that the contract also refers to a third party, William McKay, who did not sign the contract. Under the contract, Mr. McKay had the right of first refusal to mine Pishon Gold's claim. If Mr. McKay became the contractor, Mr. Barnes would work for him. If he did not, Mr. Barnes would be given the contract to mine the claim.

[19] The term that provides for Mr. McKay's involvement only increases the confusion about Mr. Barnes' role. Mr. Barnes' employment relationship to Mr. McKay is not defined. The contract states only that Mr. Barnes would be "considered to work for Mr. William McKay [as written]."

[20] The term about how Mr. Barnes was to be paid for his work is similarly ambiguous. The contract states that Mr. McKay would pay Mr. Barnes for all the work done by Mr. Barnes "once his operation produces gold." This statement could mean that Mr. McKay would pay for all of Mr. Barnes' work, from the time Mr. Barnes arrived at the claim until he departed, but would only start paying him once he began producing gold. However, the statement could also mean that he would only pay for the work Mr. Barnes performed after the operation started producing gold and would not be responsible to pay for any work done before that.

[21] Finally, Mr. McKay was not a signatory to the agreement, and therefore was not obliged to follow it. If Mr. McKay had taken the contract, he could have decided to pay Mr. Barnes as he pleased, or not at all.

[22] The contract is not, therefore, clear about how Mr. Barnes was to be paid, especially at the beginning of the contract. The contract is ambiguous.

Evidence About the Telephone Call About the Contract

[23] As the contract is not clear about Mr. Barnes' roles and responsibilities before mining commenced, I can consider the parties' evidence about what they agreed to in their phone call.

[24] Mr. Barnes testified that the parties agreed to the terms about wages and work duties on the phone. Mr. Liao denies that they agreed that Mr. Barnes was to be paid a wage, or that he was hired to maintain and repair equipment.

[25] I prefer Mr. Barnes' evidence to Mr. Liao's on this issue. I have based this conclusion on my assessment of Mr. Liao's and Mr. Barnes' credibility. Credibility consists of two parts: credibility and reliability. Credibility addresses whether the witness is trying to tell the truth. Reliability is about whether the witness provides accurate testimony.²

[26] I find that Mr. Liao is unreliable. At times, Mr. Liao's testimony was inconsistent with documentary evidence he filed in court. Thus, for example, on cross-examination he stated that he did not know whether Craig Robertson, who worked on Pishon Gold's claim with Mr. Barnes, was a mechanic. He testified that it was "not my business". However, part of the contract, which Mr. Liao wrote, states that Mr. Barnes would "hire Craig [Robertson] to be the mechanic" for the mine site. Contrary to his testimony, then, Mr. Liao did, at one point, know that Mr. Robertson was a mechanic.

[27] He also avoided answering questions. Mr. Barnes' counsel asked Mr. Liao if there was a gold sluicing plant on site. Rather than answering, Mr. Liao explained that he provided equipment to Mr. Barnes and did not charge for it.

[28] In addition, Mr. Liao had problems with his memory. He stated that he did not want to rely on his memory and could not remember some of his discussions with Mr. Barnes.

² *R v HC*, 2009 ONCA 56 at para. 41.

[29] I am therefore not convinced that Mr. Liao accurately remembered the conversation he and Mr. Barnes had about the terms of the contract.

[30] On the other hand, Mr. Barnes' evidence is both credible and reliable. His testimony was internally consistent, even when pressed by Mr. Liao. He also provided detailed answers to the questions posed to him by counsel and by Mr. Liao. Mr. Liao seemed to suggest that Mr. Barnes' memory was too good and implied he was not being truthful. However, it is plausible that Mr. Barnes would have remembered the types of details he provided.

[31] I therefore conclude that Mr. Barnes and Mr. Liao agreed in their phone conversation that Mr. Barnes would perform maintenance and repairs on Mr. Liao's equipment before mining began and that he would receive a wage for it. Mr. Barnes was to pay for food. Implicitly, then, Mr. Liao agreed to pay for other expenses, including fuel.

[32] I therefore find that Mr. Barnes does not owe Mr. Liao money for fuel used between his arrival at the claim site and the end of June. I dismiss this aspect of Mr. Liao's claim.

(b) If Mr. Barnes was responsible, how much does he owe for fuel costs?

[33] If I am wrong, and Mr. Barnes does owe Mr. Liao money for fuel, I must determine how much Mr. Barnes owes Mr. Liao.

[34] Mr. Liao did not provide a figure about how much fuel was in the tank when Mr. Barnes arrived, but provided an estimate about how much fuel the different machines on his property would use per day.

[35] Mr. Barnes said that he measured the amount of fuel in the tank when he arrived at the site. He testified that there were 7,800 litres of fuel in the tank. I prefer Mr. Barnes' evidence to that of Mr. Liao's, as Mr. Liao's evidence is, at best, an estimate based on Mr. Barnes' presumed fuel consumption, while Mr. Barnes' evidence was based on observation.

[36] At the time he left, Mr. Barnes estimated there were 2,500 litres left in the tank, which he had paid for. Subtracting 2,500 from 7,800, then, Mr. Barnes would owe money for 5,300 litres of fuel.

[37] The cost of fuel, including tax, in late August 2018 was \$1.1532 per litre. Rounding up to the nearest dollar, then, if Mr. Barnes were responsible for fuel costs, he would owe \$6,112.

(c) Did Mr. Barnes repay Mr. Liao for the \$15,000 loan?

[38] I find that Mr. Barnes repaid Mr. Liao.

[39] Mr. Barnes and Mr. Liao agree that Mr. Liao loaned 45622 \$15,000. Mr. Barnes says he repaid Mr. Liao by giving him 5.5 ounces of gold and a gold jig. Mr. Liao says that the 5.5 ounces of gold were payment for fuel. He denies that he agreed to take the gold jig as payment for the loan.

[40] Again, I find that Mr. Liao is not reliable and that Mr. Barnes is both credible and reliable.

[41] Mr. Liao's testimony was inconsistent with documentary evidence he provided to the Court. For example, during cross-examination Mr. Barnes' lawyer suggested that Mr. Liao knew the loan was to be used to release an excavator from its retention at a

dealership and would be used to mine the claim. Mr. Liao denied knowing why Mr. Barnes needed the excavator.

[42] However, an email written by a Pishon Gold employee to Mr. Barnes when the loan agreement was made says something different. The email states that the loan was provided for release of the machine and on the condition that the excavator would remain on the Pishon Gold mine site for the mining season of 2018. When reminded of this email during cross-examination Mr. Liao stated that the employee “cannot make decisions for me.”

[43] Mr. Liao filed the email as evidence that he made the loan. When he filed it, he did not qualify it in any way. Having filed the email to prove the existence of the loan, he cannot then deny its veracity.

[44] He also said that he could not remember some of the conversations he had with Mr. Barnes, including some of the discussions he had with Mr. Barnes about the gold jig.

[45] Mr. Liao’s testimony on this issue was, therefore, unreliable.

[46] On the other hand, I find Mr. Barnes to be credible. As with the evidence about the contract, Mr. Barnes gave evidence that was complete, internally consistent, and supported by other evidence, such as an email from a contractor both Mr. Liao and Mr. Barnes knew, Mike Mickey.

[47] Through his cross-examination, Mr. Liao attempted to show that some of Mr. Barnes’ evidence was not credible. In 2020, Mr. Liao contacted Mr. Barnes seeking payment of \$15,000, saying that otherwise he would commence an action in court and would then seek additional payment. Mr. Barnes agreed to pay the \$15,000, but

ultimately the parties did not come to agreement on the exact terms. Mr. Liao suggested that it was not plausible that Mr. Barnes would have agreed to pay \$15,000 to Mr. Liao in 2020, if he had already paid him before.

[48] However, I accept Mr. Barnes' explanation that he had many stressors in his life at the time and paying Mr. Liao off seemed any easier option than going to court.

[49] Finally, Mr. Liao concedes that he did not contact Mr. Barnes by email or text about the loan until March 2020. Given Mr. Liao's tendency to commit communications to writing, and given the amount of money at stake, I find it implausible that Mr. Liao would not have contacted Mr. Barnes in writing for 18 months if Mr. Barnes had not paid the loan.

[50] I find that Mr. Liao accepted the 5.5 ounces of gold and the gold jig as full payment for the loan. I dismiss this ground of Mr. Liao's claim.

Conclusion

[51] I find that 45622 was not responsible for the costs of fuel for the period between April - late June 2018. Therefore, 45622 does not owe Pishon Gold money for fuel. I also find that 45622 repaid the \$15,000 Pishon Gold loaned when Mr. Barnes gave Mr. Liao 5.5 ounces of gold and a gold jig.

[52] I dismiss Pishon Gold's claim.

[53] Costs may be spoken to in case management if the parties are unable to agree.