

SUPREME COURT OF YUKON

Citation: *Coulee Resources Ltd v Millar*,
2023 YKSC 54

Date: 20230913
S.C. No. 18-A0128
Registry: Whitehorse

BETWEEN:

COULEE RESOURCES LTD.

PLAINTIFF

AND

DAVID MILLAR

DEFENDANT

Corrected Decision: The text of the decision was corrected at paras. 39 and 54 where changes were made on October 12, 2023

Before Justice K. Wenckebach

Counsel for the Plaintiff

Mark Wallace and
Dmitri Klinov

Counsel for the Defendant

Meagan Lang

REASONS FOR DECISION

Overview

[1] The plaintiff, Coulee Resources Ltd., and the defendant, David Millar, are both in the business of placer mining. In 2017, Coulee Resources and Mr. Millar agreed to mine an area on one of Mr. Millar's mining claims under a joint venture agreement (the "JVA"). The JVA stipulated that each of the parties would provide equipment and equal amounts of labour to the venture.

[2] Both parties considered the 2017 season a success and agreed to carry on in 2018.

[3] Problems arose, however, when Coulee Resources rented equipment to mine the claim for the 2018 season. Near the end of August 2018, it requested that Mr. Millar pay half the invoice for the rented equipment. Mr. Millar refused on the basis that he had not agreed to pay any costs of the rental agreement.

[4] Despite these problems, further work was completed under the JVA. After that, with Mr. Millar's consent, Coulee Resources then continued to mine the claim on its own.

[5] Coulee Resources paid for half the costs of the rental, but the other half went unpaid. Eventually, after the rental company commenced an action for repayment, Mr. Millar paid for the remaining rental costs. However, as payback, he kept 68.4 ounces of gold he owed to Coulee Resources under the JVA.

[6] Coulee Resources, in turn, kept 7.93 ounces of gold it owed Mr. Millar from the mining it did on Mr. Millar's claim after the venture was completed.

[7] Coulee Resources is now suing Mr. Millar. It claims the parties agreed that each party would pay half the costs of the rental equipment. It seeks that Mr. Millar give it the 68.4 ounces of gold he retained. Mr. Millar claims that Coulee Resources is wholly responsible for the costs of the rental equipment. Because he paid for half the costs of the rental equipment, he is entitled to keep the gold.

[8] Mr. Millar has also brought a counter-claim for the gold that Coulee Resources kept. Coulee Resources alleges that the amount it owes to Mr. Millar should be set-off because Mr. Millar did not provide labour as required under the JVA.

[9] For the reasons below, I conclude that Coulee Resources and Mr. Millar agreed to split the costs of the rental equipment. Mr. Millar, therefore, is liable to Coulee Resources for the gold he kept. I also conclude that Mr. Millar did provide the labour as required under the JVA. There will, therefore, be no set-off amount for the gold Coulee Resources owes to Mr. Millar. Coulee Resources therefore owes Mr. Millar the gold it kept.

Issues

- A. Did Coulee Resources and Mr. Millar agree to divide the costs of the rental equipment for the 2018 mining season?
- B. Did Mr. Millar provide labour as required under the JVA for the 2018 mining season?

Analysis

- A. Did Coulee Resources and Mr. Millar agree to divide the costs of the rental equipment for the 2018 mining season?

[10] I find that Coulee Resources and Mr. Millar did agree to divide the costs of the rental equipment in 2018.

[11] Under the JVA, each party was required to supply and maintain equipment. Coulee Resources submits, however, that the parties orally agreed to a new term in 2018, whereby each party would pay for half the costs of rental equipment. Mr. Millar denies that they agreed to split the costs of the rental equipment. Because the purported contract term was made orally, my determination on this issue turns on credibility. I will therefore set out the legal principles related to credibility, describe the witnesses' evidence on this issue, and then assess the witnesses' credibility.

Legal Principles

[12] Credibility encompasses two concepts: credibility and reliability. Credibility concerns a witness' veracity or sincerity, and is based on their desire to tell the truth. Reliability concerns a witness' accuracy and is based on their ability to accurately observe, recount, and recall events. A witness may be credible, but not reliable. However, a witness cannot be reliable if they are not credible (*R v HC*, 2009 ONCA 56 at para. 41).

[13] Additionally, credibility is not all or nothing. I can believe all, some, or none of a witness' testimony.

Evidence

[14] Joel White, who is the sole director and shareholder of Coulee Resources, was the person who negotiated the JVA and worked with Mr. Millar. He and Marilyn Kamangirira, who is an employee of Coulee Resources, and Mr. White's spouse, testified on behalf of Coulee Resources about the oral agreement. Mr. Millar testified on his own behalf.

[15] All three witnesses testified that they discussed the 2018 mining season in early 2018. Mr. White testified that they agreed to rent equipment because the equipment they had used in 2017 was broken and not up to the task. Mr. Millar has no specific memory of the discussions he and Mr. White had. However, he testified that he would not have agreed to rent equipment, because he had previously had a bad experience renting equipment.

[16] Ms. Kamangirira was not present at all the meetings and could not testify about whether the parties came to an agreement about renting equipment. She did testify,

however, that at the beginning of the mining season, which was the beginning of April, she spoke to Mr. Millar about one piece of the rental equipment, because the owner of the rental company wanted to know about the road conditions before bringing the equipment to the claim. She described that Mr. Millar expressed concerns about renting equipment, and that the rental costs would sink them. Ms. Kamangirira testified that she assured Mr. Millar that they need not continue renting equipment if the project was unprofitable. If they were producing gold as anticipated, they would make more than enough money to pay for the costs of the equipment. Mr. Millar does not remember the conversation.

[17] Mr. White and Ms. Kamangirira testified that Coulee Resources rented five pieces of equipment during the mining season, however, not all five pieces would have been at the site at the same time.

[18] Mr. Millar was asked about whether he knew that the equipment Mr. White brought on site was rented. He testified he had suspicions that the equipment was rented. On June 6, he asked Mr. White about whether he was renting equipment. This led to a heated discussion because Mr. Millar did not want the rental equipment on the claim. He also testified that, later, in the season, he and Ms. Kamangirira had a discussion. She reassured him that Mr. White had an agreement with the rental company. If they did not pay for the equipment, the rental company would get Mr. White's house. He then became less concerned about the presence of the rental equipment.

[19] The witnesses also gave evidence about whether there was an agreement to rent equipment in 2017. Counsel to Coulee Resources submits that this agreement provides evidence that the parties agreed to continue the agreement in 2018.

Assessment of Evidence

[20] I will first address the evidence about whether there was an agreement to rent equipment in 2017. In short, it does not assist me. Even if I conclude the parties agreed that Mr. Millar would pay for half the equipment rental in 2017, the situation was different in 2017 than in 2018. In 2017, the machine was rented at the end of the season; the rental replaced one machine; and the machine was important to the mining operation. Mr. Millar could easily have agreed to pay half the rental then, but not be willing to pay for half the rental of a number of other machines for the entirety of the 2018 season.

[21] Turning to the assessment of credibility, Mr. Millar's counsel submits that, generally, I should not find Mr. White credible. She submits that Mr. White's evidence was internally inconsistent, and he was evasive and argumentative. She also notes that Mr. White did not produce documents as required by court order; that should also affect my findings of credibility.

[22] I find Mr. White credible. I have concerns about Mr. White's reliability, although not to the extent urged to me by defence counsel. I therefore do not completely dismiss his evidence.

[23] Mr. White was, at times, testy when cross-examined. However, he also fairly conceded when errors were pointed out. I do not draw any conclusions from that aspect of his testimony.

[24] There were some differences between Mr. White's examination for discovery and responses to questions arising from the examination for discovery, and his testimony at trial. For the most part, they are not significant. For instance, at the examination for discovery Mr. White could not state with certainty whether Mr. Millar confronted him about the rental equipment; on the stand he denied that Mr. Millar confronted him.

[25] Mr. White did, however, provide inconsistent testimony. One issue during the proceedings was about how one of the employees at the mine, Bill Uloth, had been paid. Mr. Uloth's invoices were also filed. On direct examination Mr. White testified that he assumed the invoices were complete. On cross-examination, however, Mr. White testified that they were not complete. Ms. Kamangirira and Mr. Millar also testified about the invoices, and said they were complete.

[26] Moreover, Mr. White's testimony was inconsistent with others' testimony about how well the machinery worked during the 2018 mining season. He testified that some machinery was not working, while employees who worked at the mine testified that the machinery did work.

[27] With regard to Mr. White's failure to produce documents, as I explain below, it does affect my assessment of the evidence the documents relate to. However, it does not affect my assessment of Mr. White's credibility and reliability generally.

[28] It appears to me that Mr. White misremembered events and made suppositions during his testimony, but that he was telling the truth as best as he remembered. While at times he was not reliable, he was still credible. Moreover, while some areas of Mr. White's testimony were problematic, others were not. Thus, I do not dismiss

Mr. White's testimony entirely. Rather, when assessing his evidence, I look for additional indicators of reliability before accepting his evidence.

[29] On the issue of whether he and Mr. Millar agreed to split the costs of the rental equipment, Mr. White testified that he and Mr. Millar had discussed renting equipment, and that Mr. Millar agreed to rent the equipment. I can give weight to this testimony because Ms. Kamangirira's testimony that she spoke to Mr. Millar early in the season, and that they spoke about rental equipment and how they would pay for the rental equipment, supports Mr. White's testimony.

[30] Mr. Millar's counsel submits that Ms. Kamangirira's evidence is also not reliable. She argues that Ms. Kamangirira was defensive and unable to concede errors even when confronted with inconsistencies.

[31] As I explain below, I agree with counsel that Ms. Kamangirira showed these tendencies when testifying about a spreadsheet she had created. However, on the question of whether the parties agreed to split the costs of the rental equipment, I find Ms. Kamangirira to be reliable.

[32] I find Ms. Kamangirira reliable because she carefully indicated what she did not know and gave clear and detailed evidence about what she did know. Ms. Kamangirira did speculate about whether the parties agreed to split the cost of the rentals. However, she qualified her testimony by stating that she was not present all the time and did not know specifically what the parties agreed to. Ms. Kamangirira also readily admitted if she did not know or remember the answer to a question, even if an answer could have assisted Coulee Resources' case.

[33] When Ms. Kamangirira had a clear memory, she gave detailed evidence that was unshaken on cross-examination. Thus, for example, both Ms. Kamangirira and Mr. Millar gave testimony about discussing the rentals later in the mining season. Mr. Millar remembered only a part of it; Ms. Kamangirira filled in and clarified what was said.

[34] Mr. Millar also does not remember the conversation he and she had at the beginning of April. Ms. Kamangirira's evidence about this conversation is therefore uncontested.

[35] It was not only this conversation that Mr. Millar did not remember. He also did not remember the conversations he and Mr. White had leading up to the 2018 mining season. He did, at one point, state that he and Mr. White never spoke about the details of renting equipment. However, it was clear from his testimony that he did not actually recall the discussions he had with Mr. White leading up to the 2018 mining season. The best he could say on the stand was that he would not have agreed to rent equipment.

[36] Mr. Millar's counsel submits that, even if Mr. Millar cannot remember what was discussed, I can make findings based on what the parties were likely to have done. She argues that because the parties had written the JVA, any significant changes or amendments would also have been reduced to writing. However, the parties made several changes to the JVA, such as payment of employees, that were not put in writing.

[37] Mr. Millar's counsel also argues that, because the parties had the equipment they needed, it would not have made good business sense to rent equipment. Mr. Millar would thus not have agreed to the rentals. Even if I were to conclude that the parties did

have the necessary equipment, and even recognizing Mr. Millar's unease with renting equipment, it is too much of a leap to then infer that Mr. Millar would not have agreed to the rental.

[38] Ms. Kamangirira's evidence of the conversation with Mr. Millar lends support to Mr. White's evidence about the agreement between him and Mr. Millar. This, as well as Mr. Millar's lack of recollection of any conversation about the terms of contract leads me to conclude that Mr. White and Mr. Millar agreed to split the costs of the rental equipment.

[39] Thus, Mr. Millar owes Coulee Resources the gold he kept. Coulee Resources will pay for half the cost for the demobilization of rock truck (\$1,837) which it has not yet paid.

B. Did Mr. Millar provide labour as required under the JVA for the 2018 mining season?

[40] I find that Mr. Millar did provide labour as required under the JVA.

[41] Two matters require consideration here. First, is whether Mr. Millar provided sufficient labour as required by the JVA. Second, is whether he paid his full share for Mr. Uloth's wages. I will first address the allegation that Mr. Millar did not provide sufficient labour under the JVA, and then the allegation that he did not pay his full share of Mr. Uloth's wages.

[42] The JVA states that the parties are each to "contribute their labour to the operations equally and without charge to the joint venture". Coulee Resources alleges that it, in the end, contributed more labour than Mr. Millar did. In large part, the company

relies on a spreadsheet, prepared by Ms. Kamangirira, as the foundation for this allegation.

[43] During her testimony Ms. Kamangirira explained that she prepared the spreadsheet to determine the profitability of the venture for Coulee Resources. She created the spreadsheet using her notes and Mr. White's diary entries. The spreadsheet also includes calculations about Mr. Millar's contributions. Because Ms. Kamangirira did not have access to his actual expenditures, she used estimates to determine his contributions.

[44] I do not place any weight on Ms. Kamangirira's spreadsheet. As noted above, Mr. Millar's counsel argued that Ms. Kamangirira is not reliable because she was argumentative and unwilling to concede errors while on the stand. I agree with counsel that, while testifying about the spreadsheet, Ms. Kamangirira did not take time to listen to all the questions, was combative, and had difficulty explaining aspects of it.

[45] However, the larger problem is that the documents used to develop the spreadsheet were not produced to Mr. Millar. This includes Mr. White's work diary, which he did not produce even though he was ordered to do so. Thus, the accuracy of the spreadsheet cannot be assessed. Moreover, Coulee Resources should not benefit from Mr. White's failure to produce documents as required. The civil litigation process relies on full production of documents: there are consequences when a party fails to comply with the rules and court orders. I therefore give no weight to the spreadsheet.

[46] Witnesses also testified about the contributions Mr. Millar and his employees made to the venture through their labour. Mr. Millar had competing responsibilities, including a tourism business and work on a television series. I suspect that Mr. Millar

was probably less involved in the venture than he remembers. However, I also suspect that Mr. White's perceptions of Mr. Millar's involvement are coloured by his dissatisfaction with the way the venture unfolded in 2018. Regardless of how much work he himself put into the venture, Mr. Millar also had paid labour at the site. He paid Soleil Consulting to assist with the operations for several days, agreed to pay for half the wages of one of Mr. White's employees, Bill Uloth, and had two additional employees on site for part of the season. One of those employees did work from time to time for Mr. Millar's tourism business, however, this is insufficient for me to conclude that Mr. Millar did not contribute labour equal to that of Mr. White. Mr. White has not met the burden of demonstrating that Mr. Millar's labour was not sufficient to fulfill the requirements of the JVA.

[47] In addition to Mr. White's general belief that Mr. Millar did not contribute sufficient labour, it emerged at trial that the parties did not agree about how Mr. Uloth's wages should have been paid. The parties agreed that each would pay a portion of Mr. Uloth's wages. They disagree, however, about the proportion of the wages each should pay.

[48] Coulee Resources expected Mr. Millar to pay the amount it invoiced to him for Mr. Uloth's wages. Ms. Kamangirira testified that Mr. Uloth was paid \$30 per hour, plus \$10 an hour more as a living allowance. She also testified that, in calculating responsibility for wages, she calculated that Mr. Millar was wholly responsible for some of Mr. Uloth's tasks. As a result, the total amount paid to Mr. Uloth was more than simply \$30 per hour, and Mr. Millar was responsible for more than half the total amount.

[49] Mr. White also testified that Mr. Millar was responsible for the work Mr. Uloth did solely for Mr. Millar. At the examination for discovery, however, he stated that Mr. Millar agreed to pay half Mr. Uloth's wages.

[50] Mr. Millar, on the other hand, contends that he is responsible for half the costs of labour, as agreed to by the parties. Mr. Uloth provided his invoices, and he paid for half.

[51] Although Ms. Kamangirira provided some explanation for the way Coulee Resources calculated the proportions owed by each party, it was Mr. White who negotiated with Mr. Millar how the parties would split Mr. Uloth's wages. Given his inconsistent evidence, I conclude that Mr. Millar paid what was required of him.

[52] Coulee Resources continued to mine Mr. Millar's claim after the end of the JVA, produced gold and owed a portion of it to Mr. Millar. It did not, however, give Mr. Millar his share of the gold. Mr. Millar brought a counter-claim for the gold. In this action Coulee Resources seeks a set-off based on the unequal provision of labour by Mr. Millar during 2018. As I have concluded that the Mr. Millar provided sufficient labour pursuant to the JVA, Coulee Resources' claim for set-off fails.

Conclusion

[53] Mr. Millar owes Coulee Resources the gold he retained after the completion of the joint venture. Coulee Resources seeks that Mr. Millar provide gold, rather than cash, in damages. Mr. Millar did not oppose this. I will therefore order that Mr. Millar provide the damages in gold. The amount mined was different than the amount received once it was processed. If the parties cannot agree about whether Mr. Millar should provide processed or unprocessed gold, this matter can be spoken to in case management.

[54] Coulee Resources also owes Mr. Millar half the costs for demobilization of the rock truck, which in total cost \$3,675.

[55] Coulee Resources owes Mr. Millar the gold it held back. If the parties cannot agree as to how the damages should be paid, it can be spoken to in case management.

[56] Given that Mr. Millar stated that he is seeking special costs, if the parties cannot agree on payment of costs, it can be set down for submissions.

WENCKEBACH J.