SUPREME COURT OF YUKON

Citation: *Legend Land Services, LLC v McNeil*, 2025 YKSC 20

Date: 20250425
S.C. No. 21-A0113
Registry: Whitehorse

BETWEEN:

LEGEND LAND SERVICES, LLC

Plaintiff

AND

GREG MCNEIL

Defendant

AND

LEGEND LAND SERVICES, LLC
LEGEND MINING

Defendants by Counterclaim

Before Justice E.M. Campbell

Counsel for the Plaintiff and Defendant by counterclaim — Arthur Mauro

Counsel for the Defendant — Toby Kruger

REASONS FOR DECISION

OVERVIEW

[1] This is a dispute regarding the purchase and sale of placer mining claims near Dawson City, Yukon, (the “Northstar Mining Claims”). On May 12, 2021, the plaintiff, Legend Land Services, LLC (“Legend”) entered into a contract with Greg McNeil for the purchase of the Northstar Mining Claims, including the mining equipment and buildings, for a total price of $2,500,000 USD (the “Purchase and Sale Agreement”).

[2] In accordance with the terms of the Purchase and Sale Agreement, Legend paid $150,000 USD to Mr. McNeil, as a down payment. The contract also provided that the remainder of the purchase price was to be paid over time on an agreed upon schedule. The transfer of ownership of the claims, mining equipment and buildings was to take place upon full payment of the purchase price. As part of the contract, Mr. McNeil agreed to provide training and support to Legend's employees to help them familiarize themselves with the mining operation. At the end of May 2021, Mr. McNeil, his son, as well as Wesley Greer, Legend's sole owner and director, and one of Legend's employees arrived at the mine site in Dawson City.

[3] Early on, a disagreement arose between Mr. Greer and Mr. McNeil regarding the state of the mining equipment on the claims and Legend's ability to work the claims with it. In June 2021, the parties verbally agreed to settle their dispute on a number of terms, including the return of the down payment in full to Legend and the payment of mining related invoices. However, at some point, Mr. McNeil unilaterally decided he did not have to return the down payment or pay certain invoices.

[4] In September 2021, Legend decided to send a payment to Mr. McNeil in accordance with the payment schedule of the Purchase and Sale Agreement, but Mr. McNeil refused it. Legend also worked the claims for a short period in the summer of 2022 before Mr. McNeil demanded it vacate the claims.

[5] Legend filed a statement of claim seeking to enforce the initial Purchase and Sale Agreement or, in the alternative, damages. Mr. McNeil filed a statement of defence stating that Legend had breached the initial Purchase and Sale Agreement and was not entitled to any remedy. Mr. McNeil also filed a counterclaim seeking damages for,

among other things, trespass, unlawful interference with his economic interests, theft and conversion.

[6] There are two contested applications before me. First, Legend seeks an interlocutory injunction precluding: (i) the removal of the equipment, assets, and gold from the Northstar Mining Claims that were included in the Purchase and Sale Agreement; and (ii) the sale or transfer of the Northstar Mining Claims pending the conclusion of this litigation. Mr. McNeil opposes the application.

[7] Second, Mr. McNeil seeks a declaration that specific performance is not available to Legend in these proceedings and that its statement of claim be amended accordingly. Legend opposes Mr. McNeil's application.

[8] The parties agreed to an order for an interim injunction pending a decision on the applications.

[9] For the following reasons, I conclude that a trial of the issue of specific performance is required and, as a result, Mr. McNeil's application is dismissed. Legend's application for an interlocutory injunction is granted.

FACTS

[10] On May 12, 2021, Legend and Greg McNeil entered into a purchase and sale agreement regarding the Northstar Mining Claims for a total price of $2,500,000 USD. The Purchase and Sale Agreement included all the equipment and assets situated on the Northstar Mining Claims; all the ores, mineral surface and mineral rights; the right to explore for, mine, and remove the same; as well as all water rights and improvements, easements licences, rights of way and other interests appurtenant thereto.

[11] The Purchase and Sale Agreement included a down payment in the amount of $150,000 USD. The remainder of the purchase price was to be paid pursuant to a payment schedule set out in the Purchase and Sale Agreement.

[12] The Purchase and Sale Agreement included a provision by which Mr. McNeil attested that all the property and equipment included in the Purchase and Sale Agreement was “fully functional, in good working condition, and ready to use, except for equipment batteries and antifreeze”. He also attested that there were no major component issues on the property or the equipment. The Purchase and Sale Agreement also provided that Mr. McNeil was responsible for repairs and costs, if needed.

[13] The Purchase and Sale Agreement also included a provision by which Mr. McNeil undertook to provide onsite orientation and training for a few weeks during the 2021 mining season. He also agreed to introduce Legend’s representatives to local resources and suppliers. Mr. McNeil also undertook to assist Legend with set up and/or transfer of different accounts.

[14] On May 12, 2021, Legend paid the agreed upon $150,000 USD to Mr. McNeil.

[15] On or about May 28, 2021, Wesley Greer (Legend’s Director), an employee of Legend, Mr. McNeil and his son, Blake McNeil, arrived at the Northstar Mining Claims to begin the mining operations for the season.

[16] Soon after their arrival, a disagreement arose between Mr. Greer and Mr. McNeil regarding the condition of the equipment and Legend’s ability to mine the claims with that equipment.

[17] On or about June 20, 2021, the parties, through an oral agreement, agreed to settle their dispute regarding the Purchase and Sale Agreement and entered into a settlement agreement. Pursuant to the settlement agreement, Mr. McNeil was to*:*

i. refund Legend its down payment of $150,000 USD.

ii. pay Mackenzie Fuel $11,500 CAD for the fuel used on the Northstar Mining Claims – or for expenses incurred during the 2021 mining season;

iii. pay Napa Auto Parts for all the equipment ordered for use at the Northstar Mining Claims; and

iv. pay Andrew Taylor, a local mechanic, for parts and labour he provided during the 2021 mining season.

[18] Legend agreed to bear the costs of some of the work on the mining claims.

[19] Mr. McNeil and, later, Legend's representatives left the mining claims after reaching the agreement.

[20] However, Mr. McNeil later changed his mind and decided he did not have to refund Legend's down payment nor pay some of the other invoices he had agreed to pay pursuant to the settlement agreement. At the time of the hearing, Mr. McNeil held firm on his position.

[21] On July 26, 2021, Mr. Greer contacted Mr. McNeil asking about the timing of the down payment refund to Legend and payment of the Mackenzie Fuel bill. Mr. McNeil did not respond to Mr. Greer. Legend then took steps to pay the bill from Mackenzie Fuel as well as Legend's own Napa Auto Parts account.

[22] On August 26, 2021, Mr. Greer emailed Mr. McNeil requesting information as to where to send the $50,000 USD payment and 10% royalty of the gold for the 2021 mining season in accordance with the Purchase and Sale Agreement. Mr. McNeil did not respond to Mr. Greer's email.

[23] Mr. Greer's further attempts to contact Mr. McNeil by phone and text were unsuccessful.

[24] On September 1, 2021, Mr. Greer followed up with Mr. McNeil informing him that he had mailed a $50,000 USD cheque to him via registered mail. He again requested information as to where to send the 10% gold royalty.

[25] On September 4, 2021, Mr. McNeil signed for and received the package containing the $50,000 USD.

[26] On or about September 10, 2021, Mr. Greer received a package from Mr. McNeil, which contained the $50,000 USD cheque with the words "Refused, Contract Broken" written on it along with instructions to contact his lawyer. The package also contained a copy of the Purchase and Sale Agreement with some highlighting.

[27] On September 22, 2021, Legend registered the Purchase and Sale Agreement against the Northstar Mining Claims.

[28] On January 17, 2022, Legend filed a statement of claim seeking specific performance, or in the alternative, damages for breach of contract.

[29] In August 2022, Mr. Greer attended the Northstar Mining Claims to perform maintenance work on the equipment and conduct some mining activities. Mr. McNeil, through his counsel, sent a letter to Mr. Greer demanding that he cease and desist from entering upon or working the Northstar Mining Claims.

[30] On May 10, 2023, Legend registered its statement of claim against the Northstar Mining Claims through the Dawson Mining Recorder's Office.

[31] On or before June 2, 2023, Mr. McNeil sold a piece of machinery (a Caterpillar Loader) that was included in the Purchase and Sale Agreement.

[32] In December 2023, Mr. Greer was contacted by another miner who told him he was in discussions with Mr. McNeil to purchase the Northstar Mining Claims for $375,000 USD.

[33] At or around the same time, Mr. Greer, through his counsel, received a letter from Mr. McNeil's counsel demanding that Legend remove its Statement of Claim registered against the Northstar Mining Claims.

POSITIONS OF THE PARTIES

The Plaintiff

[34] Legend submits its application for an interlocutory injunction is to prevent Mr. McNeil from disposing of the assets at the heart of this litigation. Legend submits that, despite Legend's claim for specific performance, Mr. McNeil has been actively attempting to sell the Northstar Mining Claims and has already sold an important piece of equipment. Legend submits it requires an injunction to ensure that the remedy of specific performance it is seeking is still available once a final decision is made in this matter.

[35] Legend submits that Mr. McNeil's application for a declaration that specific performance is unavailable in this case is premature, as the time for determination of the appropriate remedy is at trial.

[36] In the alternative, Legend submits that the property at issue is unique; that it has exercised due diligence; that it is willing and able to complete the agreement; and that specific performance is available in this matter.

[37] Legend argues that the settlement agreement was conditional upon performance and that it was opened to Legend to elect to enforce the Purchase and Sale Agreement

when Mr. McNeil unilaterally decided not to return the down payment after agreeing to do so. Legend adds that, in any event, a plaintiff should not be deprived of seeking specific performance simply because it tried to settle its claim outside the court process, prior to filing a statement of claim, and was unable to do so because the defendant reneged on an explicit term of their negotiated settlement. Legend submits it would be counter-productive and a waste of resources if commencing litigation were held to be a necessary step to maintain one's right to seek specific performance prior to entering into a settlement agreement. Legend submits this would have the chilling effect of discouraging people from trying to settle their disputes prior to resorting to courts for fear of losing their rights to enforce the initial contract if the other party were to fail to fulfill their obligations under the settlement agreement.

[38] In addition, Legend submits that the written Purchase and Sale Agreement is a binding and enforceable contract because it contains all the essential terms of a contract and requires no additional agreement to be completed. Upon full payment, the mining claims and the equipment are to be transferred to Legend. Legend adds that Mr. McNeil's assertion that the Purchase and Sale Agreement is simply an "agreement to agree" is wrong based on the law and the intention of the parties. Legend states that it has been and continues to be ready, willing, and able to complete the Purchase and Sale Agreement, and that the defendant is the one preventing Legend from mining the claims through his threats.

The Defendant

[39] Mr. McNeil submits that the Court should not use its extraordinary power to grant what he qualifies as a *Mareva* injunction to benefit Legend, who is seeking to

unilaterally revive the Purchase and Sale Agreement it breached. Mr. McNeil submits that, in any event, Legend does not meet the well-established test for an injunctive remedy.

[40] In addition, Mr. McNeil submits that specific performance is not a remedy available to Legend because the Purchase and Sale Agreement was not final, rather, it was only "an agreement to agree".

[41] Mr. McNeil also submits that specific performance is not available to Legend because it elected to enter into a settlement agreement with him after taking the position he had breached the Purchase and Sale Agreement. Mr. McNeil submits that rather than continuing to press for performance of the Purchase and Sale Agreement of the mining claims, Legend accepted the alleged breach and agreed to walk away. Mr. McNeil submits that, as a result, it is no longer open to Legend to unilaterally revive the Purchase and Sale Agreement that the parties agreed to set aside.

[42] In the alternative, Mr. McNeil argues that specific performance of the Purchase and Sale Agreement is not available to Legend because the property is not unique, Legend is not willing nor able to complete the Purchase and Sale Agreement, Legend did not exercise due diligence, and it does not come with clean hands. Mr. McNeil argues that Legend has not offered a "real and substantive justification" to seek specific performance. In addition, Mr. McNeil argues that Legend insisting on specific performance is an attempt to tie up his assets to insulate itself from the consequences of failing to procure alternate property in mitigation of its losses.

ANALYSIS

A. Is Specific Performance of the Purchase and Sale Agreement a Remedy Available to Legend in this Action?

[43] The first question raised by the two applications before me is whether Legend can seek specific performance of the Purchase and Sale Agreement.

The Law of Specific Performance

[44] In the recent decision of *Gill v Gill*, 2024 ONCA 877 ("*Gill*"), the Court of Appeal for Ontario summarized the legal principles applicable to specific performance as follows:

> [15] Specific performance of an agreement is an equitable remedy granted where damages cannot afford an adequate and just remedy in the circumstances: *Matthew Brady Self Storage Corp. v. InStorage Limited Partnership*, 2014 ONCA 858, 125 O.R. (3d) 121, at para. 29, leave to appeal refused, [2015] S.C.C.A. No. 50; *Paterson Veterinary Professional Corporation v. Stilton Corp. Ltd.*, 2019 ONCA 746, 438 D.L.R. (4th) 374, at para. 22, leave to appeal refused, [2019] S.C.C.A. No. 420. As the Supreme Court instructed in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at para. 22, specific performance should not be ordered automatically as the default remedy for breach of a contract for the sale of lands, "absent evidence that the property is unique to the extent that its substitute would not be readily available" or absent "a fair, real and substantial justification" for the claim to specific performance.
>
> [16] The overarching question is whether the land rather than its monetary equivalent better serves justice between the parties: *Lucas v. 1858793 Ontario Inc.* 2024 ONCA 877 (CanLII) Page: 8 (Howard Park), 2021 ONCA 52, 25 R.P.R. (6th) 177, at paras. 69-71; *Dhatt v. Beer*, 2021 ONCA 137, 68 C.P.C. (8th) 128, at para. 42. <u>The governing factors that typically inform the determination of that question include: the nature of the agreement and the property, the objective uniqueness of the agreement and the property, and their subjective uniqueness to the purchaser at the time of purchase; the adequacy of damages as a remedy; and the behaviour of the parties having regard to the equitable</u>

> nature of the remedy: *Matthew Brady*, at para. 32; *Lucas*, at para. 71. This discretionary determination is a fact-specific inquiry that requires a consideration of all the particular circumstances and the equities of the case: *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, 430 D.L.R. (4th) 296, at para. 67, leave to appeal refused, [2019] S.C.C.A. No. 55; *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.*, 2021 ONCA 201, 32 R.P.R. (6th) 1, at para. 288. [Emphasis added]
>
> *i. Is the application for a declaration that specific performance is not an available remedy to Legend premature?*

[45] Legend argues that Mr. McNeil's application should be dismissed because it is premature. Legend submits the time for determination of the appropriate remedy is at trial, when all the evidence and arguments are before the court and after liability is confirmed, not at a pre-trial application. Legend adds that by bringing his application, Mr. McNeil seeks to circumvent a trial on the issue, to undercut the entirety of this litigation, and to deny any possible remedy to Legend.

[46] Based on the guidance provided by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 at paras. 49-50, in the context of summary judgment, as well as cases where application judges determined they had the authority to decide issues on their merits on applications (*Blackberry Ltd. v Marineau-Mes*, 2014 ONSC 1790 at para. 2; and *10381187 Canada Inc. v Cherny*, 2020 ONSC 4325 ("*10381187 Canada*") at paras. 15-16), I am of the view that the *Rules of Court* of the Supreme Court of Yukon are sufficiently broad to allow me, if the record permits a fair and just determination of the issue on its merits, to decide whether specific performance is a remedy available to Legend in this case without deferring a determination of the issue to trial.

[47] The materials filed on these applications include a copy of the Purchase and Sale Agreement, a recording of the oral settlement agreement between the parties,

excerpts of the parties' examinations for discovery as well as two affidavits with attachments from Mr. Greer, Legend's sole owner and director. While I acknowledge that the record is extensive, I am of the view that it is not sufficient to allow me to determine the issue of the availability of specific performance considering the arguments raised by the parties and addressed below.

ii. Is the Purchase and Sale Agreement a conditional agreement (an agreement to agree)?

[48] Mr. McNeil's first argument in support of his position that specific performance is not available to Legend is that the Purchase and Sale Agreement was only a conditional agreement (an agreement to agree). Therefore, there is no final purchase and sale agreement to enforce. In my view, this argument does not have merit.

[49] The Purchase and Sale Agreement was filed before me and contains all the terms required of a final binding sale agreement: the parties, the property, and the price (see *Eaton Properties Ltd. v British Columbia* (1990), 53 BCLR (2d) 272 at 276, cited in *Yang v Li*, 2024 BCSC 613 at para. 57, regarding a contract for the sale of land). It requires no additional agreement to be completed or to be effective.

[50] In my view, the clauses of the contract clearly reveal the intention of the parties to enter into a binding purchase and sale agreement regarding the Northstar Mining Claims. Indeed, s. 1.c. of Purchase and Sale Agreement specifically states that the parties "desire to enter into an agreement giving Buyer the exclusive right to explore, develop and mine the Property and further granting transfer of all claims to Buyer once the final Payment has been made." Section 2 of the Purchase and Sale Agreement states that: "Upon payment of the full purchase price, the Seller shall convey their interest to Buyer by transfer of claims via Yukon Mining Recorders [as written] Office."

Also, s. 4 of the Purchase and Sale Agreement contains the agreed upon payment schedule based on a percentage of the gold mined by Legend on the claims per year.

[51] In addition, Mr. McNeil's counsel did not point to any decision that would support his argument that the Purchase and Sale Agreement is conditional simply because the full purchase price is to be paid by installments over time on an agreed upon schedule that contains a variable (i.e. a percentage of the amount of gold harvested each year), and title is to be transferred only upon full payment of the purchase price.

[52] Finally, even Mr. McNeil agreed at his examination for discovery that upon receipt of the full purchase price, in accordance with the agreed upon payment schedule, he would transfer ownership of the claims and equipment to Legend. He also clearly expressed the view that the agreement he had with Legend was a Purchase and Sale Agreement, not an opportunity to purchase the mining claims.

iii. Did Legend's decision to enter into a settlement agreement with Mr. McNeil terminate the Purchase and Sale Agreement, thereby precluding Legend from seeking specific performance of the Purchase and Sale Agreement?

[53] Mr. McNeil's second argument in support of his application is that Legend is not entitled to seek to enforce the Purchase and Sale Agreement that was terminated and replaced by a settlement agreement. Mr. McNeil argues that Legend's only legal avenue was to file a claim for breach of the settlement agreement either seeking specific performance of the settlement agreement or, in the alternative, damages.

[54] Legend disagrees. It submits the settlement agreement was conditional upon performance and Mr. McNeil's repudiation of the settlement agreement put Legend back in a position where it could elect to enforce the settlement agreement or return to the Purchase and Sale Agreement. Legend submits that it had the right to choose the latter

as it did. In addition, Legend submits it clearly communicated its election to Mr. McNeil when it attempted to pay the $50,000 USD and 10% royalty due to Mr. McNeil under the Purchase and Sale Agreement. According to Legend, this was clear notice to Mr. McNeil that Legend had accepted his repudiation of the settlement agreement and intended to pursue its rights under the Purchase and Sale Agreement. Legend argues the fact Mr. McNeil refused the payment does not change the election made by Legend.

[55] Under the doctrine of election, a party is precluded from exercising a right that is inconsistent with another right if they have consciously and unequivocally exercised the latter: *Charter Building Company v 1540957 Ontario Inc.*, 2011 ONCA 487 ("*Charter Building Company*") at para. 15. The Court of Appeal for Ontario further stated in *Charter Building Company*:

> [19] Election at common law takes place where a party is faced with a choice between two inconsistent courses of action that affect another party's rights or obligations, and knowing that the two courses of action are inconsistent and that he or she has the right to choose between them, makes an unequivocal choice and communicates that choice to the other party. The doctrine provides that the party making the election is afterwards precluded from resorting to the course of action that he has rejected. The election is effective at the point of communication on the basis that the parties to an ongoing relationship are entitled to know where they stand: *The Commonwealth of Australia v. Verwayen* (1990), 170 C.L.R. 394 (H.C.A.), at pp. 421-22.

[56] Also, the Court of Appeal for British Columbia, in *A & G Investment Inc. v 0915630 BC Ltd.*, 2014 BCCA 425 ("*A & G Investments Inc.*"), stated that an election between two inconsistent rights must be made promptly and communicated to the other party because both parties are entitled to know where they stand with respect to their rights and obligations:

> [38] An election between inconsistent rights must, however, be made promptly and communicated to the other side. Parties cannot adopt a "wait-and-see" approach to fundamental breach, as their election simultaneously determines the position of the counterparty to the contract. Either the contract is not repudiated and the rights and obligations under it still exist, or the contract is rescinded because of an accepted repudiation and then very different rights come into being in respect of a cause of action. In either case, parties must have prompt notice of their position. …

[57] Therefore, when a party is faced with a fundamental breach to a contract, they may elect to affirm the contract and hold the other party to the performance of their contractual obligations, or they may accept the repudiation and file a claim for damages. However, once the election is made, it cannot be changed. Accepting the repudiation has the effect of ending the contract and relieving both parties from their obligations under it. The party who accepted the repudiation cannot afterwards change their mind and seek specific performance because there is no longer a contract to enforce (see *JEKE Enterprises Ltd. v Northmont Resort Properties Ltd.*, 2016 BCSC 401 at paras. 443-445, aff'd 2017 BCCA 38; *Tri City Capital Corp. v 0942317 BC Ltd.,* 2016 BCSC 1514 at paras.150-151*; Fengyun v He,* 2017 BCSC 110 ("*Fengyun*") at para. 52).

[58] However, in his affidavit evidence, Mr. Greer states that the termination of the Purchase and Sale Agreement was conditional upon performance of the settlement agreement. Mr. Greer states that, once he realized Mr. McNeil would not return the down payment, Legend chose to enforce the Purchase and Sale Agreement and sought to perform its obligations under that agreement by sending a payment of $50,000 USD to Mr. McNeil, as per the payment schedule, and inquiring where to deposit the 10%

royalty for 2021. Mr. McNeil does not dispute he received and refused the $50,000 USD payment.

[59] There is therefore a disagreement between the parties as to whether they intended that the Purchase and Sale Agreement would terminate only if Mr. McNeil were to make all the payments contemplated in the settlement agreement within a certain period of time, or whether it terminated when the settlement agreement was reached.

[60] On the recording that Mr. Greer surreptitiously made of the conversation he had with Mr. McNeil when confirming the terms of their oral settlement agreement, neither party mentions that the settlement agreement is conditional upon performance. Mr. Greer is heard expressing the view that Mr. McNeil had either miscommunicated or misrepresented the state of the mining equipment included in the Purchase and Sale Agreement. Mr. Greer also expresses the view that the equipment was in a bad state of repairs and clearly insufficient to mine the claim efficiently contrary to what he had understood. Mr. McNeil responds that he did not intend to mislead Mr. Greer. Both parties then clearly state their agreement to resolve their differences on agreed upon terms, including the return of Legend's down payment. Mr. McNeil is even heard saying that it means more to him to close the deal verbally in front of his son than putting words to paper.

[61] Nonetheless, counsel for Legend submits the recording only reflects the parties' restatement of the agreement they had reached prior to the exchange recorded on Mr. Greer's phone and that much more was discussed prior to the recording. The content of the recording supports the conclusion that the settlement agreement was

reached during a discussion that took place between Mr. Greer and Mr. McNeil prior to the conversation that was recorded. Even Mr. McNeil, in his examination for discovery, stated that a lot more than what is heard on the recording was discussed between the parties in relation to the settlement agreement.

[62] Finally, the answer that Mr. Greer gave at his examination for discovery on November 8, 2023, could be interpreted as supporting his understanding that the settlement agreement was conditional upon performance:

> Q Okay, so in your mind, what are the essential components of that agreement?
>
> A Well, it's refunding my down payment, to pay the Mackenzie Fuel – a part of the Mackenzie Fuel bill, and take care of Andrew and NAPA and Bill Droid, whatever – I think we got some pit ledges from Bill or something.
>
> Q Okay, and then, everybody would walk away if all that were to happen, right?
>
> A Yes
>
> Q And the agreement – the mineral claims purchase agreement - would come to an end, right?
>
> A Yes, sir (p. 133 lines 18 to 27) [Emphasis added]

[63] As a result, I find there is a conflict in the evidence that I cannot resolve because neither Mr. Greer's affidavit nor the excerpts of Mr. Greer's and McNeil's examinations for discovery filed on the applications fully canvass what was discussed and agreed to prior to the recording. I find this conflict in the evidence can only be resolved after a judge hears all the evidence from both parties regarding what transpired during that conversation, at trial not on an application. In my view, resolution of this conflict is

necessary to determine whether the settlement agreement was conditional upon performance or whether it terminated the Purchase and Sale Agreement.

[64] However, I would add that, in my view, Legend's argument that a party shall always have the right to elect to enforce the initial agreement when the other party repudiates a settlement agreement (whether it is conditional or not) entered prior to commencing litigation is not in line with the caselaw.

[65] The only case Legend filed in support of its position involves a situation where a settlement agreement was reached after litigation was commenced. In *Charter Building Company*, the Court of Appeal for Ontario recognized that a plaintiff who initiates legal proceedings seeking specific performance of a contract, or, in the alternative, damages, who then enters into an out-of-court negotiated settlement to end the litigation, has a right to elect to either seek to enforce the settlement agreement, if the other party fails to abide by its terms, or pursue its rights under the ongoing action. However, *Charter Building Company* does not address the effect of settlement agreements reached prior to litigation.

[66] In addition, Legend's submissions run contrary to the established caselaw regarding the timing of election, which must be made promptly and communicated to the other party, to allow both parties to know where they stand in terms of their rights and obligations (*A & G Investments Inc.* at para. 38).

[67] Finally, while courts have shown some flexibility in allowing a party who initially sought specific performance only to add or make a claim for damages; courts have not displayed the same flexibility in cases involving the reverse situation, including cases

where a party demanded the return of their deposit prior to seeking specific performance (see *Fengyun* at paras. 52-73).

iv. If the Purchase and Sale Agreement persist, is specific performance available to Legend?

[68] Mr. McNeil argues that, even if the Court were to find that the Purchase and Sale Agreement was not terminated by the settlement agreement, the evidence clearly reveals that Legend is not entitled to specific performance and there is no need to have a trial on this issue. Mr. McNeil also submits that, even at the application stage, the burden of proof remains on Legend to show it is entitled to specific performance.

[69] Legend acknowledges it is its burden, at trial or summary trial, to establish it is entitled to specific performance. However, Legend takes the position that, at a pre-trial application, it is the applicant/defendant's burden to show it is not entitled to specific performance.

[70] In *10381187 Canada*, a decision filed by Legend, the motion judge concluded that the record was sufficient on the application to determine whether the plaintiff was entitled to specific performance and whether the certificate of pending litigation, that had been registered by the plaintiff on the property at issue, should be discharged. The judge did not apply a reverse burden of proof as suggested by Legend. Instead, the judge weighed the evidence to determine whether the test for specific performance was met. The judge determined the property was not unique and that monetary damages could be calculated to adequately compensate the plaintiff for the breach of contract, if a breach was found at trial (at para. 35). The judge also determined the certificate of pending litigation should be discharged. I am therefore of the view that, if I determined that the record permits a fair and just determination of the issue, the burden remains the

same and I must weigh the evidence to determine whether, on balance, specific performance is a remedy available to the plaintiff.

(a) Is the property unique?

[71] Both parties rely on Mr. Greer's affidavits and transcript of his examination for discovery filed on the applications in support of their respective positions regarding this criteria.

[72] Mr. McNeil submits the evidence establishes that the mining claims are not unique and that damages would be an appropriate remedy, if a breach of contract were found. Mr. McNeil adds that, on three occasions, Legend acknowledged that damages would be an appropriate remedy in this case. First, in its statement of claim, by identifying damages as a suitable alternative remedy. Second, by agreeing to walk away from the Purchase and Sale Agreement upon the return of its down payment and Mr. McNeil's payment of mining related invoices. Third, at Mr. Greer's examination for discovery when he left open the possibility of an agreement to resolve this matter in a manner involving something other than specific performance.

[73] Mr. McNeil submits that Legend had the opportunity to file affidavit evidence on this application to explain why the property is unique and it failed to do so. Mr. McNeil adds that, contrary to what is argued by Legend, Mr. Greer did not identify the terms of the Purchase and Sale Agreement as something that renders the property unique. Also, Mr. McNeil submits that mining is just another business for Mr. Greer and his evidence shows that, if this property does not work out, another will do.

[74] Mr. McNeil further submits that Legend's interest in the Northstar Mining Claims is purely speculative and that the law of specific performance does not protect purely

speculative commercial transactions. Mr. McNeil points out that Legend did not request that exploratory work be done on the property prior to entering into the Purchase and Sale Agreement. In addition, Legend has not performed any exploratory work on the claims or performed any type of assessment to determine their value. Mr. McNeil submits that Legend does not have a business plan in relation to the property nor any demonstrated need or desire for these specific claims. Mr. McNeil also submits that Mr. Greer's interest in the claims is more of a hobby and that the claims were simply an opportunity that presented to Mr. Greer and, by extension, to Legend.

[75] Legend submits that the property is unique because damages are not capable of assessment. Legend submits that no exploration or assessment has occurred on the Northstar Mining Claims and, as a result, there is no way to appropriately calculate damages. According to Legend, specific performance is the only way to ensure neither party is unduly harmed in this matter. In addition, Legend submits that gold mines are unique as a baseline.

[76] Finally, Legend submits that the specific terms of the Purchase and Sale Agreement it bargained for are unique and a substitute would not be readily available.

[77] It is not disputed that there has been no exploratory work on the Northstar Mining Claims to determine the approximate quantity of gold on the property. On its own, the absence of exploratory work or valuation is a fact that could cut both ways with respect to the uniqueness of the property.

[78] Turning to Mr. McNeil's argument that Legend acknowledged that damages would be an appropriate remedy in this case. As I have already concluded that a trial is required to determine whether the settlement agreement was conditional to

performance, I am not prepared, at this stage, to draw any inferences based on Legend's willingness to enter into that settlement agreement with respect to the uniqueness, or lack thereof, of the mining claims. Also, in my view, no conclusion can be drawn from the fact that Legend decided to include damages as an alternative remedy to specific performance in its Statement of Claim as part of its litigation strategy.

[79] In addition, I find the answer that Mr. Greer gave, during his examination for discovery, as to what would constitute an appropriate outcome to this case, is not as clear an indicator that damages is an appropriate remedy as counsel for Mr. McNeil puts it. At most, it is an indication that Mr. Greer is open to resolving this matter and would like to achieve an outcome acceptable to both parties:

> Q What did you want to achieve out of this case?
>
> A I'd like for it's either to mine it – you know, come to some kind of agreement where we're both happy, I guess.
>
> Q All right, what would that agreement be in your mind?
>
> A I would have to think about that. I mean, I'm not…You know, I'd have to think about that. Then [my counsel] could get [in touch] with you all or something. [p. 174 lines 10-14 of Examination for Discovery]

[80] However, at his examination for discovery, Mr. Greer also stated that he did not think the Northstar Mining Claims were special "other than it had a camp, and the equipment was supposed to be in good shape, ready to go." Mr. Greer also stated there were other claims available at the time, but they did not have the "equipment and camp and everything set up" he wanted. Mr. Greer acknowledged that, at least, one other property had come up for sale since 2021, but he had not investigated it because he has been tied up with the Northstar Mining Claims. Mr. Greer agreed that he would

consider purchasing a different property if he was not tied up with these claims. Finally, Mr. Greer did not deny it would be possible to purchase mining claims that did not have equipment and a camp already set up. However, he also stated it would be an ordeal to travel to Dawson City to start mining if the claims did not already have equipment and a camp set up. He added it would probably delay mining by a year. Mr. Greer added that he did not think he could stake his own claims because, in his views, the Dawson City area has "pretty much" been staked already (pp. 21 to 24 of Examination for Discovery).

[81] I note Mr. Greer made those statements after indicating he had no experience in gold mining prior to entering into the Purchase and Sale Agreement (p. 7 of Examination for Discovery). In my view, the evidence reveals that his desire to purchase mining claims already set up and ready to mine, such as the Northstar Mining Claims, aligns with his inexperience in the gold mining field.

[82] In addition, in his affidavits Mr. Greer stated that the terms of payment he negotiated, based on percentages of the gold mined every year rather than fixed payments, was a crucial component of the Purchase and Sale Agreement he negotiated with Mr. McNeil because no exploration work had been done on the claim.

[83] In my view, Mr. Greer's acknowledgement that the land on its own is not special and that he would be prepared to look into other properties if he were not tied up in the Northstar Mining Claims cannot be read in isolation from the rest of his evidence. Mr. Greer's evidence also reveals that the Northstar Mining Claims and the agreement he reached with Mr. McNeil, included features that were important to Legend – the equipment, the camp and the payment schedule– and that these specific features infrequently become available because: (i) none of the mining claims also available at

the time Legend entered into an agreement with Mr. McNeil had the set up it was looking for; (ii) there is only one property that has become available since 2021 in the area, to Mr. Greer's knowledge; and (iii) Mr. Greer's view that the area around Dawson City has essentially being staked already.

[84] Mr. McNeil had the opportunity but did not file any evidence showing to the contrary that gold mining claims with the set up Legend is interested in are regularly available for purchase in the area.

[85] In *10381187 Canada*, the court stated that a determination of whether a property is unique in the context of specific performance depends on both the nature of the contract and the characteristics of the property (at para. 22). This statement is based on the conclusion reached by the Court of Appeal for Ontario in *Matthew Brady Self Storage Corp. v InStorage Limited Partnership,* 2014 ONCA 858, a case where the vendor of the property was seeking specific performance, that it is the subject-matter of the contract in a broader sense, not the land alone that must be unique (at para. 37).

[86] Mr. McNeil argues that this conclusion applies only to cases where the seller seeks specific performance not when the purchaser seeks specific performance and that in the latter type of cases, it is the uniqueness of the land or property alone that is the focus of the inquiry.

[87] The following passage of the Court of Appeal's conclusion seems to support Mr. McNeil's position that the "transaction as a whole" or the terms of the contract become a consideration only where the vendor seeks specific performance:

> [36] In our view, in the context of vendor claims -- consistent with the approach taken in *Semelhago* -- there is no absolute rule, one way or the other. The following passage from the *Sharpe* text, at paras. 7.210 and 7.220 is instructive:

> > *Where the subject-matter of the contract is "unique"*, a strong case can be made for specific performance. *The more unusual the subject-matter of the contract*, the more difficult it becomes to assess the plaintiff's loss.
> >
> > . . . . .
> >
> > An award of damages presumes that the plaintiff's expectation can be protected by a money award *which will purchase substitute performance*. If the item bargained for is unique, then there is no exact substitute. [Emphasis added]
>
> [37] Two considerations emerge from that passage. First, it is the subject-matter of *the contract*, not the land alone that must be unique or unusual. Second, the measure of the adequacy of a money award is whether it "will purchase substitute performance". These considerations help shed light on the analysis where the vendor is the plaintiff.
>
> [38] The "uniqueness" analysis in such circumstances has a slightly different focus than in the usual case where the purchaser seeks the remedy. There, the issue is whether *the land itself* has some peculiar or special value *to the purchase*r who is seeking to obtain it and whether there is a reasonable substitute readily available. That paradigm does not fit into the analysis as readily where *the vendor* seeks specific performance. In one sense, there is nothing "unique" about the property the vendor receives when such an order is made. The vendor receives the purchase price -- the value of the land in money according to the contract.
>
> [39] It does not follow, however, that there may not be uniqueness, or a special character, to the circumstances of *the transaction* -- the subject-matter of the contract viewed more broadly -- that will justify specific performance. Where the vendor seeks the remedy, the focus should be on the transaction as a whole. [italics in original]

[88] However, I note that in *10381187 Canada* the application judge adopted the broader approach to the assessment of the uniqueness of the property in a case where the lessee was seeking specific performance not the owner. Also, in *Gill* the Court of Appeal for Ontario stated, at para. 16, that: "the nature of the agreement and the

property" as well as "the objective uniqueness of the agreement and the property" form part of the inquiry to determine whether the property "rather than its monetary equivalent better serves justice between the parties". *Gill* was not a case where a seller was seeking specific performance of a sale agreement but rather a family dispute where the appellants were seeking to enforce an agreement concluded with their son regarding the transfer of ownership to them of the home they occupied as their family home.

[89] In addition, in *Gill*, the court specifically stated:

> [19] … As this court instructed in *Lucas*, at para. 73: "In assessing whether a property is unique, courts may have regard to: (a) a property's physical attributes; (b) the purchaser's subjective interests, or (c) the circumstances of the underlying transaction." The trial judge erred by focussing solely on the property's physical attributes.

[90] Finally, the question as to whether a property is unique has both an objective and a subjective component. "A property does not have to be a singular property to be unique, but it has to have qualities that make it particularly suitable to the plaintiff's purposes and are difficult to replicate elsewhere: *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (SC), at para. 60, aff'd (2003), 63 OR (3d) 304 (CA)" (*Rabinowitz v 2528061 Ontario Inc*, 2024 ONSC 2357 at para. 74).

[91] As such, in my view, the fact that the claims were being sold as a mining operation with, among other things, the equipment and camp ready to operate, as well as the specific terms of the payment schedule, are relevant considerations in determining the uniqueness of the property considering Mr. Greer's, and by extension Legend's, stated purpose and interest in the mining claims at issue.

[92] As a result, I am of the view that there is evidence before me supporting a finding that the property is unique.

(b) Is Legend willing and able to complete the Purchase and Sale Agreement?

[93] Leaving aside the issue regarding the nature of the settlement agreement, the evidence reveals that Legend took a number of active steps to complete the transaction.

[94] Legend paid the down payment of $150,000 USD in full prior to Mr. Greer and another employee attending the Northstar Mining Claims at the end of May 2021.

[95] In addition, it is not disputed that Mr. Greer left Dawson City after Mr. McNeil in June 2021, and that Mr. Greer winterized the claims before he left.

[96] After Mr. McNeil failed to return the down payment, as agreed to, Mr. Greer contacted Mr. McNeil to determine where to send the $50,000 USD payment and 10% royalty for the gold mined during the 2021 season, as per the Purchase and Sale Agreement. However, Mr. McNeil did not respond to his inquiries.

[97] On September 4, 2021, Mr. Greer sent a cheque in the amount of $50,000 USD to Mr. McNeil, in accordance with the payment schedule of the Purchase and Sale Agreement. However, Mr. McNeil returned the cheque uncashed, taking the position that the Purchase and Sale Agreement was terminated.

[98] Also, in the summer of 2022, after Legend had filed its Statement of Claim, Mr. Greer attended the Northstar Mining Claims to perform maintenance work on the equipment and conduct some mining activities. He stopped mining when demanded to do so by Mr. McNeil.

[99] However, I note there is also evidence before me indicating that Mr. Greer is not willing nor prepared to complete the agreement.

[100] Mr. Greer did not inform Mr. McNeil that he intended to mine the Northstar Mining Claims in 2022.

[101] Mr. Greer did not attempt to pay the 15% royalty on the gold Legend mined during the 2022 season.

[102] In addition, Mr. Greer stated, in his examination for discovery, that he would not be prepared to put the $50,000 USD payment, that Mr. McNeil refused, in trust at this time because that money should be applied to the repairs Mr. McNeil failed to perform on the equipment.

[103] On balance, I am of the view that there is evidence supporting a finding that Legend has taken active steps to meet the financial aspects of the Purchase and Sale Agreement, steps that were halted by Mr. McNeil's refusal to accept the $50,000 USD payment in 2021 and by the commencement of this litigation. Also, Mr. Greer's responses in examination for discovery regarding the royalty due on the gold mined in 2022 and the $50,000 payment appear to be more an indicator of Legend's position in this litigation than an indicator of Legend's unwillingness and inability to meet its financial obligations under the Purchase and Sale Agreement. I note that Legend does not have the obligation to put money in trust to demonstrate its willingness to make the payments due under the agreement.

[104] However, the record also reveals that Legend has other business activities in the United States and the responses Mr. Greer provided regarding his willingness and ability to work the claims for the whole mining season every year are somewhat ambiguous even though he clearly stated that mining is something he wants to do.

[105] In addition, Mr. McNeil submits that Mr. Greer's failure to obtain the proper government authorizations to mine the claims and his failure to report the gold mined to the proper authorities demonstrate that Legend is not willing and able to meet its obligations under the Purchase and Sale Agreement.

[106] Mr. Greer did not deny he was unaware of most of his regulatory obligations as a gold miner. Mr. Greer's evidence is that, as per the Purchase and Sale Agreement, he relied on the advice of Mr. McNeil regarding the formalities to enter the country, the obtention of permits, the reporting of the gold mined, and the payment of royalties due to the government, and that, if he did not meet the rules in place, it was because he followed Mr. McNeil's advice and instructions or lack thereof.

[107] Legend's failure to report the gold mined in 2021 and 2022, as well as its failure to obtain the proper permits in 2022 is concerning. However, as it relates to the contractual relationship between Legend and Mr. McNeil only, Legend was entitled, in accordance with the Purchase and Sale Agreement, to rely on the advice of Mr. McNeil with respect to the conduct of the mining activities. Section 7 of the Purchase and Sale Agreement provides that:

> 7. **Training / Support.** Seller will be onsite for orientation and training for a few weeks of 2021 mining season. Seller has agreed to introduce Buyer to local resources and suppliers. Seller will assist Buyer with setup and/or transfer of accounts such as gold and regular banks, gold cleaner, Canadian Business Account, communication, Post Office, fuel, parts, utilities, etc.

[108] Also, under s. 6 of the Purchase and Sale Agreement, Mr. McNeil was the one responsible for maintaining the claims and permit status.

[109] In addition, Mr. Greer's evidence is that he fully registered Legend to operate in the Yukon in 2022 after realizing he had only registered the business' name with the Yukon Corporate Registry Office in 2021. His evidence is uncontradicted in that regard.

[110] On balance, inasmuch as the matter before me is a contractual dispute between two private parties, I am of the view there is sufficient evidence supporting a finding that Legend is willing and able to complete the Purchase and Sale Agreement.

(c) Does Legend come with clean hands?

[111] Mr. McNeil submits that equity should not assist Mr. Greer, and by extension Legend, because he does not come with clean hands. Mr. McNeil's argument rests on Mr. Greer's failure to inform himself of Legend's obligations regarding placer mining, his failure to obtain the proper authorizations to mine in Dawson City, and his failure, at least in part, to report and pay royalties on the gold mined.

[112] In *Victoria Gold (Yukon) Corp. v Yukon Water Board*, 2022 YKSC 46 at para. 22, Wenckebach J. described the application of the doctrine of clean hands as follows:

> The doctrine of clean hands prevents the applicant from using their bad behaviour to obtain equitable relief, such as a stay. However, it is not aimed at addressing an applicant's general bad behaviour. Rather, the wrongdoing must have "an immediate and necessary relation to the equity sued for". There must be a clear nexus between the applicant's behaviour and the basis upon which they are seeking relief. Otherwise, the doctrine of clean hands does not apply. [footnotes omitted]

[113] Again, Mr. Greer's failure to obtain the necessary permits and to report the gold Legend mined are concerning. However, Legend is not seeking a remedy in a case opposing it to government authorities in relation to its failure to comply with its regulatory obligations. The issue in this case is related to liability and enforcement of an

agreement between Legend and Mr. McNeil, who, according to Mr. Greer's uncontradicted evidence - at his examination for discovery - does not have clean hands either when it comes to compliance with regulatory obligations. Mr. Greer's evidence is that Legend failed to comply with its regulatory obligations because it relied on Mr. McNeil's advice, as it was entitled to in accordance with the Purchase and Sale Agreement (pp. 51-55, 123, 124, 154, 155, and 164-166 of Examination for Discovery).

[114] Considering the parties' respective rights and obligations under the Purchase and Sale Agreement, I am of the view there is a nexus between Legend's failure to obtain the necessary permits for mining and to report the gold it mined, and meeting its obligations under the Purchase and Sale Agreement it seeks to enforce. However, considering the evidence filed before me regarding the conduct of both parties with respect to compliance with regulatory obligations, I am of the view that the doctrine should not be relied on at this stage to preclude Legend from seeking specific performance of the Purchase and Sale Agreement.

[115] Based on my conclusions that a trial is necessary to determine whether the settlement agreement was conditional upon performance; that there is evidence supporting a finding that the property is unique and that Legend is able and willing to complete the Purchase and Sale Agreement; and that, at this stage, the evidence does not justify the application of the doctrine of clean hands, I am of the view that the determination of whether specific performance is a remedy available to Legend in this case should be left until after all the evidence is heard and liability determined at trial. As a result, Mr. McNeil's application for a declaration that specific performance of the Purchase and Sale Agreement is not available to Legend is dismissed.

[116] I now turn to Legend's application for an interlocutory injunction.

B. Is Legend entitled to an interlocutory injunction?

[117] Legend's main argument for an injunction is based on its claim for specific performance of the Purchase and Sale Agreement and the necessity of such an order to preserve the assets at the center of its claim, while the matter is being litigated, to ensure it is able to exercise its proprietary rights over the Northstar Mining Claims, equipment and camp if successful at trial.

[118] The parties disagree on the legal test that applies to Legend's application. Legend submits it is seeking an interlocutory injunction and the applicable test is set out in *RJR-MacDonald v Canada (Attorney General),* [1994] 1 SCR 311 ("*RJR-MacDonald*").

[119] Mr. McNeil submits Legend is seeking a *Mareva* type injunction because the order sought would, in effect, freeze all his assets in Canada. Therefore, the more stringent test set out in *Fine Gold Resources, Ltd. v 46205 Yukon Inc*., 2016 YKCA 15 ("*Fine Gold Resources*"), applies.

[120] A *Mareva* injunction is essentially a freezing order. It is sought to prevent a defendant from dissipating or transferring their assets pending judgment or final order (*Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 ("*Aetna*") at 25).

[121] In *Aetnea* at 25, Estey J. stated that an injunction sought against the very subject-matter of the litigation is not to be equated to a *Mareva* injunction. More recently, this exception was reiterated by the Court of Appeal for British Columbia in *Kepis & Pobe Financial Group Inc. v Timis Corp*., 2018 BCCA 420:

> [5] In *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 [Aetna], the Court confirmed *Mareva* injunctions are

> available in Canada and identified two main hurdles an applicant must overcome to obtain a *Mareva* injunction. First, the applicant must show that the defendant's wrongful acts would cause the applicant irreparable harm unless they were restrained. Second, and perhaps the higher hurdle, the applicant must overcome the rule against granting a plaintiff pre-judgment security. To overcome both hurdles, the Court stated, the applicant must provide evidence of: (i) a "strong *prima facie* case"; and (ii) a real risk that the defendant will remove its assets from the jurisdiction, or dispose of or dissipate those assets, in order to avoid the enforcement of a potential judgment.
>
> [6] The Court also carved out four exceptions to the rule against granting pre-judgement security:
>
> 1. for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute: ...;
>
> 2. where generally the processes of the court must be protected even by initiatives taken by the court itself;
>
> 3. to prevent fraud both on the court and on the adversary: ...; and
>
> 4. *quia timet* injunctions were generally permitted under extreme circumstances which included a real or impending threat to remove contested assets from the jurisdiction. [Emphasis added]

[122] In his book *Injunctions and Specific Performance* (loose leaf ed., Toronto: Canada Law Book, 1992 (updated November 2024, release 1)), at para. 2:20, pp 2-105 and 2-106, Robert Sharpe, formerly a judge of the Court of Appeal for Ontario, discusses the use of interlocutory injunctions in matters where the plaintiff seeks to restrain the disposition of assets pending trial. In his view, the test for interlocutory injunctions applies where the assets are the subject-matter of the litigation:

> Interlocutory injunctions are frequently granted to restrain disposition of an asset where the plaintiff asserts a specific or proprietary claim in respect of that asset. Rules of Court, and in some jurisdictions legislation, typically provide for interim preservation of property. If the plaintiff sues for specific performance of an agreement of sale, an interlocutory injunction may be granted, restraining the defendant from defeating the plaintiff's claim by disposing of the property in question before trial. Similarly, even where the plaintiff asserts a money claim, an interlocutory injunction may be granted to protect the claim where the plaintiff has some proprietary right in the money or right to trace that particular fund. The basis for injunctive relief here is to prevent dissipation or destruction of the property which is the subject-matter of the suit. Such orders are made in accordance with the usual principles governing interlocutory injunctions and are to be distinguished from *Mareva* injunctions. [footnotes omitted] [Emphasis added]

[123] Also, in *Fine Gold Resources*, the Court of Appeal of Yukon distinguished the appellant's matter, which was required to meet the criteria for a *Mareva* injunction because it was seeking an order precluding the respondents from dealing with any of their assets, with the situation in *Duke Ventures Ltd. v Seafoot,* 2015 YKSC 14*,* where the test for an interlocutory injunction was applied because it related to the natural resource that was the subject of the litigation:

> [37] The appellant relies upon cases, including *Duke Ventures Ltd. v Seafoot* 2015 YKSC 14, where interlocutory injunctions have been issued to preclude the loss of the natural resource that is the subject of the litigation, pending a trial on the merits. However, the appellant sought an order precluding the respondents from dealing with any of their assets. Its application for a *Mareva* injunction was not concerned with irreparable harm in the shape of a loss of a resource incapable of being quantified in monetary terms, as in *Duke Ventures*. The application did not seek to enjoin mining or the despoiling of irreplaceable land but, rather, to preserve the revenue generated by mining operations that had already been carried out. In these circumstances, the application was properly required to meet the usual criteria for a *Mareva* injunction.

[124] In my view, the fact that the Northstar Mining Claims and equipment happen to be Mr. McNeil's sole assets in the Yukon, does not change the nature of the order sought by Legend, which is an order preventing the dissipation, removal, transfer or sale of the very subject-matter of the litigation. In addition, Mr. McNeil, an American who resides in the United States confirmed in his examination for discovery that he has accounts and real property in the United States. In that sense, the order only targets one of Mr. McNeil's assets, the Northstar Mining Claims in Dawson City, including its buildings and equipment. The *Mareva* test, set out in *Fine Gold Resources*, does not apply to this type of application.

[125] Legend filed its application under Rule 51, which deals with pre-trial injunctions. Legend seeks an order that Mr. McNeil (or any agent, invitee, or other party associated with Mr. McNeil) not remove any equipment, assets, or gold from the Northstar Mining Claims, included in the Purchase and Sale Agreement and that Mr. McNeil be enjoined not to sell or transfer the Northstar Mining Claims until a final decision is made in this matter or until further order of the Court.

[126] In my view, the test for an interlocutory injunction applies in this case, keeping in mind that the subject-matter of the claim is the purchase and sale of the Northstar Mining Claims, including the buildings and equipment.

[127] To obtain an interlocutory injunction, an applicant must satisfy the following criteria:

i. there is a serious question to be tried;

ii. the applicant will suffer irreparable harm if the injunction is not granted; and

iii. the balance of convenience, taking into account the public interest, must favour the injunction. (*RJR-MacDonald* at 334)

[128] In my view, Legend meets all three branches of the test.

i. Is there a serious question to be tried?

[129] This question is to be determined based on common sense and an extremely limited review of the case on the merits. The threshold to meet this branch of the test is low. Unless the claim is frivolous or vexatious, or the result of the interlocutory application will in effect amount to a final determination of the action, or the matter raises a constitutional issue that presents itself as a question of law alone, as a general rule, the application judge should consider the second and third branches of the test (*RJR-MacDonald* at 337-338).

[130] Considering my findings on the issue of specific performance, I am of the view that the evidence reveals there are serious questions to be tried: whether the settlement agreement terminated the Purchase and Sale Agreement; whether one of the parties breached the Purchase and Sale Agreement; and whether Legend is entitled to specific performance.

ii. Will Legend suffer irreparable harm if the injunction is not granted?

[131] The only issue to determine at this stage is "whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application" (*RJR-MacDonald* at 341).

[132] In addition, the term "irreparable" refers to the nature of the harm not its magnitude. A harm that "…cannot be cured, usually because one party cannot collect damages from the other" constitute irreparable harm (*RJR-MacDonald* 341).

[133] Legend submits that it has filed evidence that Mr. McNeil has taken steps to sell the Northstar Mining Claims and its equipment. Legend acknowledges that the sale of the one piece of equipment can be compensated through damages. However, the sale or transfer of the claims and equipment cannot be properly compensated by damages because there is no information about the quantity of gold comprised in the claims. In addition, Legend submits the sale or transfer of the mining claims would render the remedy of specific performance it seeks devoid of any utility.

[134] Mr. McNeil argues Legend has not demonstrated it would suffer irreparable harm if the injunction were not granted. Mr. McNeil submits this is not a case of preservation of natural resources pending trial because both parties want to mine the claims for profit. In addition, Mr. McNeil argues that, under the Purchase and Sale Agreement, he continues to have the exclusive rights to mine the claim. Mr. McNeil adds that Legend is asking the Court to protect mere speculation in relying on the fact that the quantity of gold located within the claims is unknown. Mr. McNeil adds that Legend's claim can be quantified, and that, at most, Legend would be entitled to the purchase price. Mr. McNeil submits that he has assets in the United States that could satisfy a judgment if Legend were successful with its claim.

[135] The evidence before me does not support a finding that Mr. McNeil intends to work the claims. To the contrary, the evidence reveals that Legend's belief that Mr. McNeil is taking active steps to sell or transfer the mining claims and the equipment before trial is reasonable, and there is a real risk the claims will be sold prior to trial if the injunction is not granted.

[136] Mr. McNeil acknowledged during his examination for discovery that he sold a caterpillar loader that forms part of the Purchase and Sale Agreement after Legend filed its Statement of Claim in this case because he views it as his property.

[137] As for the Northstar Mining Claims, Mr. Greer attested in his affidavit that he was contacted by a miner who told him he was in negotiations with Mr. McNeil to buy the mining claims. According to Mr. McNeil, that miner had searched the abstracts of the Miner Recorder, had seen the statement of claim registered against the claims and wanted to discuss them. The text message attached to Mr. Greer's affidavit supports his evidence.

[138] Around the same time, Legend's counsel received a letter from Mr. McNeil's counsel demanding the removal of the statement of claim registered against the Northstar Mining Claims. The letter is attached to one of Mr. Greer's affidavits.

[139] Finally, Mr. McNeil did not file any evidence on these applications denying he was in negotiations to sell the Northstar Mining Claims at the time.

[140] In my view, the evidence before me reveals that Mr. McNeil took active steps to sell the Northstar Mining Claims to a third party prior to consenting, through counsel, to an interim injunction until a decision is made on the applications, and there is a real risk he will sell the Northstar Mining Claims with its assets, including the buildings and equipment, before trial if the interlocutory injunction is not granted.

[141] As a result, I find that irreparable harm would be caused to Legend if the interlocutory injunction is not granted as its claim for specific performance would be defeated by the sale or transfer of the Northstar Mining Claims and its assets, including its buildings and equipment.

iii. The balance of convenience

[142] Legend submits the balance of convenience favours granting the injunction.

[143] Legend submits Mr. McNeil will suffer no harm if the injunction is granted because he has not actively mined the claims for years and, instead, has been attempting to sell them. In addition, Legend submits that the injunction only concerns the Northstar Mining Claims and does not preclude Mr. McNeil from continuing his other activities.

[144] Legend also submits that, until Mr. McNeil sold a piece of equipment in the summer of 2023 and took active steps to sell the mining claims, the *status quo* was that the claims and equipment would not change hands. Legend submits that Mr. McNeil delegated the exclusive right to mine to Legend upon signing the Purchase and Sale Agreement.

[145] Mr. McNeil submits that an injunction would interfere with the *status quo* because it would prevent him from exercising his exclusive right under the *Placer Mining Act*, SY 2003, c 13, to enter the claim to work it. Mr. McNeil submits that, under the Purchase and Sale Agreement, the right of exclusivity will not pass to Legend until it pays the purchase price in full.

[146] First, the wording of the Purchase and Sale Agreement does not support Mr. McNeil's argument regarding his exclusive right to mine the claim. Read as a whole, the Purchase and Sale Agreement reveals the parties agreed that Legend, not Mr. McNeil, would work the claim and pay a percentage of the gold mined to Mr. McNeil until the purchase price was paid in full. This conclusion reflects what Mr. McNeil and

Mr. Greer expressed in the excerpts of their examinations for discovery, filed on the applications.

[147] In addition, there is no evidence before me that Mr. McNeil or someone working for him has worked on the claims since 2021. The evidence reveals that Mr. McNeil's only actions in relation to the Northstar Mining Claims are the steps he took to sell the claims and its equipment.

[148] As a result, I am of the view that the balance of convenience favours the granting of the interlocutory injunction sought by Legend.

[149] As Legend has met the three branches of the *RJR-MacDonald* test, its application for an interlocutory injunction regarding the Northstar Mining Claims and assets included in the Purchase and Sale Agreement, is granted.

CONCLUSION

[150] The application of Mr. McNeil is dismissed.

[151] The application of Legend for an interlocutory injunction is granted.

[152] Costs of the two applications may be discussed in case management, if necessary.

_____

CAMPBELL J.