COURT OF APPEAL FOR YUKON

Citation: *Golden Hill Ventures Limited Partnership v. Ross Mining Limited*, 2012 YKCA 8

Date: 20120629
Docket: 11-YU690

Between:

Golden Hill Ventures Limited Partnership

Appellant
(Petitioner)

And

Ross Mining Limited, MacKenzie Petroleums Ltd. and Norman Ross

Respondents
(Respondents)

- and -

Between:

Norman Ross

Respondent
(Plaintiff)

And

Ross Mining Limited and MacKenzie Petroleums Ltd.

Respondents
(Defendants)

And

Golden Hill Ventures Limited Partnership

Appellant
(Defendant)

Before: The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of Yukon, December 6, 2011
(*Golden Hill Ventures Limited Partnership v. Ross Mining Limited and Norman Ross*, 2011 YKSC 91, Whitehorse Nos. 09-A0014 and 09-A0087))

Counsel for the Appellant: M. B. Morgan

Counsel for the Respondent, Norman Ross: M. J. Leitch

Counsel for the Respondent, MacKenzie Petroleums Ltd.: J. Barrett

Place and Date of Hearing:	Whitehorse, Yukon June 7, 2012
Place and Date of Judgment:	Vancouver, British Columbia June 29, 2012

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The appellant, Golden Hill Ventures Limited Partnership (the "Limited Partnership"), appeals from the order of the trial judge dated December 6, 2011 discharging and vacating the claim of lien filed by the Limited Partnership against the mining property (the "Mine") owned by Ross Mining Limited (the "Mine Owner").

[2] The order was made in two proceedings. The first was an action by Norman Ross, the former owner of the shares in the Mine Owner, to enforce security given by the Mine Owner against its assets to secure the payment of a portion of the purchase price payable to Mr. Ross for the sale of his shares in the Mine Owner. The second was a proceeding commenced by the Limited Partnership for a declaration that it held a valid lien against the Mine pursuant to the *Miners Lien Act*, R.S.Y. 2002, c. 151, (the "*Act*") in priority to the security held by Mr. Ross. MacKenzie Petroleums Ltd. was joined to both proceedings because it had also filed a claim of lien against the Mine.

[3] The primary basis for the judge's order was the application of the principle said to be enunciated in *Big Creek Construction Ltd. v. York-Trillium Development Group Ltd.* (1993), 8 C.L.R. (2d) 138 (Ont. Gen. Div.), that an owner of a property should not be permitted to lien his or her own property. The judge also supported his order on three alternate grounds: (1) the true relationship between the Mine Owner and the Limited Partnership was one of borrower and lender; (2) the claim of lien by the Limited Partnership was contrary to covenants given by the Mine Owner to Mr. Ross; and (3) the claim of lien was not verified by invoices.

[4] For the reasons that follow, I would dismiss the appeal. My reasons are based on the first of the judge's alternate grounds for supporting the order. I have reservations about the breadth of the principle relied on by the judge as the primary basis for the order and its application to this case. I would prefer to rely upon the first alternate ground in respect of which I have no reservations.

Background

[5] The Mine has been owned by the Mine Owner at all material times. The shares in the Mine Owner were initially owned by Mr. Ross and his wife.

[6] Jon Rudolph owned a number of construction businesses, including Golden Hill Ventures Ltd., which were involved in the rebuilding of the Alaska Highway in Canada. Construction was nearing completion in 2005, and Mr. Rudolph looked for other businesses in which the equipment owned by his companies could be put to use.

[7] In November 2005, a company owned by Mr. Rudolph, 38890 Yukon Inc., agreed to purchase the shares of Mr. Ross in what was then Ross Mining Limited and the shares of Mr. and Mrs. Ross in 20949 Yukon Ltd. (later amalgamated to form the Mine Owner) for the sum of $9 million, $2 million of which was paid in cash and the balance of which was payable by way of a loan agreement. Payment of the balance of the purchase price was secured against the assets of the Mine Owner.

[8] The Limited Partnership was formed in late 2005. The partners of the Limited Partnership are Golden Hill Ventures Ltd. (as to approximately 99%) and an unrelated company, 2122458 Ontario Inc. (as to approximately 1%). Golden Hill Ventures Ltd. is the general partner of the Limited Partnership.

[9] As of April 1, 2006, all the assets of Golden Hill Ventures Ltd. were transferred to the Limited Partnership, which the judge found became the entity that operated the Mine. Also as of April 1, 2006, the Limited Partnership entered into loan agreements with 38890 Yukon Inc. and Ross Mining Ltd.

[10] The loan agreements contained a recital that the Limited Partnership had agreed to provide loans to 38890 Yukon Inc. and Ross Mining Ltd., respectively, for working capital purposes (which was defined as the "Indebtedness"). The first section and the first two sentences of the second section read as follows:

> 1. **Principal:** The [Mine Owner] acknowledges and agrees that from and after April 1, 2006 it will be borrowing the Indebtedness from [the

> Limited Partnership] in varying amounts from time to time. The financial records of [the Limited Partnership] shall be deemed to be conclusive evidence of the Indebtedness between the parties.
>
> 2. **Promise to Pay and Interest Calculation:** The Indebtedness and any outstanding or accrued interest and any other charges hereunder is due on demand. The Indebtedness shall bear interest at the rate of 8% per annum commencing April 1, 2006.

The agreement also provided that the Indebtedness was unsecured but the Mine Owner agreed to provide security if requested by the Limited Partnership.

[11] 38890 Yukon Inc., 20949 Yukon Ltd. and Ross Mining Ltd. amalgamated under the name of the Mine Owner on November 1, 2006 (the shares of the continuing company were then owned directly by Mr. Rudolph). The April 1, 2006 loan agreements were replaced with a consolidated loan agreement dated as of November 1, 2006 between the Limited Partnership and the Mine Owner (as amalgamated). The consolidated loan agreement was substantially the same as the April 1, 2006 loan agreements and, in particular, it contained the equivalent of sections 1 and 2 quoted above, as well as the provision regarding security. The Limited Partnership never requested security from the Mine Owner, and none was given.

[12] In his reasons for judgment, indexed as 2011 YKSC 91, the trial judge quoted, at para. 22, the following passages from an affidavit sworn by Mr. Rudolph in support of the lien claimed by the Limited Partnership with respect to the goods and services provided to the Mine by the Limited Partnership and third party contractors:

> 4. As stated previously, on November 1, 2006 [the Limited Partnership] entered into a Loan Agreement with [the Mine Owner] by which [the Limited Partnership] agreed to provide loans to [the Mine Owner] from time to time for working capital and other purposes.
>
> 5. Further, [the Limited Partnership] had an agreement with [the Mine Owner], in part oral and in part by conduct, that [the Limited Partnership] would provide, and did in fact provide, work or services and materials to [the Mine Owner] for the operation of its mine, including but not limited to: [Limited Partnership] employees to work at the mine or in connection with the mine; rental of Golden Hills Ventures Ltd. or [Limited Partnership] equipment to [the Mine Owner]

> for use at, in or in connection to the mine; and [the Limited Partnership] ordering and paying for parts from its suppliers and providing them to [the Mine Owner], or contracting with mechanics to repair [Mine Owner] equipment.
>
> 6. In practice what would happen is, for instance, [the Mine Owner] through its employees, such as a mechanic or foreman, would contact [the Limited Partnership] to indicate that it needed a part, or repair to its equipment. [The Limited Partnership] would then order and pay for the part and deliver it to [the Mine Owner] or hire and pay someone, such as Fred Cumming a contract mechanic, to do work on [the Mine Owner's] equipment.
>
> 7. While [the Limited Partnership] did not invoice [the Mine Owner] for these services or materials, it was furthered agreed as stated previously, that the intercompany account, and the financial records kept by [the Limited Partnership] of the transactions through this account, would be evidence of the amounts owed by [the Mine Owner] to [the Limited Partnership] for theses (sic) materials and services.
>
> 8. While the suppliers and mechanics themselves may have had liens against [the Mine Owner] for the work and services they provided for the benefit of [the Mine Owner] and the mine, but for [the Limited Partnership] duly paying them, [the Limited Partnership] is in an analogous relationship to a general contractor that has not been paid for the work or services and the materials that it provided to [the Mine Owner] in connection with the mine.

[13] As reflected in the above affidavit, the Limited Partnership did not invoice the Mine Owner for any of the goods and services provided by it or by the third party contractors. Some of the third party contractors issued invoices to the Mine Owner (as opposed to the Limited Partnership), and the amounts of these invoices were withdrawn from the lien claimed by the Limited Partnership.

[14] The Mine Owner encountered financial difficulties and defaulted on the payments due to Mr. Ross and others. PricewaterhouseCoopers Inc. was appointed as monitor of the Mine Owner on June 9, 2009 and was appointed as receiver of the Mine Owner on July 29, 2009. The Limited Partnership did issue three invoices to the Mine Owner for goods and services provided after the monitor was appointed.

[15] The Limited Partnership initially claimed a lien in the amount of $4,713,543. The claimed amount was subsequently increased to $6,790,456.29 and then reduced to $2,810,627.08.

[16] After the Limited Partnership commenced the proceeding for a declaration that it had a valid lien, Mr. Ross applied for a summary judgment dismissing the petition on two grounds, including the ground that the monies owing in respect of the claimed lien were loan amounts that could not be the subject of a valid lien under the *Act*. The application was heard by the judge who later became the trial judge and, in reasons for judgment indexed as 2009 YKSC 80, he dismissed the application. He held that it was not appropriate for him to weigh the evidence and the case was not bound to fail on the pleadings. An appeal from this decision was dismissed in reasons for judgment indexed as 2010 YKCA 4, in which Madam Justice Garson commented, at para. 17, that while Mr. Ross "may well succeed at trial in persuading a judge that the whole claim is a debt claim and not one for work and services", the pleadings did disclose sufficient material facts from which a claim of lien could be made out.

[17] The matter then proceeded to trial. The trial judge received into evidence affidavits that had previously been filed in the two proceedings, and he also heard testimony from Mr. Rudolph and Mr. Richard Purcell, an accountant who worked for the Limited Partnership during part of the period in question.

[18] In his reasons for judgment, the trial judge discussed the primary basis for his decision in considerable detail. In view of his conclusion on this first issue, his reasons for the alternate grounds to invalidate the claim of lien were relatively brief, each being a paragraph in length.

Discussion

[19] In general terms, a person has a lien under the *Act* if the person provides services or materials to a mine. A 2008 amendment to the *Act* (S.Y. 2008, c. 17, s. 5) provides that a renter of equipment is deemed to have performed a service. It is conceded by the Limited Partnership that a person who lends money to an owner of a mine does not thereby provide a service or material to the mine and is not entitled to a lien under the *Act* in respect of the borrowed monies.

[20] On appeal, the Limited Partnership focused its submissions on the primary basis for the judge's decision. The submissions in its factum with respect to the first alternate ground were limited to the following:

> 63. The Trial Judge also erred in law and in fact by relying on the Consolidated Loan Agreement in the manner in which he did. There is no basis in law for the conclusion that because a lien claimant is also a lender, separate and apart from its supply of services and materials to the mine, a lien filed by that claimant is not for that reason valid. Further, the Trial Judge made a palpable and overriding error of fact when he concluded that the Lien was for loans made to [the Mine Owner] pursuant to the Consolidated Loan Agreement. The Lien was in fact for work, service and materials provided to [the Mine Owner] and was based on a separate but related contract – the RML Agreement [a defined term for the agreement asserted in paragraph 5 of the affidavit of Mr. Rudolph quoted above].

[21] At the hearing of the appeal, the Limited Partnership submitted that the trial judge did not find that the sole relationship between the Limited Partnership and the Mine Owner was one of lender and borrower. It says that the judge merely found that a relationship of lender and borrower did exist, and that he also found, in para. 63 of his reasons for judgment and in para. 33 of his subsequent reasons for judgment dealing with costs (indexed as 2012 YKSC 18), that the Limited Partnership was a supplier to the Mine, in respect of which it is entitled to a lien under the *Act*.

[22] With respect, it is my view that, while the Limited Partnership itself did supply some of the goods and services to the Mine, the trial judge found that the character of all of the monies owing by the Mine Owner to the Limited Partnership included in the claim of lien was a loan owing under the consolidated loan agreement. On my reading of his reasons, the judge did not hold that the Limited Partnership was disentitled to a lien merely because it was a lender as well as a supplier.

[23] The judge stated, at para. 34, the issues before him as follows:

> 1. Does the *Miners Lien Act* permit an owner to claim a lien against the owner's mining property?
> 2. Is [the Limited Partnership] an owner of the gold mine?
> 3. Are there other grounds to invalidate [the Limited Partnership's] claim of lien?

[24] After the judge dealt with the first two issues, he started his discussion of the third issue as follows:

> [64] In addition to offending the principle that an owner cannot lien his own property, there are other grounds for vacating the [Limited Partnership] lien.
>
> [65] Firstly, [the Limited Partnership] entered into a Consolidated Loan Agreement with [the Mine Owner], thus establishing a relationship of lender and borrower. In my view there is no basis for permitting a lien which is based upon the financing of a project. The loan of money is not a service recognized by the [*Miners Lien Act*].

[25] In my opinion, the judge was not simply finding in para. 65 that a relationship of lender and borrower existed in addition to a relationship of supplier and mine owner. It is clear from the wording of the third issue in para. 34 and the wording in para. 64 that the judge relied upon his finding as the basis for disallowing the entire claim of lien. He could use the finding to disallow the entire claim only if he was of the view that all of the monies included in the claim were loans under the consolidated loan agreement. The judge knew that this was the position of Mr. Ross from the time he made the application for the summary dismissal of the Limited Partnership's petition.

[26] The judge's finding that the Limited Partnership was a supplier to the Mine is not inconsistent with his conclusion. In my view, it was open to the judge to find that the Limited Partnership did not remain unpaid for the goods and services supplied by it because it had been paid for them with proceeds of loan advances under the consolidated loan agreement.

[27] As I will detail below, there was evidence from which the judge could infer that the amounts owing to the Limited Partnership for goods and services supplied by it had been paid with loan proceeds advanced under the consolidated loan agreement and that the entire amount of the indebtedness owing by the Mine Owner constituted loans under the consolidated loan agreement. The Limited Partnership was not entitled to a lien in respect of loans owing to it.

[28] The Limited Partnership also asserts the judge made a palpable and overriding error in finding that any of the amounts included in its claim of lien were

loans under the consolidated loan agreement. In my view, there was ample evidence from which the judge could make this finding, and I am not persuaded he made a palpable and overriding error. I will highlight some aspects of the evidence that support the judge's finding and serve to refute the agreement asserted by the Limited Partnership in support of its claim of lien.

[29] There were two aspects to the Limited Partnership's claim of lien. The first aspect related to goods and services provided to the Mine by third party contractors whose invoices were paid by the Limited Partnership. The Limited Partnership asserted that it was in a position analogous to a general contractor and these third parties were its subcontractors. The second aspect of the claim related to the goods and services that the Limited Partnership itself provided to the Mine.

[30] The following evidence supported the finding that the relationship between the Limited Partnership and the Mine Owner with respect to the goods and services supplied by third party contractors was one of lender and borrower:

1. No invoices for the goods and services covered by the claim of lien were issued by the Limited Partnership to the Mine Owner prior to the appointment of the monitor.

2. The loan agreements were put in writing but there was no written agreement or other contemporaneous document supporting the alleged agreement for the provision of goods and services.

3. The accountant, Mr. Purcell, testified that the sum of $5,471,306 shown on the 2006 financial statements of the Limited Partnership due from the Mining Owner consisted of: (a) money advanced by the Limited Partnership to the Mining Owner; (b) goods and services supplied to the Mining Owner by the Limited Partnership; (c) interest; and (d) part of the unpaid purchase price for the Mine. He also agreed in cross-examination that interest was being charged on the entire sum at the rate of 8% pursuant to the consolidated loan agreement and that the entire sum was owing under the consolidated loan agreement.

4. The notes to the 2008 financial statements of the Limited Partnership stated that the sum of $10,689,399 (which was comprised of the same four things as the $5,471,306 figure on the 2006 statements) was a "loan receivable". The notes to the 2008 financial statements of the Mine Owner made reference to the same sum of $10,689,399 as being due to the Limited Partnership and stated that the "advances from [the Limited Partnership] bear interest at 8% per annum".

5. The affidavit quoted above in para. 12 was sworn by Mr. Rudolph some time after the Limited Partnership commenced its proceeding and after Mr. Ross had filed his summary judgment application taking the position that the monies for which the Limited Partnership was claiming its liens were loans and were not lienable. However, the petition commencing the proceeding, filed October 21, 2009, contained the following statement to the effect that the sums for which the Limited Partnership was claiming a lien were monies owing under the consolidated loan agreement:

> 15. The Defendant Ross Mining Limited further owes the Plaintiff additional sums under the Loan Agreement, but not in connection with the Mining Claims, which the Plaintiff reserves the right to pursue judgment for in a separate proceeding.

Mr. Rudolph made the same statement in an affidavit he swore in support of the petition. It was not until Mr. Ross filed his summary judgment application that the Limited Partnership attempted to maintain that the monies were not owing to it under the consolidated loan agreement. The Petition was amended April 8, 2010, to strike out the words "but not in connection with the Mining Claims".

6. When asked on his examination for discovery if he was saying there were two separate agreements (being the consolidated loan agreement and the alleged agreement for the Limited Partnership to provide goods and services to the Mine Owner), Mr. Rudolph testified: "No, I didn't say that." He confirmed that statement during cross-examination at the trial.

7. The trial judge found that the consolidated loan agreement did not contain anything about the provision of services, repairs and materials (para. 28), and there was no agreement other than the loan agreements by which the Mining Owner agreed to pay interest on unpaid amounts owing for goods and services supplied by the Limited Partnership.

[31] The evidence in support of the inference that the amounts owing to the Limited Partnership for goods and services supplied by it had been paid with loan proceeds advanced under the consolidated loan agreement included the evidence summarized in points 3, 4, 5 and 7 above, as well as the finding of the trial judge that prior to the appointment of the receiver neither the Limited Partnership nor Mr. Rudolph ever asserted that the work or services provided by the Limited Partnership to the Mine Owner would entitle the Limited Partnership to a claim of lien against the Mine (para. 27).

[32] In sum, the Limited Partnership was not entitled to a lien against the Mine because the trial judge effectively found that all of the monies owing by the Mine Owner to the Limited Partnership in its claim of lien were loans under the consolidated loan agreement, and it has not been demonstrated that the judge made a palpable and overriding error in this regard.

Conclusion

[33] It is for these reasons that I would dismiss the appeal, with costs to Mr. Ross and MacKenzie Petroleums Ltd.

D. Tysoe J.A.
The Honourable Mr. Justice Tysoe

I agree:
The Honourable Mr. Justice Groberman

I agree:
J.A. J.A.
The Honourable Mr. Justice Hinkson

AUTHORIZATION FOR SIGNING AUTHORITY

I, Mr. Justice C. E. Hinkson, judge of the Court of Appeal for Yukon, authorize Mr. Justice Richard Low, judge of the Court of Appeal for Yukon, to sign on my behalf the reasons for judgment in *Golden Hill Ventures Limited Partnership v. Ross Mining Limited*, Docket 11-YU690, with which I agree.

The Honourable Mr. Justice C. E. Hinkson

June 18, 2012
[Date]

Please ensure that a copy of the signed authority is filed with the Court of Appeal Registry and is distributed to the other judges of the panel.