

SUPREME COURT OF YUKON

Citation: *Fine Gold Resources, Ltd. v. 46205 Yukon Inc.*
2017 YKSC 6

Date: 20170203
S.C. No. 15-A0137
Registry: Whitehorse

Between:

Fine Gold Resources, Ltd.

Plaintiff

And

46205 Yukon Inc., Russian Mining Inc., Them R Gold Ltd., Troy Cahoon
and Richard Fanslow

Defendants

Before Mr. Justice R.S. Veale

Appearances:

Gary W. Whittle

Mark E. Wallace

James R. Tucker

Counsel for the Plaintiff

Counsel for the Defendants 46205 Yukon Inc.,
Russian Mining Inc. and Richard Fanslow

Counsel for the Defendants Them R Gold Ltd. and
Troy Cahoon

REASONS FOR JUDGMENT

INTRODUCTION

[1] VEALE J. (Oral): The defendants have applied for a Summary Trial pursuant to Rule 19 of the *Rules of Court*. The plaintiff Fine Gold applies under Rule 19(9) for an order that the application be dismissed as not suitable for disposition until full discoveries are completed, leave be granted to Fine Gold to conduct examinations for discovery and the proceeding be stayed until August 1, 2017.

[2] Alternatively, Fine Gold applies to adjourn the application for Summary Trial until discoveries are completed.

[3] Fine Gold claims that the defendants have trespassed on Claims 7 and 8 of Eureka Creek based on the proposed formal survey.

[4] The defendants claim that they can rely upon the claim boundaries of Hiro 1 and Them R Gold 10 in existence at the time of the alleged trespass.

[5] A formal survey, pursuant to s. 39 of the *Placer Mining Act* (the “Act”), S.Y. 2003, c. 13, will define the boundaries which will be completed this year subject to an appeal.

[6] The issue is whether the Hiro 1 and Them R Gold 10 claims are valid until the final boundary determination under s. 39. If so, that would provide a defence to a significant part of the Fine Gold claim. The Summary Trial application requires an interpretation of s. 24(6) of the *Act*.

BACKGROUND

[7] As I understand it, the primary claim of Fine Gold is that the defendants have trespassed and mined gold on its placer Claims 7 and 8 on Eureka Creek, in the Dawson Mining District, without Fine Gold’s consent and therefore Fine Gold is entitled to damages. The defendants claim that, if they have mined on Claims 7 and 8, it was with lawful excuse or the consent of Fine Gold.

[8] Fine Gold and the defendants agree that, pursuant to a Lease Agreement dated August 1, 2012, Fine Gold (then called Heisey Ventures Inc.) granted the Russian Mining defendants the right to mine gold on Claim 7 from August 2012 to September 30, 2013 (“the Lease”).

[9] Michael Heisey is the President of Fine Gold and Troy Cahoon is a shareholder and director of Them R Gold. Mr. Heisey and Mr. Cahoon are the main protagonists in this dispute. They appear to have had a friendly relationship until September 2015,

when the boundary dispute arose and Mr. Heisey concluded that Mr. Cahoon and consequently the Russian Mining defendants were trespassing on his Claims.

[10] There is no doubt that Mr. Cahoon conducted mining operations on behalf of the Russian Mining defendants on what the parties identified in the Lease as Claim 7.

Mr. Cahoon's last report of gold production under the Lease was July 5, 2013.

Mr. Cahoon signed a Discharge and Release of the Lease and filed it with the Mining Recorder on October 22, 2013.

[11] Mr. Cahoon also claims to have purchased various mining equipment from Fine Gold in order to mine what the parties identified as Claim 7 within the Lease. Whether the Lease and the equipment purchase were performed according to an agreement may be in dispute, although it appears that this dispute did not arise until the boundary dispute.

[12] Mr. Cahoon also conducted mining operations for the Russian Mining defendants under the Water Licence of Fine Gold during the Lease and up until the boundary dispute arose.

[13] The material suggests that Mr. Cahoon, on behalf of the Russian Mining defendants, was mining in the area in 2014 and 2015 with the knowledge of Fine Gold. What is in dispute, however, is where Mr. Cahoon mined and where the boundaries of Claim 7 and 8 actually are.

[14] It is my understanding that, at the request of Mr. Heisey, on September 15 and 16, 2015, Glen Lamerton, a qualified Canada Lands Surveyor, located and surveyed the claim posts of Claim 7 and the contiguous claims with the assistance of Mr. Cahoon and Mr. Heisey. Mr. Lamerton and Mr. Heisey swear under oath that Mr. Cahoon mined a

certain “pit” on Claim 7. Mr. Cahoon swears under oath that at no time during the survey on Claim 7 did he realize or conclude that he had mined on Claim 7 without authorization.

[15] Mr. Heisey retained Mr. Lamerton on March 16, 2016, to conduct an official survey of Claims 7 and 8, pursuant to s. 39 of the *Placer Mining Act*, S.Y. 2003, c. 13. On April 19, 2016, the Mining Recorder authorized the survey in accordance with s. 39, which sets out a procedure to absolutely define the boundaries subject to an appeal to this court. It also appears from counsel that the s. 39 procedure may take a year or longer if appealed.

Law of Summary Trial

[16] Rule 19 states that a party may apply for judgment “either on an issue or generally”.

[17] Fine Gold applies under Rule 19(9) by way of preliminary application to adjourn the application for Summary Trial pending completion of discoveries on liability and damages. Fine Gold also applies for dismissal of the application on the ground that it is not suitable for summary disposition and will not assist in the efficient resolution of the proceeding.

[18] I adopt the principles from *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), as I set them out at para. 26 of *Norclope Enterprises Ltd., v. Government of Yukon*, 2012 YKSC 25:

- (a) judges should be careful but not limited in using Rule 18A (para. 47);
- (b) in deciding whether it would be unjust to give judgment, the court may consider the amount of money involved, the complexity of the matter, its

urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other relevant matters that arise (para. 48);

- (c) in determining whether an issue in the action should be determined by summary trial, the court should consider whether deciding that critical issue will assist the parties to reach an accommodation on other questions (para. 50);
- (d) if the court can find the facts, then it must give judgment, unless for any proper judicial reason it would be unjust to do so (para. 52);
- (e) conflicts in the affidavit evidence can be resolved by considering other admissible evidence (para. 56); and
- (f) the right to summary judgment plays an increasingly important role in the efficient disposition of litigation and its use is not limited to simple or straight forward cases (para. 57).

[19] I add the *Western Delta Lands Partnership v. 3557537 Canada Inc.*, 2000

BCSC 54, where Allan J. found there is a heavy onus on the party seeking to dismiss a summary judgment application to demonstrate that the issues should not be decided summarily unless:

- (a) the litigation is extensive and the summary trial hearing itself will take considerable time;
- (b) the unsuitability of a summary determination of the issues is relatively obvious, e.g., where credibility is a crucial issue;
- (c) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
- (d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial.

[20] I add that the Supreme Court of Canada, in *Hryniak v. Mauldin*, 2014 SCC 7, stated:

[24] However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,¹ ordinary Canadians cannot afford to access the adjudication of civil disputes.² The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

...

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute. (footnotes omitted)

ISSUES

[21] Is a Summary Trial appropriate?

[22] The defendants wish the following issues to be determined in Summary Trial:

1. Are the claim posts in the ground determinative of the claim boundaries until the Minister determines the claim boundaries pursuant to s. 39 of the *Act*?
2. Do the claim posts in the ground define the location of Hiro 1 and Them R Gold 10, a fractional claim, giving the defendants the right to mine within those claims?
3. Does the lack of claim posts on Claim 7 and Claim 8 affect the boundaries of Claims 7 and 8?

[23] The three issues requires an interpretation of s. 24(6) of the *Act*, which states:

Despite anything contained in this Part, failure on the part of a locator of a claim to comply with any of the provisions of this section shall not be deemed to invalidate the location, if, on the facts, it appears to the satisfaction of a mining recorder that there has been on the part of the locator an honest attempt to comply with this Part, and that the non-observance of the formalities referred to in this section is not of a character calculated to mislead other persons who desire to locate claims in the vicinity.

[24] Counsel for Fine Gold makes several submissions in support of dismissal or adjournment of the application for Summary Trial.

[25] Counsel for Fine Gold submitted that there are serious deficiencies in the staking and filing of claims Hiro 1 and Them R Gold 10. In my view, that would make a determination under s. 24(6) even more compelling to consider before proceeding to extensive discoveries on liability and damages when the issue of whether a trespass

has occurred has not been determined. There are numerous areas mined by the defendants since 2012, all with the knowledge of Fine Gold, and addressing the lawfulness of that mining before extensive discoveries is both efficient and cost effective.

[26] Counsel for Fine Gold submits that the Summary Trial should not proceed until discoveries are completed. That would mean examinations on liability and damages on the site identified as “the pit” on Mr. Aucoin’s sketch plan before a determination of whether the defendants had the right to mine there. I anticipate that discoveries on this point alone could consume a week and would be unnecessary if there were a ruling on s. 24(6) of the *Act*.

[27] Furthermore, it would be premature to proceed to discoveries when the Mining Recorder has not made a determination under s. 39 of the *Act* on the boundary question. That determination may be a year or more in the future.

[28] Counsel for Fine Gold raises the argument that there are serious credibility disputes between Mr. Heisey (for the plaintiff) and Mr. Cahoon (for the defendants). In light of the jurisprudence indicating that credibility disputes can be resolved by affidavits and taking into account that Mr. Heisey has filed six affidavits and Mr. Cahoon four affidavits plus two affidavits for Mr. Lamerton, Fine Gold’s surveyor, and one affidavit from Mr. Aucoin, the defendants’ surveyor, I am of the view that a substantial amount of factual information is before the Court. Furthermore, the issue of in-court cross-examination can address any areas of substantial factual dispute.

[29] Counsel for Fine Gold submits that it is an abuse of process to proceed to Summary Trial. I find it to be an unusual submission that proceeding to Summary Trial

i.e. applying the *Rules of Court* can be framed as an abuse of process in the context of this court action. Surely, the Summary Trial procedure can be an efficient and cost effective method, moreso than proceeding on extensive and expensive premature discoveries. If the defendants succeed, then a very large issue has been addressed. If Fine Gold succeeds, the issues raised do not need to be addressed again. It is decidedly not an abuse of process but an efficient and cost effective procedure.

[30] I note that counsel have argued the issue of proceeding to a Board of Arbitration under s. 77 of the *Act* with encroachments. The section is discretionary and as neither party has applied for it since this dispute broke out in September 2015, I am not prepared to stay the Fine Gold's claim pending such an application. It is not mandatory.

CONCLUSION

[31] I therefore order that Fine Gold's preliminary application be dismissed and that a Summary Trial proceed on March 22, 23 and 24, 2017, on the three issues set out.

[32] I will consider submissions on costs after the Summary Trial and will move into Case Management now on the in-court cross-examination of witnesses and the filing of written outlines.

[33] I will also set a time for hearing Mr. Whittle's application for a stay of execution pending appeal.

VEALE J.