COURT OF APPEAL OF YUKON

Citation: *Fine Gold Resources, Ltd. v. 46205 Yukon Inc.*, 2016 YKCA 15

Date: 20161130
Whitehorse Docket: 16-YU780

Between:

Fine Gold Resources, Ltd.

Appellant
(Plaintiff)

And

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

Respondents
(Defendants)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Charbonneau

On appeal from: An order of the Supreme Court of Yukon, dated March 17, 2016 (*Fine Gold Resources, Ltd. v. 46205 Yukon Inc.*, 2016 YKSC 21, Whitehorse Registry 15-A0137).

Counsel for the Appellant: G.W. Whittle

Counsel for the Respondents Them R Gold Ltd. and Troy Cahoon: J.R. Tucker

Counsel for the Respondents 46205 Yukon Inc., Russian Mining Inc. and Richard Fanslow: M.E. Wallace

Place and Date of Hearing: Whitehorse, Yukon
November 14, 2016

Place and Date of Judgment: Vancouver, British Columbia
November 30, 2016

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Charbonneau

Summary:

On an appeal from an order setting aside a Mareva injunction on the grounds the applicant had not made full and frank disclosure of evidence going to the merits of the claim and had not adduced evidence of dissipation of assets in the jurisdiction and an order requiring the applicant for the injunction to pay Special Costs. HELD: the appeal from the order setting aside the injunction dismissed. The trial judge had not erred in concluding disclosure had been incomplete in a material respect and setting aside the injunction for that reason. Further it could not be said he had erred in assessing the risk of dissipation of assets. Further HELD: the Special Costs order should be set aside. There was nothing in the conduct of the applicant for the injunction deserving of the rebuke a special costs order entails.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Background

[1] This is an appeal from an interlocutory order made by Mr. Justice Veale on March 17, 2016 setting aside a *Mareva* injunction and awarding special costs to the respondents.

The Claim

[2] The appellant is the owner of two mineral claims in the Dawson Mining District: Claim P06280 (“Claim 7”) and P06821 (“Claim 8”). It leased Claim 7 to Russian Mining in 2012-2013. It alleges that, in breach of the Lease, Russian Mining or the other defendants extracted precious metals from the property and did not pay it the agreed percentage of the metals extracted. The appellant also says the defendants, owners of mineral claims “immediately adjacent or in close proximity to the plaintiff’s mineral claims”, trespassed on Claim 8 and Claim 7 after the Lease expired, despoiled the properties and extracted gold and silver from them. It says it has suffered damages, including loss of the value of the gold and silver, loss of profit from mining operations and loss of a business opportunity. It commenced an action, by Statement of Claim filed on December 17, 2015, seeking, amongst other relief:

> an injunction to restrain the defendants [respondents] …from transferring, conveying, assigning, charging, encumbering or otherwise dealing with their assets, other than in the ordinary course of business, without the consent of the plaintiff [appellant].

[3] A Statement of Defence was filed on February 4, 2016 by Them R Gold and Troy Cahoon (Mr. Cahoon and his company). Those defendants say they acted as agents for co-defendants and that they conducted certain work on Claim 7 pursuant to the Lease, which authorized Mr. Cahoon, on behalf of Mr. Fanslow (a co-defendant), to mine the claim. They describe an ongoing dispute over the boundary to the adjacent claims and say the appellant misstates its entitlement.

[4] The other defendants (Mr. Fanslow and his companies) filed a Statement of Defence on February 5, 2016. They say Russian Mining did some test drilling on Claim 8 but did so with the consent of the appellant (as part of negotiations regarding a possible lease of that claim), and 46205 Yukon Inc. ("46205") was permitted to do certain work on Claim 7, including digging, using water and doing reclamation work, pursuant to the lease. They say 46205 owns a mineral claim adjacent to Claim 7 and Claim 8. They describe a dispute with respect to the boundary dividing Claims 7 and 8 and that claim. Mr. Fanslow and his companies deny any trespass or conversion.

The *Mareva* Injunction

[5] On February 23, 2016 the appellant applied, without notice, for a *Mareva* injunction with worldwide effect, restraining the defendants from transferring or dealing with their assets, including assets outside the Yukon Territory. In support of the application it relied upon three affidavits, one sworn by Helena Tlen, a legal assistant to appellant's counsel, and two sworn by Michael Heisey, president of the appellant company. The second Heisey affidavit, sworn on February 5, 2016, deposed to most of the facts relied upon in support of the injunction.

[6] The application was made by requisition pursuant to Rule 43 of the *Rules of Court for the Supreme Court of Yukon*, Y. O/C 2009/65, the relevant portions of which read as follows:

> (13) An application of which notice need not be given may be made by filing
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> (a) a requisition in Form 3,
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> (b) a draft of the order in Form 54, and

> (c) evidence in support of the application.
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> (14) On being satisfied that the materials appropriate for an application referred to in subrule (13) have been submitted, the clerk shall refer the matter to a judge.
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> (15) If an application is referred by the clerk to a judge under subrule (12) or (14) the judge to whom the application is referred may
>
> (a) make the order,
>
> (b) require further evidence, or
>
> (c) direct that the application be spoken to.

[7] The memorandum of argument filed in support of the without notice order described what was said to be a good arguable case; the demonstrable risk the appellant would suffer irreparable harm because it had a substantial claim and would not be able to satisfy a judgment from assets in the jurisdiction; and the removal of assets from the jurisdiction. It was argued there was some evidence the respondents' gold assets had been 'dissipated and secreted'. The appellant submitted the injunction would not cause irreparable harm to the respondents.

[8] The judge to whom the requisition was referred did not require further evidence or direct that the application be spoken to. On February 29, 2016, he issued two injunctions on terms that differed from those sought by the appellant. The injunctions restrained the respondents from dealing with their *assets in the Yukon Territory* without the consent of the appellant or a court order, with leave to the respondents to apply to set aside the order.

The Order Appealed From

[9] By application filed March 4, 2016, the respondents sought to have the *Mareva* Order set aside on the grounds:

a) the evidence did not establish a strong *prima facie* case;

b) the appellant had failed to bring to light a substantial weakness in its claim (that it was founded upon establishing the boundary between adjacent mineral claims and the plaintiff knew of a deficiency in the survey of Claim 7); and

c) there was no evidence assets were being removed from Yukon other than in the normal course of business.

[10] For reasons indexed at 2016 YKSC 21, Veale J. set aside the *Mareva* Order and made the impugned costs order.

[11] After referring to Rule 52 of the *Rules of Court*, the judge canvassed the principles set out in the leading cases, including particularly *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2; and *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481. At paras. 4-30 of the reasons for judgment, the judge addressed the applicable analysis on an application for a *Mareva* injunction, as described in *Third Chandris Shipping Corp. v. Unimarine S.A.*, [1979] Q.B. 645 (C.A.), and *Chitel et al. v. Rothbart et al.* (1982), 141 D.L.R. (3d) 268, 17 A.C.W.S. (2d) 200 (Ont. C.A.):

> (i) The applicant should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.
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> (ii) The applicant should give particulars of his claim against the respondent, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the respondent.
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> (iii) The applicant should give some grounds for believing that the respondent has assets in the jurisdiction.
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> (iv) The applicant should give some grounds for believing that there is a real or genuine risk of the assets being removed, dissipated or disposed of before judgment or the award is satisfied.
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> (v) The applicant must give an undertaking in damages.

[12] The judge found there had not been full and frank disclosure because Mr. Heisey and his counsel had "failed to direct the Court on the without notice application to the Mining Recorder's letter stating that part of the Hiro claim [the claim of 46205] 'may' be within the boundary of Claim 7 and the fact that it can only be determined 'absolutely' through a survey." He held that letter drew the appellant's attention to a means of defining absolutely the boundaries of the claims surveyed. More importantly, he found Mr. Heisey and his counsel had not made full disclosure of observations made by their surveyor, Mr. Lamerton on September 15, 2015, "critical to the factors to be considered in this Mareva injunction application." He

found Mr. Heisey had chosen to present Mr. Lamerton's evidence by way of hearsay, "conveniently" expressing Mr. Lamerton's evidence in its best light and avoiding the necessity of exposing Mr. Lamerton to cross-examination.

[13] He concluded:

> [66] Mr. Heisey has chosen to present evidence by way of hearsay. There is a total failure to disclose the evidentiary documents to support the hearsay opinion.
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> …
>
> [68] The *Mareva* injunction is an exceptional and extraordinary order requiring the utmost good faith and complete disclosure. Mr. Heisey and his counsel have fallen well short of their obligations in this respect.
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> [69] In my view, this failure or breach of full and frank disclosure is fatal to the without notice order granted on February 29, 2016, regardless of the merits of the plaintiff's claim.

[14] The judge went on to find there was no evidence of a real risk of the transfer, disposal or dissipation of assets by Mr. Cahoon, other than an allegation that in 2005, Mr. Cahoon was involved in the theft of mining equipment purchased by Mr. Heisey. This allegation, however, was "dredged up to sully Mr. Cahoon's reputation rather than advance a case of real risk." Further, there was no allegation whatsoever that Mr. Fanslow had created a real risk of transfer, disposal or dissipation of assets.

[15] The lack of evidence of dissipation alone would have been enough to set aside the injunction. That being the case, it was unnecessary to weigh the merits of the claim. Insofar as the merits of the claim were concerned, the judge simply found:

> [75] If the Court accepted all the evidence of Mr. Heisey, both direct and hearsay, it is possible that he could have a good arguable case. However, the failure to disclose the evidence of Mr. Lamerton to back up the boundary dispute claim casts doubt on the merits of the claim. I cannot say that Mr. Heisey is wrong or incredible and he may be able to establish that a trespass has occurred, albeit unbeknownst to either Mr. Heisey or Mr. Cahoon until Mr. Lamerton became involved.
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> [76] But the merits of the plaintiff's claim are no longer the focus of this application because of the failure to disclose and the lack of a real risk of transfer, disposition or dissipation of assets relating to this trespass claim. I therefore set aside the *Mareva* injunction.

[16] Finally, he found there was "serious misconduct" in the non-disclosure of details of Mr. Lamerton's work. However, the judge expressly noted:

> [79] ... While this material non-disclosure arguably does not reflect improper conduct of Mr. Heisey or his counsel, it does represent a clear failure to meet the high standard of full and frank disclosure required when applying for an exceptional and extraordinary remedy like a *Mareva* injunction.

[17] In light of the fact the defendants were represented and had filed defences to the claim, and in light of the fact placer gold mining was unlikely to resume before the hearing of the application, the judge held (at para. 82) the application ought not to have been made without notice. He concluded:

> [83] Because there was almost no evidence that could be used against Mr. Fanslow and his companies, I award special costs against the plaintiff in the full amount of reasonable fees and disbursements of Mr. Fanslow, 46205 Yukon Inc. and Russian Mining Inc. I order that the special costs be paid forthwith and in any event of the cause.
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> [84] With respect to Mr. Cahoon and his company, there was some evidence upon which to base a *Mareva* injunction, but given the failure of full and frank disclosure and the failure to demonstrate a real risk of transfer, disposition or dissipation of assets by Mr. Cahoon, I order special costs against the plaintiff to the extent of 75% of the reasonable fees and disbursements of Mr. Cahoon and Them R gold Ltd. I order that the special costs be paid forthwith and in any event of the cause.
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> [85] As the 2016 mining season is approaching, the parties should endeavour to reach agreement on mining activity in the disputed location or bring the matter back to case management to set an application date and a trial date.

Grounds of Appeal

Non-Disclosure

Consideration of Hearsay

[18] The appellant says the judge erred in finding Mr. Heisey and his counsel had "fallen well short of their obligations". It says the judge erroneously failed to give some weight to the hearsay evidence; one seeking an interlocutory injunction can use hearsay to establish there is a "good arguable" case and need not produce evidence of the kind required to establish a claim at trial. The judge's concern with respect to reliance on hearsay on the application is said to have been misplaced.

Insignificance of the Omissions

[19] The appellant argues it had neither concealed nor intentionally understated the boundary dispute or its significance, and says the relevance of the passages of the Mining Recorder's correspondence to the appellant, that had not been produced, were not considered by the appellant to be significant before the March 17, 2016 judgment.

Fatality of the Omission

[20] Further, the appellant says it was an error to find the failure to make full and frank disclosure to be "fatal to the without notice order".

Risk of Removal of Assets

[21] The appellant says the judge erred in law in addressing the risk sought to be avoided by the *Mareva* injunction; it says there was a risk of harm arising from removal of assets to a place beyond the court's reach and the judge erred by insisting upon proof that the respondents intended to defeat judgment. It argues that in some cases, even a risk of dissipation need not be established: *I.C.B.C. v. Patko*, 2008 BCCA 65.

Special Costs

[22] The appellant says special costs should not have been ordered. It says the conduct of the appellant is not deserving of rebuke and costs ought not to be payable forthwith except in exceptional circumstances not present here. Costs payable forthwith can preclude litigants from advancing an otherwise meritorious claim and impair access to justice.

Discussion

Standard of Review

[23] In my opinion, this appeal stands on the footing that the judge was exercising a discretion both in granting the injunctions and in setting them aside. The most complete examination of the case for an injunction occurred when submissions of all

affected parties were heard. Substantial deference is owed to the decision under review. As this Court noted in *Patko*:

> [22] The granting or refusal of a *Mareva* injunction is a discretionary order. The onus on a party seeking to appeal a decision based on the exercise of judicial discretion is a substantial one: *A.B. v. British Columbia (Securities Commission)*, 2004 BCCA 249 at para. 11. The order will not be interfered with unless the judge erred in principle, clearly and demonstrably misconceived the evidence, or made an order which has resulted in a clear injustice: *Canadian Brodacasting Corporation v. C.K.P.G. Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.), cited in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog,* (1998), 168 D.L.R. (4th) 309, 59 B.C.L.R. (3d) 196, [1998] B.C.J. No. 2298 (QL) (C.A.) at para. 11.

Non-Disclosure

Consideration of Hearsay

[24] In my view, there is no merit in the argument that the judge imposed an inappropriate burden upon the appellant by refusing to consider hearsay evidence and, for that reason, erroneously concluded disclosure was wanting. The judge concluded the appellant had not put the full case, for and against the claim advanced, before the Court. He was not unwilling to consider hearsay evidence, as the appellant suggests, (as is evident in the fact the *Mareva* Order was initially granted on the basis of some hearsay) but held, rather, the appellant ought not to have relied upon hearsay evidence where better and more complete evidence was available to him. The problem was not the use of hearsay but, in the circumstances of this case, the use of hearsay the judge considered to be misleading because it was an incomplete and inadequate substitute for more accurate evidence.

[25] When the respondents sought to set aside the injunction, they argued that the appellant’s non-disclosure consisted of a “failure to highlight” portions of the material before the court on the initial application. The judge clearly accepted the respondent’s submission in that regard. Having granted the injunction on the initial application, the judge was in a position to determine whether, upon hearing the submissions of all counsel, the written material upon which he had relied was incomplete and, if so, whether errors or omissions in presentation of the case were material to his decision to grant the injunction in the first instance.

[26] Given the heavy onus on an applicant seeking the exercise of the court's equitable jurisdiction to grant a *Mareva* injunction, I would not interfere with the judge's conclusion that a real weakness in the appellant's principal claim (that gold had certainly been extracted from the appellant's claims) had not been brought to his attention in the first instance. In part, this appears to have been a result of the fact the material relied upon by the appellant was voluminous and, in part, a result of the fact it described a claim in breach of contract as well as a claim in trespass and conversion. The former, arising out of the alleged breach of a lease which permitted the respondents to do mining upon Claim 7 from August 2012 to September 2013, appears to be unrelated to the boundary dispute. In contrast, the latter might hinge entirely upon resolution of that boundary dispute. As a result, the nature and significance of the boundary dispute might have been lost in the written material. Further, there clearly were materials relating to that dispute that had not been produced. For that reason, I cannot say the judge was wrong to conclude the applicant had not made the full disclosure of all material matters in his knowledge.

[27] In any event, for reasons set out below, I would not disturb the judge's conclusion that the material did not describe a risk of dissipation sufficient to justify the issuance of a *Mareva* injunction.

Insignificance of the Omissions

[28] I would not accede to the argument that there had been full disclosure of all material the appellant might reasonably have considered to be material. As has become clear on careful consideration of the claim, the parties themselves clearly regarded the boundary dispute to be central to the claim for injunctive relief and even inadvertent omission or misdescription of evidence material to that dispute may be sufficient to undermine a claim to equitable relief.

Fatality of the Omission

[29] The appellant argues that where there has been innocent failure to fully disclose a potential defence to a claim, the Court, before setting aside an injunction, should reconsider the application on the merits. In support of that argument he relies

upon *Girocredit Bank Aktiengesellschaft der Sparkassen v. Bader et al*. (1998), 110 B.C.A.C. 19. In that case Goldie J.A. held:

> [46] There is no doubt the English courts have confirmed the discretionary scope of a reviewing judge to reinstate an injunction or order where the material nondisclosure was innocent. In the case at bar Ms. Geiger contends whatever nondisclosure occurred was innocent; that when all the facts are weighed the original orders were justified and that Mr. Justice Spencer in these circumstances was bound to reinstate or continue the orders in question.
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> [47] I do not agree these authorities support the conclusive effect of innocent nondisclosure. In this jurisdiction the judgment of the court of Appeal in *Gulf Islands Navigation Ltd. v. Seafarers International Union* requires the review hearing to proceed *de novo*. This does not imply any diminution in the discretion required to be exercised. In deciding whether an interim injunction should be granted or continued the assessment of the balance of convenience very often calls for a high degree of discretion exercised judicially in accordance with known principles.
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> [48] But, in any event I am of the view this contention must fail on the facts of this case. If I am correct in this the English authorities which deal with innocent non-disclosure have no application. In that respect, I think it clear the Chambers judge found the nondisclosure was not innocent - using that word to describe something not known to the applicant or whose relevance was not perceived. The following paragraph in Mr. Justice Spencer's judgment admits of no other conclusion:
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>> 7 That brings me to the question whether the *Mareva* and Anton Piller Orders can be sustained. In my judgement they cannot. The defendants have persuaded me that there were material circumstances which were not put before me in the plaintiff's ex parte application. I am satisfied that the plaintiff knew of those circumstances and that by failing to reveal them, it failed in the duty to make full and frank disclosure. That must result in the *Mareva* and Anton Piller Orders being vacated, see *Gulf Islands Navigation Limited v. Seafarers International Union of North America (Canadian District) et al.* (1959), 27 W.W.R.(N.S.) 652 (S.C.B.C.). (Emphasis added [by Goldie J.A.])
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> …
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> [50] I do not suggest the nondisclosure was culpable in the sense of reflecting deliberate intent to mislead the court. I think the appellant believed the results of its post confession audits of Mair's behaviour relieved it of the necessity of disclosing fully all that it knew, or should have known had it made the relevant inquiries, about Mrs. Bader and her relationship with the Bank and its employees, including Mair. I will say only these audit reports are based on a number of assumptions, the validity of which is questioned.

[30] In my view, those observations are particularly helpful in this case. While the trial judge in the case at bar could not say the appellant deliberately intended to mislead the court, he found the plaintiff knew of information material to the application and failed to disclose it. Here, as in *Girocredit,* there is no basis upon which we may set aside the judge's conclusion that the appellant failed in its duty to make full and frank disclosure. Therefore, there is also no basis to interfere with the judge's conclusion that the *Mareva* injunction should be vacated.

[31] In any event, the judge did reconsider the basis for issuance of the injunction and concluded the appellant had not established that the injunctions were necessary to prevent disposal or dissipation of assets.

Risk of Removal of Assets

[32] The appellant says the jurisprudence contains conflicting descriptions of the onus to demonstrate a risk of irreparable harm on a *Mareva* application. In my opinion, an application for a *Mareva* injunction in Yukon should meet the settled test in British Columbia.

[33] In *Patko*, the British Columbia Court of Appeal considered whether a trial judge erred by failing to draw an inference that there was a risk of dissipation of assets by a defendant who was alleged to have defrauded the plaintiff. After considering the special circumstance of fraud, the Court discussed the test on an application for a *Mareva* injunction in British Columbia. Finch C.J.B.C., for the Court, held:

> [24] In my view, [the trial judge] did not err in her interpretation of the authorities. [She] applied the "flexible approach" from *Mooney No. 2*, the leading case with respect to the test for granting a *Mareva* injunction in British Columbia. The approach in that case was approved by this Court in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, *supra*. This approach has been recently affirmed by a five-judge panel of this Court in *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481, [2007] B.C.J. No. 2182 (QL).
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> [25] Under the flexible *Mooney No. 2* approach, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *Mooney No. 2* at para. 43. In order to obtain an injunction, the applicant must first establish a strong *prima facie* or

> good arguable case on the merits. Second, the interests of the two parties must be balanced, having regard to all the relevant factors, to reach a just and convenient result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment: *Mooney No. 2* at para. 44.
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> [26] The root of the *Mareva* injunction is the risk of harm either through dissipation of assets or removal of assets to a place beyond the court's reach: *Tracy* at para. 45. In most cases it will not be just or convenient to tie up a defendant's assets merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted": *Silver Standard* at para. 21. Thus, though a party may apply for and obtain an injunction as security for damages sought in the litigation without showing that there is a real risk the defendant will dissipate assets, in most cases a real risk of dissipation must be established before a party will be granted a *Mareva* injunction in British Columbia.

[34] The test set out by Madam Justice Huddart at para. 44 of *Mooney v. Orr,* [1995] 100 B.C.L.R. (2d) 335, 3 W.W.R. 116, would require the applicant to lead evidence "that establishes the existence of assets within British Columbia (for a domestic injunction) or outside (for a national or international injunction) and <u>a real risk of their disposal or dissipation so as to render nugatory any judgment</u>" (emphasis added).

[35] The judge heard and clearly considered the appellant's submission that it was enough for a *Mareva* injunction to establish that gold had been mined by the respondents; the respondents had no assets of any significant value in Yukon (of value comparable to the claim advanced); some gold had in the past been exported to Chicago; and Mr. Cahoon had recently bought real property in San Juan del Sur, Nicaragua.

[36] However, he had also heard and apparently weighed the respondent's submissions that Mr. Cahoon lived in Yukon Territory and was intending to return and continue mining; and that the respondents had not hidden, dissipated, or moved assets (except in the ordinary course of business).

[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.

[38] In my view, the test was appropriately considered by the judge. It cannot be said he erred in principle or overlooked or misapprehended evidence in failing to draw the inference sought by the appellant or in concluding the appellant failed to demonstrate a risk of dissipation sufficient to grant the extraordinary remedy sought.

Special Costs

[39] The *Mareva* injunctions were granted without a hearing. While the *Rules* permit this procedure, its use in this case was problematic.

[40] When the injunctions were granted the respondents were represented by counsel in Whitehorse. Defences had been filed which described the boundary dispute and asserted the defendants were owners of claims located on the right fork of Eureka Creek adjacent to the plaintiff's claims. The defendants denied trespassing upon or converting chattels from Claim 7 or Claim 8.

[41] The defence filed by Mr. Cahoon and his company before the issuance of the injunctions included the following plea:

> 54. This dispute should be determined by the Yukon Surface Rights Board in accordance with the *Yukon Surface Rights Board Act*, SC 1994, c. 43, as amended, as required by Section 19 of the *Placer Mining Act*, SY 2003, c. 13…

[42] The defence filed by Mr. Fanslow and his company before the issuance of the injunctions included the following plea:

> 17. … 46205, Russian Mining and Fanslow admit that they are aware, Fine Gold is the registered owner of Claim 7 and Claim 8 … the boundaries of those claims are as those claims are set out in the Dawson Mining Recorder's office…
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> …
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> 72. … 46205, Russian Mining and Fanslow state as the facts are, this claim boundary dispute was deferred to the Dawson Mining Recorder's office and the Mining Recorder ultimately determined that until a survey is completed by the Canada Lands Surveyor under instructions from the Surveyor General and registered under the *Placer Mining Act*, is completed, the claims as set out in the Dawson Mining Recorder's Office stand and are valid.

[43] As the appellant points out, there are many references to the boundary dispute in the material filed in support of the injunctions; it was clear from that material the boundary issue had been considered by the Mining Recorder; and that a surveyor had been to the site and considered the extent of the over-staking.

[44] The appellant argues the perceived inadequacies in the evidentiary record with respect to the threat to the appellant's ability to recover a judgment were also apparent on the face of the record relied upon in support of the *Mareva* Order.

[45] The appellant further says the circumstances which led the judge to conclude the application ought not to have been made without notice (for example, the fact mining would not be ongoing in February and March) were also known at the time the injunctions were granted.

[46] In my view, the controversy which later arose in this case with respect to the adequacy of the description in the record of the merits of the claim, the nature of the defence, the risk of dissipation or removal of assets and the urgency of the application, might have been avoided if counsel had been asked to speak to the without notice application. Notwithstanding the rule that permits an injunction such as this to be decided without a hearing, a *Mareva* injunction should rarely be granted without a hearing. The injunction is an extraordinary remedy and requires careful

scrutiny by the judge, preferably aided by the presence of counsel, even on a without notice application, to respond to questions and to confirm that there is nothing of concern in the application that is not immediately apparent from the application materials. For that reason, in my opinion, it would have been prudent to have directed counsel to speak to the without notice application rather than granting this extraordinary remedy by desk order.

[47] The fact that on receipt of a requisition the judge has a discretion to require further evidence, or direct that the application be spoken to, does not relieve the applicant for a without notice order from the obligation of making full disclosure. However, the fact the *Mareva* injunction was granted on a requisition, without a request for further evidence or submissions, should have been considered in making the appropriate costs order in this case.

[48] In my view, the judge erred in exercising his discretion to order the appellant to pay special costs. The order was clearly not founded upon an assessment of the merits of the underlying claim. The judge noted that the appellant might have made out a strong *prima facie* case. Nor was it based upon a finding of wrongdoing on the part of the appellant. The judge expressly concluded that the failure to make full disclosure did not amount to an intentional attempt to mislead the court. Despite his finding that there was “serious misconduct” in the failure to produce the survey of Mr. Lamerton, the judge concluded, importantly, that the material non-disclosure “arguably does not reflect improper conduct of Mr. Heisey or his counsel”.

[49] The Special Costs Order was stated to be based, in part, upon the fact there was no pressing need to bring the application on a without notice basis (because of the timing of the commencement of the mining season); and because the appellant had failed to lead any substantial evidence of a risk of dissipation of assets. But the material that led to those conclusions was before the judge when the injunctions were issued. Simply failing to meet the test in the first instance cannot warrant an order for special costs; the fact a different result was arrived at upon careful

re-examination of the same material cannot be said to have been the result of blameworthy conduct on the part of the appellant.

[50] There is no suggestion the application for an injunction was a stratagem to obtain security for costs not otherwise available under the *Rules*. The appellant's concerns with respect to the removal of gold from Yukon were not entirely unfounded. There was some evidence of the movement of assets but little evidence that such movement was not in the ordinary course of business or that it was continuing or, in the case of Mr. Fanslow, that the assets were moved to a place where they would be immune from execution. As pointed out in the course of argument, the extraction of gold from placer mines goes hand in hand with the movement of gold out of Yukon. This may naturally give rise to concerns with respect to enforcement of judgments here.

[51] The Special Costs Order imposed a penalty upon the applicant for an error in judgment in assessing the weight that would be placed upon competing descriptions of the evidence with respect to the merits of the claim and the risks of a dry judgment. That penalty was, in my view, inordinate and not consistent with the appropriate exercise of the discretion to award costs in furtherance of the objectives of the *Rules*.

[52] In *Pierce v. Baynham*, 2015 BCCA 188, experienced counsel were found not to have made full and frank disclosure in applying for an *Anton Piller* order *ex parte.* The chambers judge found that counsel had <u>not</u> acted dishonestly, but that their conduct was "reprehensible and deserving of rebuke" in the form of an order that they pay special costs. On appeal, Newbury J.A. for this Court, held, at para. 43:

> it cannot be that in every case in which counsel wrongly leaves out evidence that ultimately proves to be material, a special costs order will be justified.

[53] The Court further held:

> [47] Given the chambers judge's finding in his costs reasons that Messrs. Baynham and Reid were "not acting dishonestly", I cannot agree that their conduct was "reprehensible" in all the circumstances. There is no doubt that counsel were preoccupied with the more extreme allegations made in the

> Fraud Alerts against Mr. Pierce and with identifying who had published those allegations. It was careless on the part of Mr. Baynham in particular, but also of Mr. Reid, to fail to appreciate that the chambers judge had to be fully informed concerning exactly what allegations were alleged to be defamatory and which were admitted to be true. The trial of this action will likely be a long and complicated one that may turn on exactly where this line falls. But in my respectful view, counsel's unfortunate "focus" on those matters and failure to respond more fully to the judge's question did not rise to the level of "reprehensible" conduct that deserved rebuke by a special costs award against them. Indeed, counsel's mistake was a very common one in my experience – having spent many months on their file, they lost sight of the fact that the chambers judge was coming "cold" to the case, with no prior knowledge of even the broad outlines of the litigation.

[54] In my view, the judge in the case at bar, similarly, made a special costs order in circumstances that did not call for the rebuke such an order implies. The Yukon *Rules*, like the British Columbia *Rules* considered in *Pierce*, provide that costs will ordinarily be assessed as party-and-party costs, leaving special costs in the discretion of the judge with a view to serving the object of the *Rules*: to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time, expense and process involved in resolving the proceeding are proportionate to the amount involved, the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest and the complexity of the proceeding.

[55] While the order here was not made against counsel personally, and *Pierce* is therefore not on all fours, *Pierce* is a useful reminder that the discretion to order special costs should be exercised sparingly, recognizing the rule that ordinarily costs will follow the event, so as to avoid the creation of a cost hurdle to litigants. The parties recognize that there is little jurisprudence in the Yukon Territory with respect to *Mareva* injunctions and the appellant may fairly be said, by bringing his application for an injunction, to have raised issues of importance to the jurisprudence of Yukon.

<u>Conclusion</u>

[56] I would allow the appeal only with respect to the Special Costs Order and substitute an order for costs to the respondents in any event of the cause. It follows

that I would order the respondents to repay to the appellant all amounts paid pursuant to the costs order of March 17, 2016.

[57] Given the mixed success on this appeal, I would have each party bear their own costs of the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Charbonneau"