

SUPREME COURT OF YUKON

Citation: *Nagle v Alluvium*,
2024 YKSC 63

Date: 20241121
S.C. No.21-A0110
Registry: Whitehorse

BETWEEN:

RICHARD NAGLE

PETITIONER

AND

ALLUVIUM GOLD MINING INC., and MARSHAL THOMPSON and
TAMMY BENZ

RESPONDENTS

Before Justice K. Wenckebach

Counsel for the Petitioner

Arthur A. Mauro

Counsel for the Respondents

George J. Roper

REASONS FOR DECISION

Overview

[1] This action arises out of a mining venture gone wrong. The plaintiff, Richard Nagle, and the defendant, Marshal Thompson, were, at one time, co-workers and friends. The defendant, Tammy Benz, is Marshal Thompson's wife and knew Mr. Nagle through Mr. Thompson.

[2] All three individuals were interested in placer mining. After some discussion they agreed to form a business and mine for gold in the Yukon. Their agreement was oral. Mr. Nagle and Mr. Thompson performed most of the work at the mine. Ms. Benz spent

some time at the mine helping out. Mr. Thompson put the most money into the assets and expenses.

[3] A corporation Mr. Thompson had previously incorporated also took part in the business. Mr. Thompson changed the name of the corporation to “Alluvium Gold Mining Inc.” but did not change the structure of the company. He was, both before and after the name change, the sole director and shareholder of the corporation. At the time of the name change, the corporation had no assets or liabilities. Alluvium was used to enter into various agreements for the mining venture. Its name was also on the individual parties’ business cards and on other items used in connection with the mine.

[4] The parties collectively mined their claims between about 2017 and 2020, spending a significant amount of money on equipment and gas. Although they found gold, it was not enough to compensate for their costs. In the three years the parties mined together, they did not make a profit.

[5] The relationship between Mr. Nagle, and Mr. Thompson and Ms. Benz also soured. Mr. Thompson was frustrated because, in his opinion, Mr. Nagle was not contributing to the business costs as required by their agreement. Mr. Nagle, for his part, disagreed with the way the revenues from the gold were being spent. In the end, after a disagreement about placement of some machinery, Mr. Nagle vented his feelings about Mr. Thompson on Instagram. When Mr. Thompson learned of this, he told Mr. Nagle they could no longer work together and required Mr. Nagle to leave the mining site.

[6] Mr. Nagle then brought a petition against the defendants. He takes the position that the business is a partnership. He seeks that the partnership be dissolved and seeks

ancillary orders, including that the funds of the partnership be divided between the parties. The defendants deny that the business was a partnership and seek that Mr. Nagle's petition be dismissed.

[7] For the reasons set out below, I conclude that the business was not a partnership. I also conclude that Mr. Thompson holds one-third of Alluvium's shares in constructive trust for Mr. Nagle.

Issues

[8] The issues are:

- A. Was the parties' business a partnership?
- B. If not, is there any remedy for Mr. Nagle?

Analysis

- A. Was the parties' business a partnership?

[9] Mr. Nagle provides two submissions in support of his position that the business was a partnership. First, he argues that the parties intended on forming a partnership. Alternatively, he argues that, even if the parties did not intend on forming a partnership, legally their business was a partnership.

[10] Although Mr. Thompson and Ms. Benz have provided several arguments in response, I need only consider one of their submissions, which is that the parties did not enter into a partnership.

[11] I conclude that the parties did not enter into a partnership.

Evidence

[12] Mr. Nagle attested that the parties agreed to enter into a partnership. The terms of the agreement were: the parties would all equally invest in mining equipment;

Mr. Nagle would provide the majority of the labour; Mr. Thompson and Ms. Benz, through Alluvium, which would be controlled by Mr. Thompson and Ms. Benz, would provide additional financing and financial expertise; and all losses and profits would be shared equally between the parties. In support of his evidence, Mr. Nagle filed emails between Mr. Thompson and a third party, in which Mr. Thompson called Mr. Nagle his “partner”.

[13] In cross-examination, Mr. Nagle admitted that he was content to proceed with whatever business structure Mr. Thompson and Ms. Benz determined was best. He also testified that another miner told him that incorporation was necessary for running the mining business. From this, Mr. Nagle understood that, in order to mine, they needed to operate through a company.

[14] Mr. Thompson attests that the parties agreed to form a corporation. The terms of the agreement were: the parties would retain ownership of each of their respective claims; each person would contribute one-third to the company’s costs, including acquiring assets and operating expenses; and each person would receive one-third of the profits. This amount could be adjusted at the end of the season, depending on the parties’ individual contributions. There was also agreement about how operational matters were to be decided.

[15] Mr. Thompson also filed documentary evidence to show that Mr. Nagle knew and agreed that the business would be run through a corporation. This includes emails between Mr. Nagle, and Mr. Thompson and Ms. Benz in which he speaks about setting up the company, and others in which he uses the word “company”. Additionally, financial documents with the header “Alluvium Gold Mining Inc.” and balance sheets for

“Alluvium Gold Mining Inc.” were filed. Mr. Thompson attested, and Mr. Nagle agreed, that Mr. Nagle was provided these documents when they were created and he did not comment on them.

[16] Mr. Thompson also filed documentary evidence involving third parties. These included: Instagram posts in which Mr. Nagle refers to the mining venture by the first chosen (but ultimately rejected) corporation name of “Sluice Inc.” and then by the name of Alluvium Gold Mining Inc.; business cards for the three parties, which had on them the name of the individual as the “owner/operator” of “Alluvium Gold Mining Inc.”; contracts between Alluvium and third parties; and an application to the Yukon Workers’ Compensation Health and Safety Board (the “WCHSB”) in which Ms. Benz and Mr. Nagle are identified as employees of Alluvium. Ms. Benz agrees with and adopts Mr. Thompson’s evidence.

Law

Partnerships

[17] Partnerships are formed through contracts. As a result, a valid contract is a pre-requisite for a partnership. Partnerships are also defined by three elements. The parties must: (1) carry on a business, (2) in common, (3) with a view to a profit (*Blue Line Hockey Acquisition Co., Inc. v Orca Bay Hockey Limited Partnership*, 2008 BCSC 27 at para. 37, affirmed by 2009 BCCA 34; s. 2(1), *Partnership and Business Names Act*, RSY 2002, c 166).

[18] In this case, there is no question that the parties carried on a business with a view to a profit. I will therefore not address the legal principles about those two aspects of the law of partnership.

[19] In determining whether the parties carried on their business *in common*, the court may examine how the parties held themselves out to others - whether as a partnership or otherwise. The court may also consider how the parties conducted themselves: whether they provided skill, knowledge or assets to the business; held property jointly or had joint bank accounts; shared the profits or losses; filed income tax returns as a partnership; or produced financial statements for the partnership (*Backman v Canada*, 2001 SCC 10 at para. 21 (“*Backman*”)).

[20] More generally, intention is an important factor in deciding whether there is a partnership. What matters, however, is the parties’ objective intention, not their subjective intentions. The question is whether the parties’ agreement, including their conduct, demonstrates an intention to be in a relationship that meets the definition of a partnership (*Elbow River Marketing Limited Partnership v Canada Clean Fuels Inc*, 2012 ABQB 277 at paras. 87-88; varied (not on this issue) 2012 ABCA 328).

[21] The court will make its determination based on the agreement and the surrounding facts, such as documentary evidence and the parties’ conduct (*Backman* at para. 25).

Corporations vs Partnerships

[22] The principles of the law of corporations are not at issue here. In short, corporations are a creature of statute. The *Business Corporations Act*, RSY 2002, c 20, governs how corporations are created, registered, governed, and dissolved.

[23] What will assist in analyzing the issues is understanding the differences between partnerships and corporations. Partnerships directly carry on business themselves. They are not separate legal entities from the partners. Because of this, a partner cannot

contract with the partnership. Another result is that all the benefits arising from the partnership flow to the partners; and all the partners are directly liable for the business' obligations. This means that each partner is liable to fulfill the partnership's contracts and is personally liable for torts or other legal wrongs committed by any partner through the business.

[24] A corporation, in contrast, has its own legal existence. It is the corporation that conducts business, enters into contracts and owns property. A corporation has shareholders, who, because they own shares in the company, have rights in relation to the corporation. The corporation also acts through agents, such as directors. Because the corporation is a separate legal entity, shareholders can enter into contracts with the corporation. Moreover, the shareholders are not liable for the corporation's actions. They are not obligated to fulfill contracts on behalf of the corporation nor are they responsible for the corporation's legal misdeeds.

[25] Finally, disputes and legal problems involving partners are resolved through different legislation and based on different considerations than disputes between shareholders and a corporation.

Analysis

[26] Two considerations impact my analysis of the evidence. First, the individual parties gave evidence about what they subjectively intended when entering the business relationship. However, the subjective intention of the parties in entering the contract is irrelevant. I will, therefore, not take this evidence into account.

[27] Second, it became apparent to me that while the parties were in business together, Mr. Nagle, Mr. Thompson and Ms. Benz had little understanding of the rights

and responsibilities arising from partnerships and corporations, and the differences between them. Mr. Nagle's cross-examination revealed that, even at present he is unclear about the differences between partnerships and corporations. Mr. Thompson's and Ms. Benz' evidence demonstrated they are also unclear about these differences. This was shown in the fact that Mr. Thompson thought that simply changing the name of a company he had incorporated, without allocating shares to Ms. Benz or Mr. Nagle or naming them as directors, was sufficient to reflect the business arrangement between the three of them. Moreover, this deficiency still has not been rectified with regard to Ms. Benz. She still does not have an interest in the corporation.

[28] This has an impact on the weight I give some evidence. Thus, for instance, Mr. Nagle noted that Mr. Thompson referred to him as a "partner". Similarly, Mr. Thompson and Ms. Benz pointed out that Mr. Nagle, after being asked to leave the mining site, referred to the "company". Given the lack of understanding of what those terms legally mean, I do not find that their use has any significance.

[29] I also am cautious about relying on some of the business' internal documents that Mr. Thompson filed. For example, Mr. Thompson filed a spreadsheet he and Ms. Benz had prepared, which showed the purchases made, and financial contribution to the purchases from each individual party. It is titled "Alluvium Gold Mining Inc" and was filed to show that the parties' business was conducted as a corporation. However, there is a note at the bottom of the page which states: "Initial downpayment provided by Tammy, Rich repaid \$3,000 cash+~\$2,000 in labour/start up recognition upon Marshal & Tammy's request and not \$5,000 cash to earn his equal share in the excavator ownership." (emphasis added). This statement suggests that Mr. Thompson and

Ms. Benz considered that some of the assets, although listed on a spreadsheet containing expenditures on behalf of Alluvium, belonged to the individual parties. These discrepancies make it difficult to rely on internal documents to show intent.

[30] Turning to Mr. Nagle's submission, he argues that the conduct of the parties establishes the existence of the partnership. The parties agreed to share profits and losses equally; they jointly owned property when it was not purchased by Alluvium; they agreed they would make operational decisions together; they all contributed money and labour to the business; and Mr. Thompson and Mr. Nagle provided the mining labour.

[31] The difficulty with this submission is that most of this conduct is as consistent with a closely held corporation as it is with a partnership. In a closely held corporation, the shareholders are often also the directors, *de facto* or otherwise, making decisions for the corporation. They work in the business, put money into the corporation and draw earnings from the profits. The conduct shows that the parties sought to operate a business together. It does not show whether the business was a partnership or a corporation.

[32] In my opinion, it is the parties' representations and relations with third parties which proves that Alluvium operated the mine. In Instagram posts, Mr. Nagle himself linked Alluvium to the operation of the mine. His business cards identify him as an owner/operator of Alluvium. The parties sought coverage from the WCHSB for Ms. Benz and Mr. Nagle as employees of Alluvium. Alluvium entered into contracts to lease claims and buy equipment. Viewed objectively, the mine was not run by a partnership, it was run by Alluvium.

[33] Mr. Nagle's alternative argument is that, if the parties intended to form a corporation to operate the mine, and in which the three individual parties would have an interest in the corporation, then their agreement failed to materialize. Alluvium did operate the mine, but Mr. Thompson did not register Mr. Nagle as a shareholder or director. Mr. Thompson thus failed to structure the corporation as intended by the parties. As intention is essential to the formation of corporations, this is key. The parties' relationship is therefore, not defined by the law of corporations.

[34] Mr. Nagle furthermore submits that in a situation such as here, where a corporation is not formed as intended, partnership law provides the rules by which the parties' rights and obligations are determined. Citing the principle that partnerships may be created even if the individuals involved do not intend the business to be a partnership, Mr. Nagle submits that intent is not necessary for a partnership to be formed. Thus, partnership principles can spring up and provide the rules for the business where necessary. In this way, partnership law forms a safety net for business relationships. In support of his submission, Mr. Nagle relies on the provisions in the *Partnership Act*, which prescribe the terms by which the relations between the partners will be governed when the parties fail to address their rights and responsibilities themselves.

[35] Mr. Thompson submits that what Mr. Nagle describes is not a safety net, but a trapdoor. Partnership law imposes significant obligations on parties. The law would not require parties to abide by those obligations in the absence of any intention.

[36] I agree with Mr. Thompson. A partner is personally liable for the acts of all other partners done in the course of business. Partners also owe each other a duty of utmost loyalty. These kinds of obligations do not fall on parties by accident.

[37] Additionally, Mr. Nagle's position runs contrary to contract law. Objective intention is an element in understanding the terms of contracts. Because partnerships arise out of contract, objective intention is also an element in determining if a relationship is a partnership. The principle that partnerships can exist despite the intentions of the individuals involved does not mean that intention is irrelevant to the creation of partnerships. It simply means that the determination is based on objective intention, rather than subjective intention.

[38] In the case at bar, objectively there was no partnership. What occurred was that the parties intended that Mr. Nagle was to have a degree of control over and a share in the mining business. Ultimately, Alluvium operated the mining business, owning most if not all the assets of the business. However, due to a mistake, Mr. Nagle does not have any control or a share in the business as intended.

B. Is there any remedy for Mr. Nagle?

[39] The question that may be at the heart of these proceedings is whether the mistake can be rectified and whether Mr. Nagle can acquire some interest in the business. In oral submissions, Mr. Thompson's counsel submitted that, because shares were not delivered to Mr. Nagle, I could find that Mr. Thompson holds a portion of the shares of the corporation in constructive trust for Mr. Nagle pending their delivery to him. Mr. Nagle's counsel agreed this could be an alternative remedy.

[40] Noting the parties' positions and given the evidence that the parties intended on giving Mr. Nagle an interest in the business, I find that one-third of Alluvium's shares are held in constructive trust for Mr. Nagle.

[41] Mr. Nagel also argued that, if he is a shareholder of Alluvium, then I should also provide him with a remedy in oppression, under s. 242 of the *Business Corporations Act*. I decline to do so. This was Mr. Nagle's petition. It was open to Mr. Nagle to argue constructive trust and oppression from the outset, but he did not. It was, rather, because of the respondents' submission that he received any remedy at all. The issues of whether the respondents acted oppressively and if so, what remedy should be provided, should only be resolved after they are fully canvassed.

[42] In saying this, I am not stating that there should or could be further litigation. All the parties agreed that they did not turn a profit in the three years they mined together. From the evidence of the respondents, this has not changed; and Alluvium continues to be in debt. Very little evidence was provided on this point because the company's profits and losses were not a material issue. Thus, this is a preliminary assessment, which could change with further evidence. However, Mr. Nagle is facing the risk that, even if he is successful, he will end up pouring money into legal proceedings but receive little, if anything, through a court remedy. Mr. Nagle may continue to believe that he is owed money and would be able to recoup it from Alluvium. If so, he may want to seek alternative ways to learn about the state of Alluvium's finances before initiating further proceedings.

Conclusion

[43] I make the following declaration: the respondent Marshall Thompson holds one-third of the shares of Alluvium currently existing in trust for the petitioner Richard Nagle.

[44] I order that Alluvium immediately transfer the shares held in trust to Mr. Nagle.

[45] I furthermore order that Alluvium take all steps necessary to amend corporate records to reflect that Mr. Nagle has been a shareholder as of the date the corporation was renamed to Alluvium.

[46] Costs may be spoken to in case management if the parties are unable to agree.

WENCKEBACH J.