SUPREME COURT OF YUKON

Citation: *Bauman v Evans*, 2016 YKSC 6

Date: 20160127
S.C. No. 15-A0089
Registry: Whitehorse

Between:

LARRY BAUMAN

Petitioner

And

VERNON A. EVANS

Respondent

Before Mr. Justice L.F. Gower

Appearances:

Rita M. Davie	Counsel for the Petitioner
Mark E. Wallace and Anna Starks-Jacob	Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for an order: (1) to strike a petition claiming a miner's lien, breach of contract and, alternatively, unjust enrichment; and (2) to require the withdrawal of the miner's lien and related certificate of pending litigation from the subject mining claims.

[2] The application is based on Rule 20(26)(a) of the Yukon *Rules of Court*, which authorizes this Court to order that a petition be struck out or amended on the ground that it discloses "no reasonable claim". Pursuant to Rule 20(29), no evidence is admissible on such an application. Rather, the facts pleaded are assumed to be true.

The test for striking the petition is whether it is "plain and obvious" that it has "no reasonable prospect of success": see *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, at para. 17.

FACTS AS PLED

[3] The petitioner, Larry Bauman, ("Bauman") has pled in the petition that he began a "business arrangement" with the respondent, Vernon Evans, ("Evans") in 2010. The arrangement was made entirely by an oral agreement. Pursuant to that arrangement, Bauman was to move equipment onto mining claims owned by Evans (the "Evans claims") and conduct mining operations from the spring to the fall of that year, and in each subsequent year for an unspecified duration. In particular, Bauman was to provide equipment, materials, and services and undertake the work to develop, remove overburden, and mine the Evans claims. Evans' contribution to the business arrangement was to provide the claims and the associated water license. The operational expenses were to be covered by the minerals recovered, with any loss or profit being divided equally between the parties on an annual basis.

[4] Each party performed their obligations without issue from 2010 through 2014. Each would provide the other with details of their respective operational expenses for each mining season. Recovered minerals would often be sold intermittently throughout the mining season to cover these expenses. At the end of each season, if the value of the remaining minerals exceeded the total operational expenses, then the excess would be divided equally between the parties. Similarly, if there was a loss, the parties were to each pay half or, alternatively, carry the loss over to the following year.

[5] In each of the years 2010 and 2014, the parties jointly purchased a mining hoe. The respective purchase prices for these hoes were not pled, but the monthly payment for the one purchased in 2010 was $4,573.32. Further, the current depreciated value of the two hoes is approximately $68,000.

[6] Towards the end of the 2014 season, the parties settled the expenses for that year. Bauman carried over a loss of $8,236.35, half of which was to be paid by Evans. Evans carried over a loss of $139.

[7] Following the settlement of the expenses at the end of 2014, Bauman continued to perform a further 14 days of additional work removing overburden in 2014. For this work he incurred an additional $40,320 in operational expenses. Evans was aware of this additional work and implicitly assented to it.

[8] During the first part of the 2015 mining season the parties did further work on the Evans claims, incurring a total of $96,000 in operational expenses.

[9] Also in the spring of 2015, Evans engaged a third party to begin work on nearby mining claims owned by him (the “Enviro claims”), using the same water licence as was being used for the Evans claims.

[10] On June 11, 2015, the Water Board Inspector and the Mayo Mining Inspector came to the Evans claims and notified Bauman that the work being done on the Enviro claims was not authorized under the water license. Bauman has pled that Evans breached the agreement between them by failing to provide an adequate water license, however no particulars were provided as to how this failure came about.

[11] Also on June 11, 2015, Evans told Bauman to cease operations indefinitely and to leave the Evans claims. The reason for this change of events was not pled.

[12] Bauman has pled that he incurred expenses by way of equipment hours for overburden removal in the fall of 2014 and the spring of 2015, totalling $136,320.

[13] Bauman has also pled that he incurred additional "operational expenses", including his carried over loss of $8236.35, totalling $128,686.37. He claims Evans' 50% share of these expenses as damages in the amount of $64,343.19

[14] Bauman incurred $22,800 in expenses in order to remove and relocate the equipment and supplies from the Evans claims.

[15] As a result of the work done by Bauman on the Evans claims, the claims were credited with the Mayo Mining Recorders Office for a total of 493 years, at a value of $250 per year.[1] Bauman claims that this results in a total value of $123,250, half of which ($61,625) is owed to him by Evans.

[16] The total amount which Bauman claims as due from Evans, for overburden removal, demobilization, operational expenses, and one half the value of the mining claim assessment credits, after all other credits are applied, is $250,949.19.

STATUS OF PROCEEDING

[17] Bauman has failed to plead the date on which he filed his claim of miner's lien, however it is acknowledged by Evans' counsel that Bauman filed his certificate of pending litigation against the Evans claims on September 21, 2015. On the same day, Bauman filed the petition in this Court.

[18] On October 8, 2015, Evans' counsel filed his notice of application to strike the petition and have the miner's lien and certificate of pending litigation declared invalid.

[1] As I understand it, a miner must perform a minimum of $250 worth of work each year on a mining claim in order to maintain the currency of the claim with the Mining Recorders Office.

He further asks that he not be required to file a response (in Form 11) to the petition until this application is determined on the merits.

ISSUE

[19] Evans submits that Bauman is not entitled to register the miner's lien because he falls within the definition of "owner" under the *Miner's Lien Act*, R.S.Y. 2002, c. 151, as amended (the "*MLA*"), and is therefore a "statutory owner". Evans further submits that a statutory owner cannot lien his own property. Bauman agrees with this latter proposition, but argues that he falls within the definition of "contractor" under the *MLA*, and that a contractor is entitled to a lien for providing services or materials to a mine.

ANALYSIS

Is the Miners Lien Valid?

[20] The proposition that an owner cannot be a lien claimant for the purpose of claiming a lien against their own mining property was addressed by Veale J. of this Court in *Ross v. Ross Mining Ltd.*, 2011 YKSC 91, aff'd 2012 YKCA 8 ("*Ross*"). In that case, Golden Hill Ventures Limited Partnership ("Golden Hill") applied for a declaration that it had a valid miner's lien against a gold mine owned by Ross Mining Limited ("RML"). The validity of the lien was disputed by Norman Ross, the original owner of the gold mine. In 2005, Mr. Ross sold his shares in RML, and those of his wife, to a numbered company owned by Jon Rudolph for an initial cash payment and further future payments by way of a loan agreement. Following the share sale, Golden Hill and RML were both owned and controlled by Mr. Rudolph. The numbered company was amalgamated with RML, which was noted as the borrower under the loan agreement. RML defaulted under the terms of the loan agreement in 2009 and, in July of that year,

a receiver was appointed to monitor the operation of the gold mine. About a month later, Golden Hill filed a claim of lien against RML for services and materials provided to the mine over the previous four years, approximately. The petition to enforce the lien was filed in October 2009. Similar to the case at bar, counsel for Norman Ross brought an application to dismiss the petition on the ground that the pleadings failed to disclose a triable issue.

[21] At para. 34, Veale J. laid out the issues as follows:

> 1. Does the [MLA] permit an owner to claim a lien against the owner's mining property?
> 2. Is Golden Hill an owner of the gold mine?
> 3. Are there other grounds to invalidate Golden Hill's claim of lien? (para.34)

[22] Veale J. answered the first issue in the negative after examining the respective definitions of "owner" and "contractor" in the *MLA*. These are defined in s. 1 as follows:

> "contractor" means a person contracting with the owner for the doing of work or placing or furnishing of machinery or materials for any of the purposes mentioned in this Act, but does not include a worker;…
>
> "owner" includes a person having any estate or interest in a mine or mineral claim on or in respect of which work is done or materials or machinery are placed or furnished, at whose request and on whose credit or on whose behalf or consent or for whose direct benefit the work is done or materials or machinery placed or furnished, and all persons claiming under the owner whose rights are acquired after the work has begun or the materials or machinery furnished have begun to be furnished;

[23] Veale J. then stated:

> 40 In my view, it is evident that the *MLA* was created for the purpose of allowing persons who perform work, services or furnish materials to the owner of a mine to recover the price of the work, service or materials from the mining claim or property. The theory behind the *MLA* is that an owner

> should not receive the benefit of an improvement to the detriment of a lien claimant who has not been paid. Given that the reason for the *MLA* is the protection of the lien claimant, it becomes apparent that an owner cannot file a claim of lien against his own property. This would be completely contrary to the object and purpose of the *MLA*. This is so because it would be very simple for an owner to incorporate a service company, or use a commonly controlled corporation, to purchase and supply all the services and supplies of the mine and be able to file a claim of lien that would rank with all the other *bona fide* lien claimants who provided work and services that remain unpaid. (my emphasis)

[24] In concluding that owners cannot be lien claimants directly or indirectly for the purpose of claiming a lien against their own mine (para. 57), Veale J. relied on a number of authorities. While the Court of Appeal had reservations about the breadth of this principle as it was articulated by Veale J. (para. 4 of the Court of Appeal decision), the analysis undertaken in the course of his decision is nevertheless relevant to the case at bar.

[25] One case considered by Veale J. in the *Ross* decision was *Clarkson Company Limited v. Ace Lumber Limited*, [1963] S.C.R. 110 ("*Clarkson*"). In *Clarkson,* the Supreme Court of Canada was interpreting a provision of the Ontario *Mechanics' Lien Act* similar to s. 2(1) of the Yukon *MLA*, in that it purported to define the class of persons entitled to claim a lien. The Supreme Court observed that the statute represented an abrogation of the common law about giving a charge on an owner's land, in that it purported to give priority to lien claimants over other creditors having dealings with the landowner. Accordingly, the Court said the statute should be strictly construed in determining which class of persons are entitled to claim a lien, but that once a claimant's entitlement has been clearly established, the statute will be liberally

interpreted towards accomplishing its purposes. Ritchie J. found support for this view from the dissenting opinion in the Court of Appeal below, as well as decision of the Supreme Court of Oregon:

> …I am… of opinion that the proper approach to the interpretation of this statute is expressed in the dissenting opinion of Kelly J.A. where he says that:
>
> > The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.
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> The same view was adopted in the unanimous opinion of the Supreme Court of Oregon in *Timber Structures v. C.W.S. Grinding & Machine Works* [229 P. 2d 623 at 629.], where it was said:
>
> > We agree with the defendant that the right to a lien is purely statutory and a claimant to such a lien must in the first instance, bring himself clearly within the terms of the statute. The statute is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the lien; but when the claimant's right has been clearly established, the law will be liberally interpreted toward accomplishing the purposes of its enactment.

[26] Veale J. applied this approach as follows:

> 41 The leading case on the interpretation of a lien statute is *Clarkson Company Limited v. Ace Lumber Limited…*That case decided that a company that rented equipment to a subcontractor but used on the land of the owners, could not have a lien for rental services. The Court gave a liberal interpretation to the rights that the lien statute conferred, but

> a strict interpretation in determining who can claim a lien, as the statute represented an abrogation of the common law about giving a charge on an owner's land. I conclude that the definition of "owner" in the *MLA* should similarly be given a liberal interpretation, especially as it uses the word "includes", while the provisions creating a lien should be narrowly interpreted. In my view, the same narrow interpretation applies to s. 2(1) of the *MLA*. (my emphasis)

[27] Veale J. also noted that *Clarkson* was applied in an earlier decision of this Court, *Yukon Energy Corp. v. Curragh Inc.*, [1994] Y.J. No. 132, ("*Yukon Energy Corp*.") where Hudson J. stated, at para. 32:

> I find that in interpreting the *Miners Lien Act*, I should accept that the statute is an expansive one; that its purpose is to protect contributors to a mine or mining venture or charging only their normal fees for their services, materials or labour, and not seeking the rewards of risk-takers. Interpretation should be as large and as encompassing as an interpretation can be which is not barred by the clear purpose of the *Act*. (my emphasis)

[28] Another case relied on by Veale J. was *Big Creek Construction Ltd. v. York Trillium Development Group Ltd.* (1993), 8 C.L.R. (2d) 138 (Ont. Gen. Div.). There, Big Creek, the contractor, was controlled and beneficially owned by the owners of a real estate development for which Big Creek was working. Big Creek claimed a lien against the owner's property and Farley J. exercised his discretion to discharge the lien. At paras. 54 and 55 of his judgment, Veale J. quoted from that part of the judgment of Farley J. entitled "*Big's Lack of Entitlement to a Lien Under the [Ontario Mechanics Lien] Act*":

> …[I]t seems to me that Big has [so] closely identified itself to the owner of the project that it would be inappropriate for liens to be placed on the property. The identification is so close it seems to me to run afoul of the concept that it would be inappropriate for an owner to lien its own property since it appears to me that there would be a merger of interests

> even if such were technically possible. Put another way, I would think it appropriate under these circumstances for me to exercise my discretion as I have in relationship to the covenant and indemnity situation against the liens. In this regard see *Bore et al. v. Sigurdson et al*., [1972] 6 W.W.R. 654 (B.C. Co. Ct.) at p. 666 where Cashman Co.Ct.J. said:
>
> > ... I must nevertheless ascribe to the word used in the section, that is to say "contractor", the meaning plainly given to it by the Legislature. While a contractor and an owner may in fact be one and the same person, and while it may be possible for an owner to employ himself as contractor, I am driven to the inescapable conclusion that by the very definition of "contractor" as contained in the statute the Legislature could only have dealt with "owners" and "contractors" as separate persons in light of the other definitions and, indeed, from the plain and unambiguous meaning to be ascribed to those words standing by themselves.
>
> 55 Farley J. concluded the lien part of his judgment with the following:
>
> > Again I think that it would be an appropriate use of my discretion to discharge the lien and vacate the registration to avoid a situation where a wholly owned corporation has the potential of defeating the very purpose for which it appears the Act was established. It would be unusual and difficult for the owner to be suing himself as owner as to his general contractor claims and being both the trustee and beneficiary under the trust provisions. While legally possible to maintain the distinction, I do not think in these circumstances that my discretion should not recognize the unreasonableness of the situation in practical terms. (Veale J.'s emphasis)

[29] Veale J. further observed, at para. 56, that the proposition from *Big Creek* that an owner could not lien its own property was upheld in the Divisional Court by McMurtry A.C.J.O.C., stating:

> In his reasons for judgment, Farley J. carefully reviewed the factual background and (at p. 56-58 of the Record) concluded that Big had ..."[so] closely identified itself to the owner of the project that it would be inappropriate for liens to

> be placed on the property. ..." That identification was so close it contravened the concept an owner could not lien its own property and the individuals and their wholly owned corporations were defeating the purpose of the *Act*. He also found there was an absence of any valid duty on Big to lien the project. (Veale J.'s emphasis)

[30] Veale J. answered the second issue in *Ross* affirmatively by deciding that Golden Hill was an owner of the gold mine.

[31] The third issue was answered in part by Veale J. concluding that Golden Hill's arrangement with RML established a relationship of lender (Golden Hill) and borrower (RML) and that the loan of money is not a "service" recognized by the *MLA*.

[32] *Ross* was appealed to the Court of Appeal of Yukon, and was upheld, but only on Veale J.'s answer to the third issue noted immediately above. Tysoe J.A., speaking for the Court, explained his approach to the appeal as follows:

> 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. (my emphasis)

[33] Unfortunately, and with great respect, the Court of Appeal's judgment leaves the precedential value of Veale J.'s decision in *Ross* somewhat unclear.

[34] I note here that Farley J. in *Big Creek* adopted the ratio of the British Columbia County Court in *Dahl v. Phillips* [1960] B.C.J. No. 25. In that case, the defendant was the owner of certain lands and the plaintiff agreed to construct an apartment building on the lands. The agreement was construed by the Court to be a profit-sharing agreement. Section 5 of the British Columbia *Mechanics' Lien Act* provided that a contractor "shall have a lien for wages or for the price of the work or material". The Court held that the legislation must be interpreted strictly:

> 11 A right to a mechanics' lien is a statutory right which is in derogation of ordinary rights. On this account the *Mechanics' Lien Act*, 1956, must be strictly construed. See *Robock v. Peters* (1900), 13 Man. R. 124, at 142, where Killam, C.J. points out:
>
> > "But these liens are wholly of statutory creation, and in derogation of ordinary rights. They can be given only such effect as the statute clearly warrants."

In deciding that the lien should be vacated and discharged, the Court further held that the lien claimant did not work for wages or even a fixed price for the work done by him. Further, he did not supply any material. Indeed, similar to the case at bar, under the profit-sharing arrangement, it was possible that he would receive no profit at all:

> 8 It is clear from the wording of the agreement that the plaintiff was not employed for wages. He does not allege that he supplied any material. He does however allege that he did work. The agreement does not however fix any price for the work done by him. Under the terms of the agreement, even if carried out by the defendant, it could be possible that there would be no profit to be divided between the plaintiff and the defendant…

[35] In *Layton v. Suckling*, 1998 ABQB 282, Hawco J. (also a deputy judge of this Court) accepted the reasoning in both *Dahl* and *Big Creek*.

[36] *Franro Property Development Ltd v. Heritage Glenn North Ltd*. [1993] O.J. No 2396, is a case which, like *Big Creek*, was decided by the Ontario Court of Justice - General Division in 1993. Although *Franro* was released later in that year, it made no reference to *Big Creek*. Nevertheless, the result was virtually the same. There, Franro filed a lien against the landowners, Heritage Glen North and Heritage Glen West, and asserted priority over the Royal Bank's debenture security registered against the land. Mr. Frank Rodaro and his son were the beneficial owners of 100% of Franro and 85% owners of the two landowners. In ordering that the lien be discharged and vacated, the Court stated:

> 31….[T]he contractor and the owners are controlled by the same party and the result of the claim for lien is to obstruct the rights of the debenture holder from exercising its security as against the owners. It is a deliberate attempt to seek priority over the Bank's security. It is obvious that the object of Mr. Rodaro, as owner of the lien claimant and controlling party of the owner of the lands, is to use the contrivance of these proceedings to tie the hands of the secured party from exercising its rights. Such behaviour cannot be countenanced by the court and must be nipped in the bud. (my emphasis)

[37] Bauman's counsel relies upon *G. Wright & Associates Ltd v. Vace Investments Inc.*, [2003] O.J. No. 2872 (S.C.), as authority for the general proposition that profit-sharing arrangements do not prohibit a lien claim (para.14). In that case, Vace was the landowner and Wright was the successful lien claimant. Wright had been the property manager for Vace for 16 years, providing project managing services related to the development, marketing, and sale of lots in a residential subdivision in the City of

Kitchener, Ontario. Wright's contract with Vace provided that it would receive 22.5% of the net profit from the sale of the lots. Vace argued that the lien could not be sustained because a profit-sharing arrangement cannot result in a lien. In making that argument, Vace relied upon *Big Creek*, *Franro*, *Dahl*, and *Layton*, all cited above. In a somewhat conclusory fashion, Gordon J. distinguished this line of authority at para. 13, holding that *Big Creek* and *Franro* involved parties who, in effect, were both the owner and the lien claimant, and that *Dahl*,and *Layton* dealt with a claim for profit share after the lien claimant had been paid its construction expense.

[38] With respect, I find that *G. Wright* is distinguishable on its facts. There, the lien claimant clearly had no interest whatsoever in the lands. Further, the contract was neither a partnership nor a joint venture and, unlike the case at bar, did not provide for equal sharing of any losses. Finally, and also dissimilar to the case at bar, the lien claimant had no control over the lands or the project finances (para. 10). Rather, as Evan's counsel submitted, unlike an owner, the lien claimant in *G. Wright* was in a position similar to that of a realtor earning a commission on sales.

[39] In the case at bar, I find that the business arrangement between the parties effectively created a partnership. This is because the pleadings in the petition indicate that there was a clear intention between the parties to jointly make a profit and share that profit equally. Further, the expenses to be incurred, as well as any losses, were also to be shared equally. Finally, the parties jointly purchased two pieces of mining equipment of significant value (the monthly payments for only one of the items were $4,573.32, and the depreciated value of both at the time the petition was signed on

September 17, 2015 was $68,000). Joint ownership of property is an indicia of the intention of the parties to form a partnership.

[40] It is trite law that in a partnership each partner is liable for the debts and liabilities created by the other partner, because each partner is by law an agent of the other partner. Further, the partnership is considered a separate entity from the partners, in the sense that partnership expenses are set off against partnership income and the net partnership profit is then divided according to the partnership agreement.

[41] Thus, Bauman was not a mere contractor. He was an equal partner in the business arrangement he had with Evans. The pleadings suggest that he had authority to determine when and how he would perform his work on the claims, as well as the extent of the expenditures required to do so. In that sense, he had a degree of control over the mining claims and the project finances which the successful lien claimant in *G. Wright* did not have. Further, with reference to the words of Hudson J. which I quoted above from *Yukon Energy Corp*., Bauman was not performing his work on the basis of his normal fees for such services, but rather was seeking the rewards of a risk taker. That is inconsistent with the suggestion that he was a mere contractor. In this regard, I also choose to follow the reasoning in *Ross*, and the *Big Creek* line of authorities which preceded it, that the definition of "contractor" in s. 2(1) of the *MLA* should be interpreted narrowly. Lastly, it is telling that Bauman has specifically failed to plead anywhere in the petition that he was simply performing his work as a contractor.

[42] On the other hand, I also choose to follow the suggestion in *Ross* that the definition of "owner" in s. 1 of the *MLA* should be interpreted liberally. If one falls within the definition of owner, that does not necessarily mean that the person is considered a

registered or legal owner: see *Phoenix Assurance Co. of Canada v. Bird Construction*, [1984] 2 S.C.R. 199, at p. 213; and *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community*, [2006] O.J. No. 3952 (S.C.), at paras. 240 and 241. Rather, if one falls within the statutory definition of owner, then one can be thought of as a "statutory owner". This was addressed in *Roni Excavating Ltd. v. Sedona Development Group (Loran Park) Inc*., 2015 ONSC 389, where the Ontario Court of Justice was dealing with that province's *Construction Lien Act*, which defines "owner" in terms similar to the Yukon's *MLA*, but broke the criteria out into separate paragraphs to make it clear that the condition precedent is that the person must both have an interest in the premises and have requested that an improvement be made. This was addressed as follows:

> What constitutes a Statutory Owner?
>
> 50 The *Construction Lien Act* defines "owner" as follows: "owner" means any person, including the Crown, having an interest in a premises at whose request and,
>
> (a) upon whose credit, or
> (b) on whose behalf, or
> (c) with whose privity or consent, or
> (d) for whose direct benefit, an improvement is made to the premises but does not include a home buyer;
>
> 51 This is referred to as a "statutory owner". There may or may not be more than one statutory owner for *Construction Lien Act* purposes. .
>
> 52 There is a three part test for a party to be a statutory owner under the *Construction Lien Act*:
>
> a) The party must have an interest in the premises;
> b) The party must have requested the improvement in the premises; and
> c) The improvement on the premises must have been made upon that party's credit or behalf or with that party's privity or consent or for that party's direct benefit.

> 53 As stated in *Advanced Construction Techniques Ltd. v. OHL Construction Canada*, 2013 ONSC 7505 at para. 151, [2013] O.J. No. 6013 whether or not a party is a statutory owner is dependent on the circumstances of each case.

[43] In the case at bar, based upon the pleadings in the petition, it can fairly be said that Bauman had an "interest" in the Evans claims by virtue of the partnership agreement. It is also apparent that the improvements he made to the Evans claims were done: (a) upon the credit of the partnership; (b) on behalf of the partnership; (c) with the consent of the partnership; and (d) for the direct benefit of the partnership. Further, because Bauman was an equal partner in the partnership, all of these criteria can be said to apply to him personally as well.

[44] The interesting question which arises in the case at bar, and which was apparently not raised or considered by Veale J. in *Ross* is whether Bauman can be said to have made a "request" that he perform the work leading to the improvements. Evans' counsel simply submitted that Bauman can be said to have performed the work "at his own request". However, it seems to me that it is conceivable to think of Bauman having performed his work on the claims at the notional "request" of the partnership and for the partnership's direct benefit. Further, because he was an equal partner in the partnership, in this sense he can be said to have made a request of himself to do the work. Finally, it is apparent from paragraph 4 of the petition that Bauman made an undertaking to perform the work on the Evans claims pursuant to the business arrangement. In a sense, an undertaking can be viewed as a request to one's self to do certain things, as one agrees to take on a task or obligation.

[45] Because it is undisputed between the parties that an owner cannot file a lien against his own property, it is plain and obvious that the miner's lien claim has no

reasonable prospect of success. Accordingly, the miner's liens registered by Bauman against the Evans claims and the certificate of pending litigation must be discharged and vacated from the claims.

[46] Before I move off of this point, I simply wish to make the observation, as I suggested to Bauman's counsel at the hearing, that relying upon the remedy of a miner's lien was not the only option available to him when Evans allegedly terminated the contract. Rather, instead of Bauman simply removing his equipment from the Evans claims following the dispute between the parties on June 11, 2015, he might well have had the option of commencing an action for specific performance of the contract.

Can the Petition be Continued as an Action?

[47] The next question which arises is whether the petition, with the lien claims struck, can nevertheless be converted into an action, as if it had been commenced by a statement of claim. In this regard, Bauman's counsel notes that the petition expressly seeks a declaration that Evans breached the agreement between the parties and, alternatively, a declaration that Evans was unjustly enriched by Bauman's work. In this regard, counsel relies upon Rules 1(6) and 2(3), which provide:

> 1(6) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
> (a) the dollar amount involved in the proceeding,
> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
> (c) the complexity of the proceeding.

> 2(3) The court shall not wholly set aside or stay a proceeding on the ground that it was required to be commenced by an originating process other than the one employed.

Bauman's counsel referred to this latter sub-rule 2(3) as implying "mandatory language".

While I agree that the word "shall" would suggest that, it must be remembered that

Rule 1 (14) provides:

> On application, on its own motion, or if all parties to a proceeding agree, the court may order that any provision of these rules does not apply to the proceeding.

Thus, it cannot fairly be said that any rule in the Rules of Court is mandatory.

[48] Some factors for the Court to consider on whether to convert an originating application commenced by petition into an action were set out in *Southpaw Credit Opportunity Master Fund LP v. Asian Coast Development (Canada)*, 2012 BCSC 14:

> 25 The test to be applied for conversion of a petition proceeding to an action is whether there are *bona fide* triable issues between the parties that cannot be resolved on the documentary evidence, see *Courtenay Lodge Ltd. v. British Columbia*, 2011 BCSC 1132 para. 18.
>
> …
>
> 27 In *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, Madam Justice Dardi summarized the factors the court is to consider in determining whether to order conversion to an action. They are:
>
> > (a) The undesirability of multiple proceedings;
> > (b) The desirability of avoiding unnecessary costs and delay;
> > (c) Whether the particular issues involved require an assessment of the credibility of witnesses;
> > (d) The need for the court to have a full grasp of all the evidence; and
> > (e) Whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

> 28 A further consideration that is relevant in the context of the present application is timeliness…

[49] There are a number of problems with the petition as it is presently drafted:

1) Bauman seeks a "declaration" that Evans breached the contract between the parties. Thus, even if a court was to find in Bauman's favour on this point, a mere declaration, standing alone, would not be enforceable against Evans.[2]
2) In the alternative, Bauman seeks a "declaration" that Evans has been unjustly enriched. Again, there is a problem with such a decision being unenforceable.
3) Bauman seeks various ancillary orders, including: an order for judgment; an order for all necessary accounts; an order appointing a receiver; and an order for possession of the Evans claims. However, all of these ancillary orders would seem to be premised on a finding that the miner's liens are valid.
4) Bauman has failed to plead the date on which the miner's liens were filed (which could cause problems for him in the event that I am wrong about the validity of the liens).
5) Bauman has failed to plead any particulars of how Evans breached the contract by failing to provide an adequate water license.
6) Bauman has failed to plead particulars of how he calculated his "operational expenses" for the 4 ½ years during which the parties carried on business together. Therefore, it remains unclear whether his present claim for damages, which is based upon numbers of equipment hours at various hourly rates, is a true reflection of the actual damages he may be entitled to under the contract.

[2] The Law of Declaratory Judgments, 3d Ed.,L.Sarna, 2007 :Thompson Carswell, p.3.

7) The damages claimed do not appear to flow from the nature of the contract. The contract was generally that Evans would supply the claims and the water license and Bauman would supply the equipment and perform the work. Each year minerals were sold to cover expenses. If there was a loss or a profit when the annual accounting was done, it was shared equally between the parties. The contract was not that Bauman would be paid for his machinery and labour regardless of the value of the minerals recovered. Thus, it would appear that there will have to be some form of notional accounting of the relative values of the operational expenses versus the mineral values at the time the contract came to an end, in order to determine whether Bauman has lost an opportunity for profit or whether Evans is obliged to share in any loss.
8) Bauman has failed to plead the legal basis upon which Evans is liable for his demobilization damages.
9) The damages related to the assessment credits granted by the Mining Recorders Office of $61,625 are roughly 25% of the total net damages claimed ($250,949.19), but also do not appear to flow from the contract between the parties.

[50] I also agree with Evan's counsel that the principal question at issue in this case is not the "interpretation" of the oral contract between the parties, but rather its enforcement, and that this is relevant to whether the petition should be continued as an action. In this regard, counsel relies upon *Terasen Gas*, which was cited and quoted above in *Southpaw*. In that case, Terasen Gas commenced an application by petition seeking various declarations, one of which was that an agreement between the City of

Surrey and the British Columbia Electric Company Limited, referred to as the "Trunk Line Agreement" was valid and inoperative and binding upon Terasen and the City (para. 5). The issue for consideration by the court was whether the matter was appropriate to continue as a petition and, if not, whether it could be converted into an action. In this regard, the Court stated:

> 17 The issue for consideration is whether it is appropriate that this matter proceed by way of petition or whether this matter should be converted to an action. There is no dispute as to the legal principles that guide this court in making this determination.
>
> 18 In *Three Star Investments v. Narod Developments Ltd.* (1981), 33 B.C.L.R. 164 (S.C.), the court held it is inappropriate to proceed by petition under R. 10(1)(b) where:
>
> > (a) Serious questions of law or fact are raised;
> > (b) A decision will not end the matter but requires further proceedings to be pursued; and
> > (c) The application involves not the interpretation but the enforcement of a contract. (my emphasis)

[51] In the result, the Court held that because the petitioner was seeking enforcement of the Trunk Line Agreement, proceeding by petition was not appropriate (para. 36).

[52] I discussed some of these problems with Bauman's counsel at the hearing and the response was invariably that any such problems could be corrected by amending the petition. With respect, if the petition were allowed to be continued as an action, I expect that the extent of the required amendments would be quite significant.

[53] There are also some important facts which have not yet been pled, such as particulars as to how Evans failed to provide an adequate water license. Further, even if those facts were pled in an amended petition, I expect that they will likely lead to a

requirement for pre-trial discovery in order for the court to have a full grasp of all the evidence.

[54] It must also be remembered that this proceeding was only commenced relatively recently, on September 21, 2015. Therefore, striking the petition in its entirety and requiring Bauman to commence an action by way of a statement of claim will not cause significantly greater delay or expense than requiring Bauman to make extensive amendments to the petition.

[55] With these considerations in mind, I feel it is preferable to require Bauman to commence a fresh action by way of statement of claim. In my view, it is in the interests of justice that there be pleadings and discovery in the usual way to resolve this dispute. Accordingly, I strike the petition entirely.

COSTS

[56] I did not hear from the parties on costs at the hearing. Evan's counsel did not ask for costs in his notice of application, but did seek them in his written argument. It would seem to me that Evans should be entitled the usual party and party costs for succeeding on this application, which will effectively bring the proceeding to an end. However, if the parties cannot agree upon costs, they can ask for a further hearing before me within 45 days from the date of this judgment.

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GOWER J.