Date: 20030606
Docket No.: S.C. 00-A0042
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

LUCAS KNOL

Plaintiff

AND:

EMILE LEVESQUE

Defendant

Grant Macdonald, Q.C. — For the Plaintiff

Emile Levesque — On his own Behalf

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

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[1] VERTES J. (Oral): The parties are the holders of adjoining placer mining claims in the Dawson Mining District located on what is known as "Paradise Hill". The plaintiff holds the claims known as "Dodger 4" and "Dodger 5", while the defendant holds, among others, the claims known as "Big Red" and "Caroline". The grant for these claims entitles the holder to the exclusive right to mine them and realize all proceeds therefrom.

[2] The plaintiff alleges in this action that, sometime during 1997 and/or 1998, the defendant trespassed on his claims, conducted mining operations, and extracted gold from them. The plaintiff seeks a declaration to that effect and an accounting of all

proceeds derived from such operations.

[3] The parties are both experienced placer miners and experienced businessmen. In my opinion, this is a case of willful trespass or not. In other words, if the defendant trespassed, he could not have been mistaken about it. The defendant did not claim to be mistaken. These two have worked and staked claims on Paradise Hill since the 1980's; they are familiar with each other and each other's claims. So, it is really a matter of whether the evidence satisfies me, on a balance of probabilities, that the plaintiff's allegations are true. I am so satisfied.

[4] Before I review the evidence, I want to comment on certain peculiar aspects of this trial. First of all, the defendant represented himself. He said he could not afford a lawyer. Second, the defendant is a man of limited formal education. In fact, he acknowledged that he could not read or write. Nevertheless, he said he was prepared to go to trial.

[5] Now, obviously, any self-represented litigant is put to a disadvantage. As much as a trial judge may try to assist that litigant, that cannot be as meaningful as having the benefit of counsel. On the other hand, the fact that one litigant is unrepresented entails certain disadvantages to the other side as well. For example, as happened in this case, plaintiff's counsel made repeated demands, in accordance with the Rules of Court, for production of documents by the defendant (such as business records kept by the defendant's bookkeeper). None were forthcoming. If the defendant had counsel then these things could have been easily organized.

[6] The defendant in this case, albeit uneducated, is certainly not ignorant. He was able to put forward his submissions and he was permitted to call forth any

evidence he wished. Indeed, he did call a witness to the stand as part of his case. May I say at this point, that in a case where there is a unrepresented litigant, there is certainly a burden on opposing counsel to tread very carefully, to be cognizant not only of his own client's interest, but the interest of the other side, the unrepresented litigant, insofar as procedural matters are concerned. In this case, I compliment Mr. Macdonald for the professionalism in which he handled matters throughout the course of the trial, and recognized the position that Mr. Levesque was in, in representing himself.

[7] The facts, as I find them to be, are as follows. In general, where the evidence conflicts, I prefer and accept the evidence of the plaintiff.

[8] The plaintiff and defendant knew each other since the early 1990's. Since the "Dodger" claims adjoined the defendant's claims, there had been some discussions over the years as to the defendant either leasing or buying the plaintiff's claims. This was raised several times as the defendant's operations came closer to the plaintiff's claims. The plaintiff, however, continually rejected such proposals and told the defendant to stay off his land.

[9] So, the first issue is whether the plaintiff gave permission to the defendant to go on to his claims. The second issue is whether the work done by the defendant was actually on the plaintiff's claims.

[10] The defendant claimed, in his Statement of Defence, that he did not go on to the "Dodger" claims. At his examination for discovery, he acknowledged that he had done work on those claims but only for the purpose of testing them and by permission of the plaintiff. He confirmed, for example, that he took 136 ounces of

gold from the "Dodger 5" claim. He gave 13 3/4 ounces of gold to the plaintiff as a ten percent "royalty". This version was repeated in his evidence at trial but he also testified that, since then, he went back over the ground and concluded that any work he did was not on the plaintiff's claims but was, in fact, still on his own claims. He said he checked a pit on the "Dodger 5" claim and a ditch on the "Dodger 4" claim but that both of these did not contain gold. The 136 ounces he took he claimed came from his "Caroline" claim while an unknown quantity of gold came from a ditch on his "Big Red" claim.

[11] I am satisfied that the plaintiff did not give permission as alleged by the defendant. All of the plaintiff's conduct points to a lack of consent. This is particularly evident in a letter written by the plaintiff within a few days of his initial confrontation with the defendant. The defendant confirmed that he received this letter and that it was read to him. The defendant acknowledges that the first thing the plaintiff asked him, when he found that work had been carried out, was who had given him permission. The defendant's evidence that he offered three of his (albeit worked-out) claims to the plaintiff also belies his profession of acting with consent.

[12] I need to make a comment concerning the letter I referred to. Ordinarily that evidence would come under the rubric of a prior consistent statement and be inadmissible as self-serving. Such evidence may be admissible, however, where the witness' credibility is impeached. Such evidence may then be used to bolster the witness' credibility by showing consistency with the in-court testimony, even though it is not evidence of the truth of the earlier assertions. Here, the plaintiff's credibility was directly impeached, not on any cross-examination, but by the defendant standing up and saying that the plaintiff lied. Thus, I find this letter to be highly supportive of the plaintiff's in-court version of events.

[13] I am also satisfied that work was carried out on the plaintiff's claims. A big hole had been taken out on the "Dodger 5" claim and the "Dodger 4" claim had been mined out. The plaintiff's estimate was that over 58,000 cubic yards of material had been moved on both claims.

[14] There is no doubt, as related by the Mining Inspector, that the claims on Paradise Hill are very confusing and that the only way to definitively determine the actual boundaries of the claims is by a formal survey. But I am satisfied by the plaintiff's evidence on this point. It is sufficient for me to safely draw reasonable conclusions as to where the work took place. The plaintiff exhibited good knowledge of the claims and was able to satisfactorily explain through the use of photographs and maps as to where the work took place. The defendant's insistence that he was on his own claims is simply not credible.

[15] Could the defendant have been mistaken? I am sure he is mistaken about a number of points in his evidence. He displayed a poor grasp of detail and he said that he has memory problems. But his mistakes, if any, are with regard to his current recollection of past events. I am sure, however, that at the time he did the work he was not mistaken as to where he was working.

[16] It is not for me to speculate as to motives, but it is not unreasonable to think that the defendant did this in the hope that the plaintiff would not notice. The evidence was that the plaintiff was on site only during the summer months and, even then, he worked on other claims that he held in the area.

[17] For these reasons, I find in favour of the plaintiff and issue the declaration sought in the Statement of Claim.

[18] Turning to the question of damages, this raised further issues.

[19] The plaintiff does not seek general or exemplary damages for the trespass to his claims. He seeks the value of the gold extracted by the defendant. Some of this was quantified in the evidence; for the rest there was no evidence. So, the plaintiff seeks an accounting of the gold extracted and compensation for same.

[20] First, I must consider the applicable principles.

[21] Plaintiff's counsel urges me to apply what is referred to as the "strict rule" of damage assessment. This rule developed in cases involving trespass to chattels where it was held that the trespasser was liable to pay for the full value of the "severed" chattel without allowance for the cost of "severing". This rule was adopted at the turn of the century by the Yukon Territory Supreme Court in the case of *Kincaid v. Lamb* (1906), 4 W.L.R. 167. There it was held that a trespasser who acts willfully, not through mistake, will not be entitled to deduct the expenses of obtaining the gold (that case also dealt with the extraction of gold from a placer mining claim by a trespasser).

[22] The "strict rule" has been criticized by text-book authors (see, for example, Waddams' text on The Law of Damages at pages 1-18 and 1-25) and has not been applied consistently. In my respectful opinion, it should not be applied in this case.

[23] While I certainly respect the rule of *stare decisis* and the general need to follow precedent, in my opinion the "strict rule" has no place in what is essentially a commercial loss. The general principle behind damages is that they are meant to be compensatory and not punitive. To deny an allowance for the cost of extracting the

gold (a cost that the plaintiff would have had to incur if he had extracted it) is really more punitive in nature (and it must be remembered that there is no claim for punitive or exemplary damages in this case). So, generally, the "strict rule" has the effect of over-compensating the plaintiff by giving him the benefit of the defendant's costs. I realize that 19th and 20th century cases applied the rule to cases of deliberate trespass but that time has passed. If the plaintiff wanted to punish the defendant in this case, he could have claimed general or punitive damages and then such claims could have been assessed on their own merits.

[24] With respect to the trespass on the "Dodger 5" claim, the damages are quantifiable. The defendant testified that he took 136 ounces of unpurified gold. At approximately 80 percent purity, and considering the price per ounce, he estimated the total value at $50,000. He already delivered 13 3/4 ounces which, by my calculations based on the defendant's estimate, would have been worth $5,225. This must be deducted from the total value. In addition, the defendant estimated his total cost of the operation on "Dodger 5" as $5,400. This too is to be deducted.

[25] Therefore, for the trespass to the "Dodger 5" claim, I award the plaintiff damages of $39,375. The plaintiff will also be entitled to pre-judgment interest at the statutory rate.

[26] I realize that this is an imprecise calculation but difficulty in calculating damages is never an impediment to awarding reasonable damages. One must do the best one can.

[27] Calculating the damages for the trespass to the "Dodger 4" claim is more problematic. There is no reliable evidence as to what was extracted from the ditch

that was mined. The defendant claimed that the ditch he worked on on "Dodger 4" had no gold but the extension of the ditch on his "Big Red" claim had good gold production. However, based on the evidence, including that of the Mining Inspector, I am satisfied that the work he did was the work observed by the plaintiff on the "Dodger 4" claim. I am convinced that the "Big Red" claim, as recorded by the plaintiff, encroaches approximately 200 feet into the "Dodger 4" claim (but the "Dodger 4" claim was registered in 1989 while the "Big Red" claim was registered in 1993).

[28] Plaintiff's counsel had argued that it would be appropriate to order an accounting. The defendant could produce what records he has to ascertain, if possible, the amount of gold extracted. I have serious reservations as to whether anything fruitful would come of this exercise (having heard the defendant describe generally how he runs his business) nor am I convinced that the court's Registrar would be well-equipped or knowledgeable enough about placer practices so as to be able to intelligently tackle this problem. It would be probably make more sense if someone knowledgeable about placer mining were appointed a special referee under Rule 32 to conduct any such accounting. But unfortunately I was given no suggestions as to such a person nor what special directions should be given.

[29] So, before I make an Order for an accounting, I think it would be worthwhile to ascertain if such an exercise is even feasible. Therefore, I will reserve on the assessment of damages with respect to the trespass on the "Dodger 4" claim. However, I will make the following directions:

1) Within 90 days, the defendant will produce to the plaintiff's counsel all business records relating to his mining activities for 1997 and 1998. By this I mean all financial statements and records relating to

gold production and sales.

2) Within 90 days thereafter, plaintiff's counsel can advise the Registrar as to whether he wishes an Order for an accounting, together with suggested directions and advice as to who should conduct such an accounting. Alternatively, counsel may seek simply an assessment of damages on some general or nominal basis. Counsel should put his request in writing, with a copy to the defendant, and the Registrar will then arrange a conference call between myself, counsel, and the defendant so that I may consider the request.

[30] The plaintiff, of course, may choose to take no further action. If that is the case then counsel should inform the Registrar and the defendant accordingly.

[31] The Statement of Claim seeks costs. I see no reason to depart from the presumptive rule that costs follow the event. In the absence of any special application, the plaintiff will recover his costs of the proceedings to date, including the trial, on a party-and-party basis on Scale 3.

[32] I further direct plaintiff's counsel to prepare the formal judgment for my review. Under the circumstances counsel need not obtain the defendant's written approval of the form of judgment.

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VERTES J.