SUPREME COURT OF YUKON

Citation: *Fine Gold Resources, Ltd v 46205 Yukon Inc,* 2016 YKSC 21

Date: 20160317
S.C. No. 15-A0137
Registry: Whitehorse

Between:

Fine Gold Resources, Ltd.

Plaintiff

And

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

and Richard Fanslow

Defendants

Before Mr. Justice R.S. Veale

Appearances:

Gary W. Whittle	Counsel for the Plaintiff
Mark E. Wallace	Counsel for the Defendants 46205 Yukon Inc., Russian Mining Inc., and Richard Fanslow
James R. Tucker	Counsel for the Defendants Them R Gold Ltd. and Troy Cahoon

REASONS FOR JUDGMENT
(Mareva injunction)

INTRODUCTION

[1] The defendants apply to set aside a without notice order dated February 29, 2016 (the "Mareva injunction"), enjoining the defendants from selling their Yukon assets, consisting of gold mining equipment, placer claims and gold ("Yukon assets"), pending the trial of this action.

[2] The defendants focus their application primarily on the alleged failure of full and frank disclosure and whether the plaintiff has established the risk that the Yukon assets of the defendants will be removed or sold before trial. No trial date has been set.

[3] The essence of the plaintiff's action is that the defendants have mined gold from the plaintiff's claim P06280 ("Claim 7") without authorization. The plaintiff's concern is that it will be deprived of the assets of the defendants before satisfaction of its judgment. These issues often arise in the mining business, where miners frequently reside in Yukon only in the mining season and their equipment and claims are easily removed or transferred. On the other hand, the effect of a Mareva injunction can be devastating for a defendant trying to operate a business.

The Mareva Injunction Law

[4] The general rule historically has been that orders will not be granted before trial to restrain the defendants from disposing assets on the ground that such an order constitutes a form of pre-trial execution. A Mareva injunction is an extraordinary order only available when there is a real risk that assets will be removed or disposed of and placed beyond reach.

[5] In Yukon, under Rule 52 of the *Rules of Court*, a court may make an order for detention, custody or preservation of any property that is the subject matter of a proceeding. In the case at bar, the Mareva injunction issued without notice prohibits the sale or transfer of the defendants' Yukon assets that are involved in the dispute but not the direct subject of the action. It would also apply to gold recovered by the defendants in the future.

[6] Rule 51 provides for pre-trial injunction without notice if circumstances permit and the applicant provides a sworn undertaking to abide by any order the court may make as to damages.

[7] The leading Mareva injunction case in Canada is *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 ("*Aetna*"). While *Aetna* lays out governing principles, the test for when it is appropriate to impose a Mareva injunction is articulated differently by the courts of different provinces.

[8] For example, the British Columbia Court of Appeal applies the same two-step test it relies on for all injunctions: see *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481. In Ontario and in the federal courts, the test relies on five guidelines drawn from a Lord Denning decision: see *Chitel et al. v. Rothbart et al.* (1982), 39 O.R. (2d) 513; *Front Carriers Ltd. v. Atlantic & Orient Shipping Corp.*, 2006 FC 18, both of which use the considerations articulated in *Third Chandris Shipping Corp. v. Unimarine S.A.*, [1979] Q.B. 645 (C.A.).

[9] While I agree that a "judge must not allow himself to become the prisoner of a formula" (*British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.)), I find the guidelines set out in *Third Chandris* and *Chitel* helpful to the analysis of when a Mareva injunction is appropriate and not inconsistent with the British Columbia approach, which is, of course, highly persuasive in this jurisdiction given the close connection between the Yukon and British Columbia Courts of Appeal.

[10] The guidelines set out in *Third Chandris* and adopted in *Chitel* are as follows:

> *(i)* The applicant should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

(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.

(iii) The applicant should give some grounds for believing that the respondent has assets in the jurisdiction.

(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 the judgment or award is satisfied.

(v) The applicant must give an undertaking in damages.

(i) The applicant should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

[11] It is well settled law that a party applying for a without notice Mareva injunction must make full and frank disclosure of all material facts and matters known to him and make proper inquiries for any additional relevant facts before making the application. This is required in British Columbia for all *ex parte* or without notice orders and is a broad and onerous obligation (*Neumeyer v. Neumeyer,* 2005 BCSC 1259, per Groberman J.).

[12] The disclosure must include those facts relevant to the defendant's position. If there is less than full accurate disclosure or if there is a misleading of the court about material facts, the order will be discharged. *Chitel* and *Tracy, supra*; *Mooney v. Orr* (1995), 100 B.C.L.R. (2d) 335 (S.C.), at para. 26.

[13] The principle of full and frank disclosure does not refer only to material "facts" but includes documents such as reports, letters and e-mails that may assist the judge in determining the fairness and merits of imposing a Mareva injunction, which is an exceptional and extraordinary remedy.

[14] In *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.), Sharpe J. stated that the court was entitled to know about other possible avenues of recourse available to the plaintiff (para. 127). And further, that the mere presence of a document in an application with voluminous exhibits does not relieve the party of full and frank disclosure, which includes bringing relevant matters to the attention of the Court (para. 167).

[15] In *Sparkle Ventures Inc. v. At My Accounting Department Inc.*, 2011 ONSC 1972, Brown J. stated that the test of materiality is an objective one that extends the duty to place before the court all matters which are relevant to the court's assessment. It is not for the applicant to decide but for the court to determine the full and frank disclosure required. In other words, the applicant must place all facts and documents before the court to permit it to exercise its discretion and balance the interests at stake.

[16] The principle to be applied on the failure to make full and frank disclosure is well established. The person applying must use the utmost good faith and, if they do not, the order will be set aside without regard to the merits of the application. See *Evans v. Umbrella Capital LLC,* 2004 BCCA 149, at paras. 32 – 33.

[17] Counsel is obliged as an officer of the court to disclose any fact which might influence the court's decision.

> **(ii) The applicant should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.**

[18] This factor essentially ensures that the court has sufficient information to determine if a "good arguable case" or a "strong *prima facie* case" is made out by the

applicant. This is a precondition to any further balancing or consideration of the other factors.

[19] Although *Aetna,* cited above, made a distinction between a strong *prima facie* case and good arguable one, in *Tracy v. Instaloans*, the British Columbia Court of Appeal recognized both standards as being different words without a practical difference (para. 54). However, the Court of Appeal clearly stated that, while the standard is more than an "arguable case", it does not require meeting a "bound to succeed" threshold. In my view, the preferable standard is "good arguable case" which avoids the Latin appellation.

[20] I note that the threshold in *Chitel,* the Ontario Court of Appeal may be higher in that Mackinnon A.C.J.O., made the following general statement at para. 29 which he acknowledged was not necessary to his decision:

> It is my view, without stating any final opinion on the subject, that the availability of the cross-examination transcript makes more legitimate a preliminary consideration by the motions judge of the merits of the case. Whatever the test may be regarding the granting of interlocutory injunctions generally, in my view, the granting of a Mareva injunction, under special and limited circumstances, requires that the applicant establish a strong prima facie case.

[21] In *SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of)*, [2004] O.J. No. 3290, the test was higher in that the applicant had to satisfy the court that it had a strong *prima facie* case in the sense that it is "clearly right" and "almost certain to succeed at trial." (para. 14)

[22] That said, I am of the view that the test should be that the applicant has "a good arguable case." There are several factors to take into consideration in determining the

merits of a Mareva injunction and the more stringent test should not be applied in this jurisdiction.

(iii) The applicant should give some grounds for believing that the respondent has assets in the jurisdiction.

[23] This is the easier criterion for the Mareva injunction and courts are unwilling to make unnecessary orders.

(iv) The applicant should give some grounds for believing that there is a genuine or real risk of the assets being removed, dissipated or disposed of before judgment or the award is satisfied.

[24] This factor and the previous three reflect some of the considerations balanced to reach a just and convenient result in British Columbia's two-part test. As indicated above, I prefer to break them out. In my view, such an approach is beneficial in that it requires a judge to turn his or her mind to the relevant considerations. Ultimately, any decisions about whether or not to impose or maintain a Mareva injunction will depend on a judicial consideration of whether it is a just and convenient measure.

[25] In *Insurance Corp. of British Columbia v. Patko*, 2008 BCCA 65, at paras. 24 – 26, the Court observed that there must be evidence of assets in or outside British Columbia and "evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment". In my view, it is this risk of removal, disposal or dissipation that is at the heart of an application for a Mareva injunction and the circumstance that must be clearly established by the applicant. The risk cannot be speculative but must be real or genuine.

[26] The Court of Appeal in *Patko* also made it clear that the onus is on the applicant to demonstrate a real risk, as the law in British Columbia does not impose an onus on

the defendant to show that his assets will not be dissipated before execution on the judgment (para. 30).

[27] Some jurisdictions hold that the removal, disposal or dissipation of assets must be for the specific purpose of avoiding the judgment of the applicant. I prefer the British Columbia view that there is no rigid rule and the question is whether it is just and convenient to tie up a defendant's assets simply to give the applicant security for a judgment he may never obtain. *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309(B.C.C.A.). There must be some evidence that the defendant is in some way removing, dissipating or disposing of assets in a manner clearly distinct from his usual or ordinary course of business or living.

[28] The point is that the court must take into account a variety of factors when balancing the real risk of the dissipation of assets against an interference with the defendant's normal business activities.

(v) The applicant must give an undertaking in damages in case he fails in his claim or the injunction turns out to be unjustified. The undertaking may be required to be supported by a bond or security.

[29] The requirement of the undertaking in damages is a normal requirement of injunctive relief. A rare exception occurred in a class action in *Tracy* where the plaintiff was not required to give an undertaking.

[30] Finally, it should be noted that where the application for a Mareva injunction succeeds at the without notice stage, it is clear that the defendant may move quickly to set aside the injunction. It is imperative that notice of the order be given immediately so that the review application may proceed expeditiously.

BACKGROUND

[31] This application is about a placer mining claim which is located on the right fork of Eureka Creek in the Dawson Mining District. Fine Gold Resources Ltd. owns Claim 7 and is the lawful holder of a Type B water use licence and Class 4 land use permit for it.

[32] On August 1, 2012, Fine Gold Resources Ltd. signed a Lease of Mining Claim ("the Lease") with Russian Mining Inc., as represented by Richard Fanslow, for Russian Mining Inc. and Troy Cahoon as operator, to mine Claim 7 until September 12, 2013. Russian Mining Inc. and operator Troy Cahoon mined Claim 7 in 2012 and 2013 and released and discharged the Lease on October 22, 2013.

[33] There does not appear to have been any disagreement in the e-mail correspondence between Troy Cahoon and Mike Heisey, the President of Fine Gold Resources Ltd. in the 2012 or 2013 mining season. Troy Cahoon reported to Mike Heisey on gold sluiced on October 17, 2012, and made a full report to Russian Mining Inc. In 2013, Troy Cahoon again reported on the gold recovery without any dispute. I note that the Lease contained the usual provisions about mining in a "miner-like fashion", the payment of an advance royalty payment of 89.3 ounces and 10% of gross gold and silver recovered.

[34] Mike Heisey confirmed that Russian Mining Inc. paid $100,000 in advance royalties under the Lease and purchased equipment valued at $298,000 paid for with gold bars. There was an e-mail from Mike Heisey to Troy Cahoon on July 4, 2012, stating Mr. Heisey had "just about lost patience" on the negotiations, purchase of equipment and claims but that appears to have been resolved by the signing of the Lease for Claim 7 and the purchase of the equipment.

[35] As part of its case to establish a real risk, Mike Heisey alleged that in 2005, Troy Cahoon was a 10% owner of North Star Placers, from which Mike Heisey purchased the Eureka Creek mine. Mike Heisey found some equipment listed on the Bill of Sale at Cahoon's camp and had to file a theft charge to get the equipment returned. In July 18, 2013, Troy Cahoon said "Richard [Allen] had us steal numerous items." Troy Cahoon indicates that he was instructed to retrieve items by Richard Allen, his employer, that Richard Allen did not own. Mr. Cahoon indicates the incident occurred 25 years ago.

[36] Whatever the merits of that issue are, it does not appear to have prevented the parties entering the Lease for Claim 7 in 2012 and successfully concluding the royalty payments required for Claim 7 in 2012 and 2013.

[37] Mr. Cahoon and Mr. Heisey carried on an amicable e-mail relationship between 2012 and 2015, at a time when they were mining neighbours, as 46205 Yukon Inc. owns Hiro 1 and a fractional claim, both adjacent to Claim 7. The e-mails have numerous references to Mr. Cahoon spending his winters in New Zealand, Mexico, Belize and Fiji.

[38] Mr. Heisey is aware that Mr. Fanslow resides and carries on business in Chicago, USA.

[39] However, Mr. Cahoon and Mr. Heisey fell out following a boundary dispute reported by Mr. Cahoon to the Dawson Mining Recorder. Mr. Cahoon as a representative of 46205 Yukon Inc., owned by Richard Fanslow, the owner of Hiro 1 claim, reported a boundary dispute with Mr. Heisey regarding Claims 7 in the Fall of 2015. The boundary dispute arose when Mike Heisey raised the issue with Troy Cahoon "about the boundary between Mr. Cahoon's claims, Claim 7 and the plaintiff's

bench claims". Mr. Heisey proposed that they share the cost of a survey to determine the boundary.

[40] Troy Cahoon responded:

> If you feel it [necessary] to have survey done I will not cover half the costs I staked these claims long before joe staked his claims and as shown or appears is not as on the ground and would not snipe anyone's ground.

[41] It appears that Mike Heisey retained Glen Lamerton, a Canada Lands Surveyor, on September 5 or 6, 2015, to survey the boundary. The only documentation about Mr. Lamerton's survey is contained in two brief e-mails between Glen Lamerton and Mike Heisey on September 5 and 6, 2015, in which Mike Heisey retained Mr. Lamerton and Mr. Lamerton inquired about the claim posts and access.

[42] The Mining Recorder conveyed Mr. Cahoon's complaint in a letter to Mr. Heisey dated October 2, 2015 (the "Mining Recorder's letter"). The letter contained advice regarding the procedure to be followed under the *Placer Mining Act*, S.Y. 2003, c. 13, and included the following:

> It has been identified by Mr. Glen Lamerton that post 1 of the Hiro 1 claim may be within the boundaries of the RF Eureka Creek claims. If this is the case, the Hiro 1 claim will not be cancelled, but the claim will consist of only the ground that was vacant at the time of staking, as per section 17(2)(c) of the PMA. [the *Placer Mining Act*]
>
> At this time I will not be requesting an inspection through Compliance Monitoring and Inspections (CMI). Although my office and Natural Resource Officers from CMI will provide you with the assistance we can, the Placer Mining Act, section 39(1), states that the only way to **absolutely** define the boundary of a claim is through a survey. The survey must be completed by a Canada Lands Surveyor, under the instructions from the Surveyor General, and registered under the Placer Mining Act. If a resolution cannot be reached, this

> process may be required. Section 39(5) of the Act assigns all costs of the survey to the claim holders.
>
> …
>
> Mr. Cahoon asked that I address whether or not he could continue to operate on the contested ground. Until the parties involved in the conflict can come to a mutually agreeable boundary, or a survey as per section 39 of the PMA defines the boundaries of the claims, I do not believe one party has the authority to 'remove' another party from a piece of ground. However, I believe that work done in the overlap area by either party prior to the establishment of the boundary may become subject to civil action.
>
> Work outside the contested area can continue and must remain compliant with all applicable Water Licences, Mining Land Use Approvals, and other relevant legislation and permitting. (emphasis already added)

[43] Mr. Heisey swears that "on September 15, 2015, a survey was conducted by Mr. Glen Lamerton, a Canada Lands Surveyor", accompanied at various times by Mr. Cahoon and Mr. Heisey. Mr. Heisey swears that "while I was there, we measured the 1,000' distance from the right fork baseline to the west limit of Claim 7 and determined that Mr. Cahoon was well within that line and had been mining inside that line for the last 4 years." I note here that Mr. Cahoon mined Claim 7 in 2012 and 2013 with the express agreement of Mr. Heisey. It appears that both Mr. Heisey and Mr. Cahoon assumed that Mr. Cahoon's mining was on the right side of the boundary line and they had a friendly relationship until September 2015. In response to Mr. Heisey's allegation, Mr. Cahoon deposed:

> During the process of Mr. Lamerton conducting the survey on September 15, 2015, neither Mr. Lamerton nor anyone else told me that I had been conducting my mining operation inside of the boundaries of Claim 7 for the last four years.

[44] Mr. Heisey swears a mixture of personal knowledge and hearsay from Mr. Lamerton but there is not a single document from Mr. Lamerton such as a survey, a letter or an affidavit to confirm the essence of Mr. Heisey's trespass claim. Mr. Heisey does provide a photograph of the mining equipment of the defendants taken on November 20, 2015, "which appears to be located on Claim 7."

[45] I repeat the observation of the Mining Recorder in her letter of October 2, 2015, that the only way to absolutely define the boundary claim is through a survey. There is no explanation as to why Mr. Lamerton's affidavit, letter, survey, or documents have not been provided or disclosed.

[46] In addition to the hearsay from Mr. Lamerton, Mr. Heisey has provided an e-mail dated November 19, 2015, from Mr. Jeffrey Bond, Manager, Surficial Geology, Yukon Geological Survey, which states:

> I also plotted my GPS coordinates for the center of Troy's pit and it is clearly on Claim 7, albeit, near the upper edge.

[47] There is no affidavit from Mr. Bond.

[48] Mr. Heisey swears that 4,000 to 5,000 Troy ounces of the plaintiff's gold has been mined by the defendants. Mr. Heisey estimates the value of the gold mined to be "in the range of four to five million dollars."

[49] The boundary dispute spilled over into the application of Fine Gold Resources Ltd. for a water and land use licence on the right fork of Eureka Creek. Mr. Cahoon filed a letter of intervention on December 15, 2015, detailing many allegations that are not relevant to this court action except that it came after the boundary dispute flared up. Mr. Cahoon requested a public hearing for Fine Gold's application. Mr. Heisey responded with a letter to the Yukon Water Board dated January 11, 2016, attaching the

Statement of Claim in this action and requesting the Water Board not to hold a public hearing for his application. The result of this water licence dispute is the filing of another court action by Fine Gold Resources Ltd. and Mr. Heisey against Them R. Gold and Mr. Cahoon

[50] Mr. Heisey swears that the value of assets that Mr. Cahoon and Them R. Gold have in Yukon or Canada will not be sufficient to satisfy a judgment in favour of the plaintiff. Mr. Heisey has identified equipment that he sold to Mr. Cahoon and additional equipment that is on the claims being mined by the defendants. He values it at $300,000.

[51] There is no evidence indicating any involvement of Richard Fanslow, 46205 Yukon Inc. and Russian Mining in the actual gold mining operations. He is the owner of the Hiro 1 claim and Mr. Cahoon operates the mine. Mr. Fanslow has apparently declined to be involved in discussions about the boundary dispute. Mr. Heisey appears to know little about Mr. Fanslow's assets in Yukon, Canada or Chicago, except that they will not be enough to satisfy his judgment. Mr. Heisey retained an investigation service who prepared an extensive 64-page report, dated January 19, 2016, on Mr. Fanslow's assets in the United States.

[52] There is no evidence that either Mr. Cahoon or Mr. Fanslow have taken any steps to remove any equipment from Yukon or transfer any claims.

[53] There is no doubt that considerable gold may have been mined over the four years but no evidence as to where it is or how it has been spent. Mr. Heisey has been aware gold being mined for Mr. Fanslow during the four-year period 2012 – 2015 and

he knows where it has been mined. He did not raise the boundary issue until September 2015.

[54] In Mr. Heisey's affidavit #1 filed December 31, 2015, he deposed that Mr. Cahoon purchased a house in Nicaragua in November or December 2015.

[55] Mr. Heisey's affidavit #2 filed February 23, 2016, focusses on the merits of his claim, the gold mined by Mr. Cahoon as operator for Mr. Fanslow and their inability to satisfy his expected judgment.

[56] There is no further evidence that relates to the risk that Mr. Cahoon or Mr. Fanslow might remove equipment or transfer claims. There is little dispute about the inference that the mined gold from 2012 to 2015 has been spent on mining operations or removed from Yukon.

[57] Mr. Cahoon has filed an affidavit from Nicaragua. Mr. Fanslow, who resides in Chicago, Illinois, has been unable to file an affidavit in the short period since the without notice order was made on February 29, 2016.

[58] There is a dispute on the interpretation to be given to the final paragraph of Mr. Cahoon's affidavit which reads as follows:

> 15. All of the mining that I have performed on Claim 7 during the last four years was under the Lease Agreement attached as Exhibit 3 to Heisey #2. I have not at any time mined on Claim 7 without the express permission of the owner of Claim 7.

[59] Counsel for Mr. Cahoon submits that this statement is consistent with Mr. Cahoon's denial that he has never mined Claim 7 except pursuant to the 2012 – 2013 Lease of Mining Claim agreement. Counsel for Mr. Heisey submits that the words

"all of the mining that I have performed on Claim 7 during the last four years" can be interpreted to say that Mr. Cahoon has mined on Claim 7 for the last four years.

[60] I have concluded that para. 15, in the context of this court action and the exchanges between Mr. Cahoon and Mr. Heisey can only be interpreted to be a denial of mining on Claim 7 except as permitted in the Lease for Claim 7.

ANALYSIS

[61] There is no dispute that Mr. Heisey has identified assets of the defendants in Yukon and that he has sworn an undertaking as to damages. The matters in dispute are whether Mr. Heisey has made full and frank disclosure, whether he has a good arguable claim and whether he has established that there is a genuine or real risk of the transfer of sale of assets.

Full and Frank Disclosure

[62] The first argument advanced by counsel for the defendants is that Mr. Heisey and his counsel failed to direct the Court on the without notice application to the Mining Recorder's letter stating that part of the Hiro claim "may" be within the boundary of Claim 7 and the fact that it can only be determined "absolutely" through a survey. The Mining Recorder's letter is significant because it provides a legal remedy under s. 39 of the *Placer Mining Act* to have a survey of claims that "shall be accepted as defining absolutely the boundaries of the claims surveyed" subject to an appeal to this Court.

[63] Counsel rely on the *Sparkle Ventures Inc.,* at para. 19, where Brown J. stated in a list of disclosure principles:

> …
>
> (5) It is insufficient for a plaintiff to simply append a document as an exhibit without highlighting in the body of

> the affidavit itself any important clauses or portions of the exhibits ...

[64] I appreciate the merits and adopt this aspect of the principle of full and frank disclosure. In this application, there are not hundreds of documents referred to and the Mining Recorder's letter is in fact appended twice in Mr. Heisey's affidavit.

[65] However, it is not so much the failure to highlight the Mining Recorder's letter about the importance of the survey in resolving the dispute, but rather Mr. Heisey's failure to disclose all of the facts known by Mr. Lamerton that is the most significant failure of Mr. Heisey and his counsel with respect to making full and frank disclosure. Mr. Lamerton is the only person who can address his observations of September 15, 2015, which are critical to the factors to be considered in this Mareva injunction application.

[66] Mr. Heisey has chosen to present Mr. Lamerton's evidence by way of hearsay. This conveniently avoids Mr. Lamerton stating his facts and opinion directly and significantly also prevents the defendants from challenging the evidence or cross-examining Mr. Lamerton. If there are legitimate reasons for Mr. Lamerton's silence, none were disclosed.

[67] It might be argued that the material facts of Mr. Lamerton's opinion or report were provided. However, there is a total failure to disclose the evidentiary documents to support the hearsay opinion.

[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.

[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. I do, however, have some observations about the merits.

The Risk of Transfer, Disposal or Dissipation of Assets

[70] The only evidence before me that is capable of establishing a real risk of the transfer, disposal or dissipation of assets is the allegation that in 2005, Mr. Cahoon was involved in the theft of mining equipment purchased by Mr. Heisey. Mr. Cahoon explains that he was removing equipment on the instructions of his then-employer, and he admits his conduct was wrongful. There is no evidence that any criminal or civil court action resulted and Mr. Heisey retrieved his equipment. This incident was followed by the Lease of Claim 7 on August 1, 2012, which authorized Mr. Cahoon, on behalf of Mr. Fanslow, to mine Claim 7. This lease contemplated the removal of large amounts of gold and a royalty payment of 10% of the gold and silver recovered to Mr. Heisey's company. It is significant that the Lease was entered into despite the incident in 2005 and that the Lease was completed without incident.

[71] In my view, the 2005 incident has marginal value in establishing a real risk of transfer, disposition or dissipation of assets. It is a past event of questionable conduct that has not been repeated for ten years or more. In order to qualify as a real risk, there must be a reasonable temporal connection to the Mareva injunction applied for or some reasonable basis for considering it. Under the circumstances of this application, it appears to be dredged up to sully Mr. Cahoon's reputation rather than advance a case of real risk. It does not constitute a real risk.

[72] What is more disturbing than the weak suggestion of a risk posed by Mr. Cahoon is the fact that there is not even an allegation that Mr. Fanslow has created a real risk of transfer, disposal or dissipation of assets. The only evidence about Mr. Fanslow was that when Mr. Heisey phoned him, he indicated that he wanted no discussion but would leave it to counsel.

[73] It could be argued that Mr. Cahoon and Mr. Fanslow are one and the same as regards the alleged risk of Mr. Cahoon, but I reject that. In order to make such a leap, there would have to be some evidence that Mr. Fanslow threatened to transfer, dispose or dissipate assets with some realistic evidence to indicate some action or direction to Mr. Cahoon.

[74] If I had not already set the Mareva injunction order of February 29, 2016, aside on the basis of non-disclosure, this would also provide ample basis for so doing.

A Good Arguable Case

[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.

[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.

Special Costs

[77] The defendants claim special costs based on the plaintiff's failure to make full and frank disclosure and the lack of a real risk. Because of the lack of any evidence connecting Mr. Fanslow with either the alleged trespass or any connection to a real risk of the transfer or disposition of assets, I will assess the costs separately for Mr. Fanslow and his companies.

[78] Special costs are awarded for reprehensible conduct. A non-exhaustive list was set out in *Brosseuk v. Aurora Mines Inc.*, 2008 YKSC 18, as follows:

1. Improper allegations of fraud;
2. Improper motive for bringing the proceedings such as imposing a burden on a weaker party;
3. Improper conduct of the proceedings themselves;
4. Material non-disclosure or misrepresentation; and
5. Obtaining an order without notice when the situation required notice.

[79] In this case, the most serious misconduct is the material non-disclosure of Mr. Lamerton's facts or work product about the boundary dispute. Mr. Heisey retained Mr. Lamerton in September 2015, and Mr. Lamerton was taking photographs of the claims in November 2015. Despite the obvious assistance that Mr. Lamerton could provide to the Court to assess the merit of the Mareva injunction application, only one photograph and hearsay information was presented. 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.

[80] It is also a factor that the order of February 29, 2016, was obtained while all defendants were represented by counsel. Counsel for Mr. Fanslow and his companies filed an appearance on December 23, 2015, and a statement of defence denying the allegations on February 5, 2016. Counsel for Mr. Cahoon and his company filed his appearance on January 8, 2016, and a statement of defence on February 4, 2016.

[81] Sometimes circumstances do not allow for notice of an application to be given to counsel. However, these are not those circumstances. Notwithstanding the fact that a without notice order can be of considerable importance in cases of real risk of transfer or removal of assets from Yukon, there was no evidence that this had happened or was about to happen. Furthermore, the equipment itself would be in the ice and snow at this time of year and even if it could be moved, it would be readily apparent that some activity was taking place or about to take place. Given that both Mr. Cahoon and Mr. Fanslow were out of the jurisdiction, the risk diminishes again.

[82] I take judicial notice of the fact that placer gold mining is commencing earlier in the spring because of warming temperatures. There could be concern about mining in the disputed location but a resolution of that issue does not require a Mareva injunction or a without notice application.

CONCLUSION

[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.

[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.

[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.

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VEALE J.