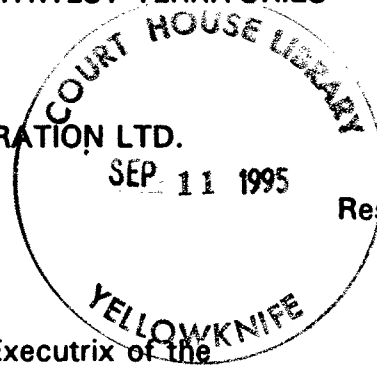


SC 7031/83

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MACK LAKE MINING CORPORATION LTD.



(Plaintiff)
Respondent

- and -

JOSEPHINE MARY NEWSON, Executrix of the
Estate of the late ERNEST A. NEWSON, the
PUBLIC TRUSTEE of the Northwest Territories
as Administrator *at litem* of the Estate of
ERNEST A. NEWSON, J. SAMUEL WACKER,
IRVING PICARD, BERTHA PICARD, HELEN R.
CRAVEN, BLUEBELL ENTERPRISES LIMITED,
GIANT YELLOWKNIFE MINES LIMITED and
JOHN DOE, being a person or persons unknown

(Defendants)
Applicants

Motion to strike the statement of claim and dismiss for want of prosecution itself
dismissed with costs in any event of the cause.

Heard at Yellowknife on August 4th 1995

Judgment filed: August 25th 1995

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Plaintiff (Respondent): Austin F. Marshall, Esq.

Counsel for the Defendant (Applicant)
Giant Yellowknife Mines Ltd.: Scott Duke, Esq.

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Applicants

REASONS FOR JUDGMENT

1 Giant Yellowknife Mines Limited ("Giant"), one of the defendants in this action, moves the Court to strike out the plaintiff's statement of claim and dismiss the action, all for want of prosecution by the plaintiff.

2 The action was commenced in October 1983 by issuance of the statement of claim. It is enough, for present purposes, to notice that the plaintiff seeks \$10,000,000 in damages and various other forms of relief on the basis of an allegedly

fraudulent deprivation of the plaintiff by the defendants (in one capacity or another) of the plaintiff's legal interest in certain mineral rights in land in the Northwest Territories. Giant is, and was in 1983, the registered holder of a leasehold interest under the Crown in that land, which interest comprises those mineral rights.

3 An amended statement of claim was issued in October 1984. Difficulty was experienced in serving one of the defendants, namely J. Samuel Wacker, a resident of Florida in the United States of America; but the other defendants had all been served with the statement of claim by that time. However, no statement of defence was filed until 1986, Giant's in January and that of the defendants Irving Picard, Bertha Picard, Helen R. Craven and Bluebell Enterprises Limited in April. The statement of defence filed on behalf of J. Samuel Wacker did not reach the registry until October that year.

4 In February 1987 Giant filed a notice of motion for an order for security of its anticipated costs. The other defendants who had filed statements of defence joined in the motion, which was not heard until June of that year, with an order issuing in November. That order was appealed to the Court of Appeal, which dismissed the appeal in April 1989 following a reference by which the amount of security was fixed. In these proceedings relating to security for costs, the applicants sought and obtained orders dismissing the action in the event that the required security was not forthcoming within the time limit set. The required security has meantime been deposited with the Clerk of the Court as ordered in 1987 and affirmed on appeal in 1989. The concurrent application to dismiss the action for want of prosecution was however dismissed at first instance and that decision was left undisturbed on appeal.

5 In the meantime, the defendants Irving Picard, Bertha Picard and Helen R. Craven are said to have died during the period from January 1987 to January 1993. The defendant J. Samuel Wacker is now in his 90s. And there have been changes of solicitors acting on behalf of the plaintiff and also Mr. Wacker, with a lapse between the plaintiff's last former solicitor getting off the record in June 1990 and the plaintiff's present solicitor coming on the record in January 1993.

6 Giant filed notice of its present motion in December 1992, relying upon the affidavit of Margaret K. Witte sworn on December 11th 1992. Leave to cross-examine Ms. Witte on her affidavit was granted by an order made in Chambers on March 15th 1993. Owing to the unavailability of Ms. Witte, however, the cross-examination did not take place until December 15th 1994. This long delay was incurred in spite of the express terms of the Chambers order requiring the cross-examination to take place prior to April 15th 1993. No extension of the time for this as limited by the order was sought by counsel on either side; it appears that they simply ignored this requirement of the order.

7 It is against this background that Giant has filed a further notice of motion asking for an expedited hearing of its 1992 notice of motion together with costs.

8 It is common ground that the first question to be answered on a motion to dismiss for want of prosecution is whether there has been inordinate delay in the prosecution of the action. Here, the facts speak for themselves: the answer is "yes".

The next question requiring examination is whether the delay is inexcusable.

And I take this to mean inexcusable to the extent that the plaintiff is shown to be responsible for it. Delays resulting from the application for security for costs (including the appeal in that respect) account for approximately two years in total. Delays in filing statements of defence likewise extend in excess of a year. And the delays which accumulated before Ms. Witte was produced for cross-examination account for almost two more years following the re-activation of the proceedings in January 1993. Of the twelve years since the action was commenced, these delays account for almost half the total.

10 It deserves to be noticed, once again, that the application made in 1987 to have the action then dismissed for want of prosecution was, in the result, itself dismissed. And while the period of delay in total is to be reckoned from 1983, it is therefore primarily the period from the appellate decision in 1989, in reference to the earlier application, that is of importance for purposes of determining if the overall delay is now inexcusable.

11 Three years, more or less, were allowed to pass following the appellate decision mentioned. These include the withdrawal in 1990 of the plaintiff's then solicitor from the record. The plaintiff evidently did not pursue the action thereafter until prodded by Giant's present application to dismiss for want of prosecution.

12 On the affidavit material before me, it is apparent that the plaintiff has been hampered in its pursuit of the action by a lack of available financial means. The affidavit of Tom Gledhill sworn on July 31st 1995 indicates that this is no longer a factor. There

is nothing before me to suggest otherwise.

13 Does the impecuniosity of the plaintiff during the period 1990 to 1993 excuse the delay which occurred in that period? Considering the nature of the plaintiff's action, and the evident difficulty encountered by the plaintiff in obtaining financial resources to enable it to continue actively in that period, I am inclined to answer this with a "yes".

14 On the whole, bearing in mind the several extensive periods of delay attributable to Giant and the other defendants, not least the delay by Giant in producing Ms. Witte for cross-examination on her affidavit in support of the present motion, I decline to conclude that the overall delay in this action is inexcusable in a sense attributable solely or principally to the plaintiff. The fact that Giant deliberately flouted the Chambers order setting the deadline for Ms. Witte's cross-examination, with consequent substantial delay, makes it difficult to take seriously (as otherwise one might) Giant's protestations to the effect that the plaintiff's delays in this action are inexcusable.

15 However, should I be in error in respect of the alleged inexcusable nature of the delay, I shall go on to consider the still further question as to whether Giant is likely to have suffered serious prejudice by reason of the overall delay here in question. The death of Irving Picard, and the believed deaths of Bertha Picard and Helen R. Craven, the officers and directors of Bluebell Enterprises Limited at the time of its involvement in transactions leading to the acquisition by Giant of the mineral rights in question is said by Ms. Witte to be seriously prejudicial to Giant in the action. It is Ms. Witte's opinion, as

set forth in her affidavit, that Irving Picard, Bertha Picard and Helen R. Craven were the only persons who would have been able to give evidence as to the nature and circumstances of the transfers of those rights to Giant and as to the circumstances in which Bluebell Enterprises Limited acquired those rights before these transfers were made.

16 Giant has pleaded in its statement of defence that it acquired the mineral rights in question in good faith and without having had notice of any interest in them on the part of the plaintiff. On that basis, notwithstanding Ms. Witte's opinion, the unavailability of the former officers or directors of Bluebell Enterprises Limited, as witnesses at trial in this action, does not appear to me to be at all likely to prejudice Giant's position. There is nothing before me upon which I could form a contrary opinion for myself. Ms. Witte ignores the existence of numerous other potential witnesses named in the affidavit material who remain available and who would appear to be of more immediate significance to Giant's case than the deceased individuals above mentioned.

17 Among other things, Ms. Witte refers to the strike which was ongoing at the time when she swore her affidavit. I take judicial notice that the strike has long since been settled, so that this is no longer likely to make for any prejudice to Giant (or its successor Royal Oak Mines Inc.). And while the length of the overall delay is indeed inordinate, I must again note that a significant share of that delay is attributable to Giant and not the plaintiff. To that extent, it is difficult to take at face value (as one otherwise might) the claims that Giant is seriously prejudiced by the delay.

18 Giant has not satisfied me, on a balance of probabilities, that it is likely to have been seriously prejudiced by the overall delay in this action to date.

19 That being so, the motion to strike the statement of claim and dismiss the action is itself dismissed with costs in any event of the cause.

M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
August 25th 1995

Counsel for the Plaintiff (Respondent): Austin F. Marshall, Esq.

Counsel for the Defendant (Applicant)
Giant Yellowknife Mines Ltd.: Scott Duke, Esq.

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REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE M.M. de WEERDT

