Pinnacle Resources v. Northern Geophysics, 2002 NWTSC 25

Date: 20020318
Docket: CV 08283

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PINNACLE RESOURCES (1996) LTD.

Plaintiff (Defendant by Counterclaim)

- and -

NORTHERN GEOPHYSICS LTD.

Defendant (Plaintiff by Counterclaim)

REASONS FOR JUDGMENT

Trial on a claim for money owing under an Option Agreement.

Heard at Yellowknife, NT on March 4 and 5, 2002

Reasons filed: March 18, 2002

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Plaintiff (Defendant by Counterclaim): Gerard K. Phillips
Appearing for the Defendant (Plaintiff by Counterclaim): Mike Magrum

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[1] This trial proceeded before me with the Defendant (Plaintiff by Counterclaim), Northern Geophysics Ltd. ("Northern Geophysics") represented by its president, Mike Magrum, who is not a lawyer.

[2] In the pleadings, the Plaintiff (Defendant by Counterclaim), Pinnacle Resources (1996) Ltd. ("Pinnacle"), claims from Northern Geophysics the sum of $150,000.00 owing under the terms of an Option Agreement between the two companies. In its Amended Statement of Defence, Northern Geophysics claims that performance of an earlier agreement between it and Apex Geoscience Ltd. ("Apex") was a condition precedent to the Option Agreement and that this earlier agreement was breached, which led to Northern Geophysics not making payments under the terms of the Option Agreement. There is also a counterclaim by Northern Geophysics for $150,000.00 it paid under the Option Agreement as well as damages for loss of opportunity and other damages.

[3] At the trial, Pinnacle called two witnesses, Mr. Olson and Mr. Williamson. A number of documents became exhibits through the evidence of those two witnesses. Counsel for Pinnacle also read into evidence excerpts from evidence given by Mr. Magrum at his examination for discovery. Northern Geophysics called no evidence.

[4] The events which gave rise to this litigation and which are not in dispute may be summarized from the evidence as follows.

[5] At the relevant time, the shareholders of Pinnacle were Reginald Olson, Michael Dufresne, John Williamson and Gordon Stewart, each as to a 25 percent interest. Mr. Olson was also a director and Mr. Williamson was the president.

[6] The shareholders of Apex were Mr. Olson as to a 51 percent interest, Mr. Dufresne as to a 24.5 percent interest and Mr. Williamson as to a 24.5 percent interest. Mr. Olson was the president, Mr. Dufresne was the vice-president and Mr. Williamson was a director at the relevant time.

[7] On January 28, 1997 two letters were signed by Northern Geophysics. The evidence was not clear as to which letter was signed first, but I do not think any significance attaches to the order of signing. Nor did the evidence reveal who actually prepared the letters, but nothing turns on that in my view.

[8] One of the January 28, 1997 letters was from Northern Geophysics to Pinnacle and was entitled "Letter of Intent". It set out a proposal whereby Northern Geophysics would acquire a one hundred percent interest in certain mineral claims in the PEC and West Dismal Uranium Properties in the Northwest Territories for the sum of $300,000.00 and a percentage of net smelter returns. Mr. Williamson, Pinnacle's president, signed for Pinnacle, acknowledging that the Letter of Intent represented the company's understanding of the terms under which Northern Geophysics might acquire the one hundred percent interest.

[9] The other January 28, 1997 letter was also from Northern Geophysics but was directed to Apex Geoscience Ltd. That very brief letter said:

> As per our conversation of this morning, it is our understanding that Apex Geoscience Ltd. will provide a summary of 4 or 5 uranium prospects available for staking in the Hornby Basin area of the NWT. If these prospects are deemed suitable for our purposes, a finders fee will be negotiated at a later date.

Mr. Williamson signed on behalf of Apex, signifying his agreement with the above.

[10] Then, on February 10, 1997, Pinnacle and Northern Geophysics executed an Option Agreement, formalizing what had been set out in the January 28, 1997 Letter of

Intent. Under the Option Agreement, Pinnacle granted Northern Geophysics the option of acquiring a one hundred percent interest in 28 specified mineral claims and claims in an area of mutual interest in the Dismal Lakes area, for the sum of $300,000.00 plus a percentage of net smelter returns. Under clause 2(b) of the Option Agreement, the $300,000.00 Option Price was to be paid "whether or not the Option is ever exercised hereunder".

[11] The Option Agreement set out a payment schedule which provided for payments of $100,000.00 on execution of the Agreement, $50,000.00 on or before February 10, 1998, $50,000.00 on or before February 10, 1999 and $100,000.00 on or before February 10, 2000. Section 7 of the Option Agreement provided for what would happen in the event of a default in payment by Northern Geophysics:

> In the event that [Northern Geophysics] defaults in making any of the foregoing payments within fifteen days of the respective times limited therefor, this agreement shall thereupon terminate and thereafter [Northern Geophysics] shall have no right, title or interest in and to the Property until such time as the Option Price is paid in full. However, [Northern Geophysics] shall remain obligated to pay the balance of the Option Price, the remaining portion of which shall become due and payable in full immediately upon such default.

[12] As contemplated by the Option Agreement, a Transfer of Mineral Claim was executed by Pinnacle in favour of Northern Geophysics for the 28 specified mineral claims. This document was signed by Mr. Williamson for Pinnacle on February 10, 1997. It was apparently registered sometime later.

[13] The next document chronologically is a three page letter dated April 25, 1997 from Apex to Northern Geophysics, providing information about five uranium properties in the Hornby Basin available for staking and asking whether any of them were of interest to Northern Geophysics. The letter also advises that Apex is aware of at least five other uranium staking prospects in that area and asks if Northern Geophysics is interested.

[14] Mr. Olson testified that the April 25, 1997 letter was sent to comply with the understanding set out in the January 28, 1997 letter from Northern Geophysics to Apex that Apex would provide this information. He said that no response to the letter was received from Northern Geophysics.

[15] The Option Agreement entered into on February 10, 1997 between Pinnacle and Northern Geophysics was amended by a letter dated August 27, 1998. That letter, from Northern Geophysics to Pinnacle, proposes that Northern Geophysics will maintain only

3 of the mineral claims out of the 28 listed in the Option Agreement. It states that Northern Geophysics will pay the remaining cash payments as per the schedule in the Option Agreement and maintain the area of mutual interest and the net smelter return within that area. It also states: "Except as amended by this letter, the [Option] Agreement remains in full force and effect". Pinnacle signed its agreement to the amendment.

[16] Mr. Olson testified that the reason for the amendment was that Northern Geophysics wanted relief from its obligation under the Option Agreement to maintain all 28 mineral claims.

[17] Mr. Olson testified that Northern Geophysics made the payments as required in February 1997 and 1998, for a total of $150,000.00 paid. The payments required in February 1999 and February 2000, totalling $150,000.00, were never made.

[18] As I indicated above, Northern Geophysics did not call any evidence at trial. The cross-examination of Mr. Olson and Mr. Williamson did not focus on the $150,000.00 claimed as owing but was instead directed at the relationship between Pinnacle and Apex and the conduct of those two companies.

[19] Mr. Magrum took the position during his cross-examination of the witnesses and in his submissions at the conclusion of the trial that Pinnacle and Apex in effect operated as one business and that the two agreements reflected in the two letters dated January 28, 1997 were really one agreement.

[20] The evidence did reveal a close connection between Pinnacle and Apex. The same men, Olson, Williamson and Dufresne, were shareholders of both companies with the addition of Mr. Stewart as a shareholder in Pinnacle. The two companies had the same mailing address. Both January 28, 1997 letters were signed by Mr. Williamson, who consulted only with Mr. Olson and not any of the other shareholders or directors. Pamela Strand, referred to in the evidence, was hired as an employee by Apex but was seconded to Pinnacle.

[21] According to Mr. Olson's evidence the activities the two companies were engaged in were different. Apex provided consulting geoscience services to the minerals industry while Pinnacle was involved in staking, identifying, acquiring and marketing mineral properties.

[22] The January 28, 1997 letters were clearly directed to the two separate companies. No evidence was adduced suggesting that Northern Geophysics did not know that these

were two separate companies or was led to believe that they were one and the same company.

[23] Mr. Magrum argued that Pinnacle and Apex would be considered related companies for accounting purposes. No evidence was presented about that and I make no finding in that regard. The important thing is that for legal purposes they are separate companies.

[24] Mr. Magrum sought to show that the Option Agreement between Pinnacle and Northern Geophysics was conditional on the performance of the understanding reflected in the letter of January 28, 1997 between Northern Geophysics and Apex. Nothing in any of the documents states that and both witnesses denied that any such term was agreed to. Furthermore, Clause 18 of the Option Agreement states the following:

> This agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreement, understandings, negotiations and discussions, whether oral or written, of the parties hereto and there are no warranties, representations or other agreements between the parties in connection with the subject matter hereof, except as specifically set forth. No supplement, modification or waiver of this agreement shall be binding unless executed in writing by the parties to be bound thereby.

[25] Even if there had been an agreement between Pinnacle and Northern Geophysics, prior to February 10, 1997, that the obligations under the Option Agreement were conditional on Apex's compliance with the January 28, 1997 letter of understanding, it would have been superseded and replaced by the Option Agreement.

[26] Further, on this issue, counsel for Pinnacle read in evidence from the examination for discovery of Mr. Magrum, who was asked at that time why, if he understood the January 28, 1997 letter between Northern Geophysics and Apex to be part and parcel of the Letter of Intent of the same date between Northern Geophysics and Pinnacle, he had not had that set out as a condition precedent to the Option Agreement of February 10, 1997. Mr. Magrum's answer on discovery was: "I had suggested it. They didn't want to go along with it and I decided to go ahead".

[27] In other words, the parties did not agree to make the understanding between Northern Geophysics and Apex a condition precedent to the Option Agreement. I find on the evidence that it was not a condition precedent and that performance of the Option

Agreement was in no way conditional on Apex complying with the understanding in the letter of January 28, 1997.

[28] Much of Mr. Magrum's cross-examination of Mr. Olson was directed at the fact that Pinnacle had staked some uranium properties in the Hornby Basin area and offered them to Northern Geophysics after the letters of January 28, 1997 were signed. These properties were separate from and not included in the properties and the area of mutual interest which were the subject of the January 28, 1997 letter and then the Option Agreement between Pinnacle and Northern Geophysics.

[29] The Hornby Basin properties had been, according to Mr. Olson's testimony, recommended to Pinnacle by Apex in the spring of 1996, but only after January 28, 1997 was it discovered that some competitors were staking there, at which point Mr. Stewart staked the properties and it was decided that they would be put in the name of Pinnacle. It was clear from Mr. Olson's evidence that Northern Geophysics viewed this as a conflict of interest on the part of Apex in that Apex was to provide it with information pursuant to the January 28, 1997 letter of understanding, but instead allowed Pinnacle to stake the properties. Apex took the position that the letter of understanding between it and Northern Geophysics did not preclude either party from staking in the Hornby Basin area. In any event, Mr. Olson's testimony was that upon Mr. Magrum raising the issue with him sometime in the spring of 1997, the properties were offered to Northern Geophysics on the basis that the deal could be done through either Pinnacle or Apex, but Northern Geophysics did not respond.

[30] I need not make any findings on whether Apex was in a conflict of interest as that is irrelevant to the issues in this case, to which Apex is not a party.

[31] Mr. Magrum asked the Court to conclude from all this that Pinnacle and Apex were really operating as one company. For the reasons set out above, I reject that argument. They were separate parties. The fact that there were dealings between them and that, with some shareholders in common, they would make decisions as to which company would do what, does not make them one company for purposes of the performance of an agreement that only one is a party to.

[32] Mr. Magrum also argued that in executing the letter of understanding of January 28, 1997 with Apex, Northern Geophysics had thought it would get information on the best properties from Apex and was unaware that Apex already had commitments in the Hornby Basin through its dealings with Pinnacle in the spring of 1996. There was no evidence that that is in fact what Northern Geophysics thought, because Northern

Geophysics did not call any evidence. All that is before me are the various documents and the testimony of the two witnesses. The letter of understanding between Apex and Northern Geophysics did not make any representations as to the quality or exclusiveness of the uranium prospects about which Apex was to provide information; it specifically left it to Northern Geophysics to determine whether the prospects were suitable for its purposes. And the letter of April 25, 1997 from Apex to Northern Geophysics sets out the uranium prospects as per the understanding in the January 28, 1997 letter.

[33] It is clear from Mr. Olson's testimony that Northern Geophysics was not happy about Apex's dealings with Pinnacle in relation to the Hornby Basin. However, I conclude that by August 27, 1998, when Northern Geophysics signed the letter to amend the Option Agreement, those concerns had been resolved or abandoned or at the very least were not viewed by Northern Geophysics as having any relevance to the Option Agreement. In signing the letter to amend, Northern Geophysics confirmed that the Option Agreement remained in full force and effect.

[34] In any event, since the Option Agreement was not, as I have found, conditional on performance of the understanding between Apex and Northern Geophysics, none of this affects Northern Geophysics' obligations under the Option Agreement. There is no evidence of any breach by Pinnacle of its obligations under the Option Agreement.

[35] Mr. Magrum also argued on behalf of Northern Geophysics that because the Transfer of Mineral Claim for the 28 claims under the Option Agreement cites as consideration for the transfer the sum of $1.00 (rather than $1.00 and other good and valuable consideration) this means either that the claims were sold to Northern Geophysics for $1.00 and it should therefore recoup the $150,000.00 it paid or that nothing further is owing by Northern Geophysics. Neither of these arguments has any merit. The Option Agreement contemplated that transfers of the mineral claims would be provided on execution. Clearly the amount to be paid by Northern Geophysics was $300,000.00 and not $1.00.

[36] In the result, I find that Northern Geophysics is in default of its obligation to make the last two payments required under the Option Agreement. Pinnacle will therefore have judgment in the amount of $150,000.00 plus prejudgment interest pursuant to the *Judicature Act*, R.S.N.W.T. 1988, c. J-1 as amended.

[37] Having found that Pinnacle did not breach the Option Agreement, and no evidence having been presented in support of the counterclaim, I dismiss the counterclaim.

[38] Pinnacle will have its party party costs in Column 6 of the tariff (based on the $150,000.00 plus pre-judgment interest claimed).

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
19th day of March 2002

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Appearing for the Defendant (Plaintiff by Counterclaim): Mike Magrum

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