COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mill v. Orogenic Gold Corp.,*
2024 BCCA 359

Date: 20241022
Docket: CA49146

Between:

Richard Mill

Appellant
(Defendant)

And

Orogenic Gold Corp.

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated May 16, 2023 (*Orogenic Gold Corp. v. Mill*, 2023 BCSC 832, Vancouver Docket S229003).

Counsel for the Appellant:	C.C. Cheng J. Mason
Counsel for the Respondent:	M.E. Fancourt-Smith J.J. Mayfield
Place and Date of Hearing:	Vancouver, British Columbia September 18, 2024
Place and Date of Judgment:	Vancouver, British Columbia October 22, 2024

Written Reasons by:
The Honourable Justice Iyer

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Richard Mill appeals from a summary trial judgment ordering him to fulfill his obligation to transfer four mineral claims to the respondent pursuant to their option agreement and extending the term of the agreement by five years. Mr. Mill submits the chambers judge erred in ordering specific performance.

Held: Appeal dismissed. The chambers judge properly considered the adequacy of damages before exercising her discretion to order specific performance. Extending the term of the agreement appropriately gave effect to the parties' bargain.

Reasons for Judgment of the Honourable Justice Iyer:

Overview

[1] This appeal arises from a dispute between the parties under an option agreement regarding potentially very valuable mineral claims located in British Columbia's "Golden Triangle" region. The respondent, Orogenic Gold Corporation Ltd. ("Orogenic") sued the appellant, Mr. Mill, alleging that he had breached the terms of the option agreement by failing to transfer title to the mineral claims to Orogenic.

[2] Orogenic applied for summary trial. The chambers judge found that Mr. Mill had breached the option agreement. She ordered Mr. Mill to transfer title to the mineral claims to Orogenic and she extended the term of the option agreement for five years.

[3] Mr. Mill does not take issue with the finding of liability. He says that the chambers judge erred in law by ordering specific performance rather than damages. Specifically, he says he should not have been compelled to transfer title and the chambers judge should not have extended the term of the option agreement.

Background

[4] In 2016 and 2017, Mr. Mill acquired title to four mineral tenures in Northwestern British Columbia ("Mineral Claims"). In September 2017, Mr. Mill incorporated Orogenic to hold the Mineral Claims and to pursue an initial public

offering (“IPO”) on a Canadian stock exchange. Mr. Mill was Orogenic’s sole director, President, and CEO.

[5] Mr. Mill instructed counsel to prepare an option agreement between himself and Orogenic in furtherance of an IPO. During this period, Martin Aiello became Orogenic’s CFO. The option agreement was concluded and dated June 1, 2018, with Mr. Aiello signing for Orogenic and Mr. Mill signing as owner of the Mineral Claims (“Option Agreement”).

[6] Key terms of the Option Agreement were as follows. Orogenic would obtain the sole, exclusive, and irrevocable right and option to acquire a 100% right, title, and interest in the Mineral Claims (subject to a net smelter royalty in favour of Mr. Mill) in exchange for shares of Orogenic being issued to Mr. Mill. Upon execution of the agreement, Orogenic would issue the shares to Mr. Mill and he would transfer title to the Mineral Claims to Orogenic. Mr. Mill would not in any way transfer or alienate any of his interest in the Mineral Claims during the term of the Option Agreement without Orogenic’s consent. Orogenic’s option would terminate if it did not complete an IPO or other going public transaction by June 1, 2023.

[7] In his capacity as Orogenic’s sole director, Mr. Mill approved the Option Agreement and the issuance of Orogenic shares to himself. He remained Orogenic’s only director, president and CEO until March 2022.

[8] Mr. Mill concedes that he did not transfer title to the Mineral Claims to Orogenic. Neither Mr. Aiello nor Wayne Workun, an investment broker who assisted with Orogenic’s incorporation and its share sales, were aware of this. They were also unaware that Mr. Mill was representing to others that he was the owner of the Mineral Claims and was negotiating option agreements over them with third parties. He was doing so in his personal capacity and for his own benefit, without disclosing the existence of the Option Agreement to those third parties.

[9] In November 2021, Mr. Aiello and Mr. Workun discovered that Mr. Mill had not transferred title to the Mineral Claims to Orogenic and that he was continuing to

deal with the Mineral Claims on his own behalf. They registered the Option Agreement with the Mineral Titles Branch in February 2022.

[10] Over the course of the next several months, Orogenic's shareholders elected additional directors, appointed a new president, and demanded that Mr. Mill transfer title to the Mineral Claims to Orogenic. Mr. Mill refused to do so. In August 2022, Orogenic's shareholders removed Mr. Mill as a director of Orogenic.

[11] Orogenic commenced the present action in November 2022 and applied for summary trial. That hearing occurred on April 6, 2023, two months before expiry of Orogenic's option under the Option Agreement.

Judgment Below (2023 BCSC 832)

[12] After finding that Mr. Mill breached the Option Agreement by failing to transfer title to the Mineral Claims to Orogenic, the chambers judge turned to the question of an appropriate remedy.

[13] The chambers judge stated the governing principle that specific performance may be awarded where damages are not an adequate remedy and the factors relevant to that assessment (RFJ at para. 88). She concluded that the uniqueness of the Mineral Claims, both subjectively and objectively, and the difficulty of accurately assessing their value, meant that damages were not an adequate remedy (RFJ at paras. 89–93). On that basis, the chambers judge concluded specific performance was available. She then considered whether there were reasons not to make that award.

[14] The chambers judge rejected Mr. Mill's argument that specific performance was inappropriate because Orogenic had also breached the Option Agreement by failing to make adequate progress towards an IPO:

> [96] The option agreement required Orogenic to complete a going public transaction within five years of the execution of the agreement. That date has not yet come to pass. Orogenic was not required to complete the going public transaction as of the date of the hearing of this application and, therefore, cannot be said to be in breach of this term of the agreement. Further, Mr. Mill's failure to transfer the Mineral Claims interfered with Orogenic's

> ability to represent that it had a means to acquire the Mineral Claims, as required by the TSXV and CSE, and this has materially contributed to Orogenic's ability, or inability, to pursue an IPO.

[15] She also rejected Mr. Mill's argument that Orogenic had failed to reimburse his expenses as required under the Option Agreement, finding that he invoiced Orogenic for expenses unrelated to the Mineral Claims (RFJ at para. 102).

[16] The chambers judge acceded to Orogenic's request to extend the deadline for completing a going public transaction. She noted that Orogenic was not seeking to enforce the option to acquire the Mineral Claims, only to compel Mr. Mill to perform the prerequisite for Orogenic to satisfy its obligations and be in a position to exercise the option granted to it under the Option Agreement (RFJ at para. 106).

[17] The chambers judge concluded (at para. 108):

> I am satisfied that Mr. Mill's conduct provides a basis in equity to order an extension of time to the condition on Orogenic to complete a going public transaction. I am satisfied that Mr. Mill's failure to deliver the transfers, as he was obliged to, has interfered with Orogenic's ability to complete a going public transaction within the time frame required by the option agreement.

[18] She extended the deadline under the Option Agreement to June 1, 2028.

Discussion

Standard of Review

[19] It is well-established that specific performance is an equitable and discretionary remedy that attracts a deferential standard of review: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at para. 94.

[20] Mr. Mill does not really dispute this. Rather, he characterizes the chambers judge as having found that Canadian stock exchanges, such as the TSXV and the CSE, require issuers such as Orogenic to own or hold the Mineral Claims as a pre-condition to obtaining a listing. He says this is not the case. Further, he says that a contrary finding amounts to an error of law, reviewable on a correctness standard.

[21] In my view, this argument is a red herring. The chambers judge acknowledged that Mr. Mill had raised the argument about what stock exchange listing requirements are, but found that she did not have to decide that issue (at para. 85):

> The advice provided to Orogenic by its solicitor in October 2017 certainly supports a finding that Orogenic must be able to show some kind of enforceable interest in the Mineral Claims as a minimum licensing requirement. However, I do not have to determine the correctness of this requirement on this application. In my view, it is enough that the parties bargained for Mr. Mill to provide the transfers, in exchange for various consideration including the issuance of common shares in Orogenic, both after the execution of the agreement, and following later share issuances in August 2018.

[22] As such, the applicable standard of review requires this Court not to intervene unless the chambers judge erred in principle, misapprehended or failed to take into account material evidence, or reached an unreasonable decision: *Perrier v. Canada (Revenue Agency)*, 2021 BCCA 269 at paras. 45–47.

Adequacy of Damages

[23] Mr. Mill submits that the chambers judge failed to consider, or failed to sufficiently consider, whether damages would be an adequate remedy. He also suggests that Orogenic was required to prove that it had attempted to mitigate its loss before seeking specific performance.

[24] As I have noted, the chambers judge expressly considered whether damages would be an adequate remedy. She found, as a matter of fact that they would not, because of the uniqueness of the property and the difficulty of obtaining an accurate assessment of the value of the Mineral Claims. Those findings were grounded in the evidence and there is no basis to disturb them.

[25] Mr. Mill relies on *Southcott* for the proposition that Orogenic was required to mitigate its loss before seeking an award of specific performance. I do not read the case that way. In *Southcott*, the appellant had promptly brought an action for specific performance after the respondent had breached the agreement for purchase and

sale of a property. The trial judge declined to award specific performance. The question before the court was about Southcott's obligation to mitigate after specific performance was foreclosed. That is not the situation here: Orogenic sought specific performance and was successful. It was not required to mitigate before seeking that remedy.

[26] In circumstances where Orogenic was faced with the real possibility of losing its right to exercise its option under the Option Agreement, seeking specific performance was the only practical remedy capable of protecting its economic interests and providing it with the substance of its bargain.

[27] I would dismiss this ground of appeal.

Extension of Time Period

[28] In his factum, Mr. Mill characterizes the chambers judge's extension of the time period as effectively a "rectification" of a contract.

[29] Rectification is available where a written contract does not accurately record the parties' agreement or otherwise requires correction: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19 at para. 31. It has no bearing in this case because there is no dispute about the deadline the Option Agreement established.

[30] Rather, Orogenic sought extension of the deadline as an ancillary remedy, to reflect the bargain the parties had made and to allow Orogenic the time it would have had to perform its obligations had Mr. Mill not breached the Option Agreement. I agree with the respondent's submission that courts have granted extensions of time in similar circumstances: see for example *Basra v. Carhoun*, 82 B.C.L.R. (2d) 71, 1993 CanLII 1435 (C.A.) at paras. 50–52; *Whitehall Estates Ltd. v. McCallum et al*., 63 D.L.R. (3d) 320, 1975 CanLII 1017 (B.C.C.A.) at paras. 56, 58–59; *Davis v. Khouri*, 2021 ONSC 4095 at paras. 55, 73–76, 82; *AD General Partner Inc. v. Gill*, 2019 BCSC 980 at paras. 43–45, 61.

[31] The chambers judge's exercise of discretion in granting an extension of time was reasonable.

Conclusion

[32] I would dismiss the appeal.

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"