IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Aurora Mines Inc.* v. *Mariah Mining Corporation et al*
2004 YKSC 63

Date: 20040924
Docket No.: S.C. No. 04-A0066
Registry: Whitehorse

Between:

AURORA MINES INC.

Petitioner

And

MARIAH MINING CORPORATION and
THE SHERIFF FOR THE YUKON TERRITORY

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Grant Macdonald, Q.C.	Counsel For the Petitioner
Debbie P. Hoffman	Counsel For Mariah Mining Corporation
Penelope Gawn	Counsel for the Sheriff for the Yukon Territory

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mariah Mining Corporation (Mariah) seized equipment provided as security under a Promissory Note from Aurora Mines Inc. (Aurora). A consent order restraining Mariah from selling or disposing of the equipment was granted on July 16, 2004.

[2] Mariah applies for an order determining the amount of money owing under the Promissory Note, the costs of seizure and fixing a redemption date after which Mariah can proceed to sell the equipment to recover its claim and seizure costs. The overriding

issue is whether the actions of Mariah were exercised in good faith and in a commercially reasonable manner. Aurora abandoned its application to add parties as defendants. No claim has been made against the Sheriff but counsel for the Sheriff appeared without making submissions.

THE FACTS

[3] I find the following facts.

[4] Raymond Brosseuk (Brosseuk) signed a Promissory Note on September 26, 2002, on behalf of Aurora promising to pay Mariah $25,000.00 US with interest at the rate of 10% per annum by June 30, 2003.

[5] The Promissory Note was secured by a General Security Agreement covering two 988B Cat Loaders and a Case 220B Excavator (the equipment) owned by Aurora.

[6] Aurora defaulted on the payment of the Promissory Note.

[7] By letter dated January 13, 2004, counsel for Mariah advised counsel for Aurora that Mariah would pursue legal action, including seizure and sale of the equipment, if Aurora did not pay the Promissory Note by February 16, 2004.

[8] By letter dated January 21, 2004, counsel for Aurora advised that Aurora did not have sufficient funds to pay the debt. Aurora also advised that it was continuing to pursue the sale of the mine assets, which they hoped to complete on or about the commencement of the 2004 mining season. Counsel advised that Aurora “expects to be in a position to address this indebtedness on or about July 2004”.

[9] Mariah did not respond to the January 21, 2004 letter of Aurora because their previous letter was clear that payment was expected by February 16, 2004. John

Heasley (Heasley), president of Mariah, was also concerned that if advance notice of seizure was given to Aurora and Brosseuk, the equipment would disappear before the seizure could be arranged.

[10] The equipment was located on Aurora's mining claims on Anderson Creek near Mayo, Yukon. The location is very remote and it is necessary to cross Mayo Lake on the ice in the winter or by barge during the summer. The ice on the lake was not considered safe for transporting heavy equipment in March 2004, so Heasley waited until the lake was free of ice in June 2004 to proceed with the seizure.

[11] Heasley had previous personal experience with Brosseuk. Brosseuk was told during the 2002 mining season not to use a bulldozer owned by Mariah. Brosseuk used the bulldozer anyway and ruined the transmission and forward clutches.

[12] Heasley was also aware of a previous business dealing of Brosseuk which took place in 1996. Brosseuk removed equipment from a mining claim in British Columbia while in default of the terms of a General Security Agreement. He was attempting to ship the equipment for sale in China. He was stopped by the creditor. I do not accept Brosseuk's explanation of those events and prefer the evidence of Barry Pfannmuller, the creditor, who went to great lengths to find the equipment and ensure that it did not go to China.

[13] I accept the evidence of Campbell Arkinstall, who has experience with mining equipment generally and Brosseuk's hard use and lack of servicing of mining equipment in particular.

[14] On June 10, 2004, the Sheriff of the Yukon Territory, accompanied by Heasley, identified the mining claims and seized the equipment.

[15] Heasley did not disable the equipment or put seizure stickers on it. On behalf of Mariah, he barged the equipment across Mayo Lake so that it could be stored in places unknown to Brosseuk. The closest community for storage purposes would be Mayo, Yukon.

[16] One of the loaders and the excavator were transported to Dawson City via Mayo for safe storage. This is a distance of 253 kilometres from Mayo.

[17] The other loader was stored with Ralph Barchen on Mayo Lake. There is a double hearsay allegation by Brosseuk that Ralph Barchen has purchased the loader. I make no finding of fact on that issue because it is hearsay and I have not found Brosseuk to be credible on the numerous affidavits filed. His claims have been refuted on several points by witnesses other than Heasley. Brosseuk has not filed any affidavits to support his hearsay claim that the loader was sold to Barchen.

[18] There is a dispute about the value of the equipment. Brosseuk claims it is worth $300,000.00, but has not provided any independent evaluation, although his heavy duty equipment mechanic could have given such evidence. Brosseuk presented only the bald assertion of his opinion on the value of the equipment. Heasley, supported by the affidavits of Campbell Arkinstall, claims the equipment is not worth more than $80,000.00. I accept the evidence of Messrs. Arkinstall and Heasley on the value of the equipment.

[19] Brosseuk apparently learned of the seizure on June 15, 2004 and Greg Oppenheimer, a director of Aurora, telephoned Mariah's solicitor indicating Aurora wanted to settle the account.

[20] On June 18, 2004, the solicitor for Aurora advised the solicitor for Mariah that funds (in an unspecified amount) from Aurora were being held in a Vancouver solicitor's trust account.

[21] On June 22, 2004, a Notice of Intention to Sell Collateral was served on Aurora claiming $25,000.00 US and interest of $5,250.00 US plus interest of $6.85 US per day. The Notice also included a claim for seizure expenses in the amount of $26,644.96.

[22] By letter dated June 23, 2003, the solicitor for Aurora advised that he had $29,890.00 US in trust held pursuant to further instructions from Aurora.

[23] Aurora filed the petition on July 9, 2004. On July 16, 2004 the parties filed a consent order prohibiting Mariah from selling or otherwise disposing of the equipment.

[24] As of July 12, 2004, Mariah had not disclosed the location of the seized equipment but did so during the subsequent flurry of affidavits.

[25] I cannot sort out the exact amounts for the Promissory Note claim or the seizure costs without further evidence. Counsel agreed that a redemption date cannot be set until the dollar amounts are determined. Counsel will address these matters and if they cannot be resolved, a further application may be made.

ISSUE

[26] The issue is whether Mariah acted in good faith and in a commercially reasonable manner in its seizure and storage of the equipment.

THE LAW

[27] The law for seizure on a default in a security agreement is found generally in sections 56 to 62 inclusive in the *Personal Property Security Act*, 2002, R.S.Y., c. 169. I will set out the specific subsections that apply to this dispute:

> **Seizure on default**
>
> **56** Subject to sections 35 and 36, on default under a security agreement,
>
> …
>
> (b) if the collateral is equipment and the security interest is perfected by registration, the secured party may render that equipment unusable without removal thereof from the debtor's premises, and the secured party shall thereupon be deemed to have taken possession of that equipment; and
>
> …
>
> **Disposal of collateral**
>
> **57**(1) On default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to
>
> (a) the reasonable expenses of seizing, holding, repairing, processing, preparing for disposition, and disposing of the collateral and any other reasonable expenses incurred by the secured party; and
>
> …
>
> **Non-compliance by secured party**
>
> **61** On application by a debtor, a creditor of a debtor, a secured party, any person who has an interest in collateral that may be affected by an order under this section, or a receiver or a receiver-manager, whether appointed by a court or pursuant to a security agreement, and after notice has been given to any person that the Supreme Court directs, the Supreme Court may
>
> …

> (b) give directions to any party regarding the exercise of their rights or discharge of their obligations under this Part or section 16;
>
> …
>
> (e) make any order necessary to ensure protection of the interests of any person in the collateral; or
>
> …
>
> **Exercise of rights and duties**
>
> **62**(1) All rights, duties, or obligations arising under a security agreement, under this Act, or under any other applicable law, shall be exercised in good faith and in a commercially reasonable manner.
>
> (2) If a person fails to discharge any duties or obligations imposed on them by this Act, any person has a right to recover loss or damage that they suffered and that was reasonably foreseeable as liable to result from that failure.

[28] Counsel agree that s. 62 of the *Personal Property Security Act* sets out the test to be applied to the seizure of the equipment.

[29] Counsel for Aurora relied upon the case of *Poplar Properties Ltd.* v. *Cranewood Financial Corp.,* [2002] B.C.J. No. 2296 (B.C.S.C.). That case involved a landlord claiming $417,423.00 in enforcement expenses for a debt of $299,043.66 making a total claim of $716,466.66. The landlord refused to accept cash as a substitute for the shares it held under a Share Pledge Agreement. The landlord also claimed that its anticipated legal costs of $547,000.00 to defend the tenant's claim of unreasonable seizure costs had to be tendered in addition to the $716,466.66. The Court noted that on two previous appearances, trial judges made suggestions as to how Poplar Properties Ltd. could efficiently recover the sum owed to it under the lease. Poplar ignored these suggestions and embarked on a separate course of action (paragraph 55). The Court ordered that cash in the amount of $716,466.66 could be used as a substitute for the pledged shares

and refused to order that the additional anticipated legal fees of $547,000.00 were required to cure the default.

[30] In my view, the case before this Court is quite distinguishable as there is no claim for future legal fees, nor is there a claim to substitute cash for shares pledged as security. The case at bar raises the issue of reasonableness in the context of the method of seizure and the storage of the equipment.

[31] However, *Poplar Properties Ltd*. v. *Cranewood Financial Corp*. does stand for the undisputed principle that creditors should not utilize their rights of seizure and sale of collateral as a method of incurring costs to punish the debtor for its default (paragraph 55).

DECISION

[32] I will comment firstly on the question of whether Mariah acted in good faith and in a commercially reasonable manner in deciding to transport the equipment across Mayo Lake and subsequently to Mayo, Yukon. The alternative advocated by Aurora would be to apply stickers to the equipment and disable it by removing a part. This would save the barging and transport expenses to Mayo.

[33] The precise wording of the *Personal Property Security Act* that permits this alternative is “the secured party <u>may</u> render that equipment unusable without removal thereof from the debtor’s premises, and the secured party shall thereupon be deemed to have taken possession of that equipment”. These words should not be interpreted as requiring a creditor to use this method of seizure but rather giving the creditor the discretion to use a less expensive method of seizure without actually taking physical

possession of the equipment. Therefore, I do not find that Mariah was under any statutory obligation to render the equipment unusable.

[34] Nevertheless, I must still determine whether the act of taking possession was in good faith and commercially reasonable. I have no doubt that the right was exercised in good faith given Heasley's knowledge of the prior conduct of Brosseuk. To leave the equipment at the Aurora mine would have created an unnecessary risk for Mariah.

[35] I now turn to the question of whether the barging of the equipment across Mayo Lake was commercially reasonable. It was not disputed that barging the equipment across the lake was the only method of removing the equipment since it was unsafe to transport the equipment across the ice. No evidence was presented of any other commercially reasonable method of taking physical possession of the equipment, nor was any evidence presented on whether a location other than Mayo was available and more reasonable.

[36] In any event, it is not the role of the Court to consider every possible alternative that might reduce the costs of taking possession so long as they are not unreasonable in the circumstances. Creditors who have not been paid have been granted remedies and must be allowed to pursue them without the Court second guessing every business decision, particularly those involving remote sites. The fact that the seizure costs were in the range of the amount of the default does not automatically result in a conclusion that it must be commercially unreasonable. The test of commercial reasonableness must be determined on all the factors such as the remoteness of the location and the time of year, both of which can produce great fluctuation in seizure costs.

[37] I am of the view that Mariah's taking possession of the equipment by barging across Mayo Lake and transporting to Mayo was commercially reasonable. That appears to me, on the evidence, to be the only commercially reasonable manner of taking possession of the equipment without risking an unauthorized interference from Brosseuk.

[38] The storage of two pieces of the equipment in Dawson City is not commercially reasonable. Although Mayo is a small community, there is no doubt in my mind that storage could be arranged there. I have therefore disallowed the transportation costs from Mayo to Dawson City.

[39] I wish to address the failure of counsel for Mariah to respond to counsel for Aurora's letter of January 21, 2004. There is a general obligation between lawyers to respond to professional letters "that require an answer" (see Canadian Bar Association, Code of Professional Conduct, 1987, Ch. 16, Rule 6). The Law Society of Yukon in its Code of Professional Conduct states in Part Two, entitled "Lawyer and Lawyer", Rule 6:

> No lawyer shall unreasonably refuse or delay in responding to communications from another lawyer.

[40] There are obviously limits to this obligation but it is not one to be taken lightly. Professional courtesy and the ability to get the job done in a reasonable time are both extremely important. In normal circumstances an unreasonable failure to respond could be a factor in determining whether the obligation of good faith has been met. In this case, the prior conduct of Brosseuk is an exceptional circumstance and excuses the failure of counsel for Mariah replying to the letter of January 21, 2004. In so ruling, I do

not wish to encourage any counsel to not respond to correspondence in a timely and reasonable manner.

[41] While I have some sympathy for Heasley's aggravation in having to come to the Yukon and direct the sheriff to the Aurora mine site, I am not prepared to allow his daily loss of revenue claim in the amount of $500.00 US. However, I allow the travel expenses that he has incurred as well as the sheriff's expenses.

[42] I have not made an order for the release of the equipment upon the payment of an amount in American funds on the Promissory Note and Canadian funds on the seizure expenses since counsel will have to exchange documentation verifying expenses. Thus, I adjourn the application generally to allow counsel to reach agreement or return to court for a specific order based on additional evidence.

[43] I order that Mariah shall have its solicitor-and-own client costs to be assessed on this application and the seizure.

_____

VEALE J.