SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 25

Date: 20200626
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN

GOVERNMENT OF YUKON
as represented by the Minister of the Department of Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Madam Justice S.M. Duncan

Appearances:

John T. Porter and Laurie A. Henderson	Counsel for the Petitioner
No one appearing	Yukon Zinc Corporation
Kibben Jackson	Counsel for Jinduicheng Canada Resources Corporation Limited
H. Lance Williams	Counsel for Welichem Research General Partnership
John Sandrelli and Cindy Cheuk	Counsel for PricewaterhouseCoopers Inc.

SUPPLEMENTARY REASONS FOR JUDGMENT
(Application for Directions on inclusion of Master Lease Items in the proposed Sale)

INTRODUCTION

[1] These are supplementary reasons for decision in the application by the Receiver, PricewaterhouseCoopers Inc., (the "Receiver") about the following relief sought:

- directions on including items listed in the Asset List attached to the Sale and Investment Solicitation Plan ("SISP") that are subject to the Master Lease Agreement between Welichem Research General Partnership ("Welichem") and Yukon Zinc Corporation ("YZC") in the Property ("Master Lease Items") of YZC to be offered for sale pursuant to the SISP; and
- directions on which, if any, of the Master Lease Items included in the SISP are subject to the security conferred on the Government of Yukon ("Yukon") pursuant to s. 14.06(7) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*"), the priority of such security (if any) and the amount of such security (if any).

Additional Submissions

[2] These supplementary reasons are provided after review of counsels' additional submissions as requested on the following issues:

i) whether the characterization of the lease between Welichem and YZC as a true lease or financing lease has relevance to the consideration of whether the Master Lease Items are the property of the debtor; and

ii) whether the Master Lease Items are fixtures.

i) True Lease or Financing Lease

[3] The first question arose because the Receiver argued that the lease of equipment by YZC from Welichem was not a true lease, but a financing lease. This

characterization had an impact on the remedies available under the *Personal Property Security Act*, R.S.Y. 2002, c. 169 ("*PPSA*"). The lease of the equipment (as well as the security agreement) were registered under the *PPSA* showing Welichem as owner and lessor of the equipment, and providing rights and process on default of the loans against which the equipment was secured. The remedies in Part V of the *PPSA* apply to a financing lease, but not to a true lease. The Receiver argued that one of the remedies in Part V, s. 57(2)(a), provides that "[c]ollateral may be disposed of … by public sale", by the Receiver in the context of a financing lease. This section refers to the ability of a secured party to dispose of collateral under a financing lease.

[4] Counsel for Welichem responded that the lease is a true lease so that the *PPSA* Part V remedies are not available. They argued further that even if the lease is a financing lease, the definition of secured party in the *PPSA* in the context of a sale of collateral secured by a financing lease does not include a receiver or receiver-manager.

[5] In its additional submissions, counsel for Welichem argued that Part V of the *PPSA* only addresses remedies available to the lessor or secured party on enforcement. The Receiver cannot sell property owned by a third party unless there is express statutory authorization. Welichem says that it is clear in this case that Welichem owns the property at issue, as evidenced by the contractual lease provision that expressly reserves title for Welichem. The characterization of the lease as a true lease or financing lease therefore has no further relevance, because Part V of the *PPSA* does not allow the Receiver to dispose of collateral that is the property of a third party.

[6] The Receiver argued in its additional submissions that the characterization of the lease as true or financing remains relevant. If the lease is a financing lease, as the

Receiver maintains, there is less prejudice to Welichem if the Master Lease Items are included in the SISP.

Analysis

[7] The *PPSA* is a complex statute. Its intersection with insolvency matters was not discussed in submissions. There may be other sections of the statute relevant to this case that have not been raised or discussed in submissions. On the basis of the sections that have been referenced, I am of the view that the Part V remedies do not assist the Receiver. The *PPSA* does not provide the Receiver with authorization to include the equipment leased from Welichem in the SISP.

[8] The inability of the Receiver in this case to avail itself of the *PPSA* Part V remedies means that the characterization of the lease as a true lease or a financing lease is not relevant.

[9] Further, I do not accept the Receiver's submissions that the reduced prejudice to Welichem if the lease is characterized as a financing lease is relevant to a consideration of whether the Master Lease Items should be included in the SISP.

ii) Fixtures

[10] The second part of the additional submissions requested was whether or not the Master Lease Items are fixtures. If they are fixtures, then they will be treated as part of the debtor's property. This would then allow the Receiver to include them in the SISP.

[11] Counsel provided thorough written submissions on this issue. At the suggestion of counsel for the Receiver and Yukon, I agreed to receive submissions on the legal argument about whether the Master Lease Items as a whole constitute fixtures, rather than receiving evidence about each item individually. The only evidence referred to was

that set out in the various reports of the Receiver, listing the Master Lease Items. No evidence was provided about the physical characteristics of each item, or other circumstances surrounding their use.

[12] The arguments of Yukon and the Receiver are similar. The essence of their position is that the Master Lease Items are all fixtures or constructive fixtures. Some are affixed to the land, clearly constituting a fixture. Other items not affixed to the land are interconnected to form part of a system for the operation of the Mine. This system, which can include items which are physically affixed and those that are not, has been referred to in some cases as "constructive fixtures". In this case, the Receiver and Yukon say that the Master Lease Items were placed at the Mine for the purpose of improving land and the Mine and for the singular purpose of operating the Mine, as can be determined objectively.

[13] Yukon and the Receiver argue that all of the Master Lease Items were used for many years for the purpose of operating the Mine, or to conduct care and maintenance of a non-operational Mine. These activities included the extraction and processing of ore, storage and transportation of concentrates, treating the waste, maintaining the infrastructure and generating the power.

[14] Welichem disagrees with this analysis. They say that it is clear that the Master Lease Items are not fixtures for several reasons. First the lease document provides that title to and ownership of the Master Lease Items is with Welichem. Secondly, the Mine closure plan contemplates the removal of the mining equipment and buildings. There is no evidence to establish that the objective intention of Welichem or YZC was that the Master Lease Items were to be fixtures at the Mine site.

[15] Welichem rejects the one single system analysis, saying it is an inaccurate statement of the law. Essentially, Welichem disagrees with the analytical process advanced by the Receiver and Yukon. Instead of examining the activity that the items support, and assessing the items generally or by category, Welichem says that each item must be assessed individually on the evidence. The surrounding circumstances and evidence of affixation and intention for each item must be analysed. Only after that process is undertaken can a conclusion be drawn that the items are all in support of single system and therefore constructive fixtures.

[16] Welichem also notes that the Receiver or Yukon in their arguments do not analyse how a finding that the items are fixtures fits with the registration of the lease and security agreements under the *PPSA*.

[17] In the alternative, if the items are found to be fixtures, Welichem says they are trade fixtures, not true fixtures. Trade fixtures are items that have been placed by the tenant to enhance its business. These items remain as chattels that can be removed by the tenant before or after the termination of the lease, unless there are terms in the lease to the contrary. They are not intended to become part of the real property, but instead are intended to enhance the use of the article for the tenant's business purposes.

[18] Yukon argues that the trade fixture argument is not applicable here because if YZC is the tenant, with the Crown as landlord, as is argued by Welichem, Welichem is not part of that contract. The trade fixture analysis contemplates the removal of the items by the tenant, not a third party.

Analysis

a) Legal Principles

[19] It is agreed by all three parties that the principles for deciding whether or not items are fixtures were set out in *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549 (B.C.C.A.), at para. 19, quoting from *Stack v. Eaton Co.* (1902), 4 O.L.R. 335, at 338:

> I take it to be settled law:
>
> (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
>
> (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
>
> (3) That the circumstances necessary to be shewn to alter the *primâ facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
>
> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

[20] The Court of Appeal also applied the principles articulated by the Supreme Court of Canada in *Haggert v. Brampton (Town)* (1897), 28 S.C.R. 174. The Court should also consider whether the object of the annexation of the items is to enhance the value of the premises; or whether the object is to improve the usefulness of the items for the purposes for which they are used.

[21] The British Columbia Court of Appeal in *Zellstoff Celgar Ltd. v. British Columbia*, 2014 BCCA 279, refined the test expressed in *La Salle.* The Court noted in most cases it can be argued equally that the object of annexation was for the better use of the lands or for the better use of the items as chattels. In many cases the object can be both. As a result this question should not be asked in isolation but instead, as quoted at para. 40:

> … should be informed by all the relevant circumstances, including the objective intention with respect to the duration of the annexation and the use of the lands … consistent with the approach taken in both *Haggert v. Brampton (Town)* and *La Salle Recreations*.

[22] The British Columbia Court of Appeal also confirmed that the determination of whether an item was intended to be permanently affixed, and thus more likely to be a fixture, instead of being temporarily attached, is related to the item's purpose. If an item is intended to remain in place as long as it serves its purpose, even if it can later be dismantled and sold, it can be considered to be permanent.

[23] This question of whether items are chattels, fixtures, constructive fixtures, or tenant fixtures has produced a large number of authorities. Many of them have been submitted in this case. As noted by the British Columbia Court of Appeal in *La Salle*, at para. 18:

> … It is probably an understatement to say that it would be very difficult to reconcile many decisions relating to this subject. It is really, I think, a matter of applying well-established principles to the particular circumstances of each case.

b) Application of Legal Principles to This Case

[24] I have reviewed the cases in the joint book of authorities provided by counsel.

[25] I appreciated and accepted the suggestion made by counsel for the Receiver that this issue can be decided by the consideration of legal principles, without a detailed examination of each of the Master Lease Items, or the circumstances surrounding their annexation (the degree and object). However, on review of the authorities, I find I am unable to make a determination of this issue without further evidence.

[26] In virtually all of the cases provided, the trial judges considered detailed evidence about the items at issue. For example, in *Zellstoff*, a case about whether or not items at a pulp mill were fixtures for the purpose of imposing property tax, expert evidence was provided by mechanical engineers about the nature of each of the items and their affixation at the mill. The main area of contention was whether the machinery could be removed and whether it had a function apart from its role in the pulp manufacturing process. In the end, all of the machinery and equipment were found to be fixtures or constructive fixtures.

[27] In *Deloitte & Touche Inc. v. 1035839 Ontario Inc.* (1998), 28 O.R. (3d) 139 (O.N.C.A.), the issue was whether the receiver could convey equipment owned by the debtor, free and clear of claims of the landlord. The equipment consisted of a bleach plant and related equipment. The Court listed each of the components in the plant, and identified whether each was self-contained, free-standing, attached to another component and in what way (for example bolted, connected, welded). The Court also considered the overall purpose of the installation of the equipment in the context of the entire building, as well as the difficulty in removing the plant from the building. It concluded on all of the evidence that the building and equipment were fixtures. Their purpose was to improve the property. The Court also found that the ancillary equipment,

such as safety equipment, lab equipment and spare parts, as well as the forklift truck, the weighscale and the bar rel turner were constructive fixtures because of "their respective uses which are essential to the whole, continuous process" (para. 42, quoting from *L & R Canadian Enterprises Ltd. v. Nuform Industries Ltd.* (1984), 34 R.P.R. 1 (B.C.S.C.), at p. 12 ("*L & R"*)).

[28] Similarly, in *L & R*, a case about the contents of a foreclosed building which had operated as a factory manufacturing papier mâché pots for use as soil containers, the Court considered the evidence about each piece of equipment – its nature, purpose and whether it was mobile, or attached, connected, anchored and in what way. Only after a consideration of these details, did the Court conclude, at para. 11, that:

> … [the] object of setting up the articles, in the interconnected way they were set up, was to enhance the value of the premises or improve its usefulness for the purpose of manufacturing pots and that each element of the whole was affixed in a way appropriate to the use of that element in a way that shows an intention not of occasional but of permanent fixing.

The Court also considered separately the spare parts – their purpose and location – and determined they were constructive fixtures because they were an extension of the equipment.

[29] Other examples where detailed evidence was considered before a determination was made are *Dickson v. Hunter,* [1881] O.J. No. 186 (Ont. Ch.); *Turismo Industries Ltd. v. Kovacs,* [1977] 1 W.W.R. 193 (B.C.C.A.) (see paras. 13- 14); *Gregrik Investments Ltd. et al. v. Clavelle et al.*(1982), 22 Sask. R. 177 (S.K.Q.B.) (see paras. 9-14 and 23-26).

[30] In the case at bar, the Receiver has listed the categories of Items at issue. They are:

> 24. As for the Master Lease Agreement Items themselves, the Receiver submits they fall into these general categories:
>
> a. Sleeper/Dormitory Trailers, Office Trailers, Kitchen Complex, Dry Complex, Mill processing building, Concentrate Building, Crusher Building, Assay Lab and Other Large buildings or Trailers
> b. Building accessories
> c. Electrical/Power System and related equipment
> d. Fitness Equipment
> e. First Aid Equipment
> f. Communications Equipment
> g. Training Equipment
> h. Office Equipment
> i. Communication Equipment
> j. Water pump and Filtration Equipment
> k. Water Treatment equipment
> l. Large Power Tools, smaller tools and related equipment
> m. Fuel Tanks
> n. Shipping Containers
> o. Heavy Machinery
> p. Vehicles
> q. Snow and ice removal equipment
> r. Crushing, processing and Assay equipment
> s. Other supplies and equipment such as piping, cables, rebar

[31] These items range from manufacturing equipment to safety and communications equipment, to camp items, and vehicles. Some of this equipment can be used in other contexts, in other locations, and is not exclusive to use at a mine. While it is clear that all of the equipment was or is being used for the purpose of operating the Mine or the care and maintenance of the Mine, there remains a question, given the existence of a

lease and the *PPSA* registration, about whether there was an intention that all of this equipment was intended to remain there throughout the life of the Mine.

[32] While the arguments advanced by Yukon and the Receiver hold some appeal, especially given the number of Master Lease Items at issue here, I am of the view that more evidence is required before I can apply the relevant legal principles. In particular, evidence about the items that are clearly not affixed and which may have multiple uses or purposes would be useful. In addition, questions remain about the effect of the *PPSA* registration of the lease and security agreement on the fixtures analysis. This issue was alluded to in Welichem's submissions but not argued.

[33] Perhaps given the general consensus on the applicable legal principles by counsel, and the information available in the Receiver's reports, agreement may be reached on some or many of the items at issue.

[34] Welichem's alternative argument that these items are tenant fixtures was dismissed by Yukon as not applicable on the facts, and not addressed (in reply) by the Receiver. Given my finding that more evidence is required before the fixtures issue can be decided, I decline to address this point at this time.

CONCLUSION

[35] In sum, I agree with the Receiver and Yukon that there is an applicable legal principle of constructive fixtures, where items that are proven to be part of a single, continuous process or whole system, may be found to be fixtures, even if they are not affixed to the land. In order to determine whether this applies, as well as whether other items in the Master Lease are clearly fixtures, I require additional evidence. I also require additional analysis of the effect of the *PPSA* on the fixtures analysis. Unless the

Master Lease Items are found to be fixtures, I do not see how they can be included in the SISP, given my findings on the inability of the Receiver to access the *PPSA* Part V remedies.

[36] As a result I decline to provide directions at this time to include the Master Lease Items in the SISP. The second question of whether these Items are subject to the security conferred on Yukon is unnecessary to be answered at this time.

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DUNCAN J.