IN THE SUPREME COURT OF YUKON

Citation: *Brosseuk v. Aurora Mines Inc., et al*, 2008 YKSC 18

Date: 20080229
S.C. No. 07-A0140
Registry: Whitehorse

Between:

RAY BROSSEUK AND JACKIE BROSSEUK

Petitioners

And

AURORA MINES INC., GREIG OPPENHEIMER, ROBIN WOOD, CHRISTOPHER HOLDEN, IE-TEC MARKETING LIMITED AND IE-TEC HOLDINGS LIMITED

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Ross McLarty — Counsel for the Petitioners
Francis Lamer — Counsel for the Respondents (excluding Aurora Mines Inc.)

REASONS FOR JUDGMENT
(Special Costs)

INTRODUCTION

[1] The respondents (excluding Aurora Mines Inc.) seek an award of special costs against the petitioners arising out of an application by the petitioners for an interim order restraining Aurora Mines Inc. from transferring the Anderson Creek Mine to IE- TEC Marketing Limited. This is essentially a shareholders dispute and it is unnecessary for Aurora Mines Inc. to be represented. All reference to the respondents in this judgment

excludes Aurora Mines Inc. The respondents have brought an application for the following:

1. A declaration that the transfer of the following mineral claims (the “Mineral Claims”) located within the Yukon Territory from the Respondent Aurora Mines Inc. to Petitioner Ray Brosseuk registered with the Mining Recorder of the Yukon Territory under number PM00202 on August 21, 2007 (the "Fraudulent Transfer”) be declared null and void and of no effect:

Claim Name	*Grant No.*
Angie 1-9	P15507-P15515
Angie 10	P15516
Cassie 1-10	P47768-47777
Discovery	3741
Kyle 1-9	P47778-P47786
Sunshine 1-2	P05297-P05298
Sunshine 3	P05299
Sunshine 4	P05300
Sunshine 5-6	P05302-P05303
Sunshine B/ D 1-3	P05911-P05913

2. A declaration that the Respondent Aurora Mines Inc. is the rightful owner of 100% of the Mineral Claims.

3. An order that the Petitioner Ray Brosseuk shall forthwith execute such document as may be necessary or useful to transfer all the right title and interest registered in his name and to the Mineral Claims back to the Respondent Aurora Mines Inc. and to reverse the effect of the Fraudulent Transfer.

4. An order that the Petitioners be prohibited, pending further such order of this Court, from taking any action or signing any document or agreement on

behalf of the Respondent Aurora Mines Inc. or representing themselves as having authority to bind the said Aurora Mines Inc.;

5. An order that the Petitioners be prohibited, pending further order of this Court from taking possession of or otherwise dealing with any of the assets of Aurora Mines Inc.;

6. All deadlines applicable to the hearing of this notice of motion be abridged *nunc pro tunc*;

7. This Petition shall be heard at the earliest opportunity;

8. Special costs.

[2] The applications were heard on February 12, 2008. The parties consented to an order granting the relief claimed in each application except for the respondents' claim for special costs.

[3] The underlying petition of Ray and Jackie Brosseuk alleges that the business or affairs of Aurora Mines Inc. have been or are being carried on in a manner that is oppressive to the interests of Ray and Jackie Brosseuk in their capacity as directors, officers and creditors of Aurora Mines Inc.

BACKGROUND

[4] Aurora Mines Inc. is the registered holder of certain placer gold claims near Mayo, Yukon, collectively called the Anderson Creek Mine (the mine). Aurora Mines Inc. was formed by Ray and Jackie Brosseuk to acquire and operate the mine. Ray and Jackie Brosseuk are married, and both are directors of Aurora Mines Inc. Ray Brosseuk is the President and Treasurer and Jackie Brosseuk is the Secretary of Aurora Mines

Inc. The other directors of Aurora Mines Inc. are the respondents Robin Wood, Christopher Holden and Greig Oppenheimer.

[5] The shares of Aurora Mines Inc. are owned by Innovative Environmental Technologies Corporation (IE-TEC). The shareholdings of IE-TEC are 48.8% by Wood, Holden and Oppenheimer and 40.7% by Ray and Jackie Brosseuk. The same shareholders own a majority of shares in IE-TEC Holdings Limited, a Mauritius company, which owns IE-TEC Licensing Limited and IE-TEC Marketing Limited.

[6] In early 2004, the directors of Aurora Mines Inc. agreed to market the mine to potential buyers through IE-TEC Marketing. At that time Aurora Mines Inc. granted IE-TEC Marketing an exclusive option to purchase the mine by way of an Option to Purchase Agreement dated effective January 31, 2004 (the Option Agreement). The option to purchase had to be exercised on or before December 31, 2007. Ray Brosseuk is a signatory to the Option Agreement on behalf of Aurora Mines Inc.

[7] The purchase price in the Option Agreement is $2,200,000 CDN. Certain liabilities of Aurora Mines Inc. were to be assumed “in partial satisfaction of the Purchase Price, being liabilities which have arisen from the operation of the business prior to the Closing Date (the Assumed Liability).” This was set out in paragraph 2.4 of the Option Agreement which also provided that Aurora Mines Inc. would provide a list of Assumed Liabilities, upon the written request of IE-TEC Marketing. It appears that the list of Assumed Liabilities has never been requested or provided.

[8] There are a number of disputes in this matter relating to efforts to sell the mine and the value of the mine. But at the heart of the dispute is the value of the Assumed Liabilities and the liability of Aurora Mines Inc. under a Services Agreement dated April

1, 2003, between Aurora Mines Inc. and IE-TEC Marketing. A resolution of Aurora Mines Inc. dated April 1, 2003, and apparently signed by Ray and Jackie Brosseuk, authorized the execution of this Services Agreement. Paragraph 2.1(c) of the Services Agreement requires Aurora Mines Inc. to pay $40,000 US per month to IE-TEC Marketing for certain defined services. The result is that IE-TEC Marketing claims $4,092,104 as an Assumed Liability which is well in excess of the purchase price of $2,200,000 CDN for the mine.

THE ALLEGED MISCONDUCT

The Transfer of Aurora Claims to Brosseuk

[9] Ray Brosseuk alleges that he has had discussions with potential buyers and an offer of $3.8 million for the mine in the spring of 2007. He claims that this deal could not proceed because Greig Oppenheimer would not agree to it.

[10] As a result Ray Brosseuk states in his Affidavit at paras. 45 and 46:

> "I caused Aurora to transfer a 50% interest in Aurora's mining claims in September, 2007 in my name to ensure the Mine was not transferred without a bona fide sale with the proceeds going to Aurora to protect the creditors of Aurora (many of whom I had solicited investments from personally) and to try to prevent creditors of the company from taking additional steps to seize assets of the company given the long delay in the repayment of their loans to Aurora.
>
> I advised Oppenheimer, Wood and others that the transfer was not intended to impede the sale of the Mine and that I will cooperate in every way to make the sale of the Mine to happen as soon as possible as appears by an e-mail dated September 11, 2007 sent by me to the IE-TEC "Advisory Board" including Wood and Oppenheimer … . In the event of a genuine sale the interest in the mining claims would be transferred back to Aurora right away."

[11] There is no evidence to indicate that Aurora Mines Inc. authorized the transfer of a 50% interest in Aurora's claims to Ray Brosseuk. Indeed, Greg Oppenheimer states that Ray Brosseuk had no authority from Aurora's Board of Directors to transfer the claims to himself and he did not pay any consideration for the claims.

[12] Greig Oppenheimer has provided a copy of a Transfer document filed in the Office of the Mining Recorder at Mayo, Yukon, on August 21, 2007, transferring a 50% interest in the Aurora claims at Anderson Creek. It appears that Ray Brosseuk signed the Transfer on behalf of Aurora Mines Inc. solemnly declaring "That I have been duly authorized as agent for Aurora Mines to transfer the Placer Mining Claims. . ."

Knowledge of the Services Agreement

[13] As mentioned, the existence and validity of the Services Agreement is a key feature of this shareholder dispute. Ray Brosseuk states the following in his Affidavit at paras. 35 and 36:

> "According to IE-TEC as of December 31, 2007 the balance owing to IE-TEC by Aurora under the Service Agreement totals $4,092,104.00 as appears by a true copy of a statement entitled "Aurora-IE-TEC Services Agreement-Balance Owing at 31, December, 2007" … .
>
> I am not aware of any agreement which contractually or otherwise binds Aurora to pay management and marketing services to IE-TEC Marketing, sets out the terms of any such agreement or describes the service provided and their costs."

[14] With respect to Ray Brosseuk's knowledge of the Services Agreement, Greig Oppenheimer states at paras. 6 and 7:

> "By way of another example, Mr. Brosseuk professes to be unaware of a service agreement under which management services have been provided by IE-TEC Marketing to Aurora (as opposed to work in conducting actual mining operations).

> I am the person who provides those services. If Mr. Brosseuk is truly unaware of the existence of this services agreement, that is because he has selective memory. Attached as Exhibit "C" hereto is a copy of the service agreement dated effective April 1, 2003 (the "Services Agreement") between IE-TEC Marketing and Aurora. Attached as Exhibit "D" hereto is a copy of the ratification of services agreement date July 10, 2003 (the "Ratification of Services Agreement") between IE-TEC Marketing and Aurora. Attached as Exhibit "E" are copies of the directors' resolutions of Aurora signed by the Petitioners as directors thereof, approving the Services Agreement and the Ratification of Services Agreement.
>
> An extensive amount of services have been provided by IE-TEC Marketing to Aurora in reliance on the terms of the Services Agreement. These services will be described in greater detail in answer to the Petition. However, the amount owing by Aurora to IE-TEC Marketing as set out in Exhibit "Q" to the Brosseuk Affidavit has been accurately computed by myself in accordance with the Services Agreement as ratified."

The Short Notice Application

[16] The Aurora Mines Inc. dispute first appeared in this Court on January 23, 2008, when a writ of summons was filed by Aurora Mines Inc. as Plaintiff against IE-TEC Marketing Limited, Greig Oppenheimer, Robin Wood and Christopher Holden as Defendants including a without notice application to restrain the Defendants from transferring the property owned by Aurora Mines Inc. to IE-TEC Marketing Limited, as well as an injunction restraining Aurora Mines Inc. from disposing of the mine and an order for the preservation of the mine.

[17] The without notice application was brought before me by Mr. McLarty purporting to act for Aurora Mines Inc. on January 24, 2008, along with a companion application by other creditors of Aurora Mines Inc. The supporting affidavit was signed by Jackie Brosseuk and she also swore that neither she nor Ray Brosseuk were aware of a

Services Agreement prior to the fees being claimed. In support of the without notice application, she stated at paras. 53 and 54:

> "If title to the Mine is transferred to IE-TEC Marketing, even though its option may not have been validly exercised and its right to buy the Mine may have lapsed, Aurora will be prejudiced because it will have lost its sole asset which has a market value of $1.8 million in excess of the purchase price under the Option Agreement.
>
> Because IT-TEC [sic] is an offshore company based in Mauritius, Aurora, its shareholders and creditors will be harmed as a result of impediments to advancing any claim to recover the property, its value or to pursue any shareholders remedies under the Yukon Business Corporations Act once the ownership of the company's only asset has left the jurisdiction to a jurisdiction in Africa. Similarly, if all liabilities are assumed by IE-TEC as proposed in the Exercise Notice, any remedies would have to be pursued against a company incorporated in Mauritius."

[18] The written argument of the applicant, Aurora Mines Inc. gave the following reasons for urgency and proceeding without notice:

> "It is not possible to serve the Defendants with this action or notice of the application in accordance with the Rules. This action was commenced on January 23, 2008 and the hearing of the application is on January 24, 2008. IE-TEC Marketing is a Mauritius company, Robin Wood resides in Europe and Christopher Holden resides in South Africa. Under Rule 13(c), they have 42 days to file an appearance after being served. Greig Oppenheimer who lives in New York has 28 days to appear under Rule 13(b).
>
> …
>
> This matter is urgent because the closing of the sale of the Mine to IE-TEC Marketing is set by the Option Agreement to occur 30 days from the date Aurora received notice of the purported exercise of the option. 30 days from December 29, 2007 is January 28, 2008."

[19] In response to the application on January 24, 2008, to proceed without notice in the name Aurora Mines Inc. matter and its apparent urgency, I ordered that the application be set down on January 31, 2008, with fax or e-mail notice to the Defendants by Friday, January 25, 2008.

[20] On January 25, 2008, Aurora Mines Inc. applied to vary the order of January 24, 2008 by serving by fax or email on Monday, February 4, 2008, for hearing on February 12, 2008. I granted the variation.

[21] On February 1, 2008, Mr. McLarty appeared at a pre-trial conference in the present proceeding based on oppression and brought by Ray and Jackie Brosseuk. He indicated that he had instructions to discontinue the previous proceeding in the name of Aurora Mines Inc. and wished to proceed with the present application on February 12, 2008, seeking an interim order restraining Aurora Mines Inc. from transferring the Mine to IE-TEC Marketing or any other person without the prior approval of the court.

[22] For the purpose of this special costs application, I find the following:

1. The transfer of 50% of the mining claims of Aurora Mines Inc. to Ray Brosseuk was without any authorization.
2. Ray Brosseuk did not bring the Services Agreement to the attention of the court in the application for an injunction on short notice.
3. The injunction application did not include any relief relating to the unauthorized transfer of the mining claims of Aurora Mines Inc.

ISSUE

[23] Is it appropriate to award special costs (formerly solicitor-and-client costs) to the respondents on this interim application?

THE LAW

[24] Special costs may be awarded, as a general rule, for reprehensible conduct during the course of litigation. In the recent decision in *Dockside Brewing Co. v. Strata Plan LMS 3837*, 2007 BCCA 183, the British Columbia Court of Appeal determined at para. 90 that:

> "The authorities do not establish any rigid rule that would prohibit an award of special costs where pre-litigation conduct is "reprehensible" and warrants rebuke. As Lambert J.A. noted in ***Sun Life Assurance***, however, "special costs are usually awarded only in relation to misconduct during the course of the litigation itself.""

[25] The test for "reprehensible conduct" for an award of special costs is found in *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 at 311 (C.A.):

> "The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and where the parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used." (my emphasis)

[26] The timing of the conduct was discussed in the *Sun Life Assurance Company of Canada v. Ritchie* (2000), 76 B.C.L.R. (3d) 93, 2000 BCCA 231 at para. 54 where Lambert J.A. stated:

> "Special costs are usually awarded only in relation to misconduct in the course of the litigation itself. However, there may arise circumstances where special costs may be awarded because of the reprehensible conduct giving rise to the litigation, particularly where the fruits of the litigation do not provide any appropriate compensation in relation to the reprehensible conduct."

[27] The circumstances which give rise to an award of special costs are varied but the following were considered in *Garcia* v. *Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (B.C.C.A.):

1. improper allegations of fraud;

2. improper motive for bringing the proceedings such as imposing a burden on a weaker party;

3. improper conduct of the proceedings themselves;

4. material non-disclosure or misrepresentation;

5. obtaining an order without notice when the situation required notice.

[28] The list is by no means exhaustive but gives some indication of the wide meaning that can be given to the word "reprehensible".

[29] Rule 57 of the *Rules of Court* also provides for costs arising out of motions in subrule (12) and costs arising from improper acts or omission in subrule (14) as follows:

> "(12) Unless the court hearing a motion otherwise orders,
>
> (a) the party making a motion that is granted is entitled to costs as costs in the cause, but the party opposing it is not entitled to costs as costs in the cause,
>
> (b) the party making a motion that is refused is not entitled to costs as costs in the cause, but the party opposing it is entitled to costs as costs in the cause, and

> (c) where a motion made by one party and not opposed by the other is granted, the costs of the motion are costs in the cause.
>
> (14) Where anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or the registrar may order
>
> (a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or
>
> (b) that the party pay the costs incurred by any other party by reason of the act or omission."

[30] Rule 57(12) suggests that the usual practice for costs on a successful motion is to award them as costs in the cause, i.e. the party succeeding on a motion gets their costs if they succeed at trial. Rule 57(14) provides the exception to Rule 57(12) where costs may even be awarded to an unsuccessful party in any event of the cause. See *Linear S.R.L.* v. *C.C.C. – Canadian Communication Consortium Inc.*, 2001 BCSC 682, where the court awarded costs in any event of the cause to the unsuccessful party on a successful application to withdraw deemed admissions.

ANALYSIS

[31] It is always a serious matter when one party appropriates property in a completely unauthorized manner "to steal a march", so to speak, against an adversary. In this case, there was no legal justification for Mr. Brosseuk to transfer 50% of the claims comprising the Aurora mine to himself. It would certainly be appropriate to commence an oppression proceeding as he has now done, but fraudulent would not be too strong a word for the unauthorized transfer of the placer claims. There appears to be no justification for the transfer except as a power play to pressure Mr. Oppenheimer or to interfere with the Option Agreement.

[32] It could be argued that the fraudulent transfer did not precipitate the present oppression proceeding and that it was disclosed in the affidavit of Mr. Brosseuk. That may be the case, but it is also clear that it became the focus of the respondents in their reply affidavit. It would hardly be appropriate to consent to a restraining order against themselves under the Option Agreement without ensuring that the claims of Aurora Mines Inc. were capable of being transferred if the Option Agreement is enforced.

[33] The denial of awareness of any Services Agreement by Mr. Brosseuk is equally troubling. Mr. Brosseuk's affidavit is quite detailed about events that favour his position on an oppression claim. It is unlikely that he would be unaware of an agreement that he appears to have signed as well as authorized by resolution of Aurora Mines Inc. That is not to say he has no valid reason for bringing the oppression application, but when a party comes to court seeking injunctive relief, full disclosure of the existence of a Services Agreement is required. Mr. McLarty submits that the existence of the Services Agreement in fact helps the petitioners. I do not follow this submission as it appears to support the respondents as well. The issue is not which party derives benefits from the Services Agreement but why it was not disclosed by Mr. Brosseuk.

[34] It may also be argued that Mr. Brosseuk should not be required to pay special costs because he has succeeded in obtaining the injunctive relief claimed. However, Rule 57(14) clearly provides for just that eventuality. Mr. Brosseuk has been successful in obtaining the interim restraining order against transferring the mine to IE-TEC Marketing. But at the same time, he has committed an improper act as well as omitting any reference to the Services Agreement.

[35] I have also considered the fact that this is an interim application and there is some risk in making a special costs order when a final hearing date has been set and further evidence may be filed. However, this application can be described as a textbook case of how not to behave in a shareholder dispute and therefore should be addressed on an interim basis. In my view, the court has an obligation to rebuke rather than appear to condone reprehensible conduct.

[36] The fraudulent transfer of the Aurora claims coupled with the misstatement about the existence of the Services Agreement is reprehensible conduct that should give rise to a special costs award against the Brosseuks despite the mixed result of the application. It is clear that it was the behaviour and conduct of the Brosseuks that put the respondents to considerable effort to clarify matters for the Court.

DECISION

[37] I order that the Brosseuks pay special costs to the Respondents to the extent of 75% of their reasonable fees and disbursements for the application to be paid forthwith in any event of the cause.

VEALE J.