

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
Commercial Division

N° : 500-11-048114-157
Plumitif #307

IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, R.S.C. 1985,
c. C-36, AS AMENDED:

BLOOM LAKE GENERAL PARTNER LIMITED,
QUINTO MINING CORPORATION, 8568391
CANADA LIMITED, CLIFFS QUEBEC IRON
MINING ULC, WABUSH IRON CO. LIMITED
AND WABUSH RESOURCES INC.

Debtors / Petitioners

and

THE BLOOM LAKE IRON ORE MINE LIMITED
PARTNERSHIP, BLOOM LAKE RAILWAY
COMPANY LIMITED, WABUSH MINES,
ARNAUD RAILWAY COMPANY, WABUSH
LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

and

FTI CONSULTING CANADA INC.

Monitor

and

BMO TRUST COMPANY
-and-
BEUMER CORPORATION

Respondents

**AMENDED WRITTEN CONTESTATION OF THE
RESPONDENT BEUMER CORPORATION
(RE-RE-AMENDED MOTION TO OBTAIN THE RELEASE OF ESCROWED FUNDS)**

I. SUMMARY

1. The Petitioners' *Re-Re-Amended Motion to Obtain the Release of Escrowed Funds* (the "**Motion**") asserts that the escrowed funds (the "**Escrowed Funds**") are an asset of Bloom Lake Iron Ore Mine Limited Partnership ("**Bloom Lake LP**") and that Beumer Corporation's ("**Beumer**") claim on the escrowed funds is an unliquidated contingent claim for contractual damages.
2. This is not correct. Beumer's claim, as set forth in the First Amended Complaint attached as Exhibit R-5 to the Motion, is a claim for the escrowed funds on grounds that such funds consist of payments earned by Beumer.
3. As more fully detailed herein, the funds in escrow have been earned by Beumer pursuant to the Contracts (as defined hereinafter).
4. Indeed, Beumer fully earned both the final five percent (5%) payment specified in the Contracts and the aggregate ten percent (10%) withholding amount specified in the Contracts on or before June 30, 2013, when all payments to Beumer were due by the express terms of the Contracts.
5. The payments were therefore earned prior to the January 27, 2015 order granting Bloom Lake LP protection under the *Companies' Creditors Arrangement Act* ("**CCA**").
6. The Motion should be dismissed on the following grounds:
 - a) the Escrowed Funds are not in the patrimony of Bloom Lake LP;
 - b) alternatively, Bloom Lake LP and Beumer are undivided co-owners of the Escrowed Funds;
 - c) alternatively, the Escrowed Funds have been pledged by Bloom Lake LP in favour of Beumer to guarantee repayment of the amounts owed pursuant to the Contracts.

II. FACTUAL BACKGROUND

7. The obligation to establish an escrow agreement stems from two contracts entered into between Beumer and Bloom Lake LP for certain construction related services and supplies, namely:
 - a) a contract dated on or about October 1, 2011 for an amount of \$29,472,985 pursuant to which Beumer was to design and supply an overland conveyer (the "**OLC**"), including an associated sacrificial conveyer (the "**OLC Contract**") to a project known as the Bloom Lake Iron/Ore Mine Expansion-Phase II located in Quebec, Canada (the "**Project**"), the whole as appears from the true copy of the OLC Contract, attached hereto as **Exhibit C-1**; and
 - b) a contract dated on or about October 1, 2011 for an amount of \$14,188,077 pursuant to which Beumer was to design and supply an ore storage structure (the

“OSS”), including an associated tripper conveyor (the “OSS Contract”) for the Project, the whole as it appears from the true copy of the OSS Contract, attached hereto as **Exhibit C-2**.

(the OSS Contract and the OLC Contract were performed and administered in parallel as part of the Project and are collectively referred to as the “Contracts”)

8. Beumer’s obligations under the Contracts were to (1) deliver the equipment included in the scope of work and (2) provide the labor services included in the scope of work.
9. Throughout the duration of the Contracts, Beumer invoiced Bloom Lake LP for its work in accordance with the payment schedule in the Contracts and Bloom Lake LP paid the invoices in recognition of Beumer’s performance.
10. Indeed, Beumer has fully performed its obligations under the Contracts and has therefore earned payment of the Escrowed Funds.
11. The Contracts, particularly Exhibits C thereto, contain the following payment terms:
 - a) 10% down payment;
 - b) 5% with submitted engineering documents (conveyor route drawings and NTE loads information);
 - c) 25% against purchase and procurement commencement;
 - d) 50% through delivery phase (Monthly invoicing);
 - e) 5% at equipment start up, payment date not to exceed Dec 31st 2012;
 - f) 5% Acceptance test passed, payment date not to exceed April 30th 2013;
 - g) 10% of each invoice will be retained.
12. Exhibit C also provides the following with respect to the 10% amount Bloom Lake LP was entitled to retain from each invoice:

Retained amount will be placed in interest bearing joint escrow account with dual signatory rights. Upon successful Acceptance test and operation of the plant or by June 30th 2013, whichever is sooner retained amount will be released. Interest amount will be split evenly between supplier and owner.
13. Beumer and Bloom Lake LP had therefore agreed to a 10% retention from each invoice and placement of such retained funds in an escrow account in recognition that at the time of payment, Beumer earned the full payment including the retained amount.
14. The Parties agreed to the “not to exceed” payment dates in recognition that Beumer would be entitled to payment within a reasonable time after delivering its equipment and

that Beumer would have no control over potential delays to the installation and start-up milestones that would otherwise trigger Bloom Lake LP's remaining payment obligations.

15. Both the "final 5% payment" and the "10% retained amount" were therefore earned by Beumer at the latest by June 30, 2013.

III. ESCROW FORMATION

16. As mentioned above, pursuant to Exhibit C of the Contracts, Bloom Lake LP was required to establish and pay the retained amounts in an "interest bearing joint escrow account with dual signatory rights."
17. As of January 30, 2013, Bloom Lake LP had still not established the escrow account required by the Contracts.
18. In the following months, Beumer repeatedly requested that the escrow account be established and funded. In a meeting on May 8, 2013, Frank Warmoth of Beumer expressed to Annie Torkia Lagacé, Senior Legal Counsel for Bloom Lake, that Beumer was concerned about Bloom Lake's solvency and was in a less secure position because Bloom Lake had not established the escrow account.
19. In June of 2013, Bloom Lake LP submitted a claim seeking purported damages resulting from various incidents in relation to Beumer's performance of its obligations under the Contracts. The claim made by Bloom Lake LP is unfounded and frivolous and is designed purely to delay the rightful payment of amount currently owing to Beumer, while Bloom Lake LP was already suffering severe financial distress.
20. Notwithstanding the existence of Bloom Lake LP's entirely unfounded claim, on June 28, 2013, the Parties finally entered into the Escrow Agreement (the "**Escrow Agreement**") (R-6) pursuant to which Bloom Lake LP was required to transfer \$6,330,854.00 (the "**Escrowed Funds**") in an escrow account to be distributed in accordance with Section 4.1 of the Escrow Agreement.
21. Section 2.3 of the Escrow Agreement clearly identifies the payments earned under the Contracts as the source of the Escrowed Funds:

2.3 Basis and Effect of the Escrowed Funds.

The Parties intend for the Initial Escrowed Funds to represent the final five percent (5%) payment specified in the Purchase Agreements [or "Contracts"], equal to the amount of \$1,964,748, less 10% withholding on such amount, plus the aggregate ten percent (10%) withholding amount specified in the Purchase Agreements [or "Contracts"], equal to the amount of \$4,366,106.

22. On or about July 5, 2013, Bloom Lake LP paid both the final 5% amount and the retained amounts into the escrow account. Such amounts were earned by Beumer at the time

Bloom Lake LP paid each prior invoice, and Bloom Lake LP was obligated by the express terms of the Contracts to release the funds to Beumer no later than April 30, 2013 in the case of the final 5% and June 30, 2013 in the case of the retained amounts.

IV. GROUNDS OF CONTESTATION

(1) THE ESCROWED FUNDS DO NOT FORM PART OF THE PATRIMONY OF BLOOM LAKE LP

23. At paragraph 25 of the Motion, it is alleged that “the Escrowed Funds (...) are an asset of Bloom Lake LP and form part of its patrimony”.

24. This allegation is unfounded both in fact and in law.

25. Beumer’s principal ground of contestation is that the Escrowed Funds do not form part of the patrimony of Bloom Lake LP.

26. As explained hereinabove, Beumer fully earned both the final 5% percent payment specified in the Contracts on or before April 30, 2013 and the aggregate 10% withholding amount specified in the Contracts on or before June 30, 2013.

27. Such amounts were earned and paid into the escrow account well before Bloom Lake LP was granted CCAA protection pursuant to the Initial Order (R-1) granted by the Honourable Justice Stephen Hamilton on January 27, 2015.

28. Indeed, upon transferring the funds in the escrow account, Bloom Lake LP relinquished both effective and legal control over the Escrowed Funds in accordance with the Escrow Agreement.

29. The fact that Bloom Lake LP has been granted protection under the CCAA is irrelevant and cannot provide Bloom Lake LP with more rights than it had prior to the granting of such protection. Indeed, the Escrow Agreement does not provide Bloom Lake LP any right of control over the Escrowed Funds.

- *Entreprises Bigknowledge inc. (Syndic de)*, 2008 QCCA 1613.

30. The Escrowed Funds “étant sorties définitivement du patrimoine” of Bloom Lake LP prior to the issuance of the Initial Order, such funds are not part Bloom Lake LP’s patrimony.

- *Entreprises Bigknowledge inc. (Syndic de)*, 2008 QCCA 1613.

(2) ALTERNATIVELY, BLOOM LAKE LP AND BEUMER RETAIN JOINT CO-OWNERSHIP OF THE ESCROWED FUNDS

31. Alternatively, Bloom Lake LP and Beumer are undivided co-owners of the Escrowed Funds.

32. Section 7.1 of the Escrow Agreement specifically provides that “each Party will be treated as the owners of that portion of the original Escrowed Funds and the earnings

thereon which is equal to its respective proportional part of the original Escrowed Funds which each ultimately receives”.

33. Indeed, Bloom Lake LP and Beumer exercise equal rights over, assume equal obligations on, and derive equal benefits from the Escrowed Funds:

3.1 Investment

Upon receipt by the Escrow Agent of a joint written direction from the Parties, in the form attached as Schedule A, the Escrow Agent shall invest the Escrowed Funds in Authorized Investments (defined below) in its name in accordance with such direction. Any direction from the Parties to the Escrow Agent shall be in writing and shall be provided to the Escrow Agent no later than 9:00 a.m. (Toronto time) on the day on which the investment is to be made. [...]

34. Beumer and Bloom Lake LP are therefore joint-owners of the Escrowed Funds and the proportional share of each in the Escrowed Funds shall be determined following the resolution of the dispute between the Parties.

(3) ALTERNATIVELY, THE ESCROWED FUNDS HAVE BEEN PLEDGED IN FAVOUR OF BEUMER

35. Alternatively, should this Court conclude that Bloom Lake LP and Beumer are not co-owners of the Escrowed Funds, the Escrowed Funds have been pledged in favour of Beumer to guarantee payment of the amounts owed:

2.3 Basis and Effect of the Escrowed Funds.

The Parties intend for the Initial Escrowed Funds to represent the final five percent (5%) payment specified in the Purchase Agreements, less 10% withholding on such amount, which equals to the amount of \$1,964,748, plus the aggregate ten percent (10%) withholding amount specified in the Purchase Agreements, equal to the amount of \$4,366,106. Nothing herein constitutes a representation, admission, or denial regarding the proper interpretation of the Purchase Agreements or existence or extent of liability under the Purchase Agreements or any modifications thereto. [Emphasis added.]

36. By transferring the Escrowed Funds to the Escrow Agent, Bloom Lake LP effectively pledged such funds to Beumer, which is consistent with the Parties’ intent; namely, that the Escrowed Funds will guarantee the execution of the obligations of Bloom Lake LP pursuant to the Contracts.

37. It follows that Beumer is a secured creditor of Bloom Lake LP, as it holds a movable hypothec over the Escrowed Funds.

FOR THESE REASONS, MAY IT PLEASE THIS COURT TO:

DISMISS the Re-Re-Amended Motion to Obtain the Release of Escrowed Funds;

ORDER the Respondent BMO Trust Company to release and remit to Beumer Corporation (“Beumer”) the Escrowed Funds paid by Bloom Lake Limited Partnership (“Bloom Lake LP”) into the BMO Trust Company account number 865-22655 (the “Escrow Account”) pursuant to the Escrow Agreement dated June 28, 2013 (the “Escrow Agreement”), being USD 6,317,305.52, plus any interest accrued thereon since December 31, 2014 (the “Escrowed Funds”), less fees payable to BMO Trust Company pursuant to the Escrow Agreement (...);

THE WHOLE with costs against the Petitioners.

ALTERNATIVELY,

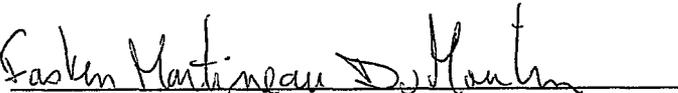
DECLARE that the Escrowed Funds paid by Bloom Lake LP and being held in the Escrow Account do not form part of the patrimony of Bloom Lake LP;

ORDER the Respondent BMO Trust Company to hold the Escrowed Funds until such time as the resolution of the dispute between Beumer and Bloom Lake LP in accordance with the Escrow Agreement;

RESERVE the parties’ rights to apply to a court of competent jurisdiction for an order for the disposition of the Escrowed Funds if the dispute between the parties is not completed within a reasonable time;

THE WHOLE with costs against the Petitioners.

Montreal, this 18th day of April 2016


Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.
Attorneys for Beumer Corporation

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THE RESPONDENT BEUMER
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(RE-RE-AMENDED MOTION TO OBTAIN
THE RELEASE OF ESCROWED FUNDS)

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