

2003 01 T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as
Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN:

ROYAL BANK OF CANADA

PLAINTIFF BY
COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as
Managing Agent of WABUSH MINES

DEFENDANT BY
COUNTERCLAIM

STATEMENT OF DEFENCE TO COUNTERCLAIM

1. The Plaintiff, Cliffs Mining Company in its capacity as Managing Agent of Wabush Mines, admits the accuracy of the quotations from the Master Lease Agreement contained in paragraphs 4, 5, 7 and 8 of the Amended Statement of Defence and Counterclaim (the "Counterclaim").

2. The Plaintiff denies each and every other allegation in the Counterclaim unless expressly admitted herein.

No Liability of the Plaintiff

3. On December 17, 1996 Wabush Mines, an unincorporated joint venture, through its managing agent, Plaintiff Cliffs Mining Company, and the Defendant Royal Bank of Canada ("RBC") entered into a lease agreement (the "Master Lease Agreement")

pursuant to which the Plaintiff as agent on behalf of Wabush Mines would lease certain equipment from RBC.

4. The Plaintiff, as was known by RBC at all times, is merely the Managing Agent for Wabush Mines which, at the relevant time, was a joint venture between Wabush Iron Co. Limited ("Wabush Iron"), Stelco Inc. ("Stelco") and Dofasco Inc. ("Dofasco"). The Master Lease Agreement specifically states that the agreement is between RBC and:

"Cliffs Mining Company, the Managing Agent, acting only for and on behalf of Wabush Mines (an unincorporated joint venture of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc.) having an office at 1100 Superior Avenue, Cleveland, Ohio 44114-2589, which declares to be duly authorized in virtue of a Management Agreement (copy of which is attached) to act on behalf of Wabush Mines and bind each of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc. in accordance with their respective liability stated in paragraph 53.1 hereof;"

5. The Management Agreement referred to is dated as of January 1, 1967 and is between the predecessors of the Plaintiff, Wabush Iron, Stelco and Dofasco. RBC was given a copy of the Management Agreement which clearly sets out that the Plaintiff simply acted as agent for and on behalf of Wabush Mines.

6. Paragraph 53.1 of the Master Lease Agreement states:

"53. Liability of each Joint Venturer

53.1 The liability of each Joint Venturer in respect of any Obligation in the Lease and Leasing Schedules shall be as follows:

- Wabush Iron Co. Limited: 37.87% thereof
- Stelco Inc.: 37.87% thereof
- Dofasco Inc.: 24.26% thereof."

7. The Plaintiff states that as merely the agent of Wabush Mines it never had and has no obligation to RBC of any kind under the Master Lease Agreement. The Master Lease Agreement specifically states the Plaintiff is the "agent" of and "acting only for and on behalf of" its principal Wabush Mines and therefore the Plaintiff is not liable in its personal capacity.

8. If RBC wished to seek a remedy pursuant to the Master Lease Agreement then RBC should have sought such remedy directly against Wabush Iron, Stelco and Dofasco pursuant to Paragraph 53.1 of the Master Lease Agreement. RBC cannot indirectly make

any claim as against the Plaintiff. Accordingly, the Counterclaim should be dismissed as against the Plaintiff.

No Breach of the Master Lease Agreement

9. In the alternative, the Plaintiff states that there was never any breach of the Master Lease Agreement as contended in the Counterclaim.
10. The Plaintiff denies that there was any failure to maintain the equipment in accordance with section 11 of the Master Lease Agreement as alleged in paragraph 6 of the Counterclaim. At all times the obligations to maintain the equipment were complied with, subject to ordinary wear and tear, as provided for in section 11.1(a) of the Master Lease Agreement. RBC has provided no particulars of its bald assertion that there was a breach of the obligation to maintain because no such breach has occurred. RBC has merely asserted such a breach, *ex post facto*, for the reasons set out in paragraph 11 of the Statement of Claim.
11. The allegation in paragraphs 9 and 14(c) of the Counterclaim that the Plaintiff intentionally failed to maintain the System in good operating condition and repair so as to take advantage of its own breach is baseless. Again, no particulars of the alleged breach of the Master Lease Agreement are provided because no such breach has occurred. Compliance was made with all obligations pursuant to the Master Lease Agreement. RBC's position is a mere contrivance that it is attempting to use to resile from its agreement as set out in the Statement of Claim.
12. Contrary to the allegations in the Counterclaim, Wabush Mines kept the Shovels in a good state of repair because it required the Shovels for its ongoing operations. Simply, Wabush Mines could not afford for the Shovels to be down for any reason.
13. If RBC believed there had been a breach of the Master Lease Agreement regarding maintenance then RBC was obligated, pursuant to Section 21, to give notice of such alleged breach and there was 30 days to cure any such breach. At no time did RBC give a notice of breach that could be cured by Wabush Mines. Accordingly, there was no breach under the Master Lease Agreement when the Option was exercised as set out in paragraph 6 of the Statement of Claim. Vague references to a failure to repair without any details mean that there was no breach pursuant to the Master Lease Agreement and the Option was validly exercised.

14. When Wabush Mines began using the Shovels under the Leases in July 1998 they were already twenty years old. Shovel #10 (Lease No. 08-73566) was built in 1977; Shovel #11 (Lease No. 08-74187) was built in 1979. Both Shovels had been extensively rebuilt in 1995 and since their rebuilds had been used for over 28,000 hours each by the summer of 2003. So by the time RBC asserted the Shovels were not in a proper state of repair, reasonable wear and tear excepted, they were 25 year old machines that had been rebuilt once and used continuously since the time of their rebuilds.

15. The Plaintiff, as agent, has maintained extensive records regarding the maintenance that was done by Wabush Mines on the Shovels from 1997 to 2006. This includes a "Summary by Work Order" for each Shovel for maintenance work done on an annual basis. Between 1997 and 2003 the following amounts were spent by Wabush Mines on maintenance of the Shovels:

YEAR	SHOVEL # 10	SHOVEL # 11
1997	\$475,398.35	\$379,034.78
1998	\$842,093.42	\$944,154.18
1999	\$842,812.92	\$712,722.57
2000	\$1,134,892.19	\$1,326,182.93
2001	\$1,489,723.17	\$1,108,627.36
2002	\$1,639,843.29	\$2,273,430.32
2003	\$1,559,140.70	\$2,122,900.91
TOTAL	\$7,983,904.04	\$8,867,053.05

16. A total of \$16,850,957.09 was spent on maintenance of the Shovels between 1997 and 2003. The allegations contained in paragraphs 10, 11 and 14 of the Counterclaim are baseless.

Amounts Paid to RBC

17. On September 15, 2003 the Plaintiff delivered a cheque to RBC for \$108,020.00 which was the balance of the purchase owed for the Shovels after deduction of the post-

June 30, 2003 lease payments as set out in paragraph 10 of the Statement of Claim. For its own reasons, RBC refused to cash this cheque.

18. Subsequently, on September 22, 2003 the Plaintiff on behalf of Wabush Mines delivered to RBC a second cheque in the amount of \$108,020.00. On September 24, 2003 RBC responded and proposed that RBC cash that cheque since it was agreed this amount, at least, was owed to RBC. The Plaintiff confirmed on behalf of Wabush Mines in its letter of October 1, 2003 that the Plaintiff did not object to RBC's proposal that "we cash said check [sic] and apply it against the purchase price for the two electric shovels, without prejudice to our respective right as to the final determination of said purchase price." For whatever reason, RBC failed to cash this cheque and it became stale dated.

19. RBC now claims that since there was an Event of Default for failure to repair Wabush Mines had no right to purchase the Shovels. If Wabush Mines did have a right to purchase, RBC now says that the Plaintiff (in its personal capacity) had to purchase the Shovels for the Fair Value Market Cap of \$2,013,324.20. The Plaintiff denies that it owes any amount to RBC in its personal capacity. The Plaintiff further denies that any amount other than the \$108,020.00 which was tendered on RBC but refused is owed to RBC.

20. In the Counterclaim at paragraph 13 RBC does acknowledge that it has received lease payments subsequent to June 30, 2003 in the amount of \$347,120.00 which are to be credited against the purchase price of the Shovels. RBC asserts that the amount of the purchase price owed to RBC is \$1,666,204.20. RBC also claims, more than 10 years after the fact, that it is entitled to 18% interest at the rate of 18% per annum compounded monthly pursuant to Section 30 of the Master Lease Agreement. RBC nowhere has acknowledged that the amount said to be owed by Cliffs Mining was tendered on it and RBC refused to accept this payment.

21. The Plaintiff states that RBC has been paid all that it is owed as set out in the Statement of Claim and that no further amount beyond \$108,020.00 is owed to RBC. The declaratory relief claimed in the Statement of Claim should be granted and the Counterclaim should be dismissed.

22. In the further alternative, the Plaintiff states that even if some amount is owed to RBC that RBC is not entitled to be paid any interest on such amount. First, RBC failed to

accept the \$108,020.00 properly tendered on it twice in September 2003 and therefore no interest should be payable in such circumstances. Second, RBC waited over 10 years to assert the Counterclaim for damages against the Plaintiff in its personal capacity and it should not be entitled to any amount in interest as against the Plaintiff in its personal capacity or at all because of such delay.

23. The Plaintiff requests that the Defendant's counterclaim be dismissed with costs payable to the Plaintiff.

DATED AT St. John's, Newfoundland and Labrador, this 24th day of February, 2014.



Christopher J. Cosgriffe

Woolgar VanWiechen Ketcheson Ducoffe LLP
Barristers and Solicitors
70 The Esplanade, Suite 401
Toronto, Ontario
M5E 1R2

Solicitors for the Plaintiff and Defendant by
Counterclaim

ADDRESS FOR SERVICE:

c/o Paul Burgess
BURGESS LAW OFFICES
P.O. Box 23196
Suite 308, Terrace on the Square
St. John's, NL A1B 4J9

TO: Neil L. Jacobs
Stewart McKelvey Stirling Scales
Suite 1100, Cabot Place
100 New Gower Street
St. John's, NL A1C 6K3

Solicitors for the Defendant and Plaintiff by Counterclaim

TO: Registry of the Supreme Court of Newfoundland and Labrador
Registry (General Division)
309 Duckworth Street
St. John's, NL A1C 5M3