C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
Commercial Division

N° : 500-11-048114-157
Plumitif # 222

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
-and-
BEUMER KANSAS CITY LLC

Respondents

FACTUM IN SUPPORT OF BEUMER CORPORATION'S CONTESTATION OF THE RE-AMENDED MOTION TO OBTAIN THE RELEASE OF THE ESCROWED FUNDS

A. RESTATEMENT OF THE FACTS

1. This factum[1] is filed by Beumer Corporation ("**Beumer**") in support of its contestation of the *Re-Amended Motion to Obtain the Release of the Escrowed Funds* (the "**Escrow Motion**").

2. Beumer hereby reiterates all the facts contained in the *Written Contestation of the Respondent Beumer Corporation (Amended Motion to Obtain the Release of Escrowed Funds)* (the "**Contestation**").

B. PRELIMINARY REMARKS

3. In paragraph 178 of the Petitioners' *Motion for the Issuance of an Initial Order* (the "**Motion for an Initial Order**"), the Petitioners explicitly admit[2] that the Escrowed Funds) constitute Bloom Lake LP's final payment under the Contracts:

> 178. On July 12, 2013, Beumer Corporation ("**Beumer**") commenced Federal Court proceedings in Ohio against Bloom Lake LP with respect to outstanding payments for Beumer's design and construction of various conveyor assets and an ore storage structure at the Bloom Lake Mine. Pursuant to an escrow agreement with Beumer, **Bloom Lake LP paid the final payment of $6,330,854** (the "Escrowed Funds") with respect to Beumer's work into escrow with the Bank of Montréal in Montréal, Québec, pending final resolution of this litigation. [Emphasis added]

4. Notwithstanding this clear admission[3], in their answer to Beumer's contestation, the Petitioners now deny the fact that the Escrowed Funds constitute a payment made to Beumer.[4]

5. Beumer submits that this 180 degree reversal stems solely from the fact that the Petitioners would have absolutely no legal basis for seeking the release of the Escrowed Funds if these funds constituted a payment, namely in light of the Court of Appeal decision in *Entreprises Bigknowledge inc.* (Syndic de), 2008 QCCA 1602 *[**Bigknowledge***].

6. Confronted with Beumer's Contestation, which relies primarily on the Court of Appeal's ruling in *Bigknowledge*, the Petitioners were therefore forced to reverse course and deny that the Escrowed Funds constitute a payment in order to artificially preserve an argument to distinguish the present case from the case in *Bigknowledge*.

7. Indeed, the Petitioners now repeatedly refute that the Escrowed Funds constitute payments for monies earned by Beumer under the Contracts.

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1 Unless otherwise defined herein, all initially capitalized terms used in this Factum shall have the meanings ascribed to them in the Contestation.

2 The Motion for Initial Order was accompanied by an affidavit sworn by Clifford Smith who also swore an affidavit in support of the Escrow Motion.

3 Also in the Escrow Motion at para. 7, the Petitioners' choice of wording varied only slightly, but still referred to the deposit as the "final payment": "Prior to the institution of the Beumer Claim, **Bloom Lake LP had deposited the final payment of USD $6,330,854** (the "Escrowed Funds") with respect to Beumer's work into escrow with the Respondent BMO Trust Company ("BMO")."

4 See paragraphs 17 to 23 of the Petitioners' answer.

8. Notwithstanding the fact that the Petitioners have already admitted that the Escrowed Funds constitute a payment, Beumer submits that this newfangled position of the Petitioners is, in any event, untenable in both fact and law.

9. Furthermore, the relationship between Bloom Lake LP and Beumer stems from the Contracts. The Escrow Agreement is nothing more than an accessory to the Contracts and cannot stand alone.

10. Indeed, the Contracts specifically stipulate the following with respect to the obligation of the parties to establish and fund a joint escrow account with respect to the payments retained under the Contracts:

- Exhibit C-1 at p. 14

> "Retained amount will be placed in interest bearing joint escrow account with dual signatory rights. Upon successful Acceptance test and operation of the plan or by June 30th 2013, whichever is sooner retained amount will be released. Interest amount will be split evenly between supplier and owner."

11. The Escrow Agreement expressly stipulates that nothing in the Escrow Agreement 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".

- Exhibit P-6 at Article 2.3

> 2.3 Basis and Effect of the Escrowed Funds.
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> 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. 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.

12. In light of the foregoing, Beumer submits that it is both noteworthy and telling that the Petitioners elected not to file the Contracts in support of the Escrow Motion.

13. It is mentioned in the preamble of the Escrow Agreement that the dispute involves a "certain contractual dispute between the Parties in the context of certain equipment sold to BLLP by Beumer pursuant to two Purchase Agreements (...)".

14. In order to determine the nature of the Escrowed Funds i.e. whether such funds constitute monies earned and paid by Bloom Lake LP to Beumer, the Court must necessarily examine the Contracts.

15. Viewing the Escrow Motion through a narrow lens, as seemingly desired by the Petitioners, may give the false impression that the Escrowed Funds are nothing more than a simple sequestration of funds pending resolution of a dispute.

16. However, when looking at the full portrait, the arguments advanced by the Petitioners simply do not pass muster.

C. THE ESCROWED FUNDS DO NOT FORM PART OF THE PATRIMONY OF BLOOM LAKE LP

I. THE ESCROWED FUNDS REPRESENT MONIES EARNED BY BEUMER AND PAID BY BLOOM LAKE LP PRIOR TO THE CCAA PROCEEDINGS

17. As admitted by the Petitioners in both the Motion for an Initial Order[5] and the Escrow Motion[6], and as more fully detailed in paragraphs 7 to 15 of Contestation, the Escrowed Funds have been earned by Beumer pursuant to the Contracts and paid by Bloom Lake LP into the escrow account prior to the filing of the CCAA proceedings.

18. Beumer therefore submits that the Court of Appeal decision in *Bigknowledge*[7] is directly applicable to the present matter and is, in and of itself, precedent to grant the conclusions sought by Beumer in the Contestation.

19. In *Bigknowledge*, the Court of Appeal upheld the Superior Court of Québec judgment that certain amounts deposited in a lawyer's trust account had definitively exited the patrimony of the debtor prior to bankruptcy and thus were not subject to the existing security over the debtor's property.

20. In paragraphs 16 to 21 of their factum, the Petitioners have attempted to distinguish the present matter from the *Bigknowledge* matter (and this despite the fact they had previously admitted that the Escrowed Funds constitute a payment). In Beumer's view, the reasoning of the Petitioners is flawed for two principal reasons:

    a) The fact pattern in the present matter closely resembles the fact pattern in *Bigknowledge*, namely in that the Escrowed Funds constitute monies that have been earned by Beumer and paid by Bloom Lake LP; and

    b) In any event, Bloom Lake LP has lost all effective control over the Escrowed Funds.

21. The key takeaways from the facts of the *Bigknowledge* matter can be summarized as follows:

    a) Bigknowledge entered into two contracts with Telus: the first related to the sale of certain assets by Telus to Bigknowledge and the second was a sublease for certain premises previously occupied by Telus.

    b) A dispute ensued between Bigknowedge and Telus regarding the sale of certain assets which allegedly did not belong to Telus.

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5 Motion for an Initial Order at para. 178.

6 Escrow Motion at para. 7.

7 *Entreprises Bigknowledge inc. (Syndic de)*, 2008 QCCA 1602.

c) Following the commencement of this dispute, Bigknowledge stopped paying rent, but continued to occupy the premises that were being subleased.

d) Telus sought and obtained interim relief from an arbitrator chosen by the parties, which forced Bigknowledge to pay the rent into the trust account of Bigknowledge's lawyer.

e) These amounts were indeed transferred into the lawyer's trust account.

f) Subsequently, Bigknowledge made an assignment in bankruptcy.

g) In the context of the bankruptcy, Telus made a property claim over the amount held in the trust account. The trustee rejected this claim.

h) Telus then appealed the Trustee's decision and the Trustee countered this appeal by asking that the money held in trust be released to the debtor's estate.

i) Ultimately, the Superior Court of Québec granted Telus' appeal in part and ordered that the funds be held in the trust account until the resolution of the arbitration between the parties.

j) The Court of Appeal of Québec upheld this decision.

22. It is useful to provide a similar summary of the facts in the present matter, which in Beumer's view are analogous to those in Bigknowledge:

a) Beumer entered into the Contracts with Bloom Lake LP.

b) Beumer delivered the equipment and completed the work provided for in the Contracts, which were invoiced to and paid by Bloom Lake LP, save and except for the amounts retained under the Contracts.

c) The retained amounts, representing the final payments under the Contracts, were to be transferred by Bloom Lake LP into a joint escrow account.

d) Bloom Lake LP refused to comply with this obligation until it finally executed the escrow agreement on June 28, 2013 and funded the escrow account on July 5, 2013.

e) In accordance with the Contracts, the retained amounts were to be released to Beumer at the latest by June 30, 2013.

f) Therefore, the retained amounts were earned by Beumer at the latest by June 30, 2013.

g) The Petitioners have admitted that the amount paid into the escrow account constitutes the final payment under the Contracts.

h) In parallel, Bloom Lake LP is asserting certain contractual claims against Beumer in which it is seeking to effect compensation against the Escrowed Funds.

i) The Escrowed Funds were effectively paid into escrow prior to the commencement of the CCAA proceedings.

23. As was the case in *Bigknowledge*, the amounts were earned by Beumer under the Contracts and **paid in full** by Bloom Lake, thus constituting a definitive payment of the amounts provided for in the Contracts in accordance with Article 1557 of the *Civil Code of Québec* (*C.C.Q.*):

- Article 1557 of the *C.C.Q.*

  1557. Payment shall be made to the creditor or to a person authorized to receive it for him.

  Payment made to a third person is valid if the creditor ratifies it; if it is not ratified, the payment is valid only to the extent of the benefit that the creditor derives from it.

- *Bigknowledge* at para. 29 and 30.

  [30] Les auteurs Baudouin et Jobin tiennent ces propos relativement au paiement et à son effet libératoire :

  > 674 - Introduction – Le paiement, pour être juridiquement valable, doit se conformer aux exigences de la loi (articles 1553 et s. du Code civil). Celui qui paye (solvens) et celui qui reçoit le paiement (accipiens) doivent justifier de leur capacité respective à donner et à recevoir. En outre, la loi impose deux règles principales relatives à l'objet du paiement: celle de l'identité entre l'objet offert et celui qui était dû, et celle de l'indivisibilité, qui force le solvens à s'acquitter de son obligation au complet en une seule et même fois.
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  > 675 - Paiement par le débiteur ou son représentant - Pour payer validement, il n'est point nécessaire que celui qui exécute l'obligation soit le débiteur lui-même. Le paiement peut, en effet, être effectué par son représentant, son mandataire, son gérant d'affaires ou même par un tiers. Dans les cas de représentation, l'acte juridique volontaire émane du débiteur qui ne se charge pas cependant lui-même de l'accomplissement de l'acte matériel.
  >
  > […]
  >
  > 679 - Paiement au créancier - Le paiement, pour avoir un effet libératoire, doit être fait au créancier personnellement ou à celui désigné pour le recevoir à sa place par la convention (mandataire ou bénéficiaire d'une stipulation pour autrui), la loi (tuteur, curateur) ou la justice (syndic à la faillite). Si des difficultés surgissent entre le créancier et son représentant, le débiteur, en toute justice, ne saurait en supporter les conséquences et devoir payer sa dette une seconde fois. Lorsque le débiteur paye au représentant conventionnel du créancier, il doit cependant prendre garde de s'assurer de sa qualité de représentant, le paiement à un tiers non autorisé ne liant pas le créancier et obligeant le débiteur à payer de nouveau, sauf dans l'hypothèse où le créancier a subséquemment ratifié l'acte ou profité du paiement (par exemple, lorsque le paiement a été fait au propre créancier du créancier, à son acquit). Le paiement fait à un tiers, sans droit, est en principe nul et donne droit à une action en répétition de l'indu.

> Est également inopposable au créancier saisissant le paiement postérieur à la saisie fait par le débiteur à un autre créancier, au détriment des droits du créancier saisissant. Celui-ci peut alors réclamer à nouveau et à son profit le paiement au débiteur, qui garde cependant un recours contre le créancier qu'il a payé.
>
> [31] Les versements de loyer ont été faits avant la faillite de Bigknowledge dans le cours normal de ses affaires et en considération de l'occupation des lieux loués. Bigknowledge ne pouvant repousser son obligation de payer, elle désirait se ménager un mécanisme de compensation advenant une sentence arbitrale en sa faveur sur la question de la réduction du prix d'achat des actifs de Telus. Dans l'intervalle, Bigknowledge devait s'acquitter d'une dette exigible alors qu'elle ne détenait pas de créance liquide et exigible contre Telus. [Emphasis added]

24. Contrary to the position of the Petitioners, the only contingent claim in the present matter is the entirely unfounded claim being asserted by Bloom Lake LP against Beumer. Bloom Lake LP therefore has no right whatsoever to effect compensation against the Escrowed Amounts, which would require that both debts are certain, liquid and exigible.

> 1673. Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and both of whose subject is a sum of money or a certain quantity of fungible property identical in kind.
>
> A party may apply for judicial liquidation of a debt in order to set it up for compensation.

25. Bloom Lake is therefore unlawfully withholding its consent to release the Escrowed Funds to Beumer. The Escrowed Funds, representing the retained amount under the Contracts, were to be released to Beumer at the latest by June 30, 2013.

26. At best, the Escrow Agreement did nothing more than cause the Escrowed Funds to remain in a state of “suspended animation” possessing all of the characteristics of payment effected to the creditor except only for the possibility of compensation in due course.

- *9010-6816 Québec Inc. (Syndic de)*, J.E. 99-862 (C.S.), REJB 1999-11847, page 12

27. Bloom Lake LP is therefore depriving Beumer of payments made in fulfilment of its contractual obligations (as admitted by the Petitioners).

28. The Escrowed Funds therefore definitively left the patrimony of Bloom Lake LP prior to the filing of the CCAA proceedings:

- *Bigknowledge* at para. 27.

> [27] L'appelant selon moi pose mal la question: il ne s'agit pas de savoir si les sommes versées sont entrées dans le patrimoine de Telus mais plutôt si Bigknowledge s'est vraiment dessaisie de ces sommes de manière définitive avant sa faillite. Comme le premier juge, je suis d'avis que les sommes sont définitivement sorties du patrimoine de Bigknowledge. Bigknowledge devait impérativement payer le loyer au fur et à mesure qu'il devenait échu si elle voulait éviter l'expulsion des lieux et la résiliation du sous-bail. Elle n'avait aucun moyen de défense à faire valoir

> à cet égard et seul le paiement des loyers a rendu possible la radiation du préavis d'exercice. La terminologie utilisée par l'arbitre ne fait pas de doute: il réfère à l'engagement de Bigknowledge de payer les différents loyers.

29. Moreover, the creditors of Bloom Lake LP will not in any way whatsoever be prejudiced by the release of the Escrowed Funds to Beumer.

30. Following release of the Escrowed Funds, Bloom Lake LP may continue to assert its contingent claims against Beumer.

31. Through the Escrow Motion, Bloom Lake LP is indirectly seeking summary judgment on its contingent claims against Beumer.

32. For these reasons, Beumer submits that the Court should grant the conclusions sought in the Contestation and order the Escrow Agent to release the Escrowed Funds to Beumer.

II. IN ANY EVENT, BLOOM LAKE LP LOST EFFECTIVE CONTROL OVER THE ESCROWED FUNDS PRIOR TO COMMENCEMENT OF THE CCAA PROCEEDINGS

33. If the Court was to determine that the Escrowed Funds do not yet constitute payments, Beumer submits that, in any event, these funds no longer form part of the patrimony of Bloom Lake LP.

34. Indeed, at the moment that the funds were transferred into the escrow account, Bloom Lake LP lost effective control over the Escrowed Funds. Moreover, such funds represented the exact amounts that were owed under the Contracts.

35. Contrary to the submissions of the Petitioners, *Bigknowledge* must not be interpreted narrowly so as to create a "categorical rule". Indeed, the Court of Appeal specifically cautions against this:

- *Bigknowledge* at para. 34-35

> [34] Le Syndic plaide que, selon la jurisprudence majoritaire, les sommes déposées pour une fin spécifique au greffe d'un tribunal ou entre les mains d'un tiers ne sont pas sorties du patrimoine du déposant et qu'en conséquence, advenant la faillite de ce dernier, les sommes sont dévolues au Syndic.
>
> [35] La jurisprudence ne pose pas selon moi une règle aussi catégorique. Les considérations qui amènent une partie à déposer auprès d'un tiers une somme d'argent peuvent varier énormément selon les circonstances. Le caractère définitif ou aléatoire du dépôt devra donc être déterminé au cas par cas. En l'espèce, l'obligation de payer le loyer était immédiate et elle a été définitivement éteinte par le paiement effectué avant la cession de biens. Les dépôts au compte en fidéicommis des avocats n'avaient rien d'aléatoire; Bigknowledge reconnaissait devoir le loyer pour les locaux occupés, faute de disposer de moyens de contester son obligation. En acquittant sa dette, Bigknowledge ne conférait pas une préférence indue à un créancier. Le paiement de son loyer lui permettait de poursuivre ses activités dans l'intérêt de tous ses créanciers.

36. In examining the particular facts of *Bigknowledge*, the Superior Court of Québec in *Ressources Meston inc.* also highlighted the fact that there is no "absolute

rule" and that the definitive character of a deposit must be examined and determined on a case-by-case basis in order to qualify the transfer of funds.

- *Ressources Meston inc. (Syndic de*), 2010 QCCS 428 (CanLII) at para. 49 and 50.

> [49] The Court of Appeal then referred to the case law previously cited in support of the position of the creditors not affected by the arrangement whereby the monies deposited for a specific purpose with the clerk of a court or in the hands of a third person have not left the depositor's patrimony and that in the event of the depositor's bankruptcy, the monies will devolve on the trustee. We can learn from this analysis of the Court of Appeal that if there is a rule, it is not absolute.
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> [50] In deciding the issue, Rayle J.A. ruled that case law, in her mind, does not set such a categorical rule. Then she states that there are determinative considerations that lead a party to deposit a sum of money with a third person, and that they can vary significantly depending on the circumstances. It is the definitive or random character of the deposit that must be examined and determined on a case-by-case basis in order to qualify the transfer of funds. [Emphasis added, unofficial English translation)

37. Therefore, it is entirely inconsequential whether the relationship between the parties can be qualified as one of sequestration, which is in any case denied by Beumer[8], as it would not change the fact that either (i) the deposit constitutes a payment made by Bloom Lake LP to Beumer or (ii) Bloom Lake LP lost effective control over such deposit.

38. Upon transferring the funds, Bloom Lake LP lost definitive control over the amounts. While some residual powers over the funds were shared by the parties, none of these accessorial powers provided any effective control over the Escrowed Funds.[9]

39. Indeed, under no circumstances, prior to the CCAA proceedings, could Bloom Lake LP have sought release of the Escrowed Funds until its contingent claim had been determined. Conversely, Beumer could have sought the release of the Escrowed Funds at any time after June 30, 2013.

40. To accept the Petitioners' position, the Court would therefore have to provide Bloom Lake LP with more rights than it had prior to the CCAA proceedings. This is simply not in line with the current state of the law.

- *Bigknowledge* at para. 36

> [36] On sait que le Syndic ne peut pas avoir dans les biens du failli plus de droits que ce dernier. Si Bigknowledge n'avait pas fait faillite, elle n'aurait eu aucun droit de regard ou de contrôle sur les sommes déposées en fidéicommis. Selon le critère de l'affaire McGilton (Syndic de) confirmée par notre Cour le 4 décembre 2006, pour

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8 Sequestration requires that there be a dispute over a specific property. In the present case, the dispute between the parties is not one that is over a specific property, but rather a contractual dispute over goods that have been purchased by Bloom Lake LP under the Contracts.

9 Section 6.1 of the Escrow Agreement provides the parties with the ability to provide directions to the Escrow Agent. In no way whatsoever can this be construed as Bloom Lake LP having effective control over the Escrowed Funds.

> conclure que les sommes étaient demeurées dans le patrimoine de Bigknowledge jusqu'au 5 décembre 2005 le Syndic devait démontrer que Bigknowledge avait conservé un certain contrôle sur celles-ci. Or, les avis d'arbitrage ne remettent pas en question la validité de la convention de sous-bail ni la quotité du loyer. Quoi qu'il advienne des arbitrages pendants, Bigknowledge n'aurait jamais eu droit au remboursement des loyers en tant que tels. Tout ce qu'elle pouvait espérer, avant que le Syndic ne signifie un avis de suspension des procédures, c'était une décision favorable sur la réduction du prix de la convention d'achat d'actifs; devenant alors créancière de Telus, elle aurait pu percevoir partie ou totalité de sa créance à même les biens de Telus détenus en fidéicommis. [emphasis added and citations omitted]

41. It is also noteworthy that upon commencement of the CCAA proceedings, the Escrowed Amounts were not only considered by the Petitioners to constitute payments, but they were also not considered in the cash flow of Bloom Lake LP.[10]

D. ALTERNATIVELY, BEUMER AND BLOOM LAKE LP ARE UNDIVIDED CO-OWNERS OF THE ESCROWED FUNDS

42. In the event that this Court does not retain the above arguments, Beumer submits that the Escrow Agreement establishes undivided co-ownership over the Escrowed Funds in accordance with Section 1010 and *ff.* of the *C.C.Q*.

> 1010. Co-ownership is ownership of the same property, jointly and concurrently, by several persons each of whom is privately vested with a share of the right of ownership.
>
> Co-ownership is called undivided where the right of ownership is not accompanied by a physical division of the property.
>
> It is called divided where the right of ownership is apportioned among the co-owners in fractions, each comprising a physically divided private portion and a share of the common portions.
>
> 1012. Indivision arises from a contract, a succession or a judgment or by operation of law.

43. The determination of the proportional share of each of Beumer and Bloom Lake LP in the Escrowed Funds as well as the end of indivision will take place simultaneously upon the resolution of the dispute of the parties.

44. Indeed, certain provisions of the Escrow Agreement do indicate that the Escrowed Amounts are being held in indivision.[11]

45. In paragraph 26 of the Petitioners' factum, the Petitioners state that the Escrow Agreement is clearly not a contract establishing undivided co-ownership as it does not create any of the legal obligations of undivided co-ownership and then purport to provide some examples.

46. The fact that the Escrow Agreement provides different rights and obligations over the Escrowed Funds than those provided for in the *C.C.Q.* is of no importance in

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[10] Motion for an Initial Order, para. 185.

[11] See paragraphs 32 and 33 of the Contestation.

determining whether the Escrowed Funds are co-owned by the parties. Indeed, the parties have the freedom to contract out of these provisions, which are not of public order.

E. ALTERNATIVELY, THE ESCROWED FUNDS HAVE BEEN PLEDGED IN FAVOUR OF BEUMER

47. In the event that the Court were to find that the Escrowed Funds did not constitute a payment or establish undivided co-ownership in such funds, Beumer submits that Escrowed Funds, representing the exact amounts owed by Bloom Lake LP under the Contracts, have been placed in escrow to guarantee payment of such amounts to Beumer.[12]

48. At the time that the pledge was established, the Escrowed Funds definitively exited the patrimony of Bloom Lake LP.

49. The delivery of property, including a sum of money, to a third party to secure the performance of an obligation, which is sometimes referred to by the parties as a "deposit", "trust deposit", "escrow" or even "bond" has the effect of creating a pledge.

> – Payette, L., *Les sûretés réelles dans le Code civil du Québec*, 4e édition, 2010, para. 837.
>
> 837. La remise d'un bien effectuée auprès d'un tiers pour garantir l'exécution d'une obligation, parfois qualifiée par les parties de «dépôt», de «dépôt en fidéicommis», de «mise sous écrou» ou même de «cautionnement», a pour effet de constituer un gage. La jurisprudence a donné plusieurs exemples de ceci, à l'époque antérieure à 2009 où une somme d'argent était susceptible d'être gagée : le dépôt d'une somme d'argent, exigé par le maître d'oeuvre lors d'un appel d'offre, aux fins de garantir les obligations contractées par le soumissionnaire, créait un gage; il en était de même pour une somme d'argent déposée à la requête d'un locateur pour garantir les obligations du locataire ou déposée par une partie à un arbitrage pour garantir l'exécution des obligations auxquelles la sentence arbitrale la condamnerait éventuellement, ou encore déposée par le débiteur auprès de l'institution financière créancière afin de garantir l'exécution d'une obligation; autre illustration: le prix de vente remis par l'acquéreur au notaire instrumentant l'acte de vente appartient au vendeur et entre dans le patrimoine de celui-ci; en consentant à ce que le notaire retienne les sommes jusqu'à preuve de la radiation des charges dont le vendeur s'engage à libérer l'immeuble vendu, le vendeur créait un gage sur ces sommes, garantissant l'obtention de la radiation. [emphasis added and citations omitted]

50. Therefore, contrary to the position of the Petitioners[13], the fact that the parties used certain terms in the Escrow Agreement, i.e. deposit, escrow, etc., does not change the fact that the Escrowed Funds have been pledged in favour of Beumer.

51. Indeed, in *Bigknowledge*, the Court of Appeal found that there was no reviewable error made by the first instance judge with respect to his determination that the

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[12] This is an alternative argument as Beumer submits that Escrowed Funds actually constitute payment a payment.

[13] See paragraphs 35 and 36 of the Answer and paragraph 29 of the Answer.

monies placed in the lawyer's trust account were pledged in favour of Telus. However, in light of the findings with respect to the payment, the Court of Appeal felt it unnecessary to examine the enforceability of the pledge against the Trustee in bankruptcy.

- *Bigknowledge* at para. 32 and 38

52. It is useful to reproduce some of the findings of the first instance judge with respect to the existence of a pledge in the *Bigknowledge* matter:

- *BigKnowledge Entreprises inc. (Syndic de)*, 2006 QCCS 4406 (CanLII)

> [38] Comme dans l'affaire traité dans l'arrêt Havre Citadel inc. (Syndic de)[14], ces sommes sont détenues à titre de gage dans les sens des articles 2665, 2702, 2703 et 2705 C.c.Q.:
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> > 2665. L'hypothèque est mobilière ou immobilière, selon qu'elle grève un meuble ou un immeuble, ou une universalité soit mobilière, soit immobilière.
> >
> > L'hypothèque mobilière a lieu avec dépossession ou sans dépossession du meuble hypothéqué. Lorsqu'elle a lieu avec dépossession, elle est aussi appelée gage.
> >
> > 2702. L'hypothèque mobilière avec dépossession est constituée par la remise du bien ou du titre au créancier ou, si le bien est déjà entre ses mains, par le maintien de la détention, du consentement du constituant, afin de garantir sa créance.
> >
> > 2703. L'hypothèque mobilière avec dépossession est publiée par la détention du bien ou du titre qu'exerce le créancier, et elle ne le demeure que si la détention est continue.
> >
> > 2705. Le créancier peut, avec l'accord du constituant, exercer sa détention par l'intermédiaire d'un tiers, mais, en ce cas, la détention par le tiers n'équivaut à publicité qu'à compter du moment où celui-ci reçoit une preuve écrite de l'hypothèque.
>
> [39] Dans cette affaire, le syndic avait vendu deux immeubles et donné quittance pour le prix. Le notaire retenait une partie du prix en attendant la radiation des droits réels enregistrés sur les immeubles. Le juge Delisle écrit :
>
> > «[11] L'énoncé des faits permet les affirmations suivantes:
> >
> > 1- puisque chacune des ventes intervenues entre la débitrice et Pauline Lemay, pour une, et André Lacoste, pour l'autre, s'est conclue au comptant, à chaque occasion le prix payé est entré dans le patrimoine de la débitrice, dès la signature des contrats;
> >
> > 2- les sommes retenues, à même le prix de vente, par le notaire instrumentant, jusqu'à ce que les droits réels enregistrés sur les immeubles vendus aient été radiés, constituaient une garantie appelée gage;
> >
> > (…)

[14] *Havre Citadel inc. (Syndic de)*, J.E. 2000-397 (C.A.).

> [14] Tel que déjà souligné, ces sommes, bien que déposées comme gage, étaient entrées dans le patrimoine de la débitrice dès la signature des actes de vente. Quand celle-ci a fait faillite, puisque les sommes étaient toujours détenues en garantie, elles faisaient partie de ses biens et, par conséquent, sont tombées sous la saisine du syndic.»
>
> [40] En l'espèce, les sommes déposées en fidéicommis sont détenues en gage en vue de l'exécution de la sentence qui doit être rendue dans les arbitrages réunis. [Emphasis added]

53. Moreover, the fact that the Escrow Agent has not specifically given consent to the creation of the pledge is of no importance. It is the Escrow Agreement that establishes the pledge and the Escrow Agent, BMO, is signatory of such agreement.

54. The delivery of the funds to the Escrow Agent and the execution of the Escrow Agreement therefore fully comply with the requirements of Section 2705 of the *C.C.Q.*

- *Caisse populaire Desjardins de Val-Brillant* v. *Blouin*, [2003] 1 SCR 666, 2003 SCC 31 at para. 18 (CanLII)

> […] For example, escrow, when the property is held by a third person for the benefit of a pledge-holder, is an integral part of the traditional concept of pledge; art. 2705 C.C.Q., however, requires a writing in order to publish the pledge:
>
> > 2705. The creditor, with the consent of the grantor, may hold the property through a third person, but if so, detention by the third person effects publication only from the time the third person receives evidence in writing of the hypothec. [Emphasis added]

55. Finally, the Petitioners argue that even if the Escrowed Funds constitute a pledge, such funds should be released to Bloom Lake LP and Beumer can then prove its secured claim.[15] Accepting this proposition could in and of itself have the effect of discharging Beumer's security over the Escrowed Funds as continued detention is required in accordance with Article 2703 of the *C.C.Q.*

F. FINAL REMARKS

56. In paragraphs 31 and 32 of the Petitioners' Factum, the Petitioners argue that the conclusion sought by Beumer in its Contestation is improper because it "goes well beyond the issues in dispute":

> 31. In its Contestation, Beumer seeks not only the dismissal of the Motion but also an order for BMO to release the Escrowed Funds to Beumer.
>
> 32. This conclusion goes well beyond the issues in dispute, and is in effect a request by Beumer to render a judgment in its favour on the merits of the litigation before the

[15] Paragraph 38 of the Answer.

U.S. Court and on the merits of the proof of claim filed by Beumer herein in these CCAA Proceedings on December 18, 2015.[16]

57. Paradoxically, through the Escrow Motion, the Petitioners are seeking to achieve the exact same result.

58. Releasing the Escrowed Funds to Bloom Lake LP would be akin to rendering a judgment in its favour on the merits of the litigation before the U.S. Court.

59. For all of the foregoing reasons, Beumer respectfully requests that this Court dismiss the Escrow Motion and grant the conclusions sought in the Contestation.

Montréal, this April 4, 2016

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[16] It must be noted that this proof of claim was filed on a *de bene esse* basis in order to preserve the rights of Beumer pending the outcome of the Escrow Motion, but should have no bearing on the outcome of the Escrow Motion.

N° : 500-11-048114-157

PROVINCE OF QUÉBEC
SUPERIOR COURT (COMMERCIAL DIVISION)
DISTRICT OF MONTREAL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED:
BLOOM LAKE GENERAL PARTNER LIMITED ET AL.,
Debtors / Petitioners
and
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP ET AL.,
Mises-en-cause
and
FTI CONSULTING CANADA INC.
Monitor
and
BMO TRUST COMPANY ET AL.
Respondents

17236/294442.00001 BF1339

FACTUM IN SUPPORT OF BEUMER CORPORATION'S CONTESTATION OF THE AMENDED MOTION TO OBTAIN THE RELEASE OF THE ESCROWED FUNDS

ORIGINAL

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