

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shier v. Copper Mountain Mining Corporation*,
2023 BCSC 152

Date: 20230202
Docket: S227589
Registry: Vancouver

Between:

Rodney Shier

Plaintiff

And

Copper Mountain Mining Corporation

Defendant

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Hearing:

Vancouver, B.C.
January 11, 2023

Place and Date of Judgment:

Vancouver, B.C.
February 2, 2023

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Overview

[1] This is an action for wrongful dismissal. Copper Mountain Mining Corporation is a substantial publicly traded company. It employed Rodney Shier as its chief financial officer under a written Executive Employment Agreement (the “EEA”). It terminated Mr. Shier’s employment on August 23, 2022 and maintains that the termination was for cause. Mr. Shier maintains that the termination was without cause.

[2] Article V of the EEA deals with termination and the consequences of termination. In s. 5.5, it makes specific provision for amounts payable to Mr. Shier, under the agreement, in the event of a termination without cause. In s. 5.4, it makes specific provision for an amount payable to Mr. Shier in the event of a termination with cause.

[3] Mr. Shier commenced this action on September 22, 2022. In his notice of civil claim, he advances two claims: a claim for \$1,574,757.52, described as a debt or liquidated demand owing under s. 5.5(b) and (d) of the EEA; and an unliquidated claim for damages for breach of the EEA. He pleads that his loss, in respect of which he claims damages, includes “the wrongful withholding of the liquidated sum of \$1,574,757.52, which was due and payable to the Plaintiff as a debt, by no later than August 30, 2022” (para. 35 of the notice of civil claim).

[4] On the same day that he commenced the action, on an application without notice, Mr. Shier obtained a garnishing order for the net amount, \$1,574,757.52, that he says is owing to him under s. 5.5(b) and (d) of the employment agreement. Copper Mountain’s bank has paid that amount into court. Copper Mountain applies to set aside the garnishing order.

[5] For the reasons that follow, I have concluded that the garnishing order must be set aside. It suffers from two related difficulties. Both relate to s. 5.9 of the EEA. In substance, s. 5.9 provides that the payments required under Article V constitute the entirety of the amounts payable to Mr. Shier pursuant to the agreement so that:

Except as otherwise provided in this Article V, the Executive shall not be entitled to any further notice of termination, payment in lieu of notice of termination, severance, damages, or any additional compensation whatsoever.

[6] Prejudgment garnishment is only available in respect of a liquidated claim. Section 5.9 is material to an assessment of whether Mr. Shier's claim to recover \$1,574,757.52 is truly, in substance, a liquidated claim.

[7] Section 5.9 matters because Mr. Shier is advancing a claim to recover unliquidated damages in excess of those contemplated in Article V. Arguably, he may be able to do that if the central premise of his case, that he was terminated without cause, is made out. Copper Mountain's actions in terminating his employment while denying an obligation to pay him the amounts owing in the event of a termination without cause would constitute a fundamental breach and repudiation of the EEA. Mr. Shier would be entitled to accept the repudiation and sue for damages, or he could sue to enforce his rights under s. 5.5. However, these two positions are inconsistent: the first presupposes that the EEA is at an end, and the second that the EEA continues in force. In advancing his claim, Mr. Shier was forced to an election as to whether he would treat the EEA as terminated. His pleading that he is entitled to claim unliquidated damages in addition to the compensation payable under s. 5.5 is only consistent with an election to treat the EEA as terminated.

[8] The true character of Mr. Shier's claim is that it is, in its entirety, a claim for damages. This claim for damages is informed by but not limited to Mr. Shier's entitlements under s. 5.5, because that section sets out amounts to which he would have been entitled had Copper Mountain satisfied its obligation to pay him the amount he was owed (all this on the assumption of a termination without cause which is, of course, an issue in the litigation), and Mr. Shier is claiming damages under various heads of which the failure to pay a liquidated amount is only one.

[9] Moreover, Mr. Shier's affidavit in support of his application for the garnishing order refers to various provisions of the EEA, but it does not refer to s. 5.9.

Mr. Shier’s materials also failed to reference s. 8.3 of the EEA, which lists those provisions of the agreement that survive its termination. The express obligation under s. 5.5 does not survive termination.

[10] A party seeking a garnishing order without notice must disclose all facts that are material to a determination of whether the order should be made. Sections 5.9 and 8.3 of the EEA are material provisions that should have been disclosed by Mr. Shier in applying for the garnishing order. Copper Mountain is entitled to have the order set aside on the ground of this failure to disclose.

Legal requirements

A liquidated claim

[11] Prejudgment garnishment is a statutory remedy governed by the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, ss. 3 and 5 [COEA]. It is only available in respect of a liquidated claim. In *Dhaliwal v. Bonterra Resources Inc.*, 2019 BCCA 303 at paras. 23-38, DeWitt-Van Oosten J.A., speaking for the court, addressed this requirement at some length. She held that it is not satisfied simply by the pleading that a specified amount is owing or payable; para. 34. The court must have regard to evidence and the pleading advancing the claim. She stated:

[34] Instead, whether a notice of civil claim advances a liquidated claim, in whole or in part, requires an individualized assessment. That assessment will necessarily be informed by the evidence provided in support of the application for a garnishing order, including (but not limited to): the context of the dispute between the parties; the terms of any agreement said to ground the debt, obligation or liability; possible acknowledgements of debt and/or part-performance by the defendant; and the pleadings. See, for example: *Pick O’Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.* (1995), 1995 CanLII 4281 (NS CA), 130 D.L.R. (4th) 472 (N.S.C.A.) at paras. 47-50.

[12] A claim in debt is a liquidated claim. So are certain claims for damages, if the amount of the claim is fixed and “capable of being ascertained as a mere matter of arithmetic”; *Dhaliwal* at para. 29, citing *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78 at paras. 8-9 and 13-14.

[13] In *Pick O’Sea*, at para. 46, Flinn J.A. quoted the following helpful description given by Goodridge C.J.N. of the distinction between a liquidated and unliquidated claim for damages, in *Soreltex International Inc. v. Custom Carpet Sales Ltd.* (1993), 24 C.P.C. (3d) 315 (Nfld. C.A.) at 317:

Suffice it to say that a liquidated claim is generally a claim for an amount agreed to be paid by a defendant to a plaintiff, such as the price of goods sold and delivered, the amount due under a promissory note or the amount agreed to be paid as liquidated damages while an unliquidated claim is generally a claim for damages arising out of a tort or breach of contract.

[14] The distinction requires the court to ascertain the true nature of the plaintiff’s claim; *Dhaliwal* at para. 37. At para. 35, Justice DeWitt-Van Oosten quoted the following passage from *Odgers on Civil Court Actions*, terming it “instructive”:

When the amount to which the plaintiff is entitled can be ascertained by calculation, or fixed by any scale of charges or other positive *data*, it is said to be “liquidated” or made clear. ... But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally unliquidated. It has, however, been clearly decided that a claim upon a *quantum meruit*, where the plaintiff states the precise sum which he claims as the value of his services, is a liquidated demand. But if the claim is in its nature a claim for damages at large, it is not in law treated as a “liquidated demand” even if the plaintiff puts a figure on the damages which he is claiming. A contract may, however, provide for the payment of a fixed sum by way of damages in certain events; and if such a sum is a true pre-estimate of the damage likely to flow from the breach and is not a “penalty” it may properly be claimed as liquidated damages.

[Emphasis added by DeWitt-Van Oosten J.A.]

The obligation to disclose all material facts

[15] In applying for a garnishing order, as with applications made without notice generally, the applicant must disclose all facts known to the applicant that are material to the exercise of the court’s discretion to grant the order; *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857 at paras. 38-73; *Politeknik Metal San ve Tic A.S. v. AAE Holdings Ltd.*, 2015 BCCA 318 at paras. 30-33. The facts that must be disclosed are limited to those that are relevant and material to the statutory criteria permitting prejudgment garnishment

under the COEA; *Environmental Packaging Technologies Ltd. v. Rudjuk*, 2012 BCCA 342 at paras. 45-51.

[16] Accordingly, facts that are material to a determination of the true character of the plaintiff's claim – whether it is a liquidated claim – must be disclosed because the COEA requires a liquidated claim. A garnishing order obtained without disclosure of them must be set aside.

Is the claim a liquidated claim?

The EEA

[17] Copper Mountain is a publicly traded company and Mr. Shier was a senior corporate officer. As one might expect in such circumstances, the EEA is a detailed contract, obviously drafted by lawyers. It is not a standard form agreement.

[18] Article I contains definitions, including a definition of "Cause" that includes three elements now relied upon by Copper Mountain. The details of the definition are not relevant to my determination of this application. In their materials on this application, both sides made submissions on the question of cause. During the hearing, I advised counsel that I would not address those submissions except to find that the question of cause is arguable on both sides, and neither side pressed the point.

[19] Article II provides that the EEA is a contract of indefinite term "... unless terminated in accordance with the terms of this Agreement".

[20] Article IV sets out Mr. Shier's entitlements. They include a base salary of \$368,000 annually, subject to upward adjustment, benefits, cash payouts pursuant to a short-term incentive plan, the "STIP", and stock options awarded pursuant to a long-term incentive plan, the "LTIP".

[21] Article V is entitled Termination of Employment and I have already summarized some of its provisions.

[22] Section 5.1 lists ways in which the EEA may be terminated. The relevant options are set out in ss. 5.1(c) and (d) which provide:

- (c) Cause. The Corporation may terminate this Agreement and the Executive's employment at any time forthwith for any Cause.
- (d) Without Cause. The Corporation may terminate this Agreement and the Executive's employment at any time without Cause by providing written notice to the Executive specifying the effective Termination Date. In such event, the Corporation shall provide and the Executive shall be entitled to receive the payments, benefits and entitlements set out in Section 5.5 or Section 5.6, as applicable.

[23] Section 5.4 sets out Mr. Shier's entitlements in the event of a termination with cause pursuant to s. 5.1(c). It states in part:

Termination for Cause ... If this Agreement and the Executive's employment is terminated pursuant to Sections 5.1(c) ... above, then the Corporation shall pay to the Executive an amount equal to the Base Salary and vacation pay earned by and payable to the Executive up to the Termination Date and the Executive shall have no entitlement to any further notice of termination, payment in lieu of notice of termination, severance, or any damages whatsoever. The Executive's entitlement to and participation in the Benefits and in all other benefits, perquisites, allowances or other entitlements whatsoever terminate automatically and immediately upon the Termination Date. Participation in the STIP terminates immediately upon the Termination Date. Any entitlements in respect of unvested LTIP Awards shall terminate automatically in accordance with the terms and conditions of the LTIP and any related Award Agreements.

[24] Section 5.5 sets out Mr. Shier's entitlements in the event of a termination without cause pursuant to s. 5.1(d). It is expressed as being subject to s. 5.6, which deals with terminations following a change of control of the company and has no application in this case. Eliminating inapplicable words, s. 5.5 states:

Termination Without Cause ... [I]f this Agreement and the Executive's employment is terminated by the Corporation without Cause pursuant to Section 5.1(d) ..., then the following provisions shall apply:

- (a) The Corporation shall pay to the Executive an amount equal to (i) any Base Salary and vacation pay earned by the Executive and payable to the Executive prorated up to the Termination Date, and (ii) any declared but unpaid STIP bonus for any fiscal year which has ended prior to the Termination Date.
- (b) The Corporation shall pay to the Executive the Executive's STIP bonus (if any) calculated *pro rata* for the period up to the Termination Date, calculated and payable based on the Executive's relative

percentage of the STIP bonus granted by the Corporation in the immediately preceding fiscal year.

- (c) Any unvested LTIP Awards that the Executive has been granted under the LTIP shall immediately vest.
- (d) The Corporation shall pay to the Executive a lump sum severance payment that is equivalent to two times the sum of (i) the Base Salary and (ii) the Target STIP Amount.

Any amounts payable to the Executive pursuant to this Section 5.5 shall be paid by the Corporation to the Executive or to the order of the Executive in cash or by certified cheque or such other means as the Executive may direct in writing as promptly as practicable (and, in any event, within five business days) following the Termination Date.

[25] Section 5.8 provides that Mr. Shier "... shall not be required to mitigate damages by seeking other employment or otherwise, nor shall any amount provided for under this Agreement be reduced in any respect".

[26] Section 5.9 provides as follows:

Release. The parties agree that the provisions of this Article V are fair and reasonable and that the payments, benefits and entitlements referred to in Section 5.5 and Section 5.6 are reasonable estimates of the damages which will be suffered by the Executive in the event of the termination of this Agreement and of the Executive's employment with the Corporation and shall not be construed as a penalty. The Executive acknowledges and agrees that the payments pursuant to this Article V shall be in full satisfaction of all terms of termination of the Executive's employment. Except as otherwise provided in this Article V, the Executive shall not be entitled to any further notice of termination, payment in lieu of notice of termination, severance, damages or any additional compensation whatsoever. As a condition precedent to any payment pursuant to Section 5.5 or Section 5.6 (but provided that the Corporation has complied with its obligations under this Agreement), the Executive and the Corporation shall execute a mutual release no later than 30 days following the Termination Date.

[Emphasis added.]

[27] Section 8.3 provides as follows:

Survival. Each and every provision of Article I, Article VI, Article VII, Article VIII, and Article IX shall survive the termination of this Agreement and of the Executive's employment regardless of the reason for such termination.

The termination

[28] On August 23, 2022, Copper Mountain’s president and CEO terminated Mr. Shier’s employment in a letter that asserted that the termination was for cause, admitted the company’s obligation to make the payments required by s. 5.4 of the EEA, and expressly repudiated any further obligation to Mr. Shier. The letter stated as follows:

The purpose of this letter is to notify you of the termination of your employment as Chief Financial Officer of Copper Mountain Mining Corporation (the “Company”) effective on today’s date, August 23, 2022 (the “Termination Date”).

Pursuant to Section 5.4 of the executive employment agreement between you and the Company dated December 1, 2020 (the “Agreement”), the Company is terminating your employment for Cause (as defined in Section 1.1(g) of the Agreement).

...

All unpaid salary and unpaid accrued vacation time owing to you up to the Termination Date will be paid to you as soon as practicable following the Termination Date. You are not entitled to receive any further payment or benefit from the Company. All outstanding long term incentive awards granted to you will be cancelled and forfeited effective as of the Termination Date. Your group insurance benefits will terminate on the Termination Date.

[29] There followed an exchange of correspondence between counsel. Mr. Shier’s counsel wrote Copper Mountain on September 6, 2022, denying the existence of cause, referring to the payments required by s. 5.5 of the EEA, and asserting that Mr. Shier had a claim for monies owing:

... in excess of \$3 million, consisting of both amounts currently due and owing by Copper Mountain to Mr. Shier, together with additional amounts payable to him as damages for breaches of the Employment Agreement.

[30] Counsel for Copper Mountain replied by letter dated September 19, 2022, asserting the existence of cause and stating:

Because Copper Mountain terminated Mr. Shier’s employment properly for cause, he is entitled to nothing beyond what he has already been paid.

The notice of civil claim

[31] In his notice of civil claim, Mr. Shier pleads that he was employed by Copper Mountain as its chief financial officer, various provisions of the EEA, and the wrongful termination of his employment on August 23, 2022.

[32] Mr. Shier pleads that, at the date of termination, his annual base salary was \$435,160 and his STIP Target Amount was 60% of his base salary or \$261,096. He pleads that, in the event of a termination without cause, s. 5.5(d) of the EEA required Copper Mountain to pay him two times the sum of these two amounts, or \$1,392,512, “as a liquidated sum”.

[33] Mr. Shier further pleads that s. 5.5(b) of the EEA requires payment of a *pro rata* portion of his 2020 STIP amount of \$281,509, or \$182,245.52, “as a liquidated sum”.

[34] Accordingly, Mr. Shier pleads:

11. The sum of the amounts in paragraphs nine and ten above total \$1,574,757.52. A payment in this amount was due and owing to the Plaintiff by the Defendant within five business days of his termination (ie. by no later than August 30, 2022). Pursuant to paragraph 5.8 of the Employment Agreement, there was no obligation on the Plaintiff to mitigate any damages he might suffer as a result of the termination of his employment, nor was there to be any reduction of either of the amounts making up the \$1,574,757.52 amount.

12. Despite demand having been made on the Defendant, it has paid no monies to the Plaintiff towards the sum of \$1,574,757.52, and that sum is justly due and owing to the Plaintiff.

[35] To this point, the notice of civil claim is advancing a claim in debt for amounts owing pursuant to ss. 5.5(b) and (d) of the EEA. However, it goes on.

[36] Mr. Shier pleads that, in addition to cash compensation for his services, he was entitled under the EEA to receive certain securities as additional compensation, in the form of stock options, restricted share units, and performance share units. He pleads that he held both vested and unvested securities at the time of termination.

[37] Mr. Shier pleads that, apart from the EEA, he had entered into a Compensation Agreement with Copper Mountain pursuant to which it agreed to pay him additional compensation of \$250,000, provided that he remained employed until the summer of 2024. He pleads that:

22. The Defendant's actions in terminating the Plaintiff's employment, also constitute a breach of the Compensation Agreement, which has caused loss and damages to the Plaintiff.

[38] Mr. Shier pleads that, far from having cause to terminate his employment, his termination took place without cause and "... solely to avoid paying the Plaintiff the large sums to which he is owed in the event that it chose to terminate the Plaintiff's employment".

[39] Mr. Shier pleads that he has suffered loss and injury as a result of Copper Mountain's actions, including the wrongful withholding of the liquidated sum that was to have been paid by August 30, 2022, the failure to permit him to exercise his securities and pay him for benefits, the breach of the Compensation Agreement, and mental distress. He advances a claim for punitive damages.

[40] In part 2 of the notice of civil claim, the prayer for relief, Mr. Shier seeks:

- a) judgment in debt in the amount of \$1,574,757.52;
- b) damages for breach of the EEA, including the value of the securities denied him by Copper Mountain;
- c) damages for breach of the Compensation Agreement;
- d) punitive damages;
- e) interest; and
- f) costs.

[41] In part 3 of the notice of civil claim, Mr. Shier sets out three legal bases for his claims. First, under the heading "Debt/Liquidated Demand", there is a claim for

\$1,574,757.52 owed under the EEA. Second, there is a claim for loss and damage for breach of the EEA and the Compensation Agreement. Third, there is a claim for punitive damages.

Analysis

[42] The question is one of the true character of Mr. Shier's claim to be paid \$1,574,757.52. The notice of civil claim describes it as a debt owing pursuant to ss. 5.5(b) and (d) of the EEA. But it also asserts that Mr. Shier has suffered loss as a result of Copper Mountain's breach of the EEA and pleads, as contributing to that loss, Copper Mountain's actions in withholding payment of the \$1,574,757.52. Specifically, it pleads:

35. As a result of the Defendant's wrongful actions, the Plaintiff has suffered loss, including the wrongful withholding of the liquidated sum of \$1,574,757.52, which was due and payable to the Plaintiff as a debt, by no later than August 30, 2022.

[Emphasis added.]

[43] In my opinion, the law does not permit Mr. Shier to claim both in debt, for amounts owing under the EEA, and in damages, for breach of the EEA, at least not where the claim for damages encompasses an allegation of damage suffered by non-payment of the debt. The two claims are inconsistent. The debt claim presupposes that the EEA remains in force. The damages claim presupposes the termination of the EEA.

[44] Assuming that Mr. Shier was terminated without cause, he was entitled to claim for amounts owing under the EEA. He was also entitled to treat his wrongful termination and Copper Mountain's denial of any obligation to pay him as a repudiation of the EEA, and to sue for damages at large. He could not do both. As *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 143-144 & 151 makes plain, dismissal without cause is, in law, an anticipatory repudiation by the employer of the contract of employment. Acceptance of the repudiation, when communicated to the employer, brings the contract to an end. It

amounts to an irrevocable election between inconsistent rights; *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 33-34.

[45] Mr. Shier submits that it was open to him to enforce parts of the EEA while accepting Copper Mountain's repudiation in respect of other parts. He submits that the existence of a claim for damages does not detract from the claim in debt under s. 5.5(b) and (d). I disagree. Section 5.9 of the EEA makes it clear that the remedies under ss. 5.5 and 5.6 are exhaustive of Mr. Shier's entitlements under the contract, in the event of a wrongful dismissal. The release of claims under s. 5.9 can only be avoided, if at all, by a decision to claim damages for breach of the contract, and Mr. Shier has made that decision. The consequence is that he can not claim the amounts payable under s. 5.5(b) and (d) independently of his general claim for damages. His right to claim damages has replaced his claim in debt. Paragraph 35 of the notice of civil claim confirms that decision, by identifying an element of the loss, in respect of which damages are claimed, as a loss arising from the failure to pay the amounts payable under s. 5.5(b) and (d).

[46] In the result, the garnishing order must be set aside because Mr. Shier's claim is not a liquidated claim. In its true character, the claim is one for damages at large.

Did Mr. Shier disclose all material facts in applying for the garnishing order?

[47] The affidavit sworn by Mr. Shier to obtain the garnishing order was in the form required by the *COEA*. It referred to the EEA and attached as exhibits the notice of civil claim, termination letter, and the letters exchanged between counsel setting out the claim and Copper Mountain's response. It did not attach the EEA.

[48] Provisions of the EEA are quoted in the notice of civil claim. The provisions quoted do not include sections 5.9 and 8.3 of the EEA. For the reasons I have already given, these sections are material to a determination of the true character of the claim. Mr. Shier was obliged to disclose them in his materials seeking the garnishing order, and it follows from his failure to do so that the order must be set aside on this ground as well.

[49] Even if I am wrong in my conclusion as to the true character of the claim, the failure to disclose would still be fatal, because the question is not whether ss. 5.9 and 8.3 are dispositive, it is whether they are material. They are material because it is impossible to fairly assess whether the claim is a liquidated claim without at least considering them.

Other alleged defects in the application for a garnishing order

[50] While my reasons to this point are determinative of the application, I will briefly address other arguments advanced by Copper Mountain.

[51] Copper Mountain submits that its obligation to pay Mr. Shier pursuant to s. 5.5 is subject to a condition precedent stated in s. 5.9, being the execution of a release by Mr. Shier within 30 days following the termination. It submits that, even in the absence of Cause (as defined), the payments contemplated in s. 5.5 were not justly due and owing, because Mr. Shier did not satisfy the condition by signing a release.

[52] The problem with this argument lies in an apparent inconsistency between s. 5.5 and s. 5.9. Section 5.5 requires Copper Mountain to pay Mr. Shier within five business days following the termination. Section 5.9 requires the parties to execute a mutual release no later than 30 days following the termination, “as a condition precedent to any payment pursuant to Section 5.5”. Reading the agreement as a whole, I would not interpret the requirement of a release within 30 days as overriding the express requirement that Mr. Shier receive his payment within five days. The condition precedent expressly presupposes that Copper Mountain has complied with its obligations, which would include the obligation to make a payment within five days.

[53] Even if I am wrong in my interpretation, it is at least arguable that the payments under s. 5.5 were justly due and owing after five days had passed. The existence of an interpretive argument to the contrary, based on s. 5.9, would not affect the true nature of the claim being advanced by Mr. Shier. But for Mr. Shier’s

election to pursue a claim for damages at large, it would have been open to him to plead and allege that the payments required under s. 5.5 were justly due and owing.

[54] Copper Mountain submits that, in his materials seeking the garnishing order, it was incumbent on Mr. Shier to “put forward at least some evidence as to how he might be said to meet the contractual definition of ‘without Cause’”. I disagree. Mr. Shier put forward evidence to establish that he was dismissed from his employment. He put before the Court Copper Mountain’s position, advanced in a letter from its lawyer, that the dismissal was for cause. At the trial of this action, the burden will be on Copper Mountain to prove cause; *McKinley v. BC Tel*, 2001 SCC 38 at paras. 20 and 58. In the absence of evidence, Mr. Shier will succeed. It would be inconsistent to subject Mr. Shier to an evidentiary burden on an application for a garnishing order when the burden would lie on the opposing party at trial.

[55] Copper Mountain submits that the formula by which Mr. Shier calculated his STIP entitlement under s. 5.5(b) is inconsistent with the contractual wording. It submits that:

Based on the actual wording of the provision, any payment under s. 5.5(b) of the Employment Agreement must be based on the percentages used to calculate a bonus in the prior year, not the actual bonus received.

[56] Section 5.5(b) is difficult to interpret. It refers to an amount “... calculated and payable based on the Executive’s relative percentage of the STIP bonus granted by the Corporation in the immediately preceding fiscal year” (emphasis is added). It is difficult to understand what the word “relative” signifies. On Copper Mountain’s interpretation, the word is redundant.

[57] Mr. Shier points out that, if Copper Mountain’s interpretation is correct, he was actually entitled to obtain a larger garnishing order than the order he obtained (by about \$17,000). If there was an error, it was to the benefit of Copper Mountain.

[58] This is an issue to be addressed at trial. I would not set aside the garnishing order on basis of an ambiguity in the EEA where, on the defendant’s interpretation, the plaintiff has understated the amount payable.

[59] Copper Mountain submits that, if it is not entitled to have the garnishing order set aside as of right, the court should exercise its discretion to set it aside under s. 5(2) of the *COEA* on the ground that it is unnecessary, because Copper Mountain is solvent and Mr. Shier is not at risk of a dry judgment. Mr. Shier disputes the factual premise of this submission. In view of the conclusions I have come to, I need not address this argument.

Disposition

[60] For these reasons, I allow the application and set aside the garnishing order made on September 22, 2022. Copper Mountain is entitled to an order providing for the payment out of the money paid into court pursuant to the garnishing order, and its costs of this application.

“Gomery J.”