SUPREME COURT OF YUKON

Citation: *Ross* v. *Ross Mining Limited*, 2009 YKSC 55

Date: 20090729
S.C. No. 09-A0014
Registry: Whitehorse

Between:

NORMAN ROSS

Plaintiff

And

**ROSS MINING LIMITED and
MACKENZIE PETROLEUMS LTD.**

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Murray J. Leitch	Counsel for the plaintiff
John Sandrelli	Counsel for the defendant Ross Mining Limited
Jocelyn Barrett	Counsel for the defendant MacKenzie Petroleums Ltd.
Geoffrey Thompson	Counsel for the Monitor, PriceWaterhouseCoopers Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] Norman Ross (“Ross”) applies for the appointment of a Receiver over the placer mining property of Ross Mining Limited (“RML”) on Dominion Creek, southeast of Dawson City. The application is opposed by RML on the issue of whether it is “just or convenient” to do so. MacKenzie Petroleums Ltd. (“MPL”) is a lien holder and opposes the application but focussed on protecting its security position. The monitor, PriceWaterhouseCoopers Inc. (“PWC”), was appointed by court order on June 9, 2009.

THE FACTS

[2] The undisputed facts are as follows:

1. Ross was the founder and original operator of the placer mining operations now being carried on by RML.
2. These operations are located approximately 50 miles southeast of Dawson City on Dominion Creek and consist of 415 contiguous placer claims.
3. RML was established by Ross in 1979. In 2000, for the purposes of operating the placer mine and holding the placer claims and associated assets, Ross and his wife established 20949 Yukon Inc. (“20949”).
4. In November 2005, Ross and his wife sold their shares in RML and 20949 to 38890 Yukon Inc. (“38890”), with $7,000,000.00 of the purchase price to be paid to Ross over time by way of instalments as set out in the Loan Agreement between 38890, as borrower, RML and 20949, as guarantors, and Ross, as lender, dated November 1, 2005 (the “Loan Agreement”).
5. RML, 38890 and 20949 amalgamated under the name of RML on November 1, 2006.
6. The following are some of the provisions of the Loan Agreement:
    (a) RML covenanted and agreed not to create, incur, assume or suffer any indebtedness except pursuant to certain permitted liens, and covenanted and agreed not to create incur, or permit to exist any lien, charge, security interest or encumbrance with respect to any of

the property and assets of 38890 or 20949 or RML, except for certain permitted liens;

(b) certain events were stipulated to be “Events of Default”, and these included the following:

(1) non-payment of the principal of the Loans or interest on them when due;

(2) breach of any material covenant in the Loan Agreement;

(3) default by RML in payment of any monies owed to anyone unless such default was being diligently contested in good faith;

(4) occurrence, in the sole opinion of Ross, of an event which would have a material adverse effect on the financial condition, business, operations, prospects or performance of RML;

(c) upon the occurrence of any Event of Default, Ross had the right to:

(1) appoint by instrument, or seek court appointment of, a Receiver or Receiver Manager with respect to any or all of the charged Property of RML; and

(2) forthwith declare due and payable the outstanding balance of the Loans and any interest due thereunder.

7. As further security for the instalment payments and detailed in the Loan Agreement, RML provided a Share Pledge Agreement, General Security

Agreement and Assignment of Placer Mining Claims, Operating Plan and Water Licence, all dated November 1, 2005.

8. RML has defaulted in payment of the sum of $1,500,000.00 due on January 3, 2009. On January 8, 2009, Ross gave notice to RML that he was exercising his right under the Loan Agreement to declare the outstanding balance of the Loans and interest as due and payable.

9. The balance owing to Ross under the Loan Agreement and the security documentation is the sum of $3,000,000.00 plus interest thereon until the date of payment as follows:

   (a) as to the sum of $1,500,000.00 originally due January 3, 2009 with interest at the rate of the lesser of:

      6%, simple interest, from November 1, 2005; and;

      25%, simple interest from January 3, 2009; and

   (b) as to the sum of $1,500,000.00 originally due January 3, 2010 with interest at the rate of the lesser of:

      6%, simple interest, from November 1, 2005; and

      25%, simple interest, from January 8, 2009;

together with all costs and other charges which otherwise are secured by the various security documentation. The total sum in default is approximately $3,401,713.40 as of July 2009.

10. RML has further defaulted under the terms of the Loan Agreement and the security documentation as follows:

(a) by RML's failure to pay the Defendant, MPL, for supplying RML with gasoline and petroleum products with respect to which MPL is claiming over $650,000.00 from RML;

(b) MPL filing a Claim of Lien against RML's interest in the placer mineral claims; and

(c) by RML's failure to promptly provide Ross with RML's annual financial statements.

11. RML is insolvent and has no working capital. Its total liabilities are in excess of $20,000,000.00, which greatly exceeds the "book value" of its total assets of just over $15,000,000.00.

12. RML had the following losses in each of the three placer mining seasons since it purchased the mining operation from Ross:

2006 Season:	$914,662.00;
2007 Season:	$2,511,588.00; and
2008 Season:	$2,519,023.00

13. The mine is not currently operating. RML's accounts payable have risen from the sum of $759,782.62 as of December 28, 2008 to $1,183,819.09 as of May 27, 2009; an increase of $424,036.47.

14. Since January 2009, through his Vancouver counsel, Ross has repeatedly been assured that funding would be provided to RML shortly and that Ross would be paid.

15. In an affidavit filed May 29, 2009, Jon Rudolph ("Rudolph"), the President of RML said that the current financial difficulties of RML are "temporary"

and can be resolved by the second Loan Agreement (“0847390”) which was entered into on March 10, 2009. Rudolph has explored the possibility of financing through other lenders as well, including Strategic Metals Ltd. (“Strategic Metals”).

16. In an affidavit filed June 8, 2009, Rudolph said that he was optimistic that a proposed loan in the amount of $5 million from Strategic Metals would permit RML to pay the amount due to Ross.

17. Rudolph has invested $6 million in RML towards payment of the purchase price. RML also owes $11 million to Golden Hill Ventures Limited Partnership (“GHV”), a business of Rudolph’s.

18. This application was initially set to be heard on June 9, 2009. However, based upon the interest being shown by Strategic Metals to provide new financing to RML, an Order by consent (the “Consent Order”) was granted on June 9, 2009.

19. The purpose of the Consent Order was to allow RML sufficient time to finalize the proposed re-financing with Strategic Metals, provided that the interests of the secured creditors, Ross and MPL, were not prejudiced during this period.

20. The Consent Order provides, among other things:

    (a) for the appointment of PWC as Monitor, without security, in respect to all of RML’s current and future assets and placer mining operations on Dominion Creek (the “Property”);

(b) that RML is enjoined from taking certain actions without the consent of the Monitor or authorization by this Court, including selling or disposing of any or all of the Property or removing any equipment or assets of RML from the minesite;

(c) that from and after 5:00 p.m. on June 13, 2009, RML is enjoined from operating or continuing to operate the mine except in accordance with an Approved Work Plan and an Approved Cash Flow;

(d) for RML to implement such security measures as may be required by the Monitor “to preserve, protect and maintain control of the Property”;

(e) that RML will pay to the Monitor the net proceeds with respect to each receipt and to forthwith report to the Monitor “all details with respect to this season’s operations” to the date of the Consent Order;

(f) that the Monitor prepare a detailed marketing plan and to report to this Court and the parties as it feels necessary;

(g) that RML cooperate with the Monitor and provide the Monitor with access to and assistance in relation to any books, documents, securities, contracts, orders and any other papers, records and information or any kind; and

(h) that Ross shall be at liberty to bring his application to appoint the Monitor as a Receiver and Manager of RML on two clear business

day's notice if RML has not signed "a *bona fide*, binding and enforceable loan agreement with Strategic Metals Ltd. or another credible lender that shall provide sufficient funding to pay out RML's secured creditors within 30 days of the date of the Consent Order", i.e. by July 9, 2009.

23. Ross filed a Notice of Hearing on July 17, 2009 to be heard July 20, 2009.

THE MONITOR'S REPORT

[3] The Monitor reports that it did not receive "*bona fide* cooperation" from RML. At page 4 of the Monitor's First Report, it states:

> 2.2.4 From the outset, the Monitor did not receive bona fide cooperation from the Company. Virtually all steps taken by the Monitor to fulfill its duties were met with resistance from either or both of Jon Rudolph and Shaun Rudolph. In general terms, the resistance is summarized below.
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> 2.2.4.1 Aggressive nature – at the initial attendance and at several situations thereafter, Jon Rudolph and Shaun Rudolph made gestures and statements to the Monitor's staff that were clearly for the purpose of intimidation. At the onset of the file, the Monitor was forced to assess the overall safety concerns of its staff.
>
> 2.2.4.2 Effectiveness of communication – frequently, Shaun Rudolph would be unable to answer or refused to provide answers to questions of the Monitor and would defer to Jon Rudolph. Jon Rudolph would often not return calls from the Monitor for several days.
>
> 2.2.4.3 Sales and Marketing Plan – not providing copies of due diligence material to assist the Monitor in its development of a sales and marketing plan;

2.2.4.4 Work Plan and Cash-flow – failure to deliver a functional work plan and cash flow on a timely basis;

2.2.4.5 Financing Agreement – the Monitor was not updated with the ongoing progress of the re-financing on a timely basis. Specifically, Ross Mining did not inform the Monitor of the collapse of the Strategic Metals financing until 10 days afterwards; and

2.2.4.6 General – Shaun Rudolph was not communicative of day-to-day activities such that the Monitor was only advised of plans and actions either at the last minute or after specific questioning by the Monitor.

[4] The Monitor reported, among other things, that:

1. RML requested the deferral of the development of a sales and marketing plan while RML met the due diligence material requests of Strategic Metals on the understanding that all the material provided to Strategic Metals would be provided to the Monitor.
2. the Monitor has not been provided the due diligence material (with the exception of one document) to permit it to develop a sales and marketing plan.
3. the relationship between the Monitor and the Manager of the property became strained when assets owned by GHV were removed from the Property without the consent of the Monitor and an opportunity to review their removal.
4. the Monitor was unable to establish a protocol for the removal of assets to meet its obligations under the Consent Order.

[5] The Monitor concluded in its report dated July 16, 2009:

> **NEXT STEPS**
>
> 9.1 The Company has not demonstrated any meaningful progress on re-financing the Company and has recently taken steps to cease operations. The related party, GHV, has removed all of its equipment that was being used by Ross Mining. The Company has provided no information to the Monitor that suggests the re-financing with 0847390 continues to be a realistic outcome.
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> 9.2 Based on the foregoing, the Monitor sees no purpose in continuing the Monitorship.

RML'S RESPONSE

[6] At the hearing of this application for appointment of a Receiver, Rudolph was permitted to testify in response to the Monitor's report because of its filing a few days before the hearing.

[7] Rudolph explained that a significant amount of work was done and documentation was prepared by him and his staff to assist the Monitor immediately following the date of the Consent Order. He testified that emotions were running high because of the years of work on the property and the $6 million dollars that he personally invested in the property. It appears that Rudolph had a reasonable working relationship with the Monitor but the relationship between the Monitor and the employees at the minesite was not cooperative.

[8] However, the fact remains that significant material to prepare the sales and marketing plan was not delivered to the Monitor, no protocol was established for the removal of assets, and the re-financing was not arranged.

[9] Rudolph advised by affidavit that, after the Strategic Metals financing did not proceed, he began to pursue and continues to pursue other financing options including the 0847390 Loan Agreement for $4.5 million. On July 6, 2009, an Amending Agreement was entered into extending the repayments dates by one year. Rudolph remains hopeful that this funding will come to fruition if more time is given.

[10] RML has ceased mining operations. Counsel for Rudolph seeks to adjourn the receivership application so that RML can be re-financed.

[11] It is clear that the Strategic Metals re-financing will not proceed and 0847390 Loan Agreement as amended has not provided re-financing.

ISSUE

[12] The issue to be determined is whether it is “just or convenient” to grant the appointment of a Receiver as requested by Ross.

THE LAW

[13] The Court has statutory jurisdiction to appoint a Receiver under s. 26(1) of the *Judicature Act*, R.S.Y. 2002, c. 128, when “it appears to the Court to be just or convenient that the order should be made”. Section 100 of the *Business Corporations Act*, R.S.Y. 2002, c. 20, also provides that on an application by any interested person, the Court may make “any order it thinks fit” including an order appointing a Receiver. In addition, Rule 56 of the *Rules of Court* provides for the appointment of a Receiver “either unconditionally or on terms”. The application is also made pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and s. 54(2) of the *Personal Property Security Act*, R.S.Y. 2002, c. 169.

[14] After hearing submissions of counsel and reading the decision of Burnyeat J. in *United Savings Credit Union* v. *F. & R. Brokers Inc.,* 2003 BCSC 640, I am satisfied that the law with respect to the appointment of a Receiver in this case is set out in paras. 15, 16 and 17 of *United Savings* as follows:

> [15] ... I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.
>
> [16] ... As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. ...
>
> [17] A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

[15] I am mindful of the fact that *United Savings* is a case where the issue was whether a Receiver should be appointed in the case of a land mortgage against a hotel by the first mortgagee. In that case, the first mortgagee had only a mortgage charge against the land and building of the hotel and the applicant sought to conduct of the sale of the hotel. The application was opposed by the second mortgagee on the basis that the court could not appoint a Receiver for a land mortgage. In addition, the second mortgagee had already been granted the ability to offer the hotel for sale.

[16] The case at bar is different, in that Ross has considerable security documentation in addition to the Loan Agreement. For example, the General Security Agreement contains the right of Ross "... to appoint any legal person as Receiver or Receiver and Manager ..."

[17] The question is whether in the case at bar, RML has satisfied the onus that there is a "compelling commercial or other reason why an order ought not to be made".

[18] Counsel for RML submits that the application for the appointment of a Receiver should be adjourned for a further unspecified period of time, with the Monitor in place to develop a marketing plan, to permit RML to conclude its re-financing. Counsel submits that the appointment of a Receiver sends a clear message that precludes RML's ability to re-finance. He further submits that the mine is not in operation so there is no danger of depleting the placer gold in place or risking the attachment of further liens to the Property. He submits that there is no prejudice to Ross in an adjournment but great prejudice to Mr. Rudolph's investment of $6 million and the investment of GHV. Counsel for RML concedes that the re-financing from the 0847390 Loan Agreement as amended has not come to fruition but submits that RML is as close as it has ever been to re-financing.

[19] In contrast to the above submissions of counsel for RML, the following factors must be considered:

1. RML has not been able to re-finance for six months;
2. the Consent Order of June 9, 2009 has already given RML additional time to arrange its financing;

3. RML has no working capital and the mine has not been profitable for the last three years;
4. RML is in default to Ross, who provided the original financing for RML, in the approximate amount of $3,401,713.40;
5. the security documentation of Ross covers all the assets of RML and provides for the appointment of a Receiver or to seek court appointment of a Receiver;
6. the fact that the due diligence material provided to Strategic Metals has not been provided to the Monitor (except for one document) thereby frustrating the preparation of a detailed marketing plan.

[20] I conclude, based upon the above factors, that RML has not meet the onus of showing a “compelling commercial or other reason” why the appointment of a Receiver should not be ordered and I therefore exercise my discretion to order the appointment of the Receiver on the terms requested.

[21] There is one further matter about the terms of the order appointing PWC as Receiver. Paragraph 19 of the proposed order, as presently drafted, provides the Receiver with the power to borrow an amount not exceeding $100,000 for the purpose of funding the exercise of its powers and duties under the order. Counsel for the Receiver has submitted that it may be difficult to borrow that money if MPL has the right to bring an application challenging the priority of the Receiver’s Borrowing Charge. I have concluded that this submission has merit and order that the right of MPL to bring its priority application with respect to the Receiver’s Borrowing Charge be deleted from paras. 19 and 29 of the order.

[22] Counsel may speak to costs, if necessary.

VEALE J.