SUPREME COURT OF YUKON

Citation: *Golden Hill Ventures Limited Partnership v. Ross Mining Limited*, 2012 YKSC 102

Date: 20121217
S.C. No. 09-A0014
Registry: Whitehorse

Between:

NORMAN ROSS

PLAINTIFF

And

ROSS MINING LIMITED, MACKENZIE PETROLEUMS LTD.
AND GOLDEN HILL VENTURES LIMITED PARTNERSHIP

DEFENDANTS

S.C. No. 09-A0087

Between:

GOLDEN HILL VENTURES LIMITED PARTNERSHIP

PETITIONER

And

ROSS MINING LIMITED, MACKENZIE PETROLEUMS LTD.
AND NORMAN ROSS

RESPONDENTS

Before: Mr. Justice R.S. Veale

Appearances:

Murray J. Leitch	Counsel for Norman Ross
Michael Morgan	Counsel for Golden Hill Ventures Limited Partnership
Jocelyn Barrett	Counsel for Mackenzie Petroleums Ltd.

REASONS FOR JUDGMENT
(Costs in the Bankruptcy Proposal)

INTRODUCTION

[1] Costs have been awarded to Norman Ross and Mackenzie Petroleums Ltd. following the decision in this matter cited as 2012 YKSC 18. The issue for this application is whether those costs, which exceed the security for costs of $75,000 previously ordered, are provable claims under s. 121 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, ("the *BIA*") and the amended proposal ("the Proposal") of Golden Hill Venture Limited Partnership ("Golden Hill") approved by the Court. If they are not provable claims, they are payable by Golden Hill outside the Proposal. The Court will also consider the effect of Mr. Ross' participation in the Proposal.

BACKGROUND

[2] Norman Ross operated a gold mine on Dominion Creek near Dawson City from 1979 until he sold it to a company owned by Jon Rudolph in 2005. Mr. Rudolph entered into a Loan Agreement with Norman Ross to finance the mine purchase and operated the mine under the name of Ross Mining Limited.

[3] On July 29, 2009, Norman Ross obtained an Order appointing PricewaterhouseCoopers LLP as the receiver of the mine as a result of the failure to complete payments under the Loan Agreement.

[4] On August 27, 2009, and by amendment on October 20, 2009, Golden Hill, a company also owned by Jon Rudolph, commenced a claim of lien action under the Yukon *Miners Lien Act*, R.S.Y. 2002, c. 151, for a claim totalling $6,790,456.29 against Ross Mining Limited, the mine under receivership. The Golden Hill lien claim was eventually reduced to $2,810,627.08 on December 16, 2009.

[5] On November 25, 2009 (“the Filing Date”), Golden Hill filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *BIA*.

[6] On January 27, 2010, a Consent Order granted security for costs in the amount of $55,000 to Norman Ross payable by Golden Hill.

[7] The Golden Hill Proposal was made to the unsecured creditors of Golden Hill on March 1, 2010, and the Proposal was accepted by the required majority of creditors on March 22, 2010.

[8] This Court approved the Proposal on March 25, 2010. The Proposal contained a specific reference to the claim of lien action in para. 2.5:

> Ross Mining Limited is currently in receivership, and the receiver of that company has undertaken a sale process with respect to the Ross Mine property and assets. GHVLP [Golden Hill] believes that it can sustain its claim in the Miner’s Lien Action and establish priority over other creditors of Ross Mining Limited (by virtue of GHVLP’s miner’s lien). Accordingly, GHVLP anticipates some recovery in the Miner’s Lien Action, although at this time it cannot predict what that recovery, if any, might be.

[9] The Proposal contained the following definition of “Claim”:

> “Claim” means any right of any Person against a Debtor in connection with any indebtedness, liability or obligation of any kind for a Debtor which indebtedness, liability or obligation was in existence at the Filing Date, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known, unknown, by guarantee, indemnity, surety or otherwise and whether or not such a right is executory in nature, including, without limitation, the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future based in whole or in part on facts which existed prior to or on the Filing Date; (emphasis added)

[10] Norman Ross filed a Proof of Claim in the Golden Hill Proposal which included the following:

> Third, pursuant to GHVLP's proceeding commenced in Yukon Supreme Court under number 09-A0087, GHVLP is contingently liable to Mr. Ross for costs if awarded in that proceeding.

[11] Mr. Ross estimated his costs to be $100,000. The Proof of Claim was dated March 19, 2010, and was accompanied by a Voting Letter voting against the acceptance of the Proposal.

[12] The cover letter of Mr. Ross' counsel described "… Mr. Norman Ross, [as] an unsecured creditor of GHVLP based on the definition of "claim" and "creditor" contained in the Proposal."

[13] Norman Ross applied for an increase in the security for costs in March 2011. In *Ross v. Golden Hill Ventures Limited Partnership et al.,* 2011 YKSC 30, I ordered that the security for costs be increased to $75,000. The Reasons for Judgment include the following:

> [5] Counsel for Norman Ross says that at the time of the Consent Order it was uncertain that the matter would proceed because GHV was in the process of submitting a proposal whose acceptance was not guaranteed. At that time, GHV was admittedly insolvent.
>
> [6] The proposal was approved by the creditors of GHV on March 22, 2010 and this Court on March 25, 2010. GHV maintains that it is still operating but it has no revenue during the winter months. There has been no disclosure of GHV's finances, contracts or future business and no statement that it can pay court costs.

[14] In its submission to this Court for special or increased costs, counsel for Norman Ross submitted at para. 39:

> Second, on December 4, 2009, GHVLP filed and served the Affidavit of K. Carruthers #1 giving notice that on November 25, 2009 GHVLP had commenced proposal proceedings under the *Bankruptcy and Insolvency Act*, which proposal was later accepted by GHVLP's creditors and approved by this Honourable Court which effectively insulated GHVLP from: (a) any costs award not protected by security for costs, and (b) any damage award for slander of title.

[15] On December 6, 2011, this Court vacated and discharged Golden Hill's claim of lien in Reasons for Judgment cited as *Golden Hill Ventures Limited Partnership v. Norman Ross*, 2011 YKSC 91. The trial judgment was upheld on appeal: see 2012 YKCA 8.

[16] On March 15, 2012, this Court ordered costs paid to Norman Ross against Golden Hill on Scale C with a 1.5 times increase and costs on Scale B to Mackenzie Petroleums Ltd. in 2012 YKSC 18. The costs of Norman Ross will be in the $150,000 range.

[17] Mackenzie Petroleums Ltd. was not a party to Golden Hill's claim of lien action when the Golden Hill Proposal was filed on November 25, 2009. It was added as a defendant to Golden Hill's lien action on January 27, 2010.

[18] Mackenzie Petroleums Ltd. did not file a proof of claim or a Voting Letter in the Proposal.

ISSUES

[19] There are two issues to determine:

1 Are awards of court costs "claims provable" under s. 121 of the *BIA,* and is that definition relevant in the context of a proposal?

2 Should the revised Bill of Costs be reduced?

ANALYSIS

Issue # 1: Are awards of court costs "claims provable" under s. 121 of the *BIA*, and is that definition relevant in the context of a proposal?

[20] Section 121(1) of the *BIA* describes "claims provable" as follows:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[21] In s. 2, the definition of claim provable is as follows*:*

> "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

[22] I am proceeding on the basis that s. 121(1) of the *BIA* applies to a proposal despite the fact that s. 121(1) refers to "the bankrupt" rather than the debtor or insolvent person.

[23] The primary distinction between a proposal and a bankruptcy is that a proposal permits the debtor to retain his assets and use them to pay off the terms of the proposal (see *Employers Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230, at p. 239). However, with respect to creditors, the procedure is very similar to a bankruptcy. Section 50(1.2) of the *BIA* requires that the proposal be made to "the creditors generally." Section 50(1.6) of the *BIA* states that "… any creditor may respond to the proposal as made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in (a) sections 124 to 126, in the case of unsecured creditors; …"

[24] Sections 124 – 126 of the *BIA* are under the subheading “Proof of Claims” which follows and necessarily relates back to the subheading “Claims Provable”, beginning at s. 121(1). These sections refer to “the bankrupt” and “bankruptcy”, but in my view necessarily must be read to include “debtor” to make the proposal framework in the *BIA* workable. The fact that the definition section of the *BIA* defines “claims provable” to include “any claim or liability in any proceedings under [the *BIA*] by a creditor” supports the interpretation that s. 121(1) of the *BIA* applies to a proposal.

[25] In terms of whether court costs are provable claims, counsel provided me with a line of cases that derive from the UK bankruptcy case of *Glenister v. Rowe*, [2000] Ch 76, [1999] EWCA Civ 1221. In *Glenister,* it was common ground that if court costs are a “contingent liability” they are a “bankruptcy debt” and the discharge of the bankruptcy would release the bankrupt from the debt. The corollary is that court costs incurred after the date of bankruptcy are not a contingent liability at the date of the bankruptcy. In concluding that the costs in question were not a contingent liability on the date of the bankruptcy and therefore payable by the discharged bankrupt, the Court of Appeal gave the following reasons at p. 84:

> 1. Costs of legal proceedings are in the discretion of the court. Until an order for payment of costs is made there is no obligation or liability to pay them and there is no right to recover them.

[26] The Court went on to say that an “order for costs is a “contingency” which may or may not happen …”. It concluded that no liability can arise simply by reason of a claim for costs made in a court proceeding. Simply put, the court concluded that, because of the discretionary nature of an award of court costs, there is no liability, contingent or otherwise, until an order is made.

[27] As indicated, this authority has been followed by numerous decisions in Canada.

[28] In *Chaloux v. Kingston Fairgrounds Golf Course* (2004), 48 C.B.R. (4th) 237 (Ont. S.C.), the bankrupt sued for personal injury and filed a voluntary assignment into bankruptcy before the issue of court costs was resolved. The court costs issue was addressed after the discharge of the bankrupt and Belch J. ruled that:

1. Compensation for personal injury did not vest in the trustee in bankruptcy; and
2. Court costs incurred after the discharge of the bankrupt were not extinguished by the assignment.

[29] Belch J. relied upon the principle from *Glenister* and agreed that the discretionary nature of all costs awards in civil proceedings removed them from being contingent liabilities under the *BIA* based upon the similarity between s. 121(1) of the *BIA* and the English statute. As a result, court costs were ordered against the discharged bankrupt.

[30] In *Strini v. Mihalicz*, 2006 ABQB 912, Mr. Strini applied for court costs arising out of a custody dispute in which he was successful against Ms. Mihalicz, who had made an assignment in bankruptcy in January 2004 and been discharged in December 2004. Kenny J. followed the reasoning in *Glenister* and *Chaloux* and concluded that court costs were not provable in bankruptcy and could be ordered against the discharged bankrupt, adding that, as a matter of policy, a discharged bankrupt should not be able to continue to litigate with impunity after a discharge from bankruptcy.

[31] In *Thow (Re)*, 2009 BCSC 1176, the issue was whether an administrative penalty assessed by the British Columbia Securities Commission (BCSC) is a claim provable under s. 121(1) of the *BIA*. Mr. Thow filed a notice of intention to make a proposal on

July 22, 2005, which was rejected by the creditors on August 22, 2005, and thus deemed to have been an assignment in bankruptcy on the July 22 date. The BCSC issued a notice of hearing on June 29, 2006, and assessed its administrative penalty on December 20, 2007. Sigurdson J. followed the *Strini* and *Chaloux* decisions and concluded that the decision to impose a penalty was discretionary and not an obligation or contingent liability under s. 121 of the *BIA* until the discretion was exercised, and therefore not a provable claim.

[32] In *Safire Infrastructure Inc. (Re)* (2009), 61 C.B.R. (5th) 225 (Ont. S.C.) the issue was whether the costs disposition in litigation directly relating to the bankruptcy itself would survive the bankruptcy on the basis of the *Glenister* principle that court costs were not claims provable pursuant to s. 121(1) of the *BIA* and therefore not released by the discharge granted. Hoy J., as she then was, concluded that the costs award survives the discharge and added that the costs were in the bankruptcy proceeding itself and not with respect to an obligation incurred or a proceeding commenced before the bankruptcy.

[33] I note that the cases just cited are consistent with the “Claims Provable” commentary in Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 2009):

> (b) Defendant’s Costs
>
> If an unsuccessful action is brought by a debtor and he or she is ordered to pay costs or if a judgment is given against him or her before he or she becomes bankrupt, the costs are a provable claim. On the other hand, if no judgment is given against him or her and no order is made for payment of costs until after he or she becomes bankrupt, costs are not a provable debt. In such a case, there is no provable debt to which the costs are incident and there is no liability to pay by

> reason of any obligation incurred by the bankrupt before bankruptcy, nor are the costs a contingent liability to which the debtor can be said to be subject at the date of his or her bankruptcy: *Re British Gold Fields of West Africa Ltd.,* [[1899] 2 Ch 7]. (emphasis added)

[34] The recent Supreme Court of Canada decision in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, confirms this principle, albeit in a different context. In that case, a Companies' Creditors Arrangement Act Court judge concluded that the filing of a claim by the Environmental Protection Agency before the date of bankruptcy should be pursued as a provable claim. This conclusion was upheld by the Supreme Court of Canada. The general principles were set out in para. 26 of that judgment as follows:

> These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. …

[35] In my view, the test described in *AbitibiBowater* case is similar to what has been outlined in case law considering s. 121(1) of the *BIA*.

[36] The authority relied on by counsel for Golden Hill is found in *Custom Iron & Machinery Ltd. v. Calorific Construction Ltd.* (1996), 45 C.B.R. (3d) 279 (Ont. C.J. (Gen. Div.)), where court costs were determined to be a "provable claim" in a proposal.

[37] The facts of *Custom Iron* are as follows. On June 22, 1993, Calorific filed a proposal under the *BIA* offering unsecured creditors thirty cents on the dollar. Calorific continued to operate its business under the proposal until May 29, 1995, when the final payout was made by the Trustee. Calorific (I assume prior to the filing date of the Proposal) acknowledged that it owed a 1983 debt to Custom and consented to

judgment in the amount of $29,050.29 plus costs, but the parties agreed that Custom would not move on the judgment until Calorific's counterclaim was dealt with. The trial judge awarded Calorific damages on the counterclaim that offset the judgment for Custom.

[38] However, on June 1 and 3, 1994, the Ontario Court of Appeal set aside the counterclaim judgment and ordered that Calorific pay the court costs of Custom at trial and on appeal. The issue was whether the 1983 judgment and costs were a claim provable in the proposal.

[39] Marshall J. followed *Flint v. Bernard* (1888), 22 Q.B.D. 90, and applied s. 121(1) and s. 178(2) of the *BIA* (the latter section discharges the debtor from all claims provable in bankruptcy). The specific ratio of Marshall J. is set out at para. 19*:*

> In the court's view this claim though future and one to which the debtor may have and indeed did become subject was a provable claim under the proposal. In the result, since the claim was provable Calorific, once the proposal was finalized, was released from all its debts then provable.

[40] It is important to note that Marshall J. appears to have lumped together the 1983 judgment and costs with the costs on the counterclaim trial and appeal. While the 1983 judgment and costs would have been a provable claim as an existing debt at the effective date of the proposal, the same cannot be said for the award and costs in the counterclaim.

[41] Counsel for Golden Hill submits that the *Custom Iron* case is authority for treating a proposal differently than a bankruptcy, and says that the court costs in the case at bar should be considered to be claims provable.

[42] I do not agree. The *Custom Iron* case does not create a different principle for proposals under the *BIA.* Rather, it addressed a judgment for a specific sum plus court costs, which pre-dated the date of the proposal and would have clearly been a claim provable. Thus, the court award of costs in the consent judgment made before the proposal was never contingent and was always a liability. It was a discretion exercised and not a contingent claim that might never be realized. To the extent that *Custom Iron* purports to be authority for the principle that court costs ordered after the filing date or acceptance of a proposal are claims provable, I decline to follow it.

[43] I prefer the line of cases that suggest a claim for costs arising after the filing date of a proposal is not a claim provable in the proposal. I do not agree that a proposal should be treated any differently than a bankruptcy with respect to a claim for costs. A claim for costs is not a liability in either case.

[44] I am supported by ss. 62(2.1) and (3) of the *BIA*, which provide for when an insolvent person in a proposal, i.e. the debtor, is released as follows:

> *When insolvent person is released from debt*
>
> (2.1) A proposal accepted by the creditors and approved by the court does not release the insolvent person from any particular debt or liability referred to in subsection 178(1) unless the proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the proposal.
>
> *Certain persons not released*
>
> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

[45] Section 178(1) sets out a list of debts that are not released by the discharge of a bankrupt. Again, while s. 178(1) is not applicable on the facts of the case at bar, it does seem to confirm that provable claims in proposals are treated the same as provable claims in bankruptcy.

[46] I am also of the view that the definition of “Claim” in this Proposal, which specifically refers to “any indebtedness, liability or obligation of any kind … in existence at the Filing Date …”, does not capture court costs, which are discretionary and, here, were awarded after the Filing Date. The court costs in this case were not an obligation or a liability until well after the Filing Date of the Proposal on November 25, 2009.

[47] I conclude that the court costs awarded to Norman Ross and Mackenzie Petroleum Ltd. are not provable claims pursuant to s. 121(1) of the *BIA* or on the actual terms of the Proposal.

[48] Before leaving this point, I should address the contention of Golden Hill that the fact that Norman Ross indicated in his proof of claim that Golden Hill was “contingently liable” for costs and participated by voting against the Proposal was, in effect, an admission that the claim for court costs was a provable claim in the Proposal. While it may have been wiser for counsel for Norman Ross to describe the claim as being without prejudice to a determination by the court, it does not enhance the submissions of Golden Hill. The claim for court costs is not a provable claim in law. It is not inappropriate to file a claim to protect a client’s position depending upon the outcome at law.

Issue # 2: Should the revised Bill of Costs be reduced?

[49] There were several items in dispute which I shall deal with summarily.

[50] Counsel for Golden Hill objects to the claimed disbursement for transcripts in the amount of $5,900 based upon the principle in *Carlson v. Tylon Steepe Development Corp.*, 2008 BCCA 179, that transcript costs are rarely claimed on a bill of costs unless there is a particular controversy over what a particular witness said. The expense of $5,900 is not a real-time reporting expense but it is somewhat excessive for the circumstances of this case and I reduce that amount to $2,500, as some references were made to the transcript.

[51] Counsel for Golden Hill objected to the duplication of tariff items as there was really only Golden Hill's claim in issue and Mr. Ross has his costs in this foreclosure action on the mine. I agree and order that the duplication of tariff items be deleted.

[52] Counsel for Golden Hill also takes exception to the claim for the maximum allowable units. In the context of the corporate complexity of Golden Hill's indebtedness and financial records, I find the claim for maximum units appropriate.

[53] The separate claims under Rule 26 and 26.1 are appropriate.

CONCLUSION

[54] To summarize, I have concluded that the costs awarded against Golden Hill in its claim of lien action are not provable claims under s. 121(1) of the *BIA* or the Proposal as they were not a contingent or future liability at the date of filing.

[55] Costs for this application may be spoken to in Case Management, if necessary.

VEALE J.