# SUPREME COURT OF YUKON

Citation: *Re: Sphere Resources Inc.*, 2009 YKSC 11

Date: 20090217
S.C. No. 08-A0148
Registry: Whitehorse

**IN BANKRUPTCY**

**IN THE MATTER OF BANKRUPTCY**

**OF SPHERE RESOURCES INC.**

Before: Mr. Justice R.S. Veale

Appearances:

David A. de Groot — Counsel for the Petitioners
Peter J. Reardon — Counsel for the Respondent

**REASONS FOR JUDGMENT**

## INTRODUCTION

[1] This is an application by four creditors of Sphere Resources Inc. ("Sphere") to petition Sphere into bankruptcy on the ground that Sphere has ceased to meet its liabilities generally as they become due.

[2] The precise issue is whether the debt is due under s. 42(1)(j) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**.**

## THE FACTS

[3] Four creditors are separately owed differing amounts totalling $507,200 by Sphere. There is no evidence of any other unpaid debt by Sphere.

[4] The debt arises out of paid subscriptions for a private placement of Sphere shares from a number of investors that included the four creditors applying. The total

subscription was in the amount of $2,086,617 for the shares, conditional upon the TSX Venture Exchange approving the Purchaser's subscription. In the event that the subscription was not approved, the document entitled "Confirmation of Subscription and Payment of Purchase Price for Shares" stated:

> … In such event only, the amount of the Purchase Price hereby delivered to the Company shall be deemed to be a loan owing by the Company to the Purchaser on terms to be agreed to between the Purchaser and the Company as soon as possible after the Company's receipt of such non-approval from the TSX Venture Exchange.

[5] There does not appear to have been any negotiation of "terms to be agreed to" by the Purchasers and the Company except as set out in a letter dated December 17, 2007 from Sphere, which contained the following term relied upon by the four creditors:

> The Company intends to repay these amounts to investors as and when it receives amounts payable by Duration Resources Limited ("DRL") upon the exercise of put or call option arrangements which DRL has with Kaldora Resources Limited ("Kaldora")

[6] There was also a News Release attached to the December 17, 2007 letter which stated that, among other things:

> The Company is in the process of restructuring the terms of $2,086,617 in subscription funds that were originally received by the Company in connection with a proposed private placement of common shares of the Company. The subscription funds are now considered loans to the Company as regulatory approval for the private placement has not been obtainable. The Company intends to repay amounts in connection with the subscription advances as and when Duration Resources Limited ("DRL") repays the Company amounts owing by DRL to the Company ($2,063,266 as at June 30, 2007). The Company owns 46% of DRL and has management control and voting control over a total of 92% of the outstanding shares of DRL.
>
> The Company expects to receive loan repayments or distributions from DRL around late September 2008, if not

> before. Further to the Company's previously announced transaction with Kaldora Resources Limited ("Kaldora"), if, by September 26, 2008, Kaldora has not exercised its buyout option to acquire DSL's 21.5% shareholding of Duration Gold (Mauritius) Limited ("DGML") and inter-company debt for U.S. $10,000,000 (payable in cash or in a publicly traded company's shares), DRL will be entitled to exercise its put option to require Kaldora to acquire such interests for U.S.$10,000,000 with DRL having the right to specify whether the amount is to be satisfied in cash or shares. The U.S. $10,000,000 amount receivable by DRL upon exercise of the buyout option or the put option is subject to reduction if Kaldora is required to contribute an amount in excess of its pro rata share of contributions to DGML. Any excess contribution by Kaldora would be multiplied by five and deducted from the consideration payable by Kaldora to DRL. To date, DRL has made proportionate contributions to DGML to maintain its 21.5% shareholding in DGML.

[7] There is no dispute that by letter dated August 11, 2008, Kaldora has given notice that it exercised the option.

[8] It is also not disputed that the amount payable by Kaldora to DRL, a company which is controlled by Sphere, is now being contested. Kaldora initially proposed to pay U.S.$815,590 on August 11, 2008, but as recently as September 10, 2008, offered U.S.$252,217.28. DRL does not accept this amount and no payment has been made by Kaldora to DRL, which would effectively be payment to Sphere.

[9] There is no evidence or allegation that DRL or Sphere are somehow thwarting the payment owed by Kaldora.

[10] The sole issue to be determined is whether the loan to the four creditors is due because Kaldora has exercised the option.

**THE LAW**

[11] A bankruptcy application may be filed pursuant to s. 43(1) of the *Bankruptcy and Insolvency Act*:

> 43. (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that
>
> (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
>
> (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

[12] The particular act of bankruptcy relied upon by the applicants is under s. 42(1)(j) which is as follows:

> 42. (1) A debtor commits an act of bankruptcy in each of the following cases:
>
> …
>
> (j) if he ceases to meet his liabilities generally as they become due.

[13] Further guidance is given in s. 43(6) and (7) as follows:

> (6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.
>
> (7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

[14] The burden of proof that the act of bankruptcy has occurred is on the applicant creditors.

[15] There are a number of well-established principles in bankruptcy law:

1. The act of bankruptcy must be clearly established: *Re Abalone Holdings Limited (No 2)* (1979), 29 C.B.R. (N.S.) 174 (Ont. S.C.) at 178 – 179.
2. Where the alleged act of bankruptcy arises under an agreement, if the obligation to pay has not arisen or is not yet due, no act of bankruptcy has been proven and

the application will be dismissed: *Toronto-Dominion Bank* v. *Langille and Langille* (1983), 45 C.B.R. (N.S.) 49 (N.S.C.A.) at p. 56; *Inex Pharmaceuticals Corp. (Re)*, 2005 BCSC 1514, confirmed in 2006 BCCA 108.

**DISPOSITION**

[16] The only evidence presented by affidavit in this case is that the loans of four applicant creditors to Sphere have not been paid. No evidence was presented about the general business dealings of Sphere.

[17] The issue is whether the terms of the loan agreement set out in the December 17, 2007 letter and accompanying News Release required the loans to be repaid upon the exercise of the put or call option arrangements or when those amounts are received.

[18] In my view, the only reasonable interpretation is that Sphere intends to repay the loans "… as and when it receives amounts payable … upon the exercise of put or call option arrangements …". The triggering event for repayment, therefore, is the receipt of funds upon the exercise of the put or call option arrangements.

[19] Counsel for the applicant creditors submitted that the case of *Mastronardi (Re)*, [2000] O.J. No. 4734 (Ont.C.A.), was applicable. In that case there were three judgments creditors arising out of wrongful death claims against Mastronardi who failed to pay them after demand. The trial judge held that the judgment creditors were all from the same family and he treated them as a single creditor. Thus, he found that there was no evidence that Mastronardi "had ceased to meet his liabilities generally as they became due." The Court of Appeal found that there were in fact three separate creditors and adjudged Mastronardi to be a bankrupt.

[20] While the *Mastronardi* case is interesting, it is not relevant to the facts before me.

[21] It is clear in the case at bar that the exercise of the option has been made but no payment has been received because of a dispute as to the amount to be paid which is well documented in the affidavit of Sphere. I have some sympathy with the applicant creditors who seem to have had little input into the terms of the loan repayment, which appear to be somewhat complex. However, the question is not how the terms of the loan repayment were negotiated but whether an act of bankruptcy has occurred according to the terms set out.

[22] I am therefore not satisfied that the act of bankruptcy has been proved on the basis that the loans are not to be repaid until the payment is received by Sphere. Sphere shall have its costs on Scale B.

VEALE J.