CANADA / JUDGMENT

Bul River Mineral Corporation (Re)

2018 BCSC 326

COURT
Supreme Court of British Columbia

DECIDED
5 March 2018

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2018 BCSC 326 Bul River Mineral Corporation (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bul River Mineral Corporation (Re),

2018 BCSC 326

Date: 20180305

Docket: S113459

Registry: Vancouver

Between:

In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

And

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57 and the Business Corporations Act, R.S.A. 2000, c. B-9

And

In the Matter of Bul River Mineral Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation and Purcell Basin Minerals Inc.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Highland Pacific Partners LP:

Kibben Jackson

Counsel for Purcell Basin Minerals Inc.:

Andrew Bird

Place and Date of Hearing/Judgment with Reasons to Follow:

Vancouver, B.C.

February 16, 2018

Place and Date of Written Reasons:

Vancouver, B.C.

March 5, 2018

Introduction

[1] These reasons are supplementary to my reasons issued on January 15, 2018 in this matter: Bul River Mineral Corporation (Re), 2018 BCSC 39 (the "Reasons"). I similarly use defined terms set out in the Reasons in these reasons.

[2] The issue addressed in the Reasons concerned whether or not Purcell was obliged to provide security to HPP in accordance with the CCAA Plan. I concluded that Purcell was required to execute and deliver security documentation to HPP: Reasons at paras. 106 and 109. However, there remained some uncertainty about the form of the security documentation to be provided by Purcell. Accordingly, I granted the parties further time to negotiate those terms, failing which the parties were to apply to determine any issues that might arise: Reasons at paras. 109-110.

[3] Two issues were originally the subject matter of these competing cross-applications brought by Purcell and HPP to determine the form of the security documentation: firstly, the description of the debt secured; and secondly, whether there would be a prohibition in the security documentation to prevent Purcell from granting subordinate security without HPP's consent.

[4] The first issue was resolved just prior to the commencement of this hearing. Accordingly, the following wording will be added after reference to the HPP Secured Note in the security documentation: "as amended, supplemented, extended, restated or replaced from time to time".

[5] Only the second issue remains; namely, whether a prohibition against further security should be included in the security documentation to be executed by Purcell in favour of HPP.

Position of the Parties

[6] HPP originally took the position that there should be an absolute prohibition against junior security in the security documentation. HPP still maintains that position at this time.

[7] However, in the draft security documentation attached to its notice of application, HPP included further wording to address the concerns of Purcell as to whether HPP could agree to such subordinate security being created.

[8] The wording proposed by HPP in its draft mortgage at Article 14.1(d) was as follows:

(d) The Mortgagor [Purcell] covenants and agrees not to create or permit to exist (except in favour of the Lender [HPP]) any mortgage, lien, pledge, charge, security interest or other encumbrance of any kind (each, a "Charge") affecting any of the Collateral, provided that the Mortgagor may create and permit (but the Lender does not grant priority to) the following:

i. Charges in favour of the Lender;

ii. Charges in favour of CuVeras, LLC ("CuVeras") which secure the obligations of the Borrower to CuVeras under that certain 10.0% senior note issued by the Borrower to CuVeras and dated December 9, 2014, which Charges shall rank pari passu with the Security Interest created hereby; and

iii. Charges approved in writing by the Lender prior to their creation or assumption.

[Emphasis added.]

Similar wording is found in HPP's draft general security agreement (GSA) at Section 4.5.

[9] Purcell's position is that there should be no prohibition whatsoever in the mortgage and the GSA. In addition, Purcell wants an express provision added to the above provisions to state that permitted charges under the mortgage and GSA will include "charges ranking subordinate to the Charges created hereby "

[10] Alternatively, Purcell seeks to add to the clause providing for approval by HPP as Lender to any subsequent charges, such that the approval would not "be unreasonably withheld".

The Debt/Security Background

[11] The analysis of this issue begins with the Plan. The Plan includes the following provisions relevant to the issuance of the HPP Secured Note (and also the CuVeras Secured Note):

Section 1.1:

"DIP Facility" means the interim financing facility provided pursuant to the terms of the DIP Credit Agreement and as approved by the Court pursuant to paragraph 2 of the DIP Order [my order dated December 15, 2011] .

"Purcell Notes" means the senior secured convertible notes issued by Purcell to the DIP Lender [CuVeras] and [HPP], as further described in Section 2.3; .

Section 2.3:

As partial consideration for amounts owing to [HPP] and [CuVeras], Purcell will be issuing the Purcell Notes, with a term of two years commencing on the Effective Date and otherwise in accordance with the terms and conditions of the notes issued by [CuVeras] in raising funds for the DIP Facility...

[Emphasis added.]

[12] The critical issue on this application is therefore, what is meant by the phrase " in accordance with the terms and conditions of the notes issued by [CuVeras] in raising funds for the DIP Facility "?

[13] A review of this issue is complicated due to two main factors, which are interrelated.

[14] Firstly, the security provisions in place at the time the Plan was approved by the Court were not simply those as between CuVeras and the individual investors. Everyone involved expressly understood within that structure that the monies advanced to CuVeras by the investors would in turn be advanced to the Stanfield Group and be secured under the DIP Facility. This is expressly recognized in Section 2.3 of the Plan, as quoted above. Accordingly, while the CuVeras investors only had a direct contractual relationship with CuVeras, that relationship also allowed the CuVeras investors to rely on the debt/security relationship between CuVeras and the Stanfield Group, as approved under the DIP Facility. HPP's counsel refers to this arrangement as "stacked security", which I agree is an apt description.

[15] Secondly, it is apparent that the provision in Section 2.3 of the Plan concerning what rights were to be accorded to HPP as against Purcell are not directly comparable to the rights given to the CuVeras investors or even CuVeras under these security arrangements, given the above complexities. For example, CuVeras was not to be HPP's debtor; nor was HPP acquiring securities as the investors did under the notes issued by CuVeras. As such, there is some uncertainty as to what elements of one or both of those earlier relationships were to be included in the "terms and conditions" in relation to the HPP Secured Note.

[16] The parties agree that there was to be first ranking security held by HPP (pari passu with CuVeras), but they disagree as to this particular prohibition in relation to subsequent security.

Discussion

[17] Purcell advances its position based on two main arguments: firstly, that any prohibition in the GSA and mortgage security for the HPP Secured Note is not consistent with the Plan; and secondly, a public policy argument concerning this type of prohibition.

a) Consistency with the Plan

[18] The HPP Secured Note and the CuVeras Secured Note, both dated from December 2014, provide:

6. In addition to any other required approvals, [Purcell] shall not incur any junior indebtedness for borrowed money unless the lender(s) shall have entered into a subordination agreement in form and substance satisfactory to the Noteholder.

7.(d) [Purcell] covenants and agrees not to create or permit to exist (except in favour of the holders of the Notes and the Plan Noteholders) any mortgage, lien, pledge, charge, security interest or other encumbrance of any kind affecting any present or after acquired real or personal property of [Purcell].

[19] The Reasons at para. 26 also refer to various amendments to both of the above Secured Notes in April 2016. The amended HPP Secured Note provided in Sections 6 and 7.(d) for similar restrictions on further security. Conversely, the amended CuVeras Secured Note contains no prohibitions or limitations on junior indebtedness or other security.

[20] To further complicate the matter, there is uncertainty regarding possible security documentation held by CuVeras in respect of the CuVeras Secured Note (or amended CuVeras Secured Note). This matter is discussed at paras. 42-43 of the Reasons. As such, there is the prospect that CuVeras, which is closely related to the current management of Purcell, has acquired secured rights against Purcell's assets beyond what was contemplated under the Plan (or beyond those proposed by HPP now). Such provisions would, of course, be inconsistent with the intent behind the Plan in granting these two secured creditors equal rights in relation to Purcell's assets.

[21] Purcell has chosen not to address this matter in its evidence on these applications. It would obviously have been highly relevant if such security existed and whether that security was silent as to any prohibition or addressed it in some fashion.

[22] The next relevant document is the form of the notes issued by CuVeras to its investors. Those notes simply refer to the debt ranking as senior to all other indebtedness of CuVeras and ranking pari passu with all of such investor notes. There is no prohibition preventing CuVeras from granting junior security in favour of someone else. The investor notes provide:

8. Seniority. This Note shall rank senior to all other indebtedness for borrowed money of the Issuer whether now or hereafter existing, and shall rank pari passu with all other Notes issued pursuant to the Securities Purchase Agreement

[23] Purcell's argument is such that the analysis is said to end there. Simply put, Purcell says that, if the CuVeras investor notes are silent as to the matter, then similarly, HPP is not entitled to any such prohibition.

[24] I disagree. As I discussed above, the CuVeras notes issued to its investors were only one part of very complex security arrangements, as between CuVeras and its investors, and also between CuVeras and the Stanfield Group. The link between the documents is more than apparent.

[25] Paragraph 8 of the CuVeras investor notes, quoted above, refers to those notes as being issued pursuant to the Securities Purchase Agreement dated December 30, 2011 (see para. 10 of the Reasons). In addition, the investor notes include a clear reference to the Securities Purchase Agreement in bold and capital letters as follows:

THE HOLDER OF THIS SECURITY IS SUBJECT TO THE TERMS OF THE SECURITIES PURCHASE AGREEMENT AMONG CUVERAS (THE "ISSUER") AND THE PURCHASERS NAMED THEREIN ...

[26] The recital in the Securities Purchase Agreement reads, in part:

C. ... The Notes are secured by the assets of [CuVeras] pursuant to the Debenture . and payment of the Notes and interest thereon that has been advanced to Stanfield under the DIP Facility will be secured by all of the assets of Stanfield up the amount then outstanding under the DIP Facility pursuant to the Mortgage and Debenture in the form attached hereto ...

[27] The debenture executed by CuVeras in favour of the investors, issued pursuant to the Securities Purchase Agreement, includes the same prohibition as HPP now proposes to include in its security against Purcell:

14.1(d) The Borrower [CuVeras] covenants and agrees not to create or permit to exist (except in favour of the Agent or the Lenders [i.e. holders of the notes issued by CuVeras]) any mortgage, lien, pledge, charge, security interest or other encumbrance of any kind affecting any present or after acquired real or personal property of [CuVeras].

[28] In my view, it is artificial to look at the investor notes issued by CuVeras in isolation. They are but one part of the overall transactions that were intended to document not only the debt but also that this debt would be secured against CuVeras' assets. Within that overall framework, those parties - the investors and CuVeras - also agreed that there would be a prohibition against further security.

[29] The fact that the investor notes refer to the "Holder" (versus the "Issuer") being subject to the Securities Purchase Agreement does not detract from the overall intention that the investor notes and the Securities Purchase Agreement are to be read together. Purcell also argues that the investor notes only intended to incorporate parts of the Securities Purchase Agreement, being the representations and warranties of the U.S. and Canadian purchasers set out in Articles 3.2 and 3.3. There is simply no basis upon which any such limitation is evident in the investor notes that would justify ignoring the clear reference to the underlying CuVeras and Stanfield Group security in Recital C, as quoted above.

[30] The further debt and security transactions between CuVeras and the Stanfield Group are consistent with the investor/CuVeras security. This same prohibitive language is found in Article 16.1(d) of the debenture security dated December 23, 2011, granted by the Stanfield Group in favour of CuVeras by way of the DIP Facility. The DIP Facility was approved by my court order dated December 15, 2011 (the "DIP Order").

[31] The DIP Order specifically authorized the Stanfield Group to execute security documentation as contemplated by the commitment letter dated December 9, 2011 between the Stanfield Group and CuVeras. The commitment letter provides that CuVeras would be granted a first mortgage and general security agreement. In addition, that letter refers to the Stanfield Group providing the following covenant or prohibition in the security documentation:

2.1(d) a covenant from [the Stanfield Group] that it will not permit any charge or security interest over the Property (as defined in the CCAA Proceedings) nor will it permit any creditor to be secured in a priority or pari-passu position with the Lender's DIP Charge on any of the Property

A similar positive covenant and prohibition from the Stanfield Group is also found in paragraph 4(e) of the commitment letter.

[32] Purcell argues that the language found in the commitment letter should be read as only restricting security that would rank in priority or pari passu with the subject security. Purcell also argues that this is consistent with the express restriction found in paragraph 8 of the DIP Order, which provides that the Stanfield Group shall not grant or suffer to exist any Encumbrances on the Property that rank in priority to, or pari passu with the DIP Charge held by CuVeras. Purcell concludes by suggesting that the debenture granted by the Stanfield Group (including the prohibition on further security found in Article 16.1(d)) goes beyond what was approved in the DIP Order.

[33] I disagree again. The language in paragraphs 2.1 and 4(e) of the commitment letter - particularly the "nor" - are clearly disjunctive. In that event, the Court must strive to give the entire sentence meaning; to ignore the first part of the sentence, as Purcell suggests, makes those words superfluous.

[34] In my view, the second half of that sentence does not detract from the more general language found in the first half. The first phrase deals with a situation where the Stanfield Group is in a position to permit (or grant) a further charge or security interest on its Property. The second half addresses a potential situation where a creditor may obtain security without the express agreement of the debtor (the Stanfield Group in this case). For example, this could potentially occur by a court-ordered charge within the CCAA proceedings sought by another creditor.

[35] In either case, the intention is clear - CuVeras extracted a covenant in the commitment letter that the Stanfield Group will not permit or allow any other charges to be put on the Property without its consent. This is not surprising since it was consistent with the security that CuVeras itself was subject to in favour of its investors. Therefore, the Stanfield Group debenture was entirely consistent with the commitment letter.

[36] Accordingly, whether one looks at the CuVeras/investor debt and security relationship or combines it with the CuVeras/Stanfield Group debt and security relationship, one comes to the same result - both include this type of prohibitive language against the granting of junior security.

[37] It is therefore in the above context that I must consider the intention of the parties to the Plan as to what was meant by referring to the HPP Secured Note as being " in accordance with the terms and conditions of the notes issued by [CuVeras] in raising funds for the DIP Facility ".

[38] I conclude that the parties to the Plan intended that the HPP Secured Note would be a first ranking secured debt, to be pari passu with security granted to CuVeras; frankly, that is not controversial.

[39] Further, I conclude that it was the intention of the parties that the security in favour of HPP (and CuVeras) would be consistent with the terms and conditions of the security held by the investors against CuVeras and also held by CuVeras as against the Stanfield Group. The investment by the CuVeras investors was made in the face of the approval of the DIP Facility and in that event, I consider that the entire security transactions must be considered as a whole. In other words, the security held by the CuVeras investors was essentially granted on the basis that they would have indirect rights as against the "Property" of the Stanfield Group through the security they held against CuVeras. Accordingly, the terms of the security held by CuVeras against that Property were, albeit indirectly, held by the investors in CuVeras.

[40] In any event, as I stated earlier, both security agreements are consistent such that even if one looks solely at the investor/CuVeras debt and security, the same result arises.

[41] In conclusion, I find that HPP's requirement for a prohibition against further security is consistent with the terms of the Plan. I also find that the HPP Secured Note is consistent with the Plan. The reference in the HPP Secured Note to a subordination agreement (clause 6) simply means that if HPP agrees to allow any such security, they may also require a subordination agreement from that junior security holder.

[42] It follows that I reject Purcell's first position, namely that the HPP mortgage and GSA either be silent on the matter of subsequent security or that they both expressly allow Purcell to grant charges ranking subordinate to the HPP and CuVeras security.

(b) Public Policy Argument

[43] I turn to Purcell's alternative argument, which amounts to Purcell submitting that the provision that HPP consent to subsequent security should be amended to add that such consent cannot be unreasonably withheld by HPP.

[44] Purcell argues that HPP's proposed limitation on subsequent security is impracticable and would inhibit Purcell's operations and ability to finance its operations. Purcell points to the statutory objectives under the CCAA in terms of providing a mechanism for the survival of companies so that they can continue in their business activities. On a general basis, I take no issue with that statement. In turn, Purcell submits that such a prohibition in favour of HPP would be antithetical to these objectives.

[45] Yet, these types of control provisions are not unheard of in an insolvency context. Interim lenders often seek, and sometimes obtain, such protections. Certainly, these types of "control" provisions are closely scrutinized by the court when considering approval of DIP loans. That was the case in respect of my granting of the DIP Order, where no one raised any concerns in respect of the prohibition found in the commitment letter.

[46] In addition, these types of provisions in security documentation are commonly encountered in non-insolvency situations. That is essentially what was to occur here, in that HPP and CuVeras' security under their Secured Notes was intended to operate after the Stanfield Group left creditor protection and Purcell had taken over the business.

[47] In either case, while subordinate security does not affect the priority of the first security, there are other areas of concern that might arise on the part of a first secured creditor. For example, realization of security becomes more complicated given notice and other requirements in relation to subsequent security holders. A first secured creditor may also expect heightened scrutiny of its actions in managing its loan and/or realizing on its security. A junior security holder may itself take actions against the secured assets, which may require a senior secured creditor to become unexpectedly embroiled in a realization scenario. Finally, a junior secured creditor may complicate any restructuring proceedings undertaken by the debtor.

[48] All of the above are valid concerns that may cause a senior secured creditor to insist upon a prohibition against further security, just as the CuVeras investors, CuVeras and HPP did in this case. These are normal business issues that arise in the course of negotiations and are resolved in that context.

[49] The court in CCAA proceedings is in a position to approve or not approve of such prohibitions in agreements if court approval of those agreements is sought. That is what occurred in relation to the DIP Facility, which contained the prohibition in the CuVeras/ Stanfield Group commitment letter and later debenture. In addition, the Court in the Sanction Order approved the Plan as fair and reasonable, which I have concluded, as above, also intended the importation of this concept into the HPP and CuVeras security to be granted by Purcell.

[50] As Purcell points out, even outside of the CCAA context, the court may have a role in determining the rights and obligations of security holders in relation to decisions that are made within the "sole discretion" of secured lenders under security agreements.

[51] Purcell refers to Marshall v. Bernard Place Corporation (2002), 58 O.R. (3d) 97 (C.A.). That case involved a failed real estate purchase where the purchaser relied upon a clause that said the inspection report had to be satisfactory to him "in his sole and absolute discretion": paras. 1, 4 and 11. The court identified that discretionary contractual provisions can be grouped into those requiring a subjective standard or those requiring an objective standard of reasonableness: para. 18. The court further stated:

[19] Under the principles articulated in Greenberg, the contract controls the standard to be applied to a sole discretion clause. The determination of whether a discretionary condition imposes a subjective or objective standard depends upon "the intention of the parties as disclosed by their contract".

[20] The requirement of honesty and good faith applies whether the exercise of discretion is measured by an objective or subjective standard (Greenberg, at p. 761 O.R., p. 554 D.L.R.). No contractual discretion is absolute, in the sense of authorizing the capricious or arbitrary exercise of the discretion. Greenberg confirmed that even a broadly stated contractual discretion is not "unbridled" and is subject to established limits. Further, as illustrated in Inglis, even where the operative standard of reasonableness is an objective one, it can only be satisfied if the discretion or opinion at issue was "reasonably formed" in the circumstances (at p. 416 O.R., per Robins J.A.).

[52] Marshall was considered and applied in this Court by Justice Smith in Zhang v. Amaral-Gurgel, 2017 BCSC 1561 at paras. 45-48. Zhang involved another real estate purchase where the vendor attempted to avoid the sale, relying on a condition that made the deal subject to obtaining her lawyer's approval of the terms and conditions of the contract: para. 1. As in Marshall, the language of the contract, indicative of the intention of the parties, evidenced the "objective factors" upon which the vendor's good faith subjective considerations were to be based: para. 48.

[53] Purcell argues that such limitations of honesty, good faith and reasonableness exist in relation to HPP withholding its consent to further security. Accordingly, Purcell seeks to include the further wording for "clarity".

[54] One difficulty with this argument is that the Court is being asked to potentially limit or restrict HPP's right to withhold its consent in an evidentiary vacuum. In fact, no such dispute has arisen between Purcell and HPP on this point. In addition, Purcell has not introduced any evidence that would suggest that it is even in the process of arranging such junior debt and security and that HPP has withheld its consent. Accordingly, Purcell's concerns at this time can only be described as speculative. Having said that, I recognize that the apparent acrimonious relationship between Purcell's current board of directors and management, on the one hand, and HPP and Mr. MacMillan, on the other, does not bode

well in terms of these parties cooperating into the future.

[55] Moreover, HPP takes an entirely different view of its obligation to consent to any junior security. HPP does not agree that the reasoning in Marshall and Zhang applies in respect of the prohibition to be found in its security. It says that the absolute prohibition is just that--absolute--and that HPP does not need to be "reasonable" in refusing its consent under its proposed clause.

[56] All this is to say that an argument already exists as to how HPP will be required to act in relation to any request made by Purcell to approve junior security.

[57] In my view, it is not appropriate that this dispute be resolved at this time, particularly with the evidentiary vacuum that exists and the disagreement as to the applicable law. As matters stand, the contractual provisions in the Plan stand as approved in the Sanction Order. Very sophisticated commercial actors negotiated and settled those terms after receiving a plethora of legal advice. In that context, it is not my role at this time to impose any further terms, particularly based on what one party now sees as appropriate on public policy grounds.

Conclusion

[58] Purcell is directed to execute and deliver the versions of the mortgage and GSA attached to HPP's notice of application. That security is to be delivered to HPP's counsel by 4:00 p.m. on Friday, February 23, 2018.

[59] HPP sought "increased" costs as against Purcell. The only circumstance brought to my attention in support was that Purcell had only conceded on the first issue just prior to the start of the hearing.

[60] Costs beyond ordinary party and party costs are either "uplift costs" or special costs. HPP does not suggest that special costs are warranted here. Uplift costs are available pursuant to s. 2(5) of Appendix B - Party and Party Costs of the Supreme Court Civil Rules, B.C. Reg. 168/2009. An award of costs under that section requires that the Court find that the appropriate scale of party and party costs under s. 2(2) (A, B or C) is, as a result of unusual circumstances, grossly inadequate or unjust.

[61] I am not convinced that an award of Scale B party and party costs in this matter would be "grossly inadequate or unjust" as a result of "unusual circumstances". This is what I would describe as a commercial dispute. While Purcell has been unsuccessful, it raised legitimate issues for consideration by the Court and Purcell and its counsel brought or responded to the applications appropriately. No issues arise in relation to the manner in which Purcell conducted itself in this aspect of the dispute.

[62] Accordingly, HPP is awarded its costs against Purcell on a party and party basis, on Scale B.

"Fitzpatrick J."

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