

CANADA / JUDGMENT

Purcell Basin Minerals Inc. (Re)

2020 BCSC 1581

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1581 Purcell Basin Minerals Inc. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Purcell Basin Minerals Inc. (Re),

2020 BCSC 1581

Date: 20200911

Docket: S186120

Registry: Vancouver

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

- 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 Purcell Basin Minerals Inc., Bul River Mineral Corporation, Gallowai Metal Mining Corporation, Grand Mineral Corporation, Jao Mine Developers Ltd. and Standfield Mining Group of Canada Ltd.

Petitioners

Before: The Honourable Mr. Justice G.C. Weatherill

Oral Reasons for Judgment Re Application for Special Costs

In Chambers

Counsel for the Applicant, Michael Moretti:

K. Jackson

G. Nesbitt

Counsel for Braveheart Resources Ltd.:

S.A. Turner

Counsel for 216687 Alberta Ltd.:

D. Sischy

Place and Dates of Hearing:

Vancouver, B.C.

June 29 and September 11, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 11, 2020

- [1] THE COURT: The application brought in this proceeding was settled shortly before the hearing began this morning, that is, with the exception of the issue of costs.
- [2] The applicant, Michael Moretti, seeks special costs against one of the respondent companies, 216687 Alberta Ltd. ("216") on the basis of what the applicant says was reprehensible conduct on the part of 216 that is deserving of rebuke. In the alternative, the applicant seeks increased costs against 216.
- [3] For its part, 216 seeks costs against the applicant at Scale B on the basis that a settlement offer it communicated to the applicant shortly after the notice of application was filed ought to have been accepted, and the litigation that took place thereafter ought not to have been pursued.

Background

- [4] The petitioners own a mining property and related mining claims (the "mine") near Cranbrook, British Columbia. The mine has not been in production since May 2018. The petitioners are insolvent.
- [5] On May 29, 2018, the petitioners sought and obtained protection from their creditors in this proceeding, pursuant to the Companies' Creditors Arrangement Act, R.S.C 1985, c. C-36 [CCAA].

- [6] This is the second proceeding under the CCAA relating to the mine and the entities that had operated it. In 2011, a group of companies known as the "Stanfield Group" sought and obtained a protection order under CCAA in British Columbia Supreme Court Action No. S113459 (the "Stanfield CCAA"). A plan of arrangement dated September 25, 2014 was approved and implemented in December of 2014 (the "Stanfield Plan").
- [7] As part of the Stanfield Plan, the first petitioner in this proceeding, Purcell Basin Minerals Inc. ("Purcell"), was formed to act as a holding company for the other petitioning companies, each of which had been a member of the Stanfield Group. Purcell is now a wholly-owned subsidiary of Braveheart Resources Inc. ("Braveheart"), a respondent on this application.
- [8] At the time the Stanfield Plan was implemented, as well as at the time the initial order was made in this proceeding, the petitioners had two main secured creditors, Highlands Pacific Partners LP ("Highlands LP") and CuVeras LLC ("CuVeras"). Pursuant to the Stanfield Plan, Highlands LP and CuVeras were issued secured promissory notes in the face amount of \$2,338,000 and \$12,009,795 respectively.

CuVeras

- [9] CuVeras is (or was) a Delaware limited liability company (although CuVeras existed at the time of the initial order, I gather there is doubt as to whether or not it has been dissolved under Delaware law). I need not determine that issue for the purposes of this proceeding. The sole member or shareholder of CuVeras was Peter Lacey, an Alberta-based businessman. Mr. Lacey was a substantial shareholder of Purcell.
- [10] CuVeras was formed for the purpose of providing debtor-in-possession ("DIP") financing to the Stanfield Group in the Stanfield CCAA.

Highlands and the MacMillan Group

- [11] Under the terms of the equivalent of CuVeras' articles of incorporation, the business of CuVeras was required to be managed by or be under the direction of a "manager" who was authorized to exercise all the corporate powers of CuVeras.
- [12] The original manager of CuVeras was Highlands Pacific LLC ("Highlands LLC"). Both Highlands LLC and Highlands LP are part of a group of entities (the "MacMillan Group") controlled by Brendan MacMillan, an American businessman who resides in San Francisco.
- [13] At the time the Stanfield Plan was implemented in December 2014, Mr. MacMillan had de facto control of Purcell and its two main secured creditors, Highlands LP and CuVeras. Thus, Mr. MacMillan was the sole director and officer of Purcell, the parent company of the petitioner group; the sole officer and director of Highlands LLC, the manager of CuVeras (Purcell's largest secured creditor); and the controlling partner of Highlands LP (Purcell's second largest secured creditor).

1974315 Alberta Ltd.

- [14] Highlands LLC was removed as a manager of CuVeras on June 29, 2016 and replaced by a company called 1974315 Alberta Ltd. ("197"). One of the directors of 197 was Reg Radford, another Alberta-based businessman who, like Mr. Lacey, was a substantial shareholder of Purcell.

Oppression Proceedings

- [15] In November 2016, Mr. Lacey and Mr. Radford, as shareholders of Purcell, commenced an oppression proceeding against Mr. MacMillan. On July 10, 2017, Justice Masuhara issued reasons in the oppression proceeding and made orders declaring that Mr. MacMillan had engaged in conduct that was oppressive or unfairly prejudicial to the shareholders of Purcell, set aside the issuance of certain shares to Mr. MacMillan, set aside Mr. MacMillan's executive contract and various notes and security that he had issued to himself in respect of that contract, and set aside various security arrangements that had been put in place by Mr. MacMillan to further his own interests ahead of those of Purcell. Mr. MacMillan resigned approximately one week after Justice Masuhara's decision was delivered. Mr. Radford succeeded Mr. MacMillan as the president of Purcell.

CuVeras Investors

- [16] The monies advanced by CuVeras to the Stanfield Group by way of DIP financing were raised by CuVeras from investors (the "CuVeras investors"), most of whom were individuals or their holdings companies. CuVeras raised approximately \$10 million from the CuVeras investors which monies were in turn used to fund the DIP loans to the Stanfield Group.
- [17] By order dated July 13, 2018 in this proceeding (the "sales process order"), the court directed that certain of the assets of the petitioners be sold in accordance with a bid process established by the sales process order ("the sales process"). However, none of the offers received by the monitor for the petitioner's assets during the sales process would have resulted in proceeds sufficient to pay the petitioner's indebtedness to Highlands LP and CuVeras, with the result that Purcell shareholders and general unsecured creditors would have received nothing from the sales process.
- [18] During the sales process, Braveheart, which is a public company, advised the monitor that it was interested in pursuing a transaction whereby it would acquire the shares of Purcell, rather the assets of the petitioners. Ultimately, Braveheart put forward a plan of arrangement dated October 11, 2018 (the "plan"). The plan was approved by the petitioners' creditors, sanctioned by the court, and implemented as of January 18, 2019.
- [19] As part of the plan, the petitioners and Braveheart entered into settlement agreements with the MacMillan Group (the "Highlands settlement") and CuVeras (the "CuVeras settlement"). The material terms of those settlements are set out in the plan.

The CuVeras Settlement

[20] By virtue of the CuVeras settlement, Braveheart agreed that it would:

- a) issue 10 million new Braveheart shares to be allocated to existing CuVeras investors on a pro rata basis.
- b) issue a Braveheart warrant to each of the CuVeras investors, entitling each such investor to receive one further new Braveheart share for each Braveheart share allocated to that investor.
- c) purchase CuVeras' existing debt claims against the petitioners and all security held by CuVeras for those claims in consideration for a \$6 million debenture (the "debenture") secured by the assets of Braveheart and redeemable for cash or shares of Braveheart over a three-year period.

[21] The CuVeras settlement was executed by Mr. Lacey on behalf of CuVeras, and Mr. Radford on behalf of the petitioners (other than Jao Mine Developers Ltd. and 197, which entities executed the agreement through others).

Shares Issued to CuVeras Investors

[22] On the implementation date of the plan, Braveheart issued 10 million new Braveheart shares and warrants to CuVeras investors, recorded in 92 separate share certificates issued to approximately 87 individual CuVeras investors (Braveheart was asked to issue more than one share certificate to some of the CuVeras investors).

[23] In issuing the shares and warrants, Braveheart relied on CuVeras and 197 to provide it with an accurate list of CuVeras investors as it had no means of verifying the list. Braveheart it says it received the list from 197 and used it as the basis for preparing the certificates for the shares and warrants that were issued by it.

[24] At the time it issued the shares and warrants, Braveheart was unaware of the existence of promissory notes in favour of a man named Mr. Michael Moretti, who has previously been linked to Mr. MacMillan. It was also unaware that Mr. Moretti has written to CuVeras, 197, and Mr. Radford on October 2, 2019 demanding payment of the amounts due under the promissory notes or that Mr. Moretti had obtained judgment against CuVeras for the amount of the promissory notes on December 19, 2019.

216

[25] The debenture was issued to 216 on the implementation date of the plan. Although it was originally for a term of three years, it has since been extended for a further two years to January 18, 2014, on slightly modified terms as to interest and conversion rates.

- [26] 216 is an Alberta company. It was formed for the sole purpose of holding the debenture for the benefit of the CuVeras investors. Its directors are Mr. Lacey, Herb Der, and Vic Kellough, each of whom is one of the CuVeras investors. They, on behalf of 216, approved and agreed to the changes to the debenture.
- [27] As part of the agreement between Braveheart and 216 to extend the debenture to 2014, each of the CuVeras investors who received Braveheart shares and warrants pursuant to the plan received a new warrant with an exercise price of \$0.15 per share. The warrants can be exercised at any time until January 21, 2021.

Michael Moretti

- [28] Michael Moretti, the applicant before me in this proceeding, is an attorney residing in Texas. Mr. Moretti says that at all material times he was one of the CuVeras investors and that he was wrongly deprived of his pro rata entitlement to the Braveheart shares and warrants that were distributed as part of the CuVeras settlement.
- [29] The evidence discloses that Mr. Moretti's name was on the list of CuVeras investors that was initially provided by 197 to Braveheart. However, 197 subsequently provided a second list of CuVeras investors to Braveheart prior to the division, in which Mr. Moretti's name had been replaced with 216. 216 received the pro rata share of shares and warrants that Mr. Moretti would otherwise have received.
- [30] The decision to substitute 216 for Mr. Moretti was made by Mr. Lacey, because Mr. Lacey perceived that Mr. Moretti had been, at the very least, associated with the prior misconduct on the part of Mr. MacMillan that had been disapproved of by the court and, more likely, had been complicit in it. Mr. Lacey, unilaterally and without any notice to Mr. Moretti or without him having an opportunity to establish the bona fides of his status as one of the CuVeras investors, removed Mr. Moretti's name from the final list of CuVeras investors that was provided to Braveheart, substituting in Mr. Moretti's place 216 as the CuVeras investor who was to receive the shares, warrants and rights under the debenture that would otherwise have gone to him.
- [31] Mr. Moretti's notice of application seeking an order that he receive his pro rata distribution of Braveheart shares and warrants was filed on June 16, 2020.

Settlement Offer

- [32] On June 17, 2020, Mr. Lacey sent Mr. Moretti an email headed "WITHOUT PREJUDICE" which attach copies of the various reasons for judgment previously issued in this proceeding by both this court and the Court of Appeal. The email also attached a letter dated June 17, 2020. It too was headed "WITHOUT PREJUDICE". That letter contained excerpts from the enclosed decisions. Those excerpts were plainly intended by Mr. Lacey to impress upon Mr. Moretti's Mr. Lacey's view that he, Mr. Moretti, had been complicit in the misconduct found against Mr. MacMillan. At the end of the letter, Mr. Lacey wrote in his capacity as a director

of 216 the following:

I do not wish to engage in further litigation; I would much rather focus my efforts on more productive efforts. However, in my view your involvement and unjustifiable support of Mr. MacMillan has contributed to the ultimate loss to the CuVeras noteholders of over \$5 million. On moral and ethical grounds it seems unconscionable to me and the other noteholders that you are expecting your proportionate share through your court application. Having said that, we are prepared to settle your application and recognize your entitlement to your proportionate share if you can provide to us through the production of books and records that investment funds were properly received and that no monies were improperly disbursed to you or Mr. MacMillan from the amounts originally invested by CuVeras noteholders.

[33] The following day on June 18, 2020, 216's counsel sent a "With Prejudice" letter to counsel for Mr. Moretti in which it was stated, in part, that Mr. Moretti's appointment as attorney for Purcell by Mr. MacMillan was found by Justice Masuhara to have been a "continuation of Mr. MacMillan's oppressive and/or unfairly prejudicial conduct" and that Mr. Moretti had failed to exercise the leverage he had during compensation negotiations between Purcell and Mr. MacMillan. The letter went on to assert that:

Mr. Moretti was prepared to facilitate the improper subordination of debt held by CuVeras noteholders to Mr. MacMillan, which would have had the effect of obliterating any value for CuVeras noteholders.

[34] The letter stated further that:

216 requires proof from Mr. Moretti that he hasn't already received monies from Mr. MacMillan (or companies under his control, including Purcell and CuVeras) at the expense of other CuVeras noteholders. Indeed, given Mr. Moretti's conduct as attorney for Purcell in which he clearly preferred the interests of Mr. MacMillan to those of Purcell shareholders and CuVeras noteholders as well as the unaccounted for monies described above, 216 reasonably did not distribute Braveheart's shares [sic] or a pro rata entitlement to the Newco Debenture in the absence of his proof of entitlement. To do so would have risked prejudicing all other CuVeras noteholders.

[35] It is apparent that the second-to-last sentence was intended to read:

... 216 reasonable distributed Braveheart's shares on a pro rata entitlement to the new co-debenture.

[36] Finally, the letter stated that:

216 is not interested in denying former CuVeras noteholders their proper entitlement of Braveheart shares and a pro rata share of the Newco Debenture. Therefore notwithstanding what 216 considers to be Mr. Moretti's misconduct as attorney for property [sic], it remains prepared to meet Mr. Moretti's requests for Braveheart's shares and a beneficial interest in the Newco Debenture as set out in his application on the following basis: (i) provide proof of his entitlement

through the production of the books and records of CuVeras and the Purcell Group (which, in theory, should account for the unaccounted for monies advanced by CuVeras as described above); (ii) confirm that he is not subject to the MacMillan Group Settlement such that he is not entitled to the releases given thereunder.

[37] On June 20, 2020, Mr. Lacey swore an affidavit in response to Mr. Moretti's application. Mr. Lacey deposed, *inter alia*, that:

- a) Mr. Moretti's approval of Mr. MacMillan's actions struck him as "particularly nefarious" (para. 15);
- b) it was shocking to him that Mr. Moretti would seemingly prefer the interests of Mr. MacMillan over those of the CuVeras investors (para. 16);
- c) 216 diligently ensured that all recipients of Braveheart shares were not in a pro rata entitlement to the new co-debenture had properly accounted for their entitlements (paragraph 32).
- d) Mr. Moretti clearly preferred the interests of Mr. MacMillan to those of Purcell shareholders and CuVeras investors, as well as the unaccounted for approximately \$5.6 million of monies advanced to Purcell either directly or by the CuVeras investors (para. 34); and
- e) Mr. Moretti sanctioned the oppressive conduct of Mr. MacMillan (para. 34).

[38] Mr. MacMillan's counsel responded to that letter by letter dated June 25, 2020, which reads the part:

In response to various other matters addressed in your letter, you have said that 216 "requires proof for Mr. Moretti that he has not already received monies from Mr. MacMillan (or companies under his control, including Purcell and CuVeras) at the expense of other CuVeras noteholders." In other words your client is asking Mr. Moretti to prove negative. Mr. Moretti confirms that he never received any money from Mr. MacMillan or the companies under his control, including Purcell and CuVeras. He is prepared to swear an affidavit to that effect. Of course, given past experience and the tone of your letter, we do not expect that that will be sufficient for your client. Mr. Moretti does not have any books and records of CuVeras, Purcell or any companies related to Purcell, meaning he cannot provide those.

As your client would know if it had reviewed the Highlands settlement (as defined in the sanction order) before instructing you to send your letter, Mr. Moretti is not a party to the Highlands settlement and is not a beneficiary of the releases provided under that agreement. To the extent that your letter is intended to convey a threat to Mr. Moretti that he may be subject to a claim by 216 should he continue to pursue his claim for the divisions to which he is entitled under the Purcell's plan of arrangement and the CuVeras settlement agreement, Mr. Moretti has no concerns.

If your client or let us be honest, Mr. Lacey, wishes to advance a claim against Mr. Moretti, they are, of course, entitled to do so. Though we suspect they have already concluded that they have no reasonable basis to assert a claim, including due to the expiry of all limitation periods. Mr. Moretti reserves all his rights in that regard. Mr. Moretti does wish to point out that he was very surprised and disappointed by Mr. Lacey's allegations that the positions he has taken, particularly considering the long history between them and Mr. Moretti's significant investments in and support for Mr. Lacey's various companies. Mr. Moretti is, of course, prepared to resolve this matter and adjourn his application if he is given the shares in Braveheart to which he is entitled along with the confirmation that 216 holds Mr. Moretti's pro rata share of the new co-debenture for his benefit.

[39] The hearing of Mr. Moretti's application first came before me on June 29, 2020. It became readily apparent that more evidence was needed regarding how and when Mr. Moretti's name on the list of CuVeras investors came to have been replaced by 216. The hearing was adjourned.

[40] 216 used the hiatus to, in essence, "double down" on its assertions that Mr. Moretti was complicit in Mr. MacMillan's improper conduct. Mr. Radford deposed that Mr. Moretti's name was removed from the list of CuVeras investors sent to Braveheart because:

197 had no documentation evidencing Mr. Moretti's purported investment in CuVeras. Given Mr. Moretti's involvement in Mr. MacMillan's oppressive conduct as well as the significant amount of unaccounted for funds ... I did not think it was prudent or fair to the other CuVeras investors to distribute any Braveheart shares, warrants or pro rata entitlement to the Newco Debenture to Mr. Moretti in the absence of documentation establishing Mr. Moretti's entitlement (para. 15).

[41] The unaccounted for funds being referred to comprise approximately \$5.6 million in investment monies that Mr. Lacey says were made to Purcell either directly or via the CuVeras DIP financing during Mr. MacMillan's tenure that he has not been able to trace.

Analysis

[42] In *Wong v. Rashidi*, 2011 BCSC 66, Justice Grauer, as he then was, set out the well-established criteria for an award of special costs at paras. 17 and 18 as follows:

[17] As the Court of Appeal established in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, the single standard for the awarding of special costs is that the conduct of the litigant in question be properly categorized as "reprehensible", encompassing scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke.

[18] Because special costs are awarded to deter, chastise and discourage reprehensible conduct, one must focus on a party's blameworthiness and intent: *International High-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724; *Li v. Huang*, 2007 BCSC 1806.

[43] In the context of CCAA proceedings such as these, Parliament has recently amended the act to provide a statutory "good faith" obligation on the part of all parties interested in the proceedings. Section 18.6 of the CCAA now provides that:

Good faith

18.6(1) Any interested person in any proceedings under this act shall act in good faith with respect to those proceedings.

Good faith - powers of court

- (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
- [44] Counsel for Mr. Moretti submits that Mr. Lacey's "Without Prejudice" letter dated June 17, 2020 is inadmissible on the basis that it did not contain the sentence mandated by Rule 9-1(1)(c) of the Supreme Court Civil Rules that "The party reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in the proceeding". He relies on the decision of this court in Wong at para. 40.
- [45] Counsel for 216 submits that the offer is admissible because it substantially complies with Rule 9-1(1)(c), and hence the court had a broad discretion to consider the effect of the offer for costs consequences, *Royal Bank of Canada v. B.M.P. Global Distribution Inc.*, 2011 BCSC 1650, at paras. 56 and 57. I note that the B.M.P. Global case was decided in the context of the series of settlement offers that had been exchanged, all of which contained the language required by Rule 9-1(1)(c) except for the final one.
- [46] I find that there is no need for me to make a determination on the admissibility of Mr. Lacey's "Without Prejudice" letter dated June 17, 2020. That is because regardless of its admissibility, I find it was not an offer that was reasonably capable of being accepted. The term requiring that Mr. Moretti "prove to us [that] investment funds were properly received and that no monies were improperly disbursed to you or Mr. MacMillan" was vague and uncertain in many respects. For example, what was meant by "properly"? What was meant by "improperly"? Moreover, proof by Mr. Moretti that no monies were improperly disbursed to Mr. MacMillan put Mr. Moretti to an almost impossible burden. The letter sent to Mr. Moretti's counsel by 216's counsel the following day made it clear that the required proof would have to take the form of the production of books and records of CuVeras and the Purcell Group and would have to account for the "unaccounted for monies advanced by CuVeras". As 216 well knew, Mr. Moretti had no control over or access to the books and records of CuVeras. All of this was pointed out to 216's counsel by Mr. Moretti's counsel in his letter dated June 25, 2020.

- [47] I find that 216, through Messrs. Lacey and Radford, made a unilateral decision to deny Mr. Moretti the shares, warrants and pro rata entitlement to the Newco Debenture that were rightfully his. I find that they did so because they were disgruntled with him what they perceived to have been his misconduct as a puppet of Mr. MacMillan. They did so entirely on the basis of their suspicion without any evidentiary foundation.
- [48] Contrary to what Mr. Lacey deposed to at para. 32 of his June 23, 2020 affidavit, I am left with no doubt that neither he, Mr. Radford, 197, nor 216 conducted any due diligence regarding any of the CuVeras investors, let alone Mr. Moretti. Had they done so, I am confident they would have provided evidence of it. Instead, without any notice to Mr. Moretti, they determined that Mr. Moretti was not entitled to participate in the CuVeras settlement and set upon a smear campaign in an attempt to dissuade Mr. Moretti from doing anything about it.
- [49] The actions of 216 and Messrs. Lacey and Radford were nothing short of a vendetta against Mr. Moretti for his having previously dealt with Mr. MacMillan.
- [50] I find that their smear campaign was highhanded and continued unabated from the time Mr. Moretti's notice of application was filed to shortly before the continued hearing this morning when faced with the uncontroverted documentary proof of Mr. Moretti's investment in CuVeras, Mr. Lacey, Mr. Radford and 216 were forced to capitulate.
- [51] Had Mr. Lacey, Mr. Radford, 197, and 216 simply asked for this documentation at the outset, this application would not have been necessary.
- [52] The court has a broad discretion and jurisdiction to award special costs in appropriate circumstances. That jurisdiction arises both at common law and in this case under s. 18.6(2) of the CCAA.
- [53] In my view, an award of special costs in favour of Mr. Moretti against 216 is warranted in this case, but should be limited to the costs incurred in respect of the preparation of Mr. Moretti's notice of application filed June 16, 2020 to and including the hearing today.
- [54] The application by 216 for costs is dismissed. There will be orders accordingly.

"G.C. Weatherill J."

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