IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120919
Docket: S126583
Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act,

R.S.C. 1985, c. C-36, as amended

and

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

and

In the Matter of Great Basin Gold Ltd.

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for Petitioner:	P.J. Reardon J.L. Cockbill
Counsel for Monitor:	J. McLean
Counsel for Credit Suisse AG:	P.L. Rubin K. McEachern
Counsel for Unsecured Note Holders:	J.R. Sandrelli
Place of Trial/Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, B.C. September 19, 2012

[1] **THE COURT**: These are proceedings commenced pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] by the petitioner, Great Basin Gold Ltd. The petitioner applies for an initial order.

[2] I will briefly describe the background circumstances, although I do not intend to go through them in detail given the complexity of the situation. The petitioner company is the publicly traded Canadian parent of a large number (22) of subsidiary companies. Through these subsidiaries or groups of subsidiaries, the group owns and operates two gold mines and holds other miscellaneous interests. The first gold mine is the Burnstone Mine located in South Africa. The second gold mine is the Hollister Mine located in Nevada, United States of America.

[3] The circumstances leading up to this filing are outlined in Affidavit #1 of Lourens van Vuuren sworn September 19, 2012. Mr. van Vuuren is the interim Chief Executive Officer and a director of the petitioner. His evidence indicates that through either a combination of economic circumstances or lack of revenue being realized through the mining operations, the corporate group has found itself in a severe liquidity crisis. The circumstances have not arisen just recently; it appears that the corporate group retained CIBC World Markets some months ago to attempt to either arrange a sale of the assets or a restructuring of its operations. I am advised that those efforts continue at this time.

[4] More recently, the Burnstone Mine in South Africa has just been closed down and has been placed in care and maintenance mode. In addition, the major South African subsidiary, Southgold Exploration (Pty) Ltd., filed for creditor protection in South Africa on September 14, 2012.

[5] The debt situation is somewhat complex.

[6] Credit Suisse, who is represented on this application, has various loans outstanding. Firstly, there is a loan to the petitioner with respect to the South Africa operations, namely a US$150 million term loan with a US$14 million hedging facility. I am told that those amounts are directly secured against the South African mine.

[7] In addition, there are loans by Credit Suisse with respect to the Hollister Mine. These are direct advances to the U.S. companies, the lead company of which is Great Basin Gold Inc., who I will address in more detail in a moment. There is a US$43 million term loan and a US$10 million hedging facility. That loan is guaranteed by the petitioner company.

[8] The majority of the assets, as I said, include the two gold mines. There have been various estimates with respect to the value of those mining operations, and of particular relevance to this application is that the book value of the South African mine is estimated to be in excess of $600 million.

[9] The application for the initial order is brought pursuant to s. 11.02(1) of the *CCAA*. I may make an order on any terms that may be imposed. Also, under s. 11.02(3)(a) of the *CCAA*, the petitioner company must satisfy the court that circumstances exist that make the order appropriate.

[10] Mr. Reardon has taken me through the evidence. I am satisfied that the petitioner company meets the technical requirements of the *CCAA* in terms of the amounts that must be outstanding in accordance with s. 3(1) of the *CCAA*. Further, the petitioner company has filed the appropriate documentation, including its projected cash flow. It is beyond question here that the petitioner company is insolvent and is able, as a "debtor company", to take advantage of the provisions of the legislation.

[11] I have the pre-filing report of the proposed Monitor, KPMG Inc., dated September 19, 2012. KPMG was just recently retained on September 18, 2012 and has provided comments on certain matters as are being considered by the court today. I would, however, note that KPMG has only limited information at this time given its recent involvement, and thus its ability to provide an independent opinion on certain issues is limited.

[12] I am satisfied that the stay of proceedings and the other ancillary relief that would typically be granted in an initial order are appropriate at this time.

[13] The more contentious issue on this application relates to the application by the petitioner company to approve Debtor-in-Possession ("DIP") financing. The proposed DIP financing is from Credit Suisse, who is, as previously stated, an existing secured creditor. The proposal is for a $35 million facility. The intention of the petitioner company is that $25 million would be used in respect to the South African or Burnstone mine operations and $10 million would be used with respect to the U.S. operations at the Hollister Mine.

[14] It is apparent from the evidence that these funds are urgently needed by the South African entities for the care and maintenance program that is currently underway in respect of the Burnstone mine. I have been advised by the petitioner that it proposes to use $7 million of the DIP proceeds to pay severance to the approximately 1,000 miners who were recently laid off. The suggestion is that recent events in South Africa with respect to other mining operations point to the volatility of the situation generally. It is submitted by Mr. Reardon that the severance payments are needed, essentially, to buy labour peace and ensure that matters are satisfactorily settled with the employee miners in South Africa.

[15] With respect to the $10 million intended for the Hollister mining operations, similarly, it is submitted that those monies are needed for the ongoing operations in Nevada. The evidence indicates that the gold being produced by that mine would not otherwise be sufficient to generate revenue to meet its ongoing obligations.

[16] The Credit Suisse DIP facility raises various issues. There are two rather unusual aspects of the proposed DIP security which must be addressed.

[17] The first is that it is proposed that the Credit Suisse agent be entitled to a fee of 15% of net proceeds that might be realized from the South African assets. Assuming a book value of $650 million, Mr. Rubin advises me that that could result in a fee of $60 million. This significant fee is unusual in respect of typical DIP financing terms.

[18] The second and even more contentious and unusual aspect of the proposed DIP financing relates to Credit Suisse's requirement that, in addition to the $35 million DIP proceeds being secured against the assets of the petitioner company, there is a further requirement that Great Basin Gold Inc. (which I earlier identified as being the American parent company) provide a direct guarantee and security for the existing facility owed to Credit Suisse in respect of the South African operations. That would include the US$150 million term loan and the US$14 million hedge facility.

[19] Some opposition was taken to the terms of the DIP facility by counsel acting for a portion of an unsecured note holder group, which is owed approximately $126 million by the petitioner company. Mr. Sandrelli, who has attended here today, acts on behalf of approximately 36% of those note holders, or those holding approximately $45 million of the overall debt. This application was brought without notice to this group, but in any event the group got wind of it and has attended and made some submissions to the court. The clients represented here today submit that the court should not approve the DIP facility as proposed, and specifically should not grant any order that would authorize the further guarantee and security intended to be granted by Great Basin Gold Inc. in respect of the existing Credit Suisse loans owed in relation to the South African operations.

[20] I am advised that the granting of the security by Great Basin Gold Inc. does not result in any breach of the covenants that were negotiated by the note holder group in their documentation. It also bears noting that the granting of the guarantee and security by Great Basin Gold Inc. is not a matter that would be prohibited under s. 11.2(1) of the *CCAA* on this application, which now specifically provides that security for DIP financing as against the debtor company's assets may not secure an obligation that exists before the order is made. Great Basin Gold Inc. is not a "debtor company" as contemplated by that section.

[21] Mr. Sandrelli quite rightly points out that this further guarantee and security to be provided by Great Basin Gold Inc. may have the effect of diluting the note

holders' recovery at the level of the petitioner company. That arises because if there is a call on the guarantee and security against Great Basin Gold Inc., that would essentially trap that debt amount as against the value of the U.S. assets before the value of those assets could flow upstream to the parent company, namely the petitioner company, through its shares of Great Basin Gold Inc. Accordingly, but for this new guarantee and security, the note holders would have ordinarily shared in that recovery along with Credit Suisse, who currently holds only a guarantee from the petitioner company for the existing debt.

[22] The circumstances of the DIP and these unusual features of the DIP have been addressed by Mr. van Vuuren in his affidavit. In particular, Mr. van Vuuren says that the directors have carefully considered the effect of granting Great Basin Gold Inc.'s guarantee and security. Of particular importance is his evidence, which was confirmed by Mr. Rubin's submissions, that Credit Suisse is not willing to advance this new DIP facility without this guarantee and security being in place.

[23] It is not particularly clear at this time whether this new guarantee and security by Great Basin Gold Inc. will ever be called upon, given that there does appear to be significant value in the South African mine at this time. I do, however, recognize that there is no certainty that the value of the South African mine will be sufficient to repay the existing amount owing by Credit Suisse at the end of the day.

[24] In any event, for all that these unusual features exist with respect to the DIP facility, the fact remains that without these funds there will be significant and, I would stress, deleterious consequences to the entire corporate group. The evidence is that without this additional financing there will be significant consequences with respect to the South African mine in respect to the care and maintenance program. The evidence is also uncontroverted that without this additional financing it will "likely result in an uncontrolled shutdown of the Hollister Mine". Both of those negative consequences would no doubt be detrimental to all of the stakeholders, including the note holder group, a portion of which is represented on this application.

[25] The proposed Monitor has also commented on these unusual features of the DIP facility, although again, the proposed Monitor points out that they have really not had an opportunity, given their recent involvement, to provide the court with any further background or other information that might assist in terms of assessing the appropriateness of the DIP facility at this time.

[26] Mr. van Vuuren has stated in his evidence that the petitioner company has attempted to find appropriate DIP financing, and this happens to be the only option available to the petitioner company at this time. So, for all that this particular DIP financing may have some unusual and negative features, it appears to be the only course available to the petitioner company.

[27] I am required to consider s. 11.2(1) of the *CCAA* and the factors set out in s. 11.2(4). I am satisfied that all of those factors have been addressed to the extent that they support the granting of the DIP facility. As Mr. Reardon has pointed out, without this DIP facility there will be extremely negative consequences to both mining operations, which are the lifeblood of this corporate group. In all, whether it is viewed from the perspective of the Canadian parent, the U.S. corporate group, or the South African corporate group, negative consequences will result if this financing is not obtained.

[28] Accordingly, I am satisfied that the DIP order is appropriate at this time and I approve that.

[29] I would hope that in the future (and that would be in the immediate future) that the parties, including the petitioner company and Credit Suisse, would sit down with the note holder group and satisfy or attempt to satisfy the note holder group in terms of the appropriateness of the DIP financing. Of course, a critical aspect of that discussion would be the value or potential value of the South African mine to the extent of assessing the risk of this guarantee by Great Basin Gold Inc. being called upon in any event. I am not making any order in that respect, but am simply suggesting, as is typical in these files, that the parties enter into some meaningful discussions concerning the situation. I appreciate that Mr. Sandrelli is, as are other

people in this courtroom, presently working with a lack of information. Hopefully, in the fullness of time after this hearing, that can be remedied towards possibly satisfying the note holders going forward.

[30] The order sought is therefore granted with some amendments.

[31] The first change is a slight reworking of para. 38 to satisfy Mr. Sandrelli's concern in respect of what exactly is being secured against the petitioner's assets. Accordingly, the following will be added to that paragraph: "For greater certainty, the DIP Lender's Charge shall not secure any obligation under the Burnstone Advisory Agreement as defined in the Term Sheet". This would relate to the 15% fee.

[32] The second change will be that any party may apply to amend or vary this order on not less than two business days' notice. I acknowledge Mr. Sandrelli's statement that there may potentially be an application to set aside the order relating to the DIP facility given the fact that this application is essentially being heard on an *ex parte* basis.

[33] Lastly, the word "defence" has been added to para. 23 such that the indemnity for the directors and officers will be clarified such that it relates to "legal defence costs" as opposed to "legal costs".

[34] The date of the comeback hearing will be 9:00 a.m. on October 10, 2012.

Fitzpatrick J.