Indexed as:
Westar Mining Ltd. (Re)

IN THE MATTER OF the bankruptcy of Westar Mining Ltd.

[1999] B.C.J. No. 2169

13 C.B.R. (4th) 289

91 A.C.W.S. (3d) 346

Vancouver Registry No. 143440/92

British Columbia Supreme Court
(In Bankruptcy)
Vancouver, British Columbia

Sinclair Prowse J.

Heard: September 14, 1999.
Judgment: September 29, 1999.

(43 paras.)

Bankruptcy -- Administration of estate -- Application to court for directions -- Practice -- Legal costs.

Application by a law firm for an order appointing it as counsel to a group of creditors, and for its costs to be paid from the estate. The trustee in bankruptcy applied for directions regarding notice to creditors. Westar Mining owned a mine that had gone into bankruptcy. The trustee was holding money that had been paid by Westar's joint venture partner in the mine. A number of creditors sought to have this fund set apart from Westar's estate and paid to them directly.

HELD: Applications allowed in part. The law firm was appointed representative counsel for a group of the creditors. The order would not prevent any creditors from retaining different counsel if they so desired. Any creditors represented by the firm would share proportionally in any money recovered by the firm. It was not appropriate to make an order that Westar's estate pay the firm's legal costs. The firm's work would not have benefitted the estate, and if successful, it would have depleted the estate. It would have been inequitable and unfair to have the owners of the estate bear the costs of an action that they opposed. If the firm were successful in its claim, it would have been entitled to seek costs against the estate. All of the creditors were to be notified by letter sent by ordinary mail of the upcoming application.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 38.

Counsel:

L.C. Donaldson, for Arthur Anderson Inc., the trustee in Bankruptcy of the Estate of Westar Mining Ltd.
B.J. Ingram, for some of the secured and unsecured creditors of Westar Mining Ltd.
C. Bird and C. Shaley, for the law firm of Ladner Downs and for various unsecured Creditors of Westar Mining Ltd.

SINCLAIR PROWSE J.:--

I) NATURE OF PROCEEDING AND RELIEF SOUGHT

1 In this bankruptcy action hearing, there were three applications made.

2 The first application, by the law firm of Ladner Downs, was a request to be appointed as the representative of a group of unsecured creditors of the bankrupt Westar Mining Ltd. ("Westar").

3 The second application, also by Ladner Downs, was that the cost of these legal services be borne by Westar's Estate.

4 The third application was made by Arthur Anderson Inc. who is the Trustee in Bankruptcy of the Westar Estate (the "Trustee"). Counsel for the Trustee requested directions on the procedure for giving notice to a particular group of creditors regarding an upcoming application.

II) BACKGROUND

5 To put these applications in context, prior to going bankrupt Westar operated two coal mines, the Greenhills Mine and the Balmer Mine. Both of these are situated in the east Kootenay area of British Columbia. These applications pertain to the Greenhills Mine.

6 Westar owned 80% of the Greenhills Mine. The other 20% was owned by Westar's joint venture partner. This joint venture partner, under the terms of the joint venture agreement, paid 20% of the operating expenses of the Greenhills Mine in return for 20% of its coal production. Westar was responsible for managing the mine.

7 At the time of bankruptcy, Westar was owed approximately $8.5 million (the "Trust Money") by its joint venture partner, as its share of the operating expenses of the Greenhills Mine. This money has now been paid and is being held in trust by the Trustee.

8 In an upcoming application, a number of the unsecured creditors of Westar will be seeking an order that a portion of the "Trust Money" be excluded from the Westar Estate and be paid to them directly. Included in this group of unsecured creditors are former employees of the Greenhills Mine and 166 suppliers of goods and services for that mine. (The 166 supply creditors will hereinafter be referred to as the "Greenhills Mine Suppliers Group" in this judgment).

9 In this upcoming application, both of the former employees of the Greenhills Mine and the Greenhills Mine Suppliers Group intend to argue that $1.6 million of the Trust Money that was owed by the joint venture partner for goods and services supplied to that mine prior to the Companies Creditors Arrangement Act, R.S.C. 1985, C-36 (the "CCAA") is impressed with a trust and is payable directly to them rather than to the Westar Estate.

10 That is, these unsecured creditors contend that these monies were only payable to Westar if it had already paid the operating expenses and therefore was entitled to be reimbursed. Otherwise, Westar held these monies in trust for the suppliers of goods and services to whom these monies were owed. As Westar had not paid these expenses, it was not entitled to be reimbursed for them. The monies are therefore held in trust for these creditors.

11 This "purpose trust" issue is to be determined at an upcoming hearing.

12 In the present hearing, the orders and directions sought pertain to the Greenhills Mine Suppliers Group and the upcoming "purpose trust" hearing only. (The former employees of the Greenhills Mine will be participating in this upcoming hearing and have their own counsel).

13 Some direction has already been given regarding the Greenhills Mine Suppliers Group and the upcoming hearing. Specifically, on April 21, 1999, the Court ordered that the Trustee send a letter to the 13 largest creditors of the Greenhills Mine Suppliers Group for the purpose of apprising them of the "purpose trust" issue. Eighty percent of the money owed to Greenhills Mine Suppliers Group is owed to these 13 creditors. (Exhibit B of the affidavit of Jerry P. Zuk sworn on September 3, 1999, sets out the names and the amounts owing to each of these creditors). These creditors, in turn, were to advise the Trustee within 15 to 20 days, as to whether they were going to participate in the determination of the "purpose trust" issue.

14 Since the making of the April 21, 1999 order, the thirteen creditors have been notified. To date 6 of these 13 creditors have contacted Ladner Downs to represent them. Moreover, Ladner Downs has been advised that some of the remaining seven creditors may also be contacting them to act as counsel.

III) DISCUSSION AND DECISION

A) Application By Ladner Downs To Act As Representative of The Greenhills Mine Suppliers Group

15 As mentioned at the beginning of these reasons for judgment, Ladner Downs is seeking an order that it be appointed to represent the Greenhills Mine Suppliers Group. This order would not preclude any of the creditors in the Greenhills Mine Suppliers Group from retaining a different counsel should they choose to do so. Moreover, unless they agree otherwise, all of the creditors would participate proportionately in any money recovered by Ladner Downs on behalf of that group.

16 All of the participants in this hearing agreed that the Court had the jurisdiction to make such a representative order. In addition, earlier in this action this Court made a similar representative appointment for the employees of the Greenhills Mine.

17 The purpose of appointing representative counsel is that it would simplify the process for both the Trustee and the creditors in the Greenhills Mine Suppliers Group.

18 This application is unopposed.

19 Given that this appointment would simplify the process and that there is no apparent prejudice to anyone, Ladner Downs is appointed to represent the Greenhills Mine Suppliers Group.

20 As was touched on earlier, the creditors in the Greenhills Mine Suppliers Group are at liberty to retain another counsel should they choose to do so. Moreover, Ladner Downs may, upon application to this Court, seek to have their appointment as representative set aside should it be unable for whatever reason to arrange a mutually agreeable working relationship with the Greenhills Mine Suppliers Group.

B) Application By Ladner Downs That Their Legal Fees Be Paid From The Westar Estate

21 As was set out above, I have appointed Ladner Downs to act as a representative of the Greenhills Mine Suppliers Group.

22 In their second application in this hearing, Ladner Downs, as the representative of this group of creditors, sought to have its legal fees paid from the Westar Estate.

23 As was recognized in Eron Mortgage Corp. (Trustee of) v. Eron Mortgage [Q.L. [1998] B.C.J. No. 282] (B.C.S.C.) at para. 36, to succeed in this application Ladner Downs must establish that the legal work it is doing for the Greenhills Mine Suppliers Group is work that will either benefit the Westar Estate or is work that is necessary for the management and preservation of the assets of that Estate. Eron, supra, also recognized that:

> Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not done it.
>
> The Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them.

24 In the present case, the work that is being undertaken by Ladner Downs will not benefit the Westar Estate. Ladner Downs will be contending, on behalf of the Greenhills Mine Suppliers Group, that $1.6 million should be excluded from the Westar Estate. Therefore, if successful, the work done by Ladner Downs will reduce the Westar Estate, not enhance it.

25 Similarly, the work to be done by Ladner Downs on behalf of the Greenhills Mine Suppliers Group is not work that would have to be undertaken by someone because it is necessary for the preservation or management of the Westar Estate. Instead, the work undertaken by Ladner Downs is directed at depleting, rather than preserving, the assets of the Westar Estate.

26 Furthermore, to permit these legal expenses to be paid from the Westar Estate would be neither fair nor equitable to the owners, that is the creditors, of the Westar Estate

27 During the proceedings, counsel for Ladner Downs argued that this claim for legal fees should be treated as being analogous to the application that a creditor might make when the Trustee has refused to act pursuant to s. 38 of Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3. Under s. 38, with leave of the Court, a creditor may be permitted to commence an action on behalf of the bankrupt after the trustee has refused to commence the action. The creditor, if successful, will benefit to the extent of his/her claim with the remainder belonging to the estate.

28 In the present situation, Counsel for Ladner Downs argued that as the Trustee had refused to take up this claim on behalf of the Greenhills Mine Suppliers Group, and as Ladner Downs had taken it up, its costs should be recoverable from the Estate.

29 In my view, the present situation is not analogous to situations covered by s. 38 of the Bankruptcy and Insolvency Act, supra. In this case, as was set out earlier, the claim is not a claim belonging to the Westar Estate, nor is it a claim that would benefit the Westar Estate.

30 If there are any analogies to be drawn, the present situation is more analogous to the situation of a creditor whose claim has been disallowed by the Trustee. That is, the fact that the Trustee has refused to accept the claim of the Greenhills Mine Suppliers Group in respect of the money held in trust may be similar to the refusal of the Trustee to accept a claim made by a purported creditor. In challenging such a refusal in the Courts, the purported creditor bears his/her own legal costs.

31 In addition, during this hearing Ladner Downs argued that it would be unfair to the members of the Greenhills Mine Suppliers Group if their legal costs were not paid by the Westar Estate. Ladner Downs contended that the unfairness arises from the fact that they would have to bear their own legal costs, whereas the other creditors of the Westar Estate would be represented by counsel for the Trustee whose fees will be paid from the Westar Estate.

32 I did not find this argument persuasive. The fact that the legal fees of the Trustee are paid from the Westar Estate is entirely in keeping with the general principles as reflected in the Eron, supra, case. Counsel for the Trustee is working to benefit the Westar Estate; is doing work necessary to preserve and manage the trust; and is doing work for which it is fair and equitable that the owners of the Estate bear the costs.

33 In this application the onus is on Ladner Downs to establish that it is fair and just that the creditors of the Westar Estate, as the owners, bear the legal fees of the lawyers representing the Greenhills Mine Suppliers Group. Ladner Downs has failed to discharge this onus. The evidence shows that it would be inequitable and unfair for them to bear these costs. That is, the owners of the Westar Estate oppose the work to be undertaken by Ladner Downs because, if it is successful, it will reduce their asset - the Westar Estate.

34 For all of these reasons, I have concluded that Ladner Downs has failed to establish that it is entitled to be paid from the Westar Estate. This application is dismissed. This finding, of course, does not preclude an order for costs against the Westar Estate should Ladner Downs, on behalf of the Greenhills Mine Suppliers Group, be successful in proving the "purpose trust" claim.

C) Application of the Trustee For Directions Regarding The Notification of Balance of the Greenhills Mine Suppliers Group

35 In this application, the Trustee sought directions as to the procedure it ought to follow in giving notice of the "purpose trust" hearing to the remainder (153 creditors) of the Greenhills Mine Suppliers Group.

36 In particular, the Trustee is seeking a direction that it be required at this stage to only give notice to those creditors who have $2,500.00 or more at stake with respect to the "purpose trust" issue.

37 The order of April 21, 1999 provided that the Trustee could apply for further directions with respect to the procedure to be followed for determining the "purpose trust" issue. However, it would appear that the Court has already decided the issue regarding the notification of the remaining creditors.

38 The previous order includes the provision that the Trustee must notify the 13 largest unsecured creditors in the Greenhills Mine Suppliers Group. As well, if necessary, the Trustee can receive further directions on the procedure to be followed in respect of the "purpose trust" issue. Then the order states that, "[t]he balance of the unsecured creditors who filed proofs of claim in the Estate of Westar Ltd. in respect of the goods and services provided to the Greenhills Mine prior to the CCAA Order shall be notified of the purpose trust issue by letter after the hearing refereed to in paragraph (3) above and shall be given a limited time frame by which to indicate their desire to participate in that issue".

39 Given these circumstances, it appears to me that the Court has already determined this issue and decided that all of the creditors remaining are to be notified by letter. Therefore, given this conclusion I do not have jurisdiction to revisit this issue.

40 However, if I am wrong with respect to this conclusion I have decided that all of these creditors should be notified in writing in any event.

41 All of the members of the Greenhills Mine Suppliers Group should be given the opportunity to determine whether they want to participate in the upcoming "purpose trust" application particularly as they may be expected to contribute to the legal costs.

42 The contents of the letter and the procedure to be followed in drafting the letter will be similar to the procedure set out for the letter sent to the 13 creditors. That is, the letter will apprise these creditors of the "purpose trust" issue and that Ladner Downs has been appointed to represent that group. The letter should be sent by ordinary mail.

43 The creditors should be given 15 to 20 days to advise Ladner Downs whether they wish to avail themselves of its legal services, and whether they intend to participate in the hearing of the "purpose trust" issue. The form of the letter should be approved by Ladner Downs before the Trustee sends it to the creditors.

SINCLAIR PROWSE J.

cp/i/drk/jjl