IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ward Western Holdings Corp. v. Brosseuk,* 2023 BCSC 1193

Date: 20230623
Docket: S209762
Registry: Vancouver

Between:

Ward Western Holdings Corp. and Westrike Resources Ltd.

Plaintiffs

And

Raymond Brian Brosseuk, Jacqueline Grace Brosseuk, Peter Hipp, Donna Hipp, Hipp Joint Spousal Trust, R.J. Sales Ltd., Northern Placer Technologies Inc., Affinity Law Corporation doing business as Affinity Law Group, D. Manning & Associates Inc. and Accurate Effective Bailiffs Ltd.

Defendants

And

Ward Western Holdings Corp., Westrike Resources Ltd. and Robert Slavik

Defendants by Counterclaim

Before: The Honourable Justice Gomery

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs and Defendants by Counterclaim, Ward Western Holdings Corp., Westrike Resources Ltd.:	O.C. Hanson
Counsel for the Defendants, Raymond Brian Brosseuk and Jacqueline Grace Brosseuk:	H. Sevenoaks
Counsel for the Defendant, D. Manning & Associates Inc.:	B. La Borie
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. June 22, 2023
Place and Date of Judgment:	Vancouver, B.C. June 23, 2023

Introduction

[1] **THE COURT:** In 2020, the Brosseuk and Hipp defendants (henceforth the "Brosseuk parties") agreed to sell 90 percent of the shares of the plaintiff, Westrike Resources Ltd., to the plaintiff, Ward Western Holdings Corp. Westrike owned and operated a gold mine at French Creek, north of Revelstoke. The sale closed in June 2020. The Brosseuk parties received $2 million on closing and a promissory note for $4.5 million. The promissory note was payable no later than December 31, 2021 and was secured by a general security agreement. Mr. Brosseuk had operated the mine prior to it closing, and the agreement was that he would continue to operate it until the post-sale production of gold reached a certain threshold.

[2] The parties had a falling out, and Ward Western assumed control over the operations, locking Mr. Brosseuk out. The Brosseuk parties had appointed D. Manning & Associates Inc. ("Manning") as a receiver under their security. The plaintiffs resisted the appointment and commenced this action. The plaintiffs alleged that Ward Western's purchase of Westrike and the mine had been induced by fraudulent or negligent misrepresentations and that Mr. Brosseuk had mismanaged the mine's operation since the sale. They sought damages for breach of the agreements and for misrepresentation and a declaration that Westrike was entitled to replace Mr. Brosseuk as mine manager. They claimed damages from Manning for steps taken by it to enforce the security held by the Brosseuk parties.

[3] The plaintiffs applied for an injunction to prevent Mr. Brosseuk or Manning from taking possession of the mine. The Brosseuk parties counterclaimed for judgment on the note and other relief. They applied for a court appointment of Manning as receiver. The two applications were heard by Justice Macintosh in April 2021. In oral reasons on April 15, 2021, subsequently published and indexed at 2021 BCSC 919, Macintosh J. dismissed the plaintiff's application and appointed Manning as receiver.

[4] Justice Macintosh's decision was the subject of proceedings in the Court of Appeal, indexed at 2021 BCCA 371, 2021 BCCA 390, and 2022 BCCA 32. By the last of these decisions, an appeal of Macintosh J.'s decision was dismissed.

[5] In consequence of the ongoing legal proceedings, Manning was unable to operate the mine. It has been inactive since 2021. Eventually, Manning found a buyer for the mining equipment, which was sold with court approval in March 2023. Manning received sale proceeds of $612,000.

[6] A trial of the action is scheduled to take place in December 2024.

[7] Manning now applies for orders and directions bearing on what is to be done with the sale proceeds. It seeks approval of its fees and disbursements and those of the lawyers who have represented it since the court appointment on April 15, 2021. It proposes to distribute the balance of the funds on hand, $337,737.29, to the Brosseuk parties. Unsurprisingly, the Brosseuk parties support the application. With one exception, the plaintiffs vigorously oppose.

[8] The exception is that the plaintiffs do not oppose an order in the terms of the order sought at paragraph 1(c) of Part 1 of the notice of application, approving Manning's activities in its capacity as a court-appointed receiver. Having read Manning's reports, I agree and that order will go.

[9] I turn to the matters in dispute on this application.

Application to Approve Manning's Fees and Disbursements

[10] Manning has prepared monthly invoices listing its fees and disbursements and provided a breakdown of the disbursements included in its invoices. The fees claimed total $163,739.04. In its materials, Manning has not provided an indication of how the fees were determined. Assuming that the determination was based on time spent at hourly rates, there is no listing of time spent, individuals involved, and the hourly rates of those individuals. There is no itemized description of the services for each block of time spent. The materials do not meet the standard required in an

sapplication to approve a receiver's accounts; *Redcorp Ventures Ltd. (Re)*, 2016 BCSC 188 [*Redcorp*] at paras. 19 and 22 to 27. They do not provide enough information to permit the court, Westrike, and any other interested person to independently evaluate whether the billing is fair and reasonable, having regard to the time spent and the persons involved.

[11] Manning's counsel advises that there is a concern in this case that full disclosure of Manning's time records may be inappropriate because there could be disclosure of privileged information to the plaintiffs, who are adverse in interest in ongoing and contentious litigation. He offered to provide the records for my review on the basis that they would not be seen by plaintiff's counsel.

[12] I do not think that it would be appropriate for me to review Manning's time records privately as proposed. The purpose of a passing of accounts is to provide assurance to all interested parties, including the debtor. The plaintiffs are interested parties. One of them is the debtor. They should have the opportunity to make meaningful submissions. To the extent that the time records reference privileged communications, they may be redacted. If the redaction are disputed, then private inspection of the original documents by the court would be appropriate as contemplated by *Supreme Court Civil Rule* 7-1(20), for the purpose of assessing whether the redactions were appropriate.

[13] I doubt that proper redactions for privilege will be extensive to the point of truly making it difficult to assess the fairness and reasonableness of Manning's accounts. It would be a problem to be addressed if it arises.

[14] I refuse this part of the application. Manning may reapply on better materials.

Application to Approve the Fees and Disbursements of Manning's Lawyers

[15] The application to approve the accounts of the law firms that have acted for Manning in its capacity as court-appointed receiver is supported by invoices from which an itemized description of the services provided by the lawyers has been redacted. The invoices identify the lawyers, hours spent, and the lawyers' hourly

rates. The information provided is inadequate. Sufficient information should be provided to enable the court to make an independent and objective assessment of the fees claimed by the lawyers, taking into account, among other matters, the nature of the services provided and the results achieved; *Redcorp* at paras. 32 and 33; *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 1923 at para. 14.

[16] Counsel for Manning's concern is, again, the protection of privilege. He offered to show me the unredacted accounts. For the reason I have already given, I do not think it would be appropriate for me to review the unredacted accounts for the purpose of deciding whether they should be approved.

[17] The privilege issue is coloured by the background. The plaintiffs are suing Manning in its former capacity as an instrument-appointed receiver of Westrike. They are suing the Brosseuk parties, who have been funding the receivership. The law firms are acting for Manning in both its capacities as formerly an instrument-appointed receiver and presently a defendant, and as a court-appointed receiver. The dual role of Manning and its lawyers is one of the reasons the plaintiffs say they need to review the accounts. They are suspicious that services provided to Manning in its capacity as a defendant are being charged to the receivership. The lawyers have sworn or affirmed affidavits stating that the services have been kept separate.

[18] The privilege issue is easily misunderstood. On an application to approve the accounts of a court-appointed receiver's lawyer, time entries revealing the receiver's communications with the lawyer are not privileged and immune from production in the ordinary course. That much is obvious from authorities such as *Redcorp*. While the privilege issue has not been fully ventilated on this application, I incline to the view that it is different if there are entries that would disclose communications pertaining to the conduct of the litigation with the plaintiffs. Those entries may be redacted, and Manning may seek approval of the lawyer's accounts supported by invoices that have been redacted accordingly.

[19] Accordingly, many of the services provided by the lawyers to Manning may be disclosed without waiving privilege over those communications that are truly privileged in the context of this application. Manning may reapply to approve the account supported by invoices from which only itemized entries that it maintains would disclose truly privileged communications had been redacted. If the plaintiffs dispute the redactions, the dispute will be decided by the judge who hears the application, and the privilege issue may be further argued at that time. To be clear, it will not be open to the plaintiffs to argue that privilege has been waived by the fact that some communications between Manning and its lawyers that do not pertain to the litigation of the plaintiffs have been disclosed.

Application For an Interim Description to the Brosseuk Parties

[20] The amount proposed for distribution, approximately $338,000, is what would be left over after the receiver and its lawyers are paid the amounts they have billed. The plaintiffs object to the proposed distribution on two grounds. First, they dispute the entitlement of the Brosseuk parties to be paid any part of the $4.5 million claimed by them together with interest and costs. Second, they submit that the proposed distribution is not prudent in view of the anticipated expenses of the receivership before the trial can take place in December 2024.

[21] On the pleadings, the entitlement of the Brosseuk parties is disputed, but the ground of dispute is not entirely clear. The response to counterclaim does not specifically address the Brosseuk parties' claim on the $4.5 million promissory note. Manning and the Brosseuk parties say that the pleading is no more than a general denial. The plaintiffs say that their amended notice of civil claim pleads fraudulent misrepresentations calling into question the entitlement of the Brosseuk parties generally, and that the factual elements of this pleading are incorporated into their response to counterclaim.

[22] In my view, the question I must ask is whether there is a triable issue as to the entitlement of the Brosseuk parties to be paid the $4.5 million claimed in their counterclaim. I do not think it is necessarily fatal that they have not applied for

judgment if it is clear on the materials before me that they could obtain summary judgment if they applied.

[23] The test on an application for summary judgment is whether it is manifestly clear or clear beyond a reasonable doubt that the party applying is entitled to judgment; *Beach Estate v. Beach*, 2019 BCCA 277 at para. 65.

[24] The decision of Macintosh J. and the various decisions in the Court of Appeal do not address the validity of the Brosseuk parties' claim that they are owed $4.5 million on a promissory note, although it is fair to say that the validity of the promissory note is assumed for the purpose of the application at hand. In deciding whether to appoint a receiver, it was enough to be satisfied that the Brosseuk parties had a strong claim on the note. The judges did not have to decide and did not decide that the claim was bound to succeed.

[25] Justice Macintosh appears to have viewed the plaintiffs' claim for damages and the defendant's claim on the note as offsetting one another. At para. 46, he described the $4.5 million owed by the plaintiffs as a cushion against the plaintiffs' damages claim. While the counterclaim on the note is secured and the plaintiffs' claim is not, there are circumstances in which a secured claim may be reduced in amount or eliminated entirely by the doctrine of equitable setoff; *Holt v. Telford*, [1987] 2 S.C.R. 193, 1987 CanLII 18 (SCC).

[26] Notwithstanding the ambiguity of the pleadings and the plaintiffs' lack of success in their arguments to date, on the materials before me, I cannot say that it is clear beyond a reasonable doubt that the Brosseuk parties are owed money by the plaintiffs. Accordingly, I do not think that I should order a distribution to the Brosseuk parties that could only be justified on the footing that they are, in fact, owed money.

[27] In light of the conclusion I have come to, I do not need to address the plaintiffs' second objection to a distribution.

[28] If the Brosseuk parties can resolve the dispute as to their entitlement under the promissory note by an application for summary judgment or in some other way, they may reapply for an interim distribution.

Disposition

[29] For these reasons, the application for the orders sought in paragraphs 1(b) and 1(d) of Part 1 of the notice of application is dismissed. An order will go in the terms set out in paragraph 1(c) of the notice of application. The costs of this application will be in the cause.

"Gomery, J."