

Court of Queen's Bench of Alberta

CLERK OF THE COURT
FILED
NOV 10 2020
CALGARY, ALBERTA

Date: November 4, 2020
Docket: 2001 05630
Registry: Calgary

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

And In The Matter Of Dominion Diamond Mines ULC, Dominion Diamond Delaware Company, LLC, Dominion Diamond Canada ULC, Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC and Dominion Finco Inc.

Between:

Diavik Diamond Mines (2012) Inc

Applicant

- and -

Dominion Diamond Mines ULC et al

Respondents

**Endorsement
of the
Honourable Madam Justice K.M. Eidsvik**

[1] Diavik Diamond Mines (2021) Inc. (“DDMI”) applies for an Order that would allow it to hold *all* of Dominion Diamond Mines’ (“Dominion”) share of diamond production from the Diavik Mine and approve a process to realize on these diamonds in order to reimburse the amounts DDMI has been paying on Dominion’s behalf (the “Cover Payments”) to continue to operate the Diavik Mine since approximately April, 2020. The Cover Payment to September 30, 2020 totals US\$83.2 M, and approximately Can\$120 M as of October 18, 2020.

[2] Dominion, and other parties, object to this application and argue that DDMI should continue to only be allowed to hold the amount of Dominion's share of diamonds from the Diavik Mine that equates to the amount owing for Cover Payments (based on what is known as the DICAN evaluation).

[3] Although initially Dominion argued that all diamonds should be delivered to them and they would manage their sale and pay DDMI back what is owed in Cover Payments, ultimately, DDMI and Dominion agreed that DDMI could sell the diamonds based on an agreed realization process, with one issue to be determined in this process. The outstanding issue is the amount of fee that should be paid to DDMI for undergoing this process on top of its expenses (2.5% or 1%?). The diamonds in excess of the Cover Payments owed, based on the DICAN evaluation, should be delivered immediately to Dominion.

Background

[4] On April 22, 2020 I granted Dominion, and other related parties, an initial Order under the CCAA. The Order established a stay of proceedings in favour of Dominion until May 2, 2020.

[5] On May 15, 2020, I granted DDMI an Order allowing an exception to the general stay, and allowing DDMI to make Cover Payments on behalf of Dominion.

[6] DDMI had also sought at that application that it be able to hold Dominion's share of production "based on royalty valuations performed from time to time" at the Production Splitting Facility in Yellowknife by the Government of NWT. Dominion objected vehemently to DDMI holding its share of diamond production and had concerns about the Diavik Mine remaining open at all.

[7] I ordered that the May 20, 2020 planned delivery of Dominion's share of diamonds could be held back by DDMI with certain conditions. I agreed with DDMI that it was not a "reckless decision" to keep the mine open as alleged and accepted that in any event, there would be significant costs to keep the mine in "care and maintenance". I noted that the Joint Venture Agreement ("JVA") allowed only security over the diamonds – not a delivery holdback. At the time, the value of diamonds was uncertain, the SISF was only contemplated and not yet in place, and in balance, considering the Covid situation, I allowed a temporary holdback.

[8] In June, I heard a further application by DDMI seeking to continue to hold back delivery of all of Dominion's share of the Diavik Mine diamond production as security for the Cover Payments it was making on Dominion's behalf.

[9] Dominion, and other secured parties, continued to object on the basis that the terms of the JVA entered into between the parties (and their predecessors) did not allow for DDMI to withhold delivery of the diamonds. This potentially altered the security arrangement with many parties. Alternatively, it argued that DDMI should only be able to hold back the amount of diamonds that equaled the amount of the Cover Payments (as determined by DICAN).

[10] On June 19, 2020, I ordered that DDMI could hold back the portion of Dominion's share of diamond production equal to the total value of the Cover Payments made by DDMI (the "Dominion Products") "and the value of the Dominion Products shall be determined based on royalty evaluations performed from time to time at the PSF by the Government of the Northwest Territories.". Further, I allowed DDMI to seek a further Order "to exercise rights and remedies as against the Dominion Products" with leave of the Court, or on certain happenings.

[11] On September 25, 2020, I allowed a temporary Order so that, pending this application, DDMI did not have to deliver the excess diamonds beyond those allowed to be held. DDMI seeks an Order continuing this moratorium and the further ability to sell the diamonds and pay back any difference between the sale price they obtain and the amount of the Cover Payments (plus interest and expenses).

Discussion re amount of Dominion's share of diamonds that can held back

[12] After hearing further extensive arguments, and reviewing the evidence led by DDMI and Dominion, I am not persuaded that I should amend the basics of my June 19, 2020 Order so that DDMI can hold back, or sell, anymore of Dominion's diamonds beyond the amount that is determined normally by DICAN as equal to the Cover Payments. My reasons are as follows.

[13] Firstly, DDMI argues that the DICAN evaluation method to divide the Diavik diamonds is not appropriate since this value may not match the sale value of these diamonds. Indeed, DDMI is concerned that the DICAN value of the diamonds presently held by them exceeds the amount that they may obtain in the market considering the volatile conditions for diamond sales and does not take into account fees or expenses of any type. Normally, if there was not a stay in place, DDMI would be able to sell all of Dominion's share of the diamonds and pay Dominion back anything in excess. Returning part of its collateral here is potentially prejudicial to DDMI and of no prejudice to Dominion.

[14] Dominion on the other hand, led evidence to show that based on recent sales of diamonds, DDMI will not be under secured if it is left with the amount of diamonds as determined by DICAN. It pointed out that the DICAN evaluation is the method that has been used for years to determine their respective share and it was indeed the manner in which DDMI initially proposed that the diamond share be evaluated. All of the diamonds that Dominion has sold in 2020 have sold at a higher realized value than the DICAN evaluation. DDMI's affiant also confirmed that DDMI's diamonds have sold recently for more than the DICAN evaluation – although DDMI did not proffer any evidence about what the value was.

[15] Dominion also disagreed about the percentage of the amount of costs that should be deducted from the gross DICAN amount. Their costs are 11% vs. DDMI's suggestion of 13-20%.

[16] Dominion also pointed out that in terms of future forecasting – there are differing views in the market.

[17] Finally, Dominion argued that DDMI also has security in Dominion's 40% share ownership of the Diavik Mine.

[18] My June Order attempted to balance DDMI's rights and decision to continue to operate the Diavik Mine in face of the pandemic, and over the initial objections of its 40% partner, Dominion, which has meant ongoing high expenses being faced by Dominion while it is trying to restructure its business and keep its operation in the Ekati Mine as a future viable operation. Dominion continues to have serious concerns about how DDMI is running the Diavik Mine and complains about the Mine being over budget and mismanaged. It has started an action in this regard in B.C. (which is presently stayed).

[19] Further, normally, the ability for parties to realize on their security or claims against a party protected by a stay in CCAA proceedings are affected. I have allowed a limited waiver of this stay with respect to DDMI considering this unusual situation – but with some limits – i.e. that the normal collateral is limited to the amount of the Cover Payments owed. This is a balance that I have attempted to achieve to allow for the Diavik Mine to remain operational and allow Dominion to continue to attempt to restructure.

[20] In terms of the value of the limited collateral, the DICAN evaluation was proposed by DDMI in the first place likely because it is the method that has been used for years between the parties to divide the diamond production. The evidence in front of me does not convince me that it is unfair – or has changed since the parties both agreed to this method a few months back. I recognize that there is a difference between splitting diamonds and selling them – however based on the limited evidence in place, this independent evaluation method is a fair way to continue to proceed.

[21] DDMI argues that it will be prejudiced if it cannot hold on to the whole of Dominion's share of the diamond collateral. However, I also note that DDMI has security in the 40% ownership of Dominion in the Diavik Mine. Again, I had arguments on both sides about the value of this interest but no professional evidence of value. I don't accept that just because there have been no bids to buy Dominion's 40% share in the Diavik Mine recently, that it is valueless. However, I also take DDMI's point that the Mine is near the end of its life and it has serious reclamation costs that will have to be paid ultimately, so that the value does not equate to the enormous amounts of funds that have been invested in it in the last few years. Ultimately, in my view this Mine has some value, and DDMI has priority security in it.

[22] Notably, the Monitor in June did not support DDMI's request to hold all of Dominion's share of the Diavik diamonds. Presently, the Monitor is generally supportive of DDMI's proposition to sell Dominion's diamonds to pay off the Cover Payments, but he took no position about what amount of diamonds should be sold. He pointed out that there is "conflicting evidence" and positions on the method of evaluation of the diamonds and the accuracy or appropriateness of the DICAN valuation and whether the excess diamonds beyond the DICAN valuation should be delivered to Dominion.

[23] I understand DDMI's concerns, however, on balance, I am not convinced that it is appropriate to deviate from the terms of my June 19, 2020 Order. The fact that we now have more information about the recent value of diamonds is actually in favour of keeping the Order in place as it is, as opposed to an adverse change of circumstances that would require an amendment.

[24] Further, the fact that the Stalking Horse Bid and SISP were not ultimately successful in finding a buyer of Dominions' 40% interest in the Diavik Mine does not change the underlying reason to limit the *exception* to the general stay. I understand that presently there is no near future prospect that a cash infusion will be made so that the Cover Payments are repaid by a new purchaser, but this was one of the reasons that I allowed the Dominion share to be held back in the first place.

The Monetization Process

[25] Thanks to the hard work of all parties, most of the details about the sales process for the diamonds have been ironed out between the parties. It is set out in the "Monetization Process" – with Schedules A and B. One remaining issue was the fee that DDMI wants to charge on top of the deduction for interest and other fees. Another is a few tweaks to the waterfall distribution with respect to the surplus from the diamond sales.

The Fees

[26] DDMI seeks a 2.5% fee as a handling, sorting, sales and cash collecting fee. It argued that this is "consistent" with what is charged to third parties for these services. Dominion on the other hand argued that the evidence shows that this fee is too high, many costs associated with the sales of diamonds are fixed, and Dominion would expect that the fees for such services would only be 1%. It is prepared to sell its diamonds with this fee structure. The difference in cost according to DDMI's counsel would be in the range of \$1.8M.

[27] Section 9.4.(c) indicates that "all other reasonable costs and expenses incurred in collecting payment" beyond legal fees and interest can be deducted from the security interest (here the diamond sales). It is reasonable for DDMI to charge a fee, but since Dominion is prepared to do this for 1% vs. 2.5%, it is better for all of the creditors if it is done in the least expensive way. DDMI can elect to do it themselves for 1%, or it can have Dominion sell the diamonds, on the same terms that have been worked out, for 1%. I leave it to DDMI to elect.

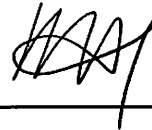
The Distribution Waterfall

[28] The waterfall distribution is found in para 8 of the monetization process (at p. 14.4 – 342 in CaseLines). Many parties had not had a chance to review this final proposed process and had concerns about the distribution proposals. Most suggestions were likely acceptable, but the parties had not had time to agree one way or another. The Monitor had some helpful suggestions but I note that overall, he was not taking a position one way or another on DDMI's application as discussed earlier. I would appreciate it if the parties could make another effort to clear up the waterfall and otherwise, I can hear any discreet issues that remain.

[29] In the meantime, I make the following comments. Firstly, with respect to the diamonds that are to be delivered to Dominion, it agreed that it would keep them secure and segregated for now. Secondly, there was some concern about the wording of para 8(a) about the royalty and tax provision that may be able to be worked out. Similarly, some last minute concerns arose with paragraph 8(c) about the administration costs. There was no concern that once these were paid, the Cover Payments could be made (para 8 (d)). There was then concern about whether any payments should be made to other creditors etc. before being sent to Dominion. I would like to hear more before I decide on these issues one way or another, if they cannot be resolved.

Heard on the 30th day of October, 2020.

Dated at the City of Calgary, Alberta this 4th day of November, 2020.



K.M. Eidsvik

J.C.Q.B.A.

Appearances:

Sean Collins
for the Applicant Diavik Diamond Mines (2012) Inc

Peter Rubin
for the Respondent Dominion Diamond Mines ULC

Kelsey Meyer
for the Monitor

Marc Wasserman and Emily Paplawski
for Credit Suisse AG, Cayman Islands Branch, as Administrative Agent
Under the First Lien Credit Agreement

Brendan O'Neill
for the Washington Group of Companies

Kyle Kashuba
for Ad Hoc Group of Bondholders

John Salmas
for Wilmington Trust, National Association

Mary L.A. BATTERY, Q.C.
for the Northwest Territories

Terrence Warner
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Andrew Astritis
for Public Service Alliance of Canada and its component, the Union of Northern Workers

Joseph Bellissimo
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