

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36

AND

IN THE MATTER OF OTSO GOLD CORP., OTSO GOLD OY, OTSO GOLD AB, and
2273265 ALBERTA LTD.

PETITIONERS

APPLICATION RESPONSE

Application response of: Brunswick Gold Ltd. ("BGL" or the "Application Respondent")

THIS IS A RESPONSE TO the Notice of Application of Pandion Mine Finance Fund LP ("Pandion Mine Finance"), RiverMet Resource Capital LP ("RiverMet"), and PFL Raahe Holdings LP ("PFL Raahe") and, together with Pandion Mine Finance and RiverMet, "Pandion") filed 7 January 2022.

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of NONE of the orders set out Part 1 of the Notice of Application.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of ALL of the Orders set out in Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of NONE of the Orders set out in Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. All capitalized terms shall have the same meaning as set out in the Notice of Application filed 7 January 2022 and Affidavit #1 of Joseph Archibald sworn 7 January 2022 unless otherwise defined herein.

Background

2. BGL is the majority shareholder and an unsecured creditor of Otso Gold.

Pandion Restructuring and BGL Subscription

3. Prior to BGL's involvement in the company, Otso Gold sought refinancing and to secure management expertise to resume production at the Otso Gold Mine, which had been in care and maintenance since 1 April 2019.
4. On 2 July 2019, Otso Gold entered into a Services Agreement, whereby Lionsbridge Pty Ltd. and Westech International Pty Ltd. agreed to provide management and technical services to Otso Gold. Brian Wesson and Clyde Wesson are principals of Lionsbridge and Westech.
5. On 7 October 2019, Pandion and the Wessons, purporting to act on behalf of Otso Gold, entered into the consent & agreement to restructure Otso Gold's debt to PFL Raahe. The key commercial terms of the restructuring agreement included:
 - (a) payments to PFL Raahe of:
 - (i) \$1.56 million in common shares of Otso Gold upon the completion of an up to \$7 million equity raise;
 - (ii) \$11.5 million due in March 2021; and
 - (iii) \$11.5 million due in September 2021;
 - (b) cancellation of gold deliveries to Pandion, their upside participation, and free carry right; and
 - (c) after the payments outlined in (a), the release of PFL's security package.
6. As an arrangement fee for the restructuring of Otso Gold's debt to Pandion, shares of Otso Gold were issued to B & A Wesson Pty Ltd. and C & C Wesson Pty Ltd., entities controlled by Brian Wesson and Clyde Wesson.
7. In the fall of 2020, the Wesson defendants began soliciting BGL to invest in Otso Gold. At the time, Pandion and the Wessons were Otso Gold's two largest shareholders and had effective control of Otso Gold.
8. On 13 December 2020, BGL and Otso Gold entered into a subscription agreement (the "**2020 Subscription Agreement**") and a suite of related documents. The Wessons purported to act on behalf of Otso Gold in the negotiations with BGL.
9. The 2020 Subscription Agreement included a schedule of warranties, which Otso Gold warranted were "true and accurate" and were "not in any respect misleading" as of the date of the agreement and the date of completion. These included several

warranties in respect of the extent of Otso Gold's liability to Pandion, as fixed at US\$23 million, and the nature of Pandion's security.

10. Among other warranties, Otso Gold warranted that the financial disclosure fairly represented its assets, liability, and financial position; included all liabilities, whether actual, contingent, unquantified, or disputed; and was not affected by any fact that made the disclosure unusual or misleading in any respect. Similarly, Otso Gold warranted that all assets used by any group company for or in connection with its business are free from all encumbrances (except as disclosed). Such matters were said to be true and accurate and not in any respect misleading as at the date of completion.
11. Aside from the US\$23 million liability, the Wessons disclosed no liability under the restructuring agreement, or the purported risk its debt would be "reinstated" to many multiples of this liability, either during the negotiations for the 2020 Subscription Agreement or at the time of its entry. Instead, the financial disclosure stated that Otso Gold's liability to Pandion was less than US\$25 million, with no reference to any other alleged contingent liability to Pandion. Likewise, its was expressly stated in Otso Gold's financial statements and management discussion and analysis that its liability to Pandion would be released upon the making of various specified payments which did not include the payments due with respect to any royalty rights (nor were any documents reflecting such security disclosed).
12. Pandion was provided with and raised no issue with these materials in and around the course of the subscription.

BGL's Further Investments and Disclosure Issues regarding the Pandion Loans

13. Following BGL's initial investment in Otso Gold, Pandion and the Wessons sought to induce further investments from BGL.

(a) BGL's Second Investment in Otso Gold

14. The initial purpose of BGL's \$11 million USO financing was to provide Otso Gold with funding to organize drilling at the Otso Gold Mine and to commission a bankable feasibility study at the mine which would be used to attract the necessary bank financing to fund commercial production.
15. While the Wessons had advised that would be completed by June 2021 (drilling) and August 2021 (feasibility study), respectively, Brian Wesson advised on 14 June 2021 that the feasibility study and restart of production would not in fact take place as previously indicated, and in fact could not complete without an immediate further investment from BGL of USD\$11 million, which he recommended be provided through the exercise of the warrants.
16. When BGL proposed that Otso Gold raise further funding through equity investments with warrants, or through unsecured convertible notes, and set out these alternative proposals to Pandion, BGL received no direct response.

17. Instead, the Wessons advised BGL that Pandion was opposed to such financing, and that instead it would be necessary to raise funds by way of BGL immediately converting its existing warrants. At a call on 23 June 2021 between the Wessons and BGL, the Wessons advised that Pandion was opposed Otso Gold taking on additional debt or issuing equity, that it was not otherwise possible to issue further equity because this would involve breaching the rule that the Company could not issue more than 25% of its market capitalisation to a related party, and that it was not possible for Otso Gold to take on additional debt as that would constitute an event of default under the Restructuring Agreement. Indeed, it was at this point that the Wessons disclosed that Otso Gold was already technically in default as it had not paid the interest on a convertible loan note due to Pandion and that Pandion was entitled to reinstate the debt owing to it by the Company to the original amount that was owed by the Company prior to the entry into the Restructuring Agreement (then represented to be USD\$40 million). This was the first time that either position was disclosed to BGL.
18. BGL then sought to ascertain the true position in relation to the Company's financing arrangements with Pandion. So far as BGL was aware at that time from its enquiries:
 - (a) the Restructuring Agreement combined the debts owed to Pandion under a Pre-Paid Forward Gold Purchase Agreement and a Maintenance Loan Agreement, and the USD \$23 million liability was the amount of debt arising under the Restructuring Agreement.
 - (b) under the Royalty Agreement, a royalty was payable to Pandion in the amount of 2.5% of "Net Smelter Returns" for a term of 100 years. The Company also has the right to buy back the existing royalty for a sum of US\$15 million but not after the obligations under the Restructuring Agreement cease to be outstanding.
19. Based on the understanding of the Pandion facility as explained by the Wessons, on 30 June 2021, BGL provided proposals for resolving the Company's funding issues. In particular, BGL proposed it would provide funding by exercising its warrants in the amount of \$11 million and a private placement in the amount of \$5 million at a 25% discount to market price with warrants subject to the following conditions: (i) Pandion and the Company amending the Restructuring Agreement so that the "Pandion Debt is to be confirmed at US\$23 mln and not the original amount of US\$ [40] mln"; and (ii) Pandion and the Company amending the Royalty Agreement so that the Company can buy back the royalty within one year after the repayment of the Pandion debt.
20. Over the next few days, the terms of BGL's investment and whether the conditions sought by BGL in relation to the warrant investment were acceptable were discussed. By email dated 7 July 2021 from Clyde Wesson to BGL, Clyde Wesson stated that "the royalty could not be approved". This was a reference to BGL's condition that the Royalty Agreement be amended. At no stage, however, during

the discussions in relation to whether the royalty buyback in the Royalty Agreement could be given up was the existence of the any security disclosed.

21. Ultimately, the understanding reached between the parties in respect of the warrant investment was reflected in a letter dated 8 July 2021 signed by Brian Wesson and Mr. Joseph Archibald on behalf of Pandion whereby, in general terms:
 - (a) BGL would immediately convert its warrants in order to fund Otso Gold's commercial operations for USD\$11 million;
 - (b) Otso Gold would immediately seek to raise further funds by way of a private placement of up to USD\$5 million;
 - (c) on or before 7 December 2021, Otso Gold would repay USD\$23 million plus interest in full and final settlement of Pandion's loans;
 - (d) Otso Gold would be permitted to borrow for the purposes of repaying Pandion's loans; and
 - (e) the parties would work in good faith to amend the material agreements as necessary to give effect to the letter agreement.
22. While BGL closed on the conversion of its warrants, Pandion subsequently failed or refused to negotiate the agreement formalizing amendments to the material agreements on a timely basis or at all. BGL circulated a draft agreement on 22 July 2021, the day following its conversion, on which it did not receive any comments from Pandion until 16 August 2021. When BGL promptly provided further comments on that draft, Pandion did not respond until 1 September 2021. Ultimately, those negotiations broke down following Pandion's demanding as a term of any amendment the acceleration of the maturity date for its convertible debt from 2023 to 7 December 2021, a significant departure from the framework the parties had negotiated in advance of the letter agreement.

(b) BGL's Third Investment in Otso Gold

23. On 28 September 2021, the Company issued a press release stating that BGL would be injecting a further \$5 million in equity by way of private placement and that BGL first gold pour was expected in October 2021.
24. BGL provided the additional working capital to the Company by way of a private placement of US\$5 million under the terms of a Subscription Agreement dated 19 October 2021 ("**2021 Subscription Agreement**"). This was accompanied by a "Supplemental Disclosure Letter" dated 19 October 2021, signed by Clyde Wesson for the Company. Under Clause 9.2 (Debts Owed by Group Companies), the Company disclosed that it "has Indebtedness owing to Pandion on 7 December 2021 of USD 23 million plus accrued interest under the PPF [Restructuring] Agreement and other documents in place with Pandion." No reference was made

in the Second Subscription Agreement (or the accompanying supplemental disclosure letter) to the existence of the Royalty Lien.

25. Notwithstanding the second subscription, there continued to be delays to the start of production at the gold mine as well as finalisation of the feasibility report.

(c) Failed Negotiations to Discharge the Pandion Debt

26. By October 2021, Otso Gold had still not been able to raise debt finance from banks to discharge the USD\$23 million liability. By this time, only VTB Bank and Sberbank of Russia were potential contenders.
27. However, the Wessons put up obstacles to obtaining funding from VTB or Sberbank. That included:
- (a) the Wessons refusing to participate (or having to be forced to participate) on behalf of the Company in calls with Sberbank and other major European banks; and
 - (b) the Wessons' refusal to cooperate with a due diligence visit by Sberbank to the Otso mine on 28 October 2021. The Wessons failed to provide (and/or delayed in providing) any supporting technical information underpinning critical areas of the mine's operation despite requests from Sberbank and pleas from BGL to engage with such requests.
28. Towards the end of October 2021, the situation was becoming critical. The first gold pour was scheduled for 3 November 2021, however the finalisation of feasibility had been delayed again and the Wessons were requesting additional funds. BGL questioned why the additional funds were required when the US\$5 million private placement had been provided on 19 October 2021 and the projections prepared by management in the early part of October 2021 appeared to indicate that the mine would be self-sufficient from November onwards.
29. By an email dated 30 October 2021, BGL wrote to the Otso Gold's board to propose a non-binding proposal for a bridge financing loan facility to facilitate an additional period of time for a structured and orderly refinancing of its senior indebtedness.
30. In light of the urgency of the situation, on 9 November 2021, BGL met with Pandion at its offices in Greenwich, Connecticut. At that meeting, Mr. Archibald (on behalf of Pandion) stated that payments under the Royalty Agreement would remain secured through the Royalty Lien so that in the case of bankruptcy the royalties would have to be paid first. This was the first time that the existence of the security over the Royalty Agreement had been disclosed. Copies of those agreements were produced to BGL for the first time on 23 November 2021.
31. In light of the position that BGL found itself in, and with no realistic prospect of obtaining financing from third party banks, BGL wrote to the Company on 10

November 2021 to withdraw its offer to provide a bridge loan. BGL then wrote to Pandion on 11 November 2021 to offer additional financing of up to US\$15 million in return for Pandion extending the repayment date on 7 December 2021 for three months, assisting with a transition of management away from Lionsbridge and agreeing to sell its shares to BGL. This proposal was rejected. In a letter dated 14 November 2021, Brian Wesson replied that BGL must raise the entirety of the cash to discharge the USD\$23 million liability.

32. At the same time as the negotiations set out above were ongoing, BGL alleges (and Pandion admits) and the Wessons engaged in a series of clandestine meetings. In particular, during the week of 8 November 2021, Mr. Brian Wesson travelled to the U.S.A. to meet with Pandion. Upon his return to Finland, Mr. Wesson informed certain of Otso Gold's staff that Pandion and others would be visiting the mine but asked that hotel arrangements be made on a no-names basis. Pandion, its mining consultants, SRK Consulting, and David Young and Julien Bosche of Trident Royalties plc, thereafter travelled to Finland to survey the mine and meet with Brian Wesson during the week of 15 November 2021. Company funds were used to cover the hotel expenses of Pandion and the SRK Consulting representatives. These negotiations and visits were not authorised or approved by Otso Gold or its board and ran directly counter to the objectives of the negotiations which were then-ongoing between Otso Gold and Pandion regarding the USD\$23 million liability.

Commencement of Restructuring Proceedings

33. Following disclosure of the security documents, BGL determined that the Wessons had actively refused to disclose details that it must have known about the royalty lien. BGL had repeatedly requested any and all such details from Lionsbridge since June 2021, without getting a substantive response.
34. Moreover, in the course of investigating these matters further, BGL learned that the Wessons were in regular email communication with Pandion throughout 2021 regarding Otso Gold's finances. That communication was despite the Wessons' failure to disclose financial information BGL's nominees to the Otso Gold board.
35. Otso Gold held a board meeting on 24 November 2021. During that meeting, Otso Gold approved the appointment of A&M to provide restructuring services to the Petitioners. At that meeting, the Wessons otherwise advised that they were working on a bid to take over Otso Gold in coordination with Pandion.
36. On November 26, 2021, BGL sent Pandion a letter giving Pandion notice of, among other things, its concerns about non-disclosure of material information relating to the Pandion Loans, and potentially inappropriate coordination between Pandion and Lionsbridge in that regard.
37. Following the rescheduling of another board meeting on 29 November 2021, at the Wessons' request, the board received a letter from Lionsbridge stating that the

Wessons were resigning immediately as officers and directors of Otso Gold and that Lionsbridge was terminating the Services Agreement (in breach of the termination clause therein, which required three months notice by Lionsbridge to terminate). At the same time, A&M personnel discovered various record-keeping and financial irregularities, which were raised to Finnish border control services and resulted in the apprehension of Brian Wesson at the Helsinki-Vantaa international airport, as he attempted to leave the country.

Calculation of Pandion's Debt

38. Pandion now claims that Otso Gold owes it approximately US\$95 million as a result of a default under the Restructuring Agreement. BGL disputes its entitlement to any amount above the \$23 million liability, or as otherwise disclosed to BGL at the time of its initial investment.

Proceedings Against Pandion and the Wessons

39. Otso Gold's indebtedness and contingent liabilities were not fully, fairly, and specifically disclosed to BGL. Rather, the Wessons, purporting to act on behalf of Otso Gold and with the knowledge and encouragement of the Pandion, made representations that were knowingly false or made with recklessness as to their truth or falsity. BGL relied on these representations in entering into the 2020 Subscription Agreement and subsequent investment agreements.
40. BGL has commenced proceedings in Connecticut and British Columbia against Pandion and the Wessons arising from the non-disclosure. In British Columbia, BGL alleges that the Wessons made fraudulent misrepresentations and that Pandion and the Wessons conspired and agreed or acted in combination and in concert and with a common design, to have the Wessons make the fraudulent misrepresentations to induce BGL to invest in Otso Gold while concealing the nature and extent of Otso Gold's alleged liabilities to Pandion. As a result of this scheme orchestrated by Pandion and the Wessons, BGL invested in Otso Gold and sustained damages and loss. BGL further alleges that Pandion and the Wessons unlawfully conspired to, *inter alia*, facilitate the default of Pandion's loan agreements.

Part 5: LEGAL BASIS

41. BGL adopts and relies on the legal basis in the Application Response of the Petitioners dated January 13, 2021.
42. It is not just and convenient to appoint a receiver and manager, particularly in light of Pandion's failure to act in good faith in discharging its rights and obligations under the GSA.
43. The appointment of a receiver is a discretionary remedy. The onus is on the applicant to satisfy the court that it would be just and convenient to appoint a receiver in the circumstances.

Textron Financial Canada Limited v. Chetwynd Motels Ltd.,
2010 BCSC 477 at para. 24 [*Textron*]

44. The appointment of a receiver is an exceptional remedy that should only be used sparingly, with due consideration for the effect of the receivership on the parties, as well as consideration of the conduct of the parties involved.

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,
2009 BCSC 1527 at para. 25

45. The *BIA* and the *PPSA* require, respectively, that “any interested person in any proceedings under [the *BIA*] shall act in good faith with respect to those proceedings” and that all rights, duties, or obligations arising under a security agreement, like the *GSA*, be “exercised or discharged in good faith and in a commercially reasonable manner.”

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 4.2

Personal Property Security Act, R.S.B.C. 1996, c. 359, s. 68(2)

Continuing Legal Education Society of British Columbia, *British Columbia Personal Property Security Act Practice Manual* (November 2021) at §26.1

46. Under these provisions, good faith requires interested parties to not bring or conduct proceedings for an oblique motive or improper purpose and to not lie or mislead with respect to the debtor-creditor relationship. If good faith is lacking (e.g., where the applicant has lied or misled with respect to the status of the loan or the state of the lender-borrower relationship or has orchestrated default of the loan), the court may refuse to appoint a receiver.

CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.,
2021 ABQB 137 at paras. 59 and 61

Royal Bank of Canada v. Chongsim Investments Ltd.
(1997), 32 O.R. (3d) 565 (S.C.)

British Columbia Personal Property Security Act Practice Manual at §26.5

47. The extant allegations of conspiracy against Pandion directly impugn Pandion’s conduct in the lead up to the alleged default under its loan agreements. Pandion is alleged to have acted dishonestly fraudulently in inducing or permitting the inducement of BGL’s investment and thereafter in frustrating Otso Gold and BGL’s ability to satisfy the \$23 million liability, permitting its “reinstatement” to USD\$95 million as currently alleged.

48. Given Pandion's bad faith exercise of its rights and obligations, or pending the determination of such issues, it ought not be permitted to appoint a receiver under the GSA, or at all.
49. Further, and in any event, it is not just and convenient to appoint a receiver in the circumstances.
50. Even where there is a contractual right to appoint a receiver, the statutory requirement that the appointment of a receiver be just and convenient must be assessed. There is no "presumption" that a court-appointed receiver will be ordered; rather, the applicant must still demonstrate that it is appropriate and necessary for the court to appoint a receiver. Thus, although the GSA provides for the appointment of a receiver, this does not create a *prima facie* right to a receivership; rather, Pandion still has the burden of demonstrating that a receivership is just and equitable.

Textron at para. 55;
*BCIMC Construction Fund Corporation v. The Clover on
Yonge Inc.*, 2020 ONSC 1953 at paras. 45-50

51. Where there a fundamental issue relating to the existence or amount of the debt at issue and there are *bona fide* trial issues that cannot be resolved on the documentary evidence alone, it is not just and convenient to appoint a receiver.

*Southern Cone Capital Ltd. v. EmVest Food Products
(Mauritius) Ltd.*, 2017 BCSC 2385 at paras. 34 and 36

52. The balance of convenience militates against the appointment of a receiver in these circumstances. Beyond the questions of Pandion's and the Wessons' conspiracy to conceal Otso Gold's precise liabilities or trigger the purported reinstatement obligation, Otso Gold has raised significant concerns with respect to the calculation and enforceability of its loan agreements. Until such time as those issues has been fully and finally resolved, Pandion should not be permitted to advance any sale of assets or distribution of funds. To do otherwise, and grant the receivership on the terms sought, creates a serious risk that Pandion will be paid funds that it is subsequently found not to be entitled to.


Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Victor Koshkin made December 3, 2021.
2. Affidavit #1 of Calli Ron made January 13, 2022.
3. the pleadings and materials filed herein; and
4. such further and other material as counsel may advise and this Honourable Court may allow.

The Application Respondent estimates that the Application will take 2 hours.

The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

Date: 14/JAN/2022



Lawyer for application respondent
J. Kenneth McEwan, Q.C. / William
Stransky

THIS APPLICATION RESPONSE was prepared by J. Kenneth McEwan, Q.C., of the firm of McEwan Cooper Dennis LLP, whose place of business and address for delivery is 900-980 Howe Street, Vancouver BC V6Z 0C8, Telephone: (604) 283-7740; Fax: (778) 300-9393.