IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pandion Mine Finance Fund LP v. Otso Gold Corp.,* 2022 BCSC 136

Date: 20220128
Docket: S220231
Registry: Vancouver

In the Matter of the Receivership of Otso Gold Corp.

Between:

Pandion Mine Finance Fund LP, Rivermet Resource Capital LP and PFL Raahe Holdings LP

Petitioners

And

Otso Gold Corp.

Respondent

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. January 14, 2022
Place and Date of Judgment:	Vancouver, B.C. January 28, 2022

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Introduction

[1] Otso Gold Corp ("Otso") is a Canadian company that owns a gold mine in Finland. The ownership is indirect. Otso owns a Swedish subsidiary ("Otso AB"), which in turn owns a Finnish subsidiary ("Otso OY"). It is Otso OY that owns the mine. The mine is Otso's only substantial asset. It is an open pit mine that employs more than 130 people together with an array of consultants when it is in operation.

[2] Otso produced gold at the mine between November 2018 and March 2019, and again briefly in November and December 2021. Both times it was obliged to cease operations and put the mine into care and maintenance because it lacked working capital.

[3] Otso is also beset by a dispute between the company and its former managers (collectively, "Lionsbridge"). Lionsbridge withdrew from management at the end of November 2021. Consultants brought in to replace Lionsbridge are critical of the plans made and the steps taken under Lionsbridge's management. Lionsbridge defends its work. This dispute clouds projections of the mine's potential productivity upon which valuations of the mine depend.

[4] The petitioners ("Pandion") collectively constitute Otso's only secured creditor. There is a dispute as to how much Pandion is owed. It may be in the vicinity of US$26 million or exceed US$95 million. Whatever the amount owing, there is no dispute that Otso is in default and is not in a position to pay.

[5] Otso's majority shareholder ("Brunswick") maintains that it was induced by fraudulent misrepresentations and other wrongful conduct on the part of Pandion and Lionsbridge into investing US$27 million in Otso in exchange for shares. Brunswick is advancing these claims in actions recently commenced in Connecticut and in this Court. Pandion and Lionsbridge vigorously deny Brunswick's claims.

[6] Accordingly, Otso is insolvent because it is at present unable to pay its debts as they come due. Otso's financial predicament is compounded by the following:

a) The value of the mine is uncertain;

b) The amount owing to Pandion is uncertain; and

c) Brunswick is suing Pandion and Lionsbridge, and there may be claims by or against Otso arising from or in connection with this litigation;

[7] In early December 2021, Otso sought court protection for the purpose of preparing a proposal to its creditors in three jurisdictions: British Columbia, Sweden, and Finland. It obtained the necessary court orders staying all proceedings against the Otso companies in all three jurisdictions. In this Court, I granted Otso, Otso AB and Otso OY relief under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 [*CCAA*]. I appointed Deloitte Restructuring Inc. ("Deloitte") as Monitor. In a decision indexed as *Otso Gold Corp. (Re),* 2021 BCSC 2531 I extended the duration of the stay to January 14, 2022.

[8] Because Otso's insolvency is the subject of proceedings in three jurisdictions, there is a risk that one court's attempt to manage the insolvency risks being viewed as an interference in matters falling within another court's purview.

[9] On January 7, 2022, Pandion filed an application in the *CCAA* proceeding seeking to terminate the stay of proceedings against Otso and to appoint Deloitte as a receiver of Otso, Otso AB and Otso OY. The application was returnable on January 14. On January 13, Otso conceded that it was unable to obtain the financing required to pay its expenses while it prepared a proposal to its creditors. It abandoned its claim to further court protection in this Court.

[10] The stay of proceedings under the *CCAA* therefore lapsed on January 14. For the time being, court orders staying proceedings against Otso AB and Otso OY in Sweden and Finland remain in effect.

[11] On January 14, 2022, Pandion's application for appointment of a receiver came on for hearing before me. Pandion restated the application as one advanced in a fresh proceeding, and confined it to an application for the appointment of a

receiver of Otso's assets and undertaking (excluding Otso AB and Otso OY). This is the application addressed in these reasons.

[12] Otso does not oppose Pandion's application, but it says that the appointment of a receiver should include certain terms. Brunswick opposes the application.

[13] Having heard Pandion's application on January 14, 2022, I reserved judgment and made an interim order appointing Deloitte as receiver of Otso until my decision on the application could be delivered in these reasons for judgment.

Issues

[14] Having regard to the arguments advanced, Pandion's application raises the following issues:

1. Is Pandion limited on this application to obtaining an interim receivership order?

2. Is it just or convenient that a receiver of Otso be appointed?

3. If so, what are the appropriate terms of a receivership order?

Background

[15] The parties filed more than 2,500 pages of evidence. In their submissions, counsel went into considerable detail with a view to explaining why their respective clients' actions were reasonable, and those of their adversaries were careless and wrongful. Each side accuses the other of bad faith.

[16] There are material conflicts in the evidence. Faced with extensive affidavit evidence untested by cross-examination, and having heard just three days of argument in chambers (counting a hearing without notice on December 3, 2021 and a contested hearing on December 15, 2021, both in the *CCAA* proceeding), I am not in a position to resolve the conflicts. However, to provide context for this decision, it is important that I outline three important disputes.

The issue concerning the mine's prospects

[17] In these reasons, "Lionsbridge" encompasses Lionsbridge Capital Pty. Ltd., its subsidiary, Westech International Pty. Ltd., and their principals, Brian Wesson and Clyde Wesson. The two companies were contracted to provide management services to Otso from 2019 until November 30, 2021. The Wessons were directors of Otso.

[18] In the summer and fall of 2021, Otso was approaching the point of reopening the mine. In the run-up to production, it needed more cash. Brunswick advanced US$27 million in exchange for shares. Brunswick ended up with 67% of the common shares and a majority of the seats on the Otso's board.

[19] It became apparent that Otso would not be in a position to make a substantial payment to Pandion when it became due on December 7, 2021. Brunswick and the directors it had nominated to Otso's board came to suspect that they had been misled as to Otso's financial circumstances and the mine's prospects. They decided that Otso should retain Alvarez & Marsal Europe LLP ("A&M"), to investigate, advise on the restructuring of the company, and effectively assume control of the mining operations. In light of that decision, on November 30, 2021, the Wessons abruptly resigned from the board and Lionsbridge abandoned its management services agreement with Otso.

[20] Otso made its application under the *CCAA* three days later, on December 3, 2021. Following the appointment, A&M determined that a long term mine plan was required. In the *CCAA* proceeding, based on evidence from A&M's managing director, Thomas Dillenseger, I found that a long term mine plan is a prerequisite to the development of a reliable financial projection of the revenues to be expected from the mine; *Otso Gold Corp. (Re)* at paras. 25-26. A reliable financial projection is required to value the mine.

[21] As of January 12, 2022, the long term mine plan was complete. It featured larger gold reserves and higher costs than were anticipated under Lionsbridge's management. A&M expected that the preparation of mine cash flow projections

would require further funding and take another month, until February 14. A&M noted that significant capital expenditures would be required for the purchase of spare parts and essential maintenance would be required in the short term, if the mine was to remain in operation. Mr. Dillenseger described Otso's accounting records as disorganized and decentralized.

[22] The value of the mine is therefore uncertain, because the mine's prospects are uncertain. Resolving the uncertainties to the extent that may be possible will require time and money.

The dispute as to the amount owing to Pandion

[23] At the commencement of the *CCAA* proceeding, Otso acknowledged that it owed Pandion US$25.875 million and advised the Court that the amount might be much larger.

[24] Pandion loaned money to Otso and its subsidiaries beginning in late 2017. From the beginning, the loans were secured and extensively documented. The documentation took various forms, including two Pre-Paid Gold Forward Purchase Agreements, a Net Smelter Returns Royalty Agreement (the "Royalty Agreement"), and a Maintenance Loan Agreement.

[25] In October 2019, Otso and its subsidiaries agreed with Pandion to restructure the loans in an agreement entitled Consent and Agreement to Pre-Paid Forward Gold Purchase Agreement and Maintenance Loan Agreement (the "Consent Agreement"). It consolidated the indebtedness to Pandion into a single US$23 million obligation to be paid in two instalments no later than the "Deferment Termination Date". Clause 2.1 set out the following consequence if the US$23 million payment was not made on time:

> The deferment and consolidation granted pursuant to this Section 2.1 shall automatically terminate on the Deferment Termination Date and the Deferred Payment Amounts, <u>together with all other amounts due on such date under this Agreement and the Transaction Documents</u>, shall be immediately due and payable on such date.
>
> [Emphasis added.]

[26] On December 13, 2020, Otso and its subsidiaries agreed with Pandion to amend the Consent Agreement to provide that the Deferred Payment Amounts would be paid in one lump sum on December 7, 2021, which became the last possible Deferment Termination Date.

[27] The interpretation and legal consequences of clause 2.1 of the Consent Agreement are in issue. By clause 6.2(a), the Consent Agreement is governed by the laws of the State of New York. The balance of clause 6.2 contemplates litigation in the District Court of Helsinki or the U.S. Federal Courts sitting in the City of New York.

[28] Pandion says that the amount owing by Otso pursuant to clause 2.1 is US$95 million. Otso says that Pandion has both understated and overstated its claim. Understated, because the total of the amounts payable by virtue of the words I have emphasized is approximately US$118 million. Overstated, because, under New York law, the emphasized words amount to a penalty that is legally unenforceable as a matter of public policy. Otso has obtained an apparently credible expert opinion from a retired Justice of New York State's Appellate Division providing support for its legal argument. Referring to the sentence quoted above from clause 2.1 as the Fixed-Damages Clause, the expert, James McGuire, states:

> In sum, the Fixed-Damages Clause of the Consent Agreement is an unenforceable penalty provision under New York law. While I am not being asked to opine on whether it is an unenforceable penalty provisions (*sic*), I believe my obligation to the Court requires that I do. …

[29] Mr. McGuire's expert report was delivered to Brunswick on the eve of the hearing of this application. Counsel for Brunswick advises that, while time did not permit a response, she expects to obtain a credible report to the contrary. For present purposes, I assume that the issue is fully arguable on both sides.

[30] Accordingly, the amount owing to Pandion under its security cannot be determined on this application. It will require judicial determination by a court applying the law of New York State.

Brunswick's claims against Pandion and Lionsbridge

[31] On December 23, 2021, Brunswick commenced an action in the Superior Court in Connecticut, naming Pandion and two of its officers as defendants. On January 5, 2022, Brunswick commenced action No. 220017 in the Vancouver Registry of this Court naming the same defendants together with Lionsbridge defendants (the two companies and the Wessons).

[32] The claims advanced by Brunswick in the two actions are essentially the same. According to the Complaint filed in Connecticut:

> … this action concerns a brazen scheme in which Defendant PFL, the largest creditor and major shareholder of a struggling mining company, together with the other Pandion Defendants, sought to secure a favorable return, and potential exit, on their investment by hand-picking new management for the company that would be beholden to them and then colluding with management to fraudulent lure and exploit a new investor, Plaintiff BGL. To induce BGL to invest in Otso Gold Corp. (the "Company"), the Pandion Defendants and Lionsbridge Capital Pty. Ltd., the management services company selected and appointed by the Pandion Defendants, concealed both PFL's security interest in the Company's primary asset, a gold mine in Finland, and the extent of the Company's potential indebtedness to PFL. … After successfully luring BGL to invest, the Pandion Defendants and management then used the threat of massive escalating debt to PFL to extract additional investments from BGL. In less than one year, the Pandion Defendants and their management improperly extracted $27,000,000 in investments from BGL, without disclosing to BGL that the Company's contingent liabilities to the Pandion Defendants were more than three times that amount.

[33] Pandion and Lionsgate deny that there was collusion between them. They maintain that the matters which Brunswick alleges were concealed – Pandion's interest under the Royalty Agreement, and the extent of Otso's indebtedness to Pandion – were disclosed to Brunswick before it invested. They say that, if Brunswick misunderstood what it was getting into when it invested in Otso, it was as a result of its own failure to conduct due diligence.

[34] As already noted, I am not in a position on this application to decide whether Brunswick's claims are well-founded.

Analysis

1. Is Pandion limited on this application to obtaining an interim receivership order?

[35] Pandion seeks appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*], s. 66 of the *Personal Property Security Act,* R.S.B.C. 1996, c. 359, *Supreme Court Civil Rule* 16-1, and the inherent jurisdiction of the court. In argument, counsel focused their attention on s. 243(1) of the *BIA* and s. 39 of the *LEA.* Both statutes contemplate the appointment of a receiver where the court considers it "just or convenient".

[36] Section 244 of the *BIA* requires a secured creditor who intends to enforce security on all or substantially all of the property of an insolvent person to give the debtor notice in a prescribed form. The notice must be given 10 days in advance.

[37] Otso and Brunswick submit that recourse to s. 243 is not available in this case because Pandion has not yet given notice to Otso in the manner contemplated by s. 244 of the *BIA.* They rely on s. 243(1.1) which provides:

> (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
>
> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a receiver before then.
>
> [Emphasis added.]

[38] Otso and Brunswick submit that all that is possible at this stage, prior to delivery of the 10-day notice required under s. 244, is appointment of an interim receiver pursuant to s. 47 of the *BIA.* The difference is that the appointment of an interim-receiver is time-limited. Section 47 provides:

> 47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

> (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
>
> (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
>
> (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

[39] Pandion responds that the Court can and should permit the appointment of a receiver under s. 243(1) on the basis that it is "appropriate" in this case not to be bound by the 10-day notice requirement, as contemplated by s. 243(1.1)(b).

[40] It is not obvious that the 10-day notice requirement under s. 244 of the *BIA* is necessarily relevant if the application is viewed as one brought pursuant to s. 39 of the *LEA*; *Saskatchewan (Attorney General) v. Lamare Lake Logging Ltd.,* 2015 SCC 53 at paras. 32, 49 [*Lamare Lake*]. For the purpose of this application, I will assume against Pandion that its application is brought solely pursuant to s. 243 of the *BIA,* so that the 10-day notice requirement must be addressed.

[41] Absent consent, the 10-day notice requirement can be avoided in two ways: by making an interim order under s. 47; or by a finding that it is appropriate to appoint a receiver immediately or on shorter notice, pursuant to s. 243(1.1)(b). In effect, Otso and Brunswick argue that an interim order under s. 47 is to be preferred, at least in the circumstances of this case. Counsel did not direct me to any cases addressing the choice between an interim order under s. 47 and an immediate order under s. 243(1.1)(b).

[42] Brunswick submits that the manner in which Pandion has brought this application favours a time-limited, interim order rather than an order under s. 243. As noted above, Pandion initially brought its application as an interlocutory application in the *CCAA* proceeding. At the hearing on January 14, 2022, when it was pointed out that the *CCAA* proceeding was about to come to an end with the lifting of the stay pronounced on December 3, 2021 and Otso's abandonment of its claim for relief under the *CCAA*, Pandion undertook to immediately commence a fresh proceeding by petition seeking the relief claimed in its notice of application.

Brunswick submits that this manner of proceeding has deprived it of the opportunity to put up a full defence to the application.

[43] In my view, pursuant to s. 243(1.1)(b), it is appropriate that any receivership order I make should be made under s. 243(1), on terms addressed below.

[44] The discretion conferred under s. 243(1.1)(b) is broad. An inquiry into whether it is "appropriate" to appoint a receiver before the 10-day notice period has elapsed is necessarily a wide-ranging inquiry. There is nothing in the language of s. 243(1.1)(b) to suggest that the inquiry is confined by the possibility of an interim receiver under s. 47.

[45] Court appointment of a receiver under s. 243 (or any other statute) is a drastic and exceptional remedy; *Cascade Divide Enterprises, Inc. v. Laliberte,* 2013 BCSC 263 at para. 81. The purpose of the 10-day notice requirement is to provide a debtor company with the opportunity to negotiate and reorganize its affairs before a receiver is appointed; *Lamare Lake* at para. 53. Provision is made in subsection (1.1)(b) for the 10-day period to be abridged because there may be circumstances in which immediate appointment is appropriate. An obvious example is where there is an immediate risk of dissipation of assets. Parliament has not circumscribed the possible circumstances with limiting language. It has left it to the court's discretion.

[46] In my view, important considerations bearing on the exercise of my discretion under s. 243(1.1)(b) are the extent to which the purpose of the 10-day notice requirement is engaged in this case, the possibility of prejudice to Pandion resulting from the requirement, and the possibility of prejudice to Otso and Brunswick if it is waived.

[47] Otso initially applied to court for protection under the *CCAA* in the face of the looming deadline to replay its indebtedness to Pandion. Otso made the application on December 3, 2021 and the deadline was December 7, 2021. Otso anticipated that steps might be taken by Pandion and was not in a position to pay Pandion what

it was owed. The looming deadline was one of Otso's reasons for seeking court protection.

[48] On December 15, 2021, Pandion made Otso and Brunswick aware of its intention to seek appointment of a receiver on January 14, 2022, and obtained leave to bring such an application, if leave was required, notwithstanding the *CCAA* stay of proceedings. Thus, Otso has had much more than 10 days notice of Pandion's intention to seek appointment of a receiver. Pandion might have given notice under s. 244 at that time.

[49] On January 7, 2022, Pandion served its motion materials for its application returnable on January 14.

[50] Otso is not in a position to repay Pandion, and would not have been in a position to repay Pandion if Pandion had given it notice under s. 244 more than 10 days before the application was heard. In the circumstances of this case, compliance with the 10-day notice requirement would serve no practical purpose. It would just be a formality.

[51] The only reason not to make a receivership order under s. 243(1), as opposed to an interim order under s. 47, would be if Otso or Brunswick were prejudiced by the manner in which Pandion has proceeded. Brunswick says that there is prejudice because Pandion did not file the petition under which it is proceeding with the application in a timely way. While I am not able to say that Brunswick would be on firmer ground, opposing the application, had Pandion filed its petition well in advance of the hearing, it is a fair point that Pandion is seeking a remedy in this action without giving the notice required in the case of a fresh proceeding under the *Supreme Court Civil Rules.* To the extent that there is prejudice arising from the belated commencement of a fresh proceeding, it can be remedied in the terms of an order under s. 243(1).

[52] Accordingly, in my judgment, rather than making a time-limited, interim order under s. 47, it is appropriate to proceed under s. 243(1), making it a term of any

receivership order made that any interested party will be at liberty to apply to set the order aside. On that basis, there is no prejudice to Otso and Brunswick resulting from the truncation of notice. It may well be that a further application will not be required.

2. Is it just or convenient that a receiver of Otso be appointed?

[53] The purpose of a court-ordered receivership, generally, is to preserve and protect property pending the resolution of issues between the parties; *Lamare Lake* at para. 51. The cases identify a long list of considerations to be taken into account in determining whether the appointment of a receiver is just or convenient. In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527 at para. 25, Masuhara J. adopted a list of factors from a leading text, *Bennett on Receivership, 2nd ed.* (Toronto: Carswell, 1999) at p. 130. This approach was affirmed in *Textron Financial Canada Limited v. Chetwynd Motels Ltd.,* 2010 BCSC 477 at paras. 21-55. The factors are:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;
m) the length of time that a receiver may be in place;
n) the cost to the parties;
o) the likelihood of maximizing return to the parties;
p) the goal of facilitating the duties of the receiver.

[54] These factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient; *Bank of Montreal v. Gian's Business Centre Inc.,* 2016 BCSC 2348 at para. 23.

[55] The following considerations favour the appointment of a receiver in this case.

[56] A continuing expenditure of funds is necessary to preserve the value of the mine. Otherwise, it is a wasting asset. Otso does not have the funds required even to keep the mine in "care and maintenance" mode. It has been unable to find a lender in the context of the *CCAA* proceeding. Brunswick is unwilling to inject further equity. Pandion is willing to fund the necessary expenditure in the context of a receivership, but not otherwise.

[57] Appointment of a receiver will facilitate preservation and the orderly marketing of the mine for the benefit of all of Otso's creditors, and perhaps even its shareholders. Pandion is the party with the greatest economic stake. It has first call on the assets, it is not clear that there is sufficient value that it will be paid in full, and the value of its security is deteriorating. It is the fulcrum creditor. Moreover, Pandion has contracted for the right to appoint a receiver.

[58] There are only two ways out of the present predicament. If the amount owing to Pandion is resolved in Otso's favour so that Pandion can be paid out, it is conceivable that Brunswick may come up with the necessary funds or another equity investor may be found. Otherwise, the mine must be sold. Either way, the appointment of a receiver will facilitate matters by stabilizing the situation. It will prevent the assertion of lawsuits against Otso without leave of the court. The likely alternative is a free for all of litigation and a wasting asset.

[59] A court-appointed receiver is objective and neutral, characteristics of particular importance in a case involving competing claims and factual disputes. The receiver may seek assistance from the court. In the context of a receivership, the court may give directions for the resolution of contentious issues.

[60] As noted above, Otso does not oppose appointment of a receiver *per se*, although it seeks terms I will address below.

[61] Brunswick submits that appointment of a receiver must be refused because Pandion lacks good faith. It is true that good faith is required of an applicant for a receivership order under s. 243; *BIA,* s. 4.2. Brunswick submits that:

> 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 [and] fraudulently in inducing or permitting the inducement of [Brunswick's] investment and thereafter in frustrating Otso gold and [Brunswick's] ability to satisfy the $23 million liability, permitting its "reinstatement" to USD$95 million as currently alleged.

[62] Brunswick's allegation that Pandion engaged in a conspiracy is disputed. I am unable to determine on this application whether it is well founded.

[63] I cannot find that Pandion is pursuing its claim against Otso and seeking appointment of a receiver in bad faith. Whether or not Pandion is liable to Brunswick, it is undisputed that Otso owes more than US$25 million to Pandion. It is undisputed that Pandion has the status of a secured creditor.

[64] I conclude that it is just and convenient that a receiver be appointed.

3. If so, what are the appropriate terms of a receivership order?

[65] The starting point is the model receivership order established pursuant to Practice Direction 47. The parties' submissions require consideration of modifications to the model order under the following heads:

a) Inclusion of choses in action in the receivership;

b) Claims against Otso;

c) Resolution of the amount owing to Pandion;

d) Marketing of assets; and

e) Other terms.

a) Inclusion of choses in action in the receivership

[66] The model order extends to "all of the assets, undertakings and property" of the debtor, including choses in action. Clause 2(j) of the model order authorizes the receiver to:

> initiate, manage and direct all legal proceedings now pending or hereafter pending (including appeals or applications for judicial review) in respect of any of the Debtors, the Property or the Receiver, including initiating, prosecuting, continuing, defending, settling or compromising the proceedings.

[67] Otso initially took the position that the receiver should not be appointed over choses in action of Otso as against Pandion, Lionsbridge, or any of its former directors or officers. In oral argument, it modified its position to submit that the receiver might be appointed over the choses in action, reserving to the parties' liberty to apply.

[68] Choses in action belonging to Otso should be realized for the benefit of Otso and its creditors. The receiver should be afforded an opportunity to investigate and report on any choses in action it might discern. If the receiver chooses to pursue a claim on Otso's behalf, the model order permits it to do so. As an independent officer of the court, the receiver can be trusted to take such steps. However, it is easy to imagine that Pandion might choose not to fund pursuit of a chose in action that other interested parties might wish to pursue, and that the receiver might be impaired in its ability to pursue such claims.

[69] It will be a term of the order that, if the receiver chooses not to pursue a chose in action that an interested party believes should be pursued, that party will be afforded a reasonable opportunity to seek the court's direction. The court might

allow the interested party to pursue the claim in Otso's name, on appropriate terms such as those contemplated, in the context of a bankruptcy, by s. 38 of the *BIA*, or make such other order as seems appropriate for the realization of the claim.

b) Claims against Otso

[70] Clause 2(j) of the model order, quoted above, extends to claims against Otso. The receiver may defend, settle, or compromise such claims. Clause 8 is also important, because it stays actions against Otso without the receiver's consent or leave of the court, except for the filing of a proceeding to prevent the tolling of a limitation period.

[71] One of Brunswick's concerns, articulated in oral argument, is that Otso itself may be liable under the various agreements documenting Brunswick's investment in respect of losses flowing from defaults on the part of Lionsgate and Pandion. Brunswick says that it is not just the majority shareholder but also a contingent creditor of Otso. Accordingly, it may wish to apply to court to lift the stay of actions against Otso, perhaps in the context of its actions against Pandion and Lionsbridge.

[72] The stay afforded under clause 8 of the model order is one of the advantages of the receivership. It contemplates further applications to court, as may be necessary. No further provision is necessary.

c) Resolution of the amount owing to Pandion

[73] The amount of money owing to Pandion is disputed and the nature of the dispute is such that it will require a judicial determination. It should be a term of the receivership order that the receiver or any interested party may seek directions to facilitate early resolution of this question by this Court or another court.

d) Marketing of assets

[74] Otso and Brunswick submit that Otso's assets – ultimately, the mine itself – should not be marketed until the amount owing to Pandion is settled. Brunswick submits that there is "a serious risk that Pandion will be paid funds that it is subsequently found not to be entitled to".

[75] I disagree that the marketing of Otso's assets should be postponed. Given the amount in issue and jurisdictional uncertainties, resolution of the amount owing to Pandion may take some time. In the meantime, Pandion will be bearing the costs of the receivership. Pandion is admittedly owed more than US$23 million as a secured creditor, and has an arguable claim that it is owed US$95 million. There is a risk that Pandion is under-secured, and the mine is a wasting asset. There is a real risk of unfairness to Pandion if it is held up in its ability to recover its debt indefinitely.

[76] Brunswick's stated concern that Pandion may be paid funds that it is subsequently found not to be entitled to is without substance. Brunswick is protected by standard terms of the model order requiring court supervision of sales and distributions. Clause 2(l) of the model order requires the receiver to seek court approval of asset sales exceeding stipulated thresholds. I fix the thresholds at $100,000 for a single transaction, or $1 million in the aggregate. Clause 12 of the model order requires the receiver to hold funds received through the sale of assets and not to pay them out except by court order.

e) Other terms

[77] Clause 23 of the model order requires me to fix a borrowing limit for funding of the receivership. Based on Otso's cash flow projections, I fix the limit at $3.5 million.

Disposition

[78] For these reasons, I order that a receiver be appointed on the terms of the model receivership order with the following additional terms:

a) The receiver will establish a Service List as provided in the interim order made on January 14, 2022;

b) The receiver will inform parties on the Service List if the receiver chooses not to pursue a chose in action belonging to Otso, and if any interested

party believes the chose in action should be pursued, that party may apply to this Court for directions;

c) The receiver or any interested party may apply to this Court for directions to facilitate early resolution of the amount owing to Pandion by this Court or another court;

d) The thresholds for Court approval under clause 2(l) are set at $100,000 for a single transaction, or $1 million in the aggregate;

e) The borrowing limit under clause 23 is fixed at $3.5 million;

f) Any interested party may apply to vary or set aside this order.

[79] I am seized of future applications in connection with this receivership.

"Gomery J."