Date of Release: February 4, 1993 NO. 143440/92

(In Bankruptcy)

VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF

WESTAR MINING LTD.

REASONS FOR JUDGMENT

OF

THE HONOURABLE MR. JUSTICE B.D. MACDONALD

(IN CHAMBERS)

Dates and place of hearing:	January 29 and February 1, 1993 at Vancouver, B.C.
Counsel for the applicants: (Greenhills Workers Association and Elk Valley Industries Ltd.)	Frank G. Potts and Angela Thiele
Counsel for the Trustee in Bankruptcy: (Arthur Andersen, Inc.)	Digby Leigh and D. Hobbs
Counsel for Fording Coal Limited:	Edward C. Chaisson, Q.C. and D.G. Batchellor
Counsel for the Monitor: (BDO Dunwoody Ward Mallette Inc.)	Ross D. Ellis
Counsel for 13 trade creditors:	Greg J. Gahlen
Counsel for C.P. Rail:	R. Lonergan and M. Fitch

The Greenhills Workers Association (G.W.A.) and Elk Valley Industries Ltd. (Elk Valley) apply on separate motions to set aside the sale by the Trustee of the bankrupt estate of Westar Mining Ltd. (Westar) of the Greenhills mine to Fording Coal Limited (Fording). Fording's offer of $33 million, payable in cash on closing, together with an additional sum in excess of $3 million for coal inventory and supplies, was accepted by the Trustee with the approval of the

Inspectors on December 2, 1992. The sale was closed on December 4, 1992.

There are five Inspectors of the bankrupt estate of Westar. Three can be regarded as representatives of the Bank of Montreal, which is by far the largest unsecured creditor (some $250 million). The fourth Inspector is a nominee of the provincial government, and the fifth a representative of C.P. Rail. Since Fording is a subsidiary of C.P. Rail, the fifth Inspector quite properly took no part in their consideration of the two competing offers which were in the hands of the Trustee by December 1, 1992.

The two motions under consideration seek various relief:

(a) a requirement that the Trustee disclose details of all offers received for the Greenhills assets;

(b) obliging the Trustee to hold a meeting of creditors to enable them to vote on the Trustee's decision to accept the Fording bid;

(c) an order under ss. 37 and 119 of the ***Bankruptcy and Insolvency Act***, S.C. 1992, c. 27 (the Act), revoking the decision of the Trustee and the Inspectors to sell the Greenhills assets to Fording and requiring the reversal of that sale; and

(d) an order under s. 37 of the Act requiring the Trustee to advertise for fresh tenders for a reasonable period.

Whatever the precise relief sought, the object of the applicants is to set aside the sale by the Trustee to Fording of the Greenhills assets. Fording describes Elk Valley as a "rejected bidder," and paints G.W.A. with the same brush because of the latter's joint venture agreement with Elk Valley to acquire a 15% to 25% interest if Elk Valley became the successful purchaser of the Greenhills assets. Clearly, the interests of G.W.A. extend far beyond the position of its members as creditors of this bankrupt estate.

For example, when G.W.A. became aware of Fording's interest in the Greenhills assets in late November of 1992, following the collapse of the Luscar offer (which the Trustee and the Inspectors had accepted after the first round of tenders), it wrote to Fording as follows:

"It appears you have become interested in Greenhills ... we feel you should be advised of our position.

We are strongly committed to employee ownership. We believe this is the only way Greenhills is viable. It is clear your philosophy does not include true employee involvement through ownership. As a result, it will be very difficult, if not impossible, to reach any agreement.

You may wish to consider this in your deliberations."

In the face of such an ultimatum, it is perhaps not surprising that one of the reasons advanced by Fording for insisting on a prompt closing, if its offer for the Greenhills assets was accepted, was to avoid the application of pending changes in provincial labour legislation which would have obliged it to assume the collective agreement between Westar and G.W.A. and claims estimated at $20 million thereunder. As Fording states forthrightly in opposition to these motions, it would have been prepared to pay much less (or would not have bid at all) if it had been a condition of the sale that Fording "inherit" that collective agreement.

The attack of the applicants on the sales process undertaken by the Trustee after its appointment on August 31, 1992, and approved by the Inspectors on September 22, 1992, immediately following their election at the first meeting of creditors, can be summarized as follows:

1. The Trustee's fundamental mistake was to allow only eleven days between the first advertisement that Westar's two mines were for sale and the obligation to post $50,000 refundable deposits for the opportunity to gain access to information relating to each mine.

2. Although the stay granted in these bankruptcy proceedings in respect of the Balmer mine expired on September 24, 1992, the Greenhills stay extended and that mine continued to operate until October 30, 1992. There was no need to sell both mines on such a "short fuse."

3. Against that background, the decision of the Trustee and the Inspectors to limit the second stage of the tender process for the Greenhills assets to only 7 days (November 23 to December 1, 1992) and to those who made the initial $50,000 deposit during the first stage, together with others (such as Fording) who had expressed interest on the collapse of the Luscar offer, is simply unreasonable.

In their reply to the submissions of the respondents, the applicants concede that if this court regards the exposure of a specialized asset such as the Greenhills mine to the market for a total of only 18 days as reasonable, then their applications must fail, because there is no suggestion here of fraud or bad faith on the part of the Trustee or the Inspectors.

While I do not, for the reasons discussed below, accept the statement that potential purchasers of the Greenhills assets were aware of their availability for purchase for only 18 days, I have concluded that in all the circumstances existing at the times of the several decisions of the Trustee and of the Inspectors following the receiving order, those decisions were reasonable and ought not to be interfered with by the court.

Much argument was advanced by the applicants regarding the standard of conduct to which a Trustee must be held on applications under s. 37 of the Act. I do not consider the analogies to sales by mortgagees under a power of sale or to court supervision of receivers to be particularly helpful. We are concerned here with a statutory scheme which clothes the Trustee with the authority to sell so long as he has the approval of the Inspectors.

Admittedly, the blessing of the Inspectors is not a bar to an application under s. 37, which provides:

"37. Where ... any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order ... as it thinks just."

But the broad sweep of that provision (and a similar provision relating to review of Inspectors' decisions) has been confined by decisions of the courts.

An example of such a decision is ***Re Groves-Raffin Construction (No. 2)*** (1978), 28 C.B.R. 104 (S.C.B.C.) at p. 112:

"In considering the conduct of a trustee ... the scheme of the Act is to allow

the trustee to administer the estate under the supervision of the inspectors without interference unless there has been an excess of power, fraud, a lack of bona fides, or unless the actions of the trustee and the inspectors are unreasonable from the standpoint of the good of the estate."

It is only the latter consideration (unreasonableness) which has been placed in issue here.

I accept the Trustee's submission that the preceding four months of C.C.A.A. proceedings involving Westar had served to alert the international coal industry of the possibility that Westar's two mines might shortly be marketed. I also endorse the decision of the Trustee, as later ratified by the Inspectors, that the coal industry was the only realistic market for Westar's two mines within a time frame which would enable their sale as going concerns. Westar had a Korean partner in the Greenhills mine, and at least two Japanese corporate shareholders.

The tender process initiated by the Trustee immediately on its appointment, and subsequently approved by the Inspectors, was well known to both applicants from the outset. Neither of them raised any objection to the procedure at the time or until it became apparent that Luscar was the successful bidder for the Greenhills assets. That opposition by G.W.A. faded with Luscar's offer, only to be renewed when Elk Valley's tender during the second stage of the process was rejected.

In fairness to the applicants, they did warn the Trustee that Elk Valley would require considerable time (now estimated at a minimum of 6 weeks) to prepare an unconditional offer. The financing on which Elk Valley was counting up to the final days of the first stage of the tender process evaporated only hours before the October 28, 1992 deadline. It was obliged to "start from scratch" at stage two, and seven days was obviously inadequate. But the Trustee and the Inspectors rightly concluded that they could not afford to wait for Elk Valley.

Even the applicants concede that the Trustee and the Inspectors had no choice when faced with Fording's cash offer (incidentally, a slightly better offer than the one previously accepted from Luscar) on the one hand, and Elk Valley's "subject-to-everything" offer on the other. I commented during argument on these motions, and I repeat, that Elk Valley's offer was no more than a 45-day option to purchase for a consideration of only $10.00.

An option for that period, commencing December 1, 1992 would delay completion of any sale into 1993 and result in the purchaser being unable to compete for contracts for the coal year commencing April, 1993. That very pressure was another reason for Fording's requirement for an early closing. That, and the desire to avoid pending changes in provincial labour legislation, were not the only two reasons for haste in completing a sale.

It was in the interest of all concerned that the Greenhills operation resume as soon as possible. As the province submitted during efforts preserve the Luscar sale in mid-November, the credibility of Greenhills as a source of supply (and, indeed, of this province as a reliable supplier of coal) was in jeopardy.

I pause to comment on the argument of the applicants that the sale to Fording was improvident, based upon a going concern valuation for the Greenhills mine produced by Westar during the C.C.A.A. proceedings ($80 million for Westar's 80% interest) and the reported willingness of Fording to pay in excess of $60 million for the Greenhills mine some two years earlier. The mine is worth only what a willing purchaser will pay for it at a given time. The uncertainties of the international coal market need no review here. Recent history in this province speaks for itself. The ability to compare, at this

stage, the Fording offer with Luscar's (only a month earlier) provides adequate evidence of real market value.

Much was made by the respondents of the fact that it is now too late to put the parties to the sale (Fording and the bankrupt estate of Westar) back into their respective positions before the sale. That might not be so if there were another purchaser in the wings ready to close a sale, but Elk Valley is a long way from that position.

Even though I am prepared to approach these applications as if they had come on before me for hearing in mid-December of 1992 (the respondents insisted that these applications should be argued before me, and I was not then available), I have come to the conclusion that these applications are too late. Based primarily as they are on the Trustee's original decision to allow only 11 days for interested parties to provide a $50,000 refundable deposit as a key to access necessary information, these applications should have been brought during the initial stage of the tender process, particularly after the Balmer stay was extended to October 30, 1992 to match the situation at Greenhills.

The decision to market both mines at the same time, despite the difference in the initial period of the bankruptcy stays; the weeding out of curiosity seekers by the $50,000 deposit requirement; the period of time between advertising (along with specific targeting of the coal industry) in mid-September and the October 28, 1992 closing date for tenders; the decision to limit the second round of the tender process to those expressing interest during the first round or following the collapse of the Luscar sale, are all reasonable in light of the circumstances which existed at the time those decisions were made.

Furthermore, those decisions of the Trustee were all endorsed by the Inspectors. That is the scheme of the Act, with which this court should interfere only for sound reasons. Such reasons do not exist here.

A number of authorities were cited by counsel in the course of argument. I mention some of them now.

Re Pachal's Beverages Limited (1969), 13 C.B.R. 160 (Sask. C.A.) at pp. 164-5:

"In the absence of some basis on which to question the reasonableness and soundness of the inspectors' decision ... the applicant did not discharge the onus upon it. ...

* * * *

The whole scope of ... the Act is that the governing authority shall be the inspectors and not the Court. If, however, they act ... not for the benefit of the estate, the court may interfere, but otherwise the policy of the Act is to leave the matter entirely in their hands. (See, ***Re J.L. Jacobs & Co.*** (1941), 22 C.B.R. 208 at p. 214).

It is fundamental ... that the inspectors are the proper ones to pass upon matters of this kind affecting the interests of the creditors, and that their actions should not be interfered with by the Court unless there is involved ... some lack of*bona fides* or ... it is clearly unreasonable from the standpoint of the good of the estate. (See, ***Re Niagara Crushed Stone*** (1961), 2 C.B.R. (N.S.) 271 at p. 275)."

Re Adam Burwash Ltd. (1977), 24 C.B.R. 81 at p. 82:

"The court will not lightly interfere with a decision taken by the inspectors within the ambit of their authority . ... The reason for overriding a decision of the inspectors must be very cogent indeed. (See, ***Re Goldberg*** (1927), 8 C.B.R. 463 at 464)."

Re Katz (1991), 6 C.B.R. (3d) 211 (Ont. Ct. of Justice) at p. 214:

"... the obligations of a trustee in bankruptcy are similar to those of a court-appointed receiver."

I share the concern of the learned authors of ***Bankruptcy And Insolvency Law of Canada*** (Houlden and Morawetz) 3rd ed. (revised) at pp. 1-86, when they question whether that statement is correct, since a trustee is required to obtain the approval of the inspectors to a sale whereas a court-appointed receiver is not.

Cuckmere Brick v. Mutual Finance, [1971] 1 Ch. 949 (C. of A.).

G.W.A. relies heavily on this case as establishing the duty on a mortgagee selling under a power of sale in a mortgage, and argues that a trustee in bankruptcy must meet a higher standard. However, that is not a bankruptcy case dealing with the duties of a trustee in bankruptcy operating under the Act. Indeed, the reference is to a "trustee for sale," whatever that may be. I have already rejected any analogy between a mortgagee exercising a power of sale and a trustee in bankruptcy.

Tse Kwong Lam v. Wong Chit Sen, [1983] 1 W.L.R. 1349 (Privy Council).

This is another power of sale case, complicated by the fact that the purchaser was related to the mortgage.

G.W.A. raised the fact that C.P. Rail had applied for the receiving order in this case and nominated the Trustee, while its subsidiary (Fording) ultimately purchased the Greenhills assets. I reject any suggestion that the Trustee bears a "heavy onus" to show that it "acted fairly and obtained the best price" in these circumstances.

C.P. Rail presented the bankruptcy petition in these proceedings at my request during the final stages of the C.C.A.A. proceedings commenced by Westar in May, 1992. The identity of the proposed Trustee was disclosed and approved before that petition was filed. C.P. Rail's nominee as inspector did not participate in the decision to accept the Fording offer. This is not a case where the court is called upon to protect the rights of a mortgagor in extra-judicial sale proceedings where suspicious circumstances are disclosed.

The proper test, in the absence of any allegation of fraud or bad faith, is whether the decision complained of is unreasonable, from the perspective of the good of the estate, in all the circumstances which prevailed at the time of the decision. If not, the court should not interfere with a decision of the trustee which has been authorized by the inspectors.

In conclusion, I find no fault with the Trustee's sale plan, as approved by the Inspectors, at either the first or second stage of the tender process. In the circumstances, and in face of the time constraints under which the

Trustee was operating at the time, its actions were not unreasonable. Indeed, they are not open to criticism as business decisions from any perspective. I expressly find the initial tendering process, which drew no complaint from the applicants until Luscar became the successful tenderer (temporarily as it turned out), to have been adequate in light of the C.C.A.A. proceedings which preceded that process. There was an adequate exposure to the market. With the approval of the Inspectors it would even have been open to the Trustee to sell the Greenhills assets by private sale, particularly at the second stage of the process and against the background of the earlier Luscar offer.

In the absence of an alternative source of cash, Fording cannot be returned to its pre-purchase position. Some $10 million in taxes have been paid or secured. $18 million has been diverted to release the charge created by this court to secure trade suppliers during the C.C.A.A. stay. To require a fresh tender process at this time would jeopardize the availability of payment to those suppliers, or at the very least keep them out of those monies for a further period without any reasonable prospect of compensation in interest.

These applicants both participated in the bidding process and raised no complaint until they were unsuccessful. Fording is a*bona fide* purchaser for value at a price established by market exposure. It is entitled to rely upon the scheme of the Act and the authority of the Inspectors unless there is some "very cogent" reason for this court to interfere. No such reason exists here.

JUDGMENT

The applications of G.W.A. and Elk Valley to set aside the sale of the Greenhills assets to Fording are dismissed, with costs of one application (two days of hearing) to each respondent appearing and making submissions.

"B.D. Macdonald, J."

Vancouver, B.C.

February 4, 1993.