

Citation: Greka Energy Corp. v. Northsun  
Energy Ltd.  
2001 YKCA 7

Date: 20010716  
Docket: YU00462  
Registry: Vancouver

**COURT OF APPEAL FOR THE YUKON TERRITORY**

**ORAL REASONS FOR JUDGMENT**

Before:

The Honourable Madam Justice Ryan  
The Honourable Madam Justice Saunders  
The Honourable Madam Justice Levine

July 16, 2001

Vancouver, B.C.

BETWEEN:

**GREKA ENERGY CORPORATION**

PETITIONER  
(RESPONDENT)

AND:

**NORTHSUN ENERGY LIMITED**

RESPONDENT  
(APPELLANT)

J.E. Gouge, Q.C. and  
D.M. Bain

appearing for the Appellant

G.R. Thompson

appearing for the Respondent

[1] **RYAN, J.A.:** Northsun is a Yukon corporation, engaged in the oil and gas exploration and production business. Northsun owns 99% of the issued and outstanding shares in Northsun Italia S.p.A. ("NIS"), an Italian corporation owning oil and gas exploration rights in Italy. An Australian subsidiary of Northsun owns the remaining 1% of the shares of NIS.

[2] Greka is a Colorado corporation with its principal place of business in the state of New York. Greka is also in the business of oil and gas exploration and production.

[3] On 30 November 2000, Northsun and NIS entered into a loan agreement with Greka (the "Loan Agreement") so that Northsun could repay a debt of approximately \$588,000.00 to an unrelated party.

[4] The Loan Agreement contains the following terms, among others:

- Recital A states that the parties have an agreement in principle for Greka to purchase all of the stock of Northsun.
- Paragraph 2 states that a loan was made available in the amount of U.S. \$586,993.05 with accrued interest since 1 December 2000 at a rate of "Libor" [the acronym for "Lender Inter Bank Offered Rate"] plus 3% per annum.
- Paragraph 3 requires Northsun to use the funds specifically to pay the debt to the unrelated party.
- Paragraphs 4.1 and 4.2 provide as follows:

4. Term of Loan and Security

4.1 The funds drawn down by the BORROWER under the Loan shall be repaid in full together with interest as provided in 5 below on or before a repayment date of December 21, 2000. At the LENDER'S sole and exclusive option, Lender may extend the repayment date to December 31, 2000 and for two additional 30-day periods thereafter. Any such repayment date beyond December 21, 2000 is at the LENDER'S complete discretion and BORROWER shall not presume such extension unless it is received in writing from the LENDER.

4.2 Should any part of the Loan drawn down by the BORROWER and interest thereon remain unpaid as of the December 21, 2000 repayment date or any other repayment date as described in 4.1, subject to the prior receipt of shareholder approval in accordance with the Business Corporations Act (Yukon), the LENDER shall have either of the following rights solely and exclusively at the LENDER'S discretion and option:

a) The LENDER shall have the right to refund all monies paid to date by the BORROWER and/or NIS and the BORROWER hereby jointly and severally undertakes to thereupon convey and assign with the utmost despatch [*sic*] their interest in the Scheduled Property to LENDER.

b) The LENDER shall have the right to convert the Loan into the greater of 1) 18,000,000 Common Shares in the BORROWER or NIS or 2) 200% of the total issued and outstanding shares on a fully diluted basis of the BORROWER and/or NIS as of the repayment date.

- The "Scheduled Property" is defined as the participating interests held in Italy which the chambers judge understood to be the sole oil and gas exploration assets of Northsun and NIS in Italy.
- Pursuant to paragraph 7.4 of the Loan Agreement, Northsun and NIS agreed to appoint a representative of Greka to the Board of Directors of Northsun (to be one of six directors) until the loan was repaid.

[5] On 30 November 2000, the same date that the Loan Agreement was signed, Northsun and NIS signed a document entitled "Term Sheet". The Term Sheet is the agreement in principle referred to in the Loan Agreement providing the terms of Greka's purchase of the shares of Northsun and its affiliated companies. The Term Sheet would not be binding until the signing of a share purchase agreement.

[6] Northsun did not repay the loan by 21 December 2000 and there were no extensions for repayment. Greka commenced negotiations to finalize its share purchase as contemplated by the Term Sheet and Greka loaned Northsun a further \$20,000.00 to negotiate the share purchase agreement.

[7] On 23 February 2001, Energia della Concordia ("Concordia"), a subsidiary of an Italian company known as CPL, approached Northsun with a proposal to purchase shares of Northsun and its affiliated companies.

[8] On 28 February 2001, Northsun entered into an agreement with Concordia, whereby a significant percentage of the same oil and gas exploration rights in Italy defined as the "Scheduled Property" in the Loan Agreement with Greka would be transferred to Concordia (the "CPL Agreement"). The CPL Agreement was drafted so that an initial payment of U.S. \$621,000.00 (the first advance) would be used to pay off the

Greka Loan Agreement. Then, upon receiving the authorization of the Italian Ministry involved, a further U.S. \$500,000.00 (the second advance) would be paid to Northsun.

[9] On 28 February 2001, by fax letter Northsun terminated the negotiations with Greka for the share purchase, which letter purported to terminate the Loan Agreement and the Term Sheet.

[10] On 1 March 2001, CPL advanced to Northsun the money necessary to repay the loan to Greka. On 2 March 2001 Northsun sent a bank draft to Greka in the amount of U.S. \$620,705.85 as repayment of the Loan Agreement, which was delivered 5 March 2001. At the same time (2 March 2001) Northsun requested the return of the share certificates of NIS being held by Greka. To date, Greka has retained the share certificates and has not cashed the bank draft.

[11] On 2 March 2001, by fax letter Greka informed Northsun that the Loan Agreement was in default and Greka wished to exercise its option to convert the loan into shares of Northsun and NIS as of 21 December 2000.

[12] The Loan Agreement between Greka, Northsun and NIS provided that it was governed by the laws of the State of New

York and the jurisdiction of the courts of the State of New York.

[13] On 5 March 2001, Greka initiated an action before the United States District Court for the Southern District of New York seeking specific performance of Article 4.2 of the Loan Agreement. On the same date, 5 March 2001, Greka obtained a temporary restraining order, which was followed by a hearing on the motion for a preliminary injunction on 13, 22, 23 and 26 March 2001.

[14] On 3 April 2001, His Honour Judge Greisa granted Greka a preliminary injunction.

[15] On 6 April 2001, Northsun filed a notice of appeal from the New York Injunction with the United States Court of Appeals for the Second Circuit (the "Second Circuit Appellate Court").

[16] On 10 April 2001, Greka filed a petition in the Supreme Court of the Yukon Territory, seeking various remedies pursuant to section 243 of the *Yukon Corporations Act*. On 17 April 2001, Greka filed a further petition in the Supreme Court of the Yukon Territory seeking the appointment of an interim receiver-manager of Northsun. On 27 April 2001, Greka's application for an appointment of a receiver-manager

was argued in chambers and the Chambers Judge reserved judgment.

[17] On 31 May 2001, Northsun's appeal of the New York Injunction was argued before the Second Circuit Appellate Court and on 4 June 2001, the Second Circuit Appellate Court vacated the New York Injunction with reasons to follow. The reasons for judgment of the Second Circuit Appellate Court are still outstanding.

[18] On 5 June 2001, a copy of the order of the Second Circuit Appellate Court was delivered to the Chambers Judge. On 12 June 2001, reasons for judgment were issued by the Chambers Judge.

The Yukon Legislation

[19] Section 243(1) of the ***Yukon Business Corporation Act*** ("the Act") provides that "a complainant may apply to the Supreme Court for an order under this section."

[20] Section 240 defines "complainant" as:

- (a) a registered holder or beneficial owner, or a former registered holder or beneficial owner, or a security of a corporation or any of its affiliates.
- (b) a director or an officer or an former director or officer of a corporation or any of its affiliates, or

- (c) any other person who, in the discretion of the Supreme Court is a proper person to make an application under this Part.

[21] Section 243(2) and (3) of the Act provide:

(2) If, on an application under subsection (1) the Supreme Court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates affects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Supreme Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Supreme Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager;

...

The Petition

[22] In its petition to the Court Greka alleged the following acts or omissions of Northsun to be unfairly prejudicial to Greka:

- (a) taking steps to defeat [Greka's] beneficial interest in [Northsun].
- (b) attempting to convey, transfer or encumber stock and assets in which [Greka] holds a beneficial interest;
- (c) attempting to convey, transfer or encumber stock or assets in which [Greka] holds a beneficial interest in contravention of a preliminary injunction of the United States District Court; and
- (d) attempting to convey, transfer or encumber stock or assets in which [Greka] holds a beneficial interest, and in doing so, neglecting or failing to obtain the approval of the Board of Directors of [Northsun], and in particular, neglecting or failing to obtain the approval of the director Richard A. L'Altrelli.

[23] It should be noted here that the petition contained no allegation that Northsun had acted prejudicially in entering into an agreement with Concordia while Greka was "negotiating in good faith."

[24] The first issue for the Chambers Judge was whether Greka had standing as a complainant under the Act. The Chambers Judge found that Greka had standing on the basis that it was a creditor of Northsun. The Chambers Judge observed that not every creditor no matter how remote from the corporation's

business ought to have standing. He found that the Term Sheet (the agreement in principle to purchase Northsun's shares) was executed as an express condition of Greka's entry into the loan agreement. The loan agreement gave Greka an expectation of payment on December 21, 2000. Failing repayment of the loan Greka would be in a position to be assigned the Scheduled Property, (the oil and gas leases in Italy), convert the loan to shares, or purchase Northsun's subsidiary by way of the Term Sheet. The Chambers Judge concluded:

Since Greka has a legitimate interest in the affairs of [Northsun] as a creditor, I find Greka to be a proper person to make an application under s. 243 of [the **Act**]."

[25] It is interesting to note however, that Greka did not complain in its petition that its right *qua* creditor had been infringed. Northsun had tendered payment in full of Greka's debt, which Greka declined to accept. Greka's complaint was not that it would not be re-paid its loan, but that Northsun was prejudicing an asset that Greka was entitled to acquire.

[26] If the allegations in the petition were to be made out, Greka had to show that it had an entitlement under paragraph 4.2 of the loan agreement to the Northsun assets or shares. When the New York Appellate Court set aside the New York injunction on the ground that Greka had failed to establish a

likelihood of success on its claim, there was no evidence to support the allegations in the petition.

[27] Rather than dismiss the application for the appointment of a Receiver-Manager, the Chambers Judge found another basis for concluding that Northsun had acted unfairly. He found that Greka was acting in good faith, negotiating a share purchase agreement with Northsun rather than directly pursuing the default provisions of the Loan Agreement and that it was manifestly unfair and prejudicial to Greka for Northsun to enter into an agreement with Concordia at the same time that Greka was negotiating in good faith. The Chambers Judge made this finding in spite of the fact that nothing in the Loan Agreement between Greka and Northsun purported to constrain Northsun's right to negotiate with other bidder's for Northsun's shares, nor had material been placed before him which fully addressed the factual issues raised by such an assertion.

[28] Before this court counsel for Northsun urged us to find that no duty to bargain in good faith has ever been recognized in Canadian commercial law. (see ***Fraser v. Van Nus*** (1983) 45 BCLR 44, 61-63, reversed on other grounds (1985) 67 BCLR 285; ***Westcom TV Group Ltd. v. CanWest Global Broadcasting Inc.***

[1977] 1 W.W.R 761. More importantly, counsel submitted that

this point had been decided against him in the court below without argument from him on the point.

[29] After finding that Northsun acted unfairly in the manner I have just described, the Chambers Judge concluded that the appointment of a Receiver-Manager would be too draconian a step. Instead, he ordered an interim injunction in the terms I have outlined at the beginning of these reasons for judgment.

[30] Greka's petition did not seek injunctive relief. Counsel did not have an opportunity to address the issues raised by such an application. Among other things, counsel for Northsun did not have an opportunity to put forward evidence on the issue of the balance of convenience or to argue that damages would be an adequate remedy.

[31] At the end of the day Greka was granted standing as a complainant on the basis of its position of a creditor, yet the unfair action found by the Chambers Judge did not affect Greka in its capacity as a creditor, but rather in its unsuccessful bid to acquire Northsun's shares. The Chambers Judge granted relief not sought by the petitioner, on grounds not advanced by the petitioner, with no opportunity by Northsun to call evidence or make submissions on the point. I

am of the view that in these circumstances the appeal should be allowed.

[32] I would allow the appeal and set aside the order for an interim injunction.

[33] **SAUNDERS, J.A.:** I agree.

[34] **LEVINE, J.A.:** I agree.

[35] **RYAN, J.A.:** The appeal is allowed and the order for an interim injunction, is set aside.

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**The Honourable Madam Justice Ryan**