COURT OF APPEAL FOR YUKON TERRITORY

Citation: ***Mackenzie Petroleums v. United Keno Hill Mines et al***, 2003 YKCA 0001

Date: 20030210
Docket: YU0492
YU0493

Between:

Mackenzie Petroleums Ltd.

Respondent
(Petitioner)

And

United Keno Hill Mines and UKH Minerals Limited

Respondent
(Petitioner)

And

AMT Canada Inc.

Appellant
(Respondent)

- and -

Docket: YUO493

Between:

AMT Canada Incl

Appellant
(Respondent)

And

Mackenzie Petroleums Ltd.

Respondent

(Petitioner)

And

United Keno Hill Mines Limited and UKH Minerals Limited

Respondents
(Respondents)

And

Energold Minerals Ltd.

Appellant
(Respondent)

Before: The Honourable Chief Justice Finch
(In Chambers)

Oral Reasons for Judgment

ALL PARTIES VIA TELEPHONE CONFERENCE CALL

R.A. Buch	Counsel for the Appellant, AMT Canada Inc.
K.D. Parkkari	Counsel for the Appellant, Energold
D. Shier	Counsel for the Respondent, Mackenzie Petroleums
M. Radke	Counsel for the Department of Justice (Yukon Territory)
S. Hogeboom	Counsel for the Department of Justice(Canada)
M.J. Leitch	Counsel for 12094 Yukon Inc. and Duncan’s Limited
Place and Date:	Vancouver, British Columbia February 10, 2003

[1] **FINCH, C.J.B.C**: AMT Canada Inc. (“AMT”) a “purchaser pursuant to court order”, and Energold Minerals Inc. ”Energold”, a secured creditor, both apply to abridge the time for notice of the time for notice of these applications, and for orders staying execution of the order pronounced by Mr. Justice Hudson on 24 January 2003.

[2] The form of that order has not been settled, and hence no formal order has been entered. The parties agree, however, that the critical parts of that order:

1. Declare AMT to be in default of obligations imposed on it by a series of orders approving sale to AMT of assets owned by the respondents United Keno Hill Mines Limited and UKH Minerals Ltd;

2. Extend the time for making payment of purchase money instalments required by the order for sale to noon on 10 February 2003; and

3. In default of payment within the time limited, declare that AMT is barred from, and divested of, all rights in the subject assets. If that should occur, the petitioner may apply to have the assets administered by a receiver or trustee of its choice.

[3] The applications for a stay of the order are opposed by the petitioner, who is a creditor of UKH Minerals, pursuant to the ***Miners Lien Act***. The petitioner is supported in its opposition to a stay by the Yukon Territorial Government, who is also a creditor. Four other creditors who appeared on the applications took no position, and the Department of Justice and Department of Indian and Northern Development similarly took no position.

[4] The subject order, pronounced 24 January 2003, is the latest in a series of orders concerning the sale of the Elsa Mine and other assets in the Yukon described in para. 2 of the order of September 26, 2001. On 8 May 2001, Mr. Justice Marshall granted the original order for sale of the assets to AMT. The terms of that order were subsequently amended or varied until on 26 September 2001, the terms of the order for sale were finally pronounced by Hudson J. in order comprising some 23 paragraphs. For present purposes, the following paragraphs of the order are important:

> 3. And this Court further orders that the Purchase Price shall be paid and credited as follows:
>
> (a) the sum of $25,000 which was paid into Court by the Purchaser to the credit of this Proceeding, on or about May 8, 2001;
>
> (b) the Purchaser shall pay an additional $1,050,000.00 into Court to the credit of

this Proceeding, on or before December 31, 2002; and

(c) subject to the provisions of paragraphs 4 and 5 of this Order, the Purchaser shall pay the balance of the Purchase Price, plus applicable GST on payments made up to that point in time, into Court to the credit of this proceeding on or before December 31, 2003.

4. And this Court further orders that in the event the Purchaser engages in the construction, removal or modification of capital works for the maintenance or remediation of any environmental condition or damage on or related to the Assets (the "Environmental Capital Works"), the costs of the Environmental Capital Works incurred on or before the Final Payment Date shall be a credit against the Purchase Price up to the amount of the Environmental Capital Works exceed $70,000.00, the amount of such excess between $700,000.00 and $1,500,000.00, that is, up to $800,000.00 (the "Environmental Remediation Allowance"), shall entitle the Purchaser to a deferral of the payment of a portion of the Purchase Price equal to the Environmental Remediation Allowance as provided for in paragraph 4 of this Order;

5. And this Court further orders that the Environmental Remediation Allowance shall be deducted from the amount otherwise payable by the Purchaser on the Final Payment Date and shall be paid over the two years following that date in equal quarterly instalments, in the event that commercial production has commenced by the Final Payment Date, and, in the event that commercial production has not commenced by the Final Payment Date, the Environmental Remediation Allowance shall be paid over the three years following that date in equal quarterly instalments, with the first instalment being due on that date which is three months after the Final Payment Date.

> 21. And this Court further orders that if the Purchaser shall fail to pay into Court to the credit of this Proceeding any portion of the Purchase Price by the date stipulated herein for making such payment, or such other date as this Court may subsequently order, then any person listed in Schedule “K” to this Order as having an interest which comprises part of the Secured Interests may apply to this Court for directions for the enforcement of this Order or any or all of the Secured Interests.

[5] The applications giving rise to the order of 24 January 2003 were triggered by AMT’s failure to pay the sum of $1,050,000 into court on or before 31 December 2002. On 13 January 2003, the petitioner filed an application for an order declaring that AMT was in default of the order of 26 September 2001, and the immediate divesting of AMT’s interests in the assets. On 21 January 2003, AMT applied to vary the order of 26 September 2001 so that AMT would have the opportunity to pay the sum of $200,000 “promptly”, to pay a further $200,000 by 30 April 2003, and to pay the balance owing by 31 July 2003. AMT also sought to adjourn the petitioner’s motion for four weeks.

[6] As noted at the outset, on 24 January 2003, Hudson J. declared AMT to be in default of the order for sale, and he gave it until noon on 10 February 2003 to pay the sum of

$1,050,000 on account of the purchase price, and costs of $7,500.

[7] In an affidavit filed on 21 January 2003, AMT admitted default of the 26 September 2001 order in three respects. It acknowledged that it had no paid the 31 December 2002 instalment; it admitted failing to deliver quarterly reports required by the order; and it agreed it had allowed certain mineral claims comprised within the assets to lapse, contrary to the order, by its failure to pay the sum of $10,000 in July 2002 necessary to keep those claims in good standing.

[8] On its application for a stay, AMT says the learned chambers judge erred in refusing it a reasonable time within which the make the required payment. It says it should have further time to complete financial arrangements. It also says the judge erred in failing to require the petitioner to give ten days notice of its intention to enforce its security as required by s.244 of the ***Bankruptcy and Insolvency Act***. AMT says that if a stay is not granted it will lose the benefit of more than $700,000 it has expended to maintain the site of the Elsa Mine and to perform environmental remediations, and a further $400,000 of debt incurred to effect improvements to the assets. It says such loss would be irreparable harm, and that the balance of convenience favours a stay.

[9] Energold has brought its separate application for a stay. It says that if AMT is divested of the subject assets and a trustee is appointed, Energold and other secured creditors, will have to pay the site maintenance and environmental remediation costs now paid by AMT, either directly or from the proceeds of any sale. Energold says no other party will step in to pay those costs and the secured creditors will therefore suffer irreparable harm. Further, the assets have not been exposed to the market, and the pending offer from a third party, Nevada Pacific Gold (Yukon) Ltd., may well be less than what the assets are worth. It says the order made by the chambers judge was not sought by any of the parties.

[10] The petitioner responded to these arguments by saying first, there is little prospect of a successful appeal. The judge's order was discretionary, and no error of principle has been shown. The notice argument under s.244 of the ***Bankruptcy and Insolvency Act*** was not made to the chambers judge and should not be considered on the stay application. The harm alleged by both applicants is not irreparable. If an appeal were to succeed, any loss suffered by either could be compensated for in damages. AMT has had a year and a half to organize the necessary financing. It has no firm plan for doing so now, could not raise $10,000 to maintain the lapsed

mineral claims in good standing, and has been unable to pay its creditors for work on the property to the extent of $400,000. An order staying execution would merely forestall the inevitable, and not only cause the petitioner delay, but would cause it to lose the offer it now has in hand from Nevada.

[11] The parties to not disagree as to the test to apply on an application to stay execution pending appeal. The applicants must show that there is a serious question to be determined, that the applicants would suffer irreparable harm if the stay is refused, and that on balance, the inconvenience to the applicants if the stay is refused would be greater than the inconvenience to the respondent if the stay is granted.

[12] In my opinion, the prospects for success on this appeal are poor. The learned chambers judge was asked to give directions for enforcement of the order of 26 September 2001 as provided for in para.21 of that order. He had a broad discretion to exercise in giving directions, and had to weigh on the material before him, the competing interests of all parties. In granting AMT only a very short time to remedy its default in payment, he was no doubt influenced by AMT’s failure to arrange financing within the year and a half preceding 31 December 2002, the substantial indebtedness it

had incurred, and the absence of any firm plan or proposal to replace the scheme contemplated by the order. I have not been persuaded that any error of principle has been shown in the way the judge exercised his discretion, and I consider that it would be a very difficult task to persuade a division of this court that such a discretionary order should be set aside.

[13] Nor do I consider there to be any real merit in the argument based on s.244 of the ***Bankruptcy and Insolvency Act***. Even if the court were prepared to hear argument on an issue not raised before the chambers judge, it is not argument with any real prospect of success. The s.244 applied in the circumstances of this case, as to which I am in some doubt, AMT's remedy would appear to lie in the provisions of s.248. The chambers judge was not asked to exercise the discretion provided by that section.

[14] I agree with AMT's submission that refusal of the stay will likely cause it irreparable harm. It will lose its interest in the assets, as well as the value of the work it has done is site maintenance and environmental remediation. While these are matters theoretically compensable in damages, it seems unlikely to me that a successful appeal would lead to that result. It is even less likely, in the absence of stay, that the appeal will be pursued.

[15] Even so, I do not consider that AMT or Energold have shown the balance of convenience to lie in their favour. As late as the hearing of the stay application on 6 February 2003 AMT had no firm plan or proposal to put forward. Its affidavit material offered excuses, explanations and vague assurances. It offered no security or conditions upon which a stay might reasonably have been considered. It asks for a further substantial variance of the sale order by extending the time for payment, offering nothing that rendered likely payment at the deferred date. To have granted a stay in such circumstances would have caused the petitioner irreparable harm of at least equal magnitude to that to be suffered by AMT on a refusal of a stay. The petitioner would lose the judgment it has in hand in exchange for nothing but uncertainty.

[16] For that reason, and because the chances for success on appeal are, in my view, so poor, I consider that the balance of convenience heavily favours the petitioner.

[17] I would dismiss both applications for a stay of execution with costs.

"The Honourable Chief Justice Finch"

CORRECTION: MARCH 24, 2003

The Style of Cause should be changed from **COURT OF APPEAL FOR BRITISH COLUMBIA** to **COURT OF APPEAL FOR YUKON TERRITORY**