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COURT COURT OF QUEEN'S BENCH OF ALBERTA COM
JUDICIAL CENTRE CALGARY Oct 15 2020
J. Romaine

PROCEEDINGS IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF MANITOK ENERGY INC.

IN THE MATTER OS THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF RAIMONT ENERGY CORP.

IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF CORINTHIAN OIL CORP.

DOCUMENT **BRIEF OF LAW**

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DOCUMENT

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INTRODUCTION

1. Yangarra Resources Ltd. (“Yangarra”) is seeking the Court’s advice and directions with respect to the order granted by Justice K.M. Horner on February 14, 2018 (the “Approval and Vesting Order”) which expressly approves an asset purchase agreement (the “APA”) between Yangarra Resources Ltd. and Manito Energy Inc., as prescribed in paragraph 15 thereof.
2. The background to this application is straightforward. Yangarra understood that Manito was at risk of becoming insolvent, or was insolvent, when Yangarra made an offer to purchase certain Manito assets (the “Ferrier Property” and the “Wells”). Yangarra did so on the express condition that the transaction must be judicially approved, and thus binding and enforceable, while not subject to any challenge or setting-aside because of Manito’s insolvency.
3. The Approval and Vesting Order was granted, and the transaction closed shortly thereafter. Yangarra has a legal entitlement to the assets it acquired pursuant to the APA.

FACTS

THE TRANSACTION HISTORY

4. On or around December 22, 2017 Yangarra offered to purchase all of Manito’s interests in the Wells, situated on lands legally described as TWP 037-08W5 S/2 Sec. 26.¹
5. During Yangarra’s and Manito’s negotiation of the APA it was known and understood that Manito was at risk of becoming insolvent, or already had become insolvent.²
6. In fact, on January 11, 2018 Manito filed a notice of intention to make a proposal.³
7. On January 21, 2018 Yangarra and Manito entered into the APA, which contains an effective date of October 1, 2017.⁴
8. In fact, the APA states clearly on its cover page, and at the very top of its first page, that it is effective as of the 1st day of October, 2017.⁵
9. Yangarra was only prepared to enter into the APA on the condition that it was judicially approved.⁶
10. The Approval and Vesting Order was granted on February 14, 2018.
11. The Approval and Vesting Order states, in part that:

¹ Affidavit of Gurdeep Gill, affirmed/sworn October 9, 2020 (the “Affidavit”) at para 4.

² *Ibid*, at para 5.

³ *Ibid*, at para 6.

⁴ *Ibid*, at para 7.

⁵ *Ibid*, at Exhibit “A”.

⁶ *Ibid*, at para 8.

- (a) the Transaction (the APA) is dated January 26, 2018 with an effective date of October 1, 2017;
- (b) it is granted having reviewed the Second Report of the Proposal Trustee;
- (c) it is granted having heard submissions of counsel for Manitoak, National Bank of Canada (“NBC”), the Proposal Trustee and those other persons listed on the counsel slip;
- (d) service of the application and supporting materials was good and sufficient;
- (e) the Transaction is approved;
- (f) all of Manitoak’s right, title and interest in and to the Purchased Assets described in the Sale Agreement shall vest absolutely in the name of the Purchaser (Yangarra), free and clear of and from any and all security interests (whether contractual, statutory or otherwise)....and for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchase Assets are hereby expunged and discharged as against the Purchased Assets;
- (g) the net proceeds of the Transaction are immediately payable to NBC and applied on the account of the obligations due and owing to NBC by Manitoak;
- (h) Yangarra shall have no liability of any kind whatsoever in respect of any Claims against Manitoak;
 - (i) notwithstanding:
 - (ii) the pendency of the proceedings in which this order is granted;
 - (iii) any applications for a bankruptcy order now or hereafter; and
 - (iv) any assignment in bankruptcy made in respect of Manitoak
- (i) the vesting of the Purchased Assets in Yangarra pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Manitoak and shall not be void or voidable by creditors of Manitoak, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under any federal or provincial legislation; and
- (j) Yangarra, among others, is at liberty to apply for further advice, assistance and directions to give full force and effect to the terms of this Order.⁷ [emphasis added]

12. The Receiver in this action now takes the position that Yangarra is not entitled to the benefit of the APA’s effective date. Specifically, monies were advanced to Manitoak relating to the

⁷ *Ibid*, at Exhibit “B”.

production derived from the Ferrier Property and the Wells for December 2017, January 2018, and February 2018 (collectively the “Winter Proceeds”).

13. As the Winter Proceeds arise after the APA’s effective date, Yangarra is entitled to these amounts. The Receiver disagrees, and thus Yangarra brings this application pursuant to paragraph 15 of the Approval and Vesting Order.
14. The Approval and Vesting Order was not appealed, nor is Yangarra aware of anyone having applied to have the Approval and Vesting Order varied.

THE HISTORY OF THIS DISPUTE

15. Yangarra brought a third party claim against the Receiver, filed on August 23, 2019, in which the relief sought includes “to have the Winter Service Funds (which are another term for the Winter Proceeds) returned to them (Yangarra) by Alvarez (the Receiver).”
16. This third party claim was filed less than 19 months after the Approval and Vesting Order was granted.
17. A procedural dispute subsequently arose about the capacity in which the Receiver was named as a defendant to Yangarra’s third party claim. This resulted in the consent order granted by Master Farrington on October 29, 2019, whereby the third party claim was to be amended such that it was being brought against Alvarez & Marsal Canada Inc., acting in its sole capacity as the court appointed Receiver and Manager of Manito Energy Inc. and not in its personal or corporate capacity.
18. The October 29, 2019 consent order required Yangarra to file and serve its amended third party claim, which it did, and also provided that the third party claim was stayed pending the determination of the Receivership Application. Furthermore, the Receiver agreed to hold the amount at issue in Yangarra’s third party claim in trust.
19. The consent order also permits the Receiver to apply to strike out or dismiss Yangarra’s third party claim, which the Receiver has not done.
20. Yangarra changed counsel between filing its third party claim and agreeing to the consent order. After the consent order was granted, Yangarra’s new counsel participated in a number of communications with the Receiver’s counsel, and there was a general agreement that the dispute over the entitlement to the Winter Proceeds would be best resolved by an application pursuant to paragraph 15 of the APA.
21. Yangarra and the Receiver engaged in settlement discussions in June 2020.
22. In July 2020 it seemed that settlement would not occur, and Yangarra and the Receiver agreed to attempt to proceed with seeking advice and directions regarding the Approval and Vesting Order, relying in part upon an agreed statement of facts.
23. Yangarra provided a draft agreed statement of facts to the Receiver on August 20, 2020.

24. The Receiver provided a comment on the draft agreed statement of facts on September 17, 2020 and September 18, 2020.
25. On September 24, 2020 Yangarra sought confirmation that the Receiver's comment was the only issue with the draft agreed statement of facts.
26. Counsel for Yangarra and counsel for the Receiver spoke on September 30, 2020 and Yangarra thereafter provided a revised draft agreed statement of facts incorporating the Receiver's comment.⁸
27. Yangarra followed-up with the Receiver regarding the draft agreed statement of facts on October 5, 2020, at which point Yangarra was advised that there would be no agreed statement of facts.
28. Yangarra then prepared its affidavit in support of this dispute.

ISSUE

THE APPROVAL AND VESTING ORDER ALREADY DETERMINED YANGARRA'S ENTITLEMENT TO THE WINTER PROCEEDS

29. It is clear, obvious and unchallenged that Yangarra was interested in purchasing certain assets on the condition that such purchase, including the precise terms thereof, was not at risk of being set-aside or otherwise disturbed because of Manitok's insolvency.
30. As such, Yangarra did not close the APA until after the Approval and Vesting Order was granted.
31. There is only one possible interpretation of the Approval and Vesting Order: Yangarra is legally entitled to the rights and obligations arising from the APA, without limitation.
32. The APA and the Approval and Vesting Order each make express reference to the effective date of October 1, 2017.
33. It is both obvious and common sense that when a purchaser values an asset and forms an agreement to purchase that asset, the date at which the purchaser acquires the benefit of an asset and the revenue flowing therefrom is a material component thereof.
34. Yangarra is entitled to what it acquired, and the issue of the APA's validity was long ago judicially determined.
35. Moreover, the APA and the Approval and Vesting order are a clear example of how insolvency proceedings are supposed to proceed. NBC was a creditor of Manitok's, and the APA resulted in the influx of \$2,082,500.00 into Manitok's estate, the net proceeds of which then satisfied a portion of Manitok's debt to NBC.

⁸ Yangarra has not put the correspondence referenced, or the draft agreed statements of facts, into evidence, as the contents thereof are likely subject to settlement privilege, however the timing of these steps is relevant given the positions the Receiver is now taking.

36. In *Extreme Retail (Canada) Inc. v Bank of Montreal* the Ontario Superior Court of Justice held that an approval and vesting order's language was "unambiguous and far reaching" and the terms of the APA in this instance are very similar.⁹

37. *Extreme* goes on to hold that

this dispute is governed by the plain language of the Approval and Vesting Order relating to the terms up on which Extreme acquired the assets that it purchased. I have earlier quoted the operative provision of that order. In my view, that language makes it plain that the assets that Extreme acquired were not subject to any higher rights. In this respect, the language of the order is unambiguous and far-reaching. Accordingly, assuming that there had existed an enforceable subordination agreement...that higher BMO security interest was a right or encumbrance that was deleted by the Approval and Vesting Order.

As I have noted above, BMO argues that the Approval and Vesting Order was never intended to have such an effect. As I have also noted, however, BMO was a party to the proceedings, was represented in court when the Approval and Vesting Order was granted...BMO had ample opportunity to raise the issues of its claimed priority...and it could have sought to have a suitable limiting provision inserted in the Approval and Vesting Order. It failed to do so...

it is neither appropriate nor desirable to, in effect, open up and revisit the terms of a vesting order, especially one given two and a half years ago, and upon which parties have subsequently acted and conducted their affairs. It is impossible to say what would have occurred as the parties were negotiating the sale agreement, had the issue of BMO's claimed priority been raised at the time. I am not prepared to speculate that it would have been a matter of no moment: Extreme negotiated for and acquired the assets on the terms set out in the sale agreement and the Approval Vesting Order...

the approval and Vesting Order was a final judicial determination of the rights of the parties represented in that proceeding in respect of the assets that were the subject of the sale. The CCAA objective of providing a mechanism for the efficient restructuring of corporations that encounter financial difficulty would be seriously undermined if parties who failed to assert or protect their rights at the time of the restructuring were permitted subsequently to return to court to undo past transactions. Such an approach should be discouraged.¹⁰ [emphasis added]

38. The above reasoning applies squarely to this application. Approval and vesting orders, generally, serve an important purpose of allowing insolvent parties' assets to be disposed of efficiently and with finality. The APA was approved by the Approval and Vesting Order on the terms set out in the sale agreement, including the APA's effective

⁹ *Extreme Retail (Canada) Inc. v Bank of Montreal*, 2007 CarswellOnt 5520, at para 10 ("Extreme").

¹⁰ *Ibid*, at paras 17-18 and 20-21.

date and the Winter Proceeds which were plainly derived from post-effective date production.

39. The principle of *res judicata* applies to the APA and the terms therein.
40. Purchase and sale agreements routinely include effective dates that differ from the date the transaction is formed and the date that it closes. The purpose of an effective date is plain on its face: the acquiring party receives the benefit of what it is acquiring as of the date when the transaction is agreed to have taken effect.
41. It is trite law that contracts must be interpreted to give meaning to the clauses therein. If parties did not intend an effective date to have the meaning described above, they would not insert an effective date into a contract.
42. There is no basis in law or in equity to attempt to revise the terms of the APA. The Receiver's refusal to provide Yangarra with the Winter Proceeds constitutes a collateral attack upon the Approval and Vesting order, and this approach must be discouraged.
43. The Receiver, or any other party, could have objected to the APA during the application heard on February 14, 2018.
44. Such an objection would have necessarily been timely, as required, and also could have included challenging the APA's effective date, the APA's effect upon creditors, or any other provisions therein. The time to do so has long passed. Moreover and as held in *Extreme*, it is not appropriate for a party or the Court to "open up and revisit" the terms of a vesting order, or the agreement that is the subject thereof. As noted, Manito's creditors already received the benefit of the purchase price that Yangarra paid pursuant to the APA.
45. The Receiver's position that the APA and Yangarra's rights thereunder amount to an unsecured claim is incorrect, for the reasons outlined above. This premise requires accepting that the Approval and Vesting Order, an order of this Court, has no force or effect, and puts Yangarra in the same position it would be in had the Approval and Vesting Order not been sought or granted at all. That position is nonsensical.
46. The Receiver's suggestion that there is a limitations issue in this proceeding, or that Yangarra is otherwise precluded from seeking this relief, is absurd. The Receiver also mischaracterizes the relief that Yangarra actually sought.
47. Yangarra brought its third party claim, seeking among other relief:
 - (b) To have the Winter Service Funds returned to them by Alvarez;
 - (c) To have the Proceeds remitted to Yangarra by Alvarez: and. . .

(f) Such further and other relief as this Honourable Court deems just¹¹

on August 23, 2019, which is well within the applicable limitation period. There is no other bar or restriction upon Yangarra's right to seek this relief.

CONCLUSION

48. Yangarra contracted for, and obtained judicial approval of, the Wells' purchase effective October 1, 2017. Yangarra seeks a direction that it is entitled to the Winter Proceeds and that the Receiver shall remit them to Yangarra forthwith.
49. Yangarra also seeks costs on an appropriate scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OCTOBER, 2020.



McMillan LLP

Per: Andrew E. Stead

¹¹ Third party claim filed by Yangarra on August 23, 2019 in Court of Queen's Bench Action No. 1801-17233.