COURT OF APPEAL FOR ONTARIO

CITATION: Greta Energy Inc. v. Pembina Pipeline Corporation, 2022 ONCA 783
DATE: 20221117
DOCKET: C70222

Gillese, Huscroft and Sossin JJ.A.

BETWEEN

Greta Energy Inc. and Great Grand Valley 2 Limited Partnership

Plaintiffs (Appellants)

and

Pembina Pipeline Corporation and BluEarth Renewables Inc.

Defendants (Respondents)

Brendan van Niejenhuis and Senwung Luk, for the appellants Greta Energy Inc. and Great Grand Valley 2 Limited Partnership

Mark A. Gelowitz and Sandy Hay, for the respondent Pembina Pipeline Corporation

R. Seumas M. Woods and Rebecca Torrance, for the respondent BluEarth Renewables Inc.

Justin H. Nasseri and Avi Bourassa, for the intervener Ontario Petroleum Institute

Heard: September 12, 2022

On appeal from the judgment of Justice Cory A. Gilmore of the Superior Court of Justice, dated November 17, 2021, with reasons reported at 2021 ONSC 7579.

REASONS FOR DECISION

OVERVIEW

[1] This case concerns the sale of three assets, two of which were subject to Right of First Refusal ("ROFR") clauses. The appellants Greta Energy Inc. ("Greta") and Great Grand Valley 2 Limited Partnership ("GG2") held ROFRs on two of the assets that a respondent, BluEarth Renewables Inc. ("BluEarth"), sought to purchase. Greta held a ROFR on the Grand Valley 1 wind farm ("GV1") and GG2 held a ROFR on the Grand Valley 2 wind farm ("GV2"). The appellants exercised their ROFR for one of the assets and brought an action claiming various forms of relief on the basis that the price of the assets subject to the ROFRs was wrongly manipulated by the respondents.

[2] The appellants' motion for summary judgment was dismissed. The respondents' motion for summary judgment was granted and the appellants' action was dismissed. In essence, the motion judge found that the respondents acted in their self-interest and did not act improperly in doing so.

[3] The appellants argue that the respondents breached their duty of good faith and honest performance, but also contest the dismissal of their claims against the respondents for inducing breach of contract and conspiracy. The Ontario Petroleum Institute was permitted to intervene on the appeal. The Institute made submissions urging the court to clarify the duty of good faith and honest performance in situations where a ROFR grantor agrees to sell a bundle of assets

to a third-party buyer where ROFRs are attached to some, but not all, of the bundled assets.

[4] The appeal is dismissed for the reasons that follow. Having dismissed the appeal, we find it unnecessary to address the intervener's submissions.

BACKGROUND

The parties

[5] This appeal concerns four parties:

1. The appellant Greta;
2. The appellant GG2, a limited partnership. The General Partner of GG2 is GGV2 GP Inc., a corporation in which Greta is the sole shareholder;
3. The respondent Pembina Pipeline Corp. ("Pembina") (formerly "Veresen");[1] and
4. The respondent BluEarth, a limited partnership that acquires, builds, and operates wind, hydro, and solar facilities across North America.

The assets in question

[6] Veresen intended to sell a series of assets, including three wind farms (the "Wind Facilities"):

---

[1] Veresen was acquired by Pembina after the key events at issue. The motion judge and the parties' materials refer to the respondent Pembina as "Veresen". For consistency, we refer to Pembina as Veresen throughout these reasons.

1. GV1: GV1 was owned by Grand Valley 1 LP (“GV1LP”). Veresen was a 75% owner and Greta was a 25% owner of GV1LP. GV1LP’s General Partner, Grand Valley Wind Farms Inc., was owned by Veresen and Greta, each of which had a 50% share, and was governed by a shareholders’ agreement.
2. GV2: GV2 was owned by Grand Valley 2 Limited Partnership (“GV2LP”), of which Veresen was a 75% owner and GG2 owned the remaining 25%. GV2LP was governed by a limited partnership agreement.
3. St. Columban (“SCELP”): Veresen was the 90% owner of SCELP and 2177958 Ontario Inc. (“217”) owned 10%.

[7] Greta held a ROFR with respect to Veresen’s interest in GV1. GG2 held a ROFR identical to the one for GV1 for Veresen’s interest in GV2. No ROFR was held by Veresen or 217 for the other’s interest in SCELP. However, 217 could unilaterally block the sale of Veresen’s interest in SCELP.

The sale transactions

[8] In August 2016, Veresen announced its intention to sell the Wind Facilities and several other assets. Veresen preferred an *en bloc* sale of its interest in GV1LP, GV2LP, and SCELP. BluEarth was interested and signed a Confidential Information Memorandum to access Veresen’s financial models related to revenue and expenses over time. BluEarth submitted a bid on January 13, 2017. Veresen advised BluEarth on January 20, 2017 that its bid was successful and invited

BluEarth to begin the process of negotiating a purchase and sale agreement ("PSA").

[9] During negotiations, BluEarth provided Veresen with a preliminary breakdown and later a final breakdown of the purchase price for each of the three Wind Facilities, as follows: $55,713,509 for GV1, $156,212,774 for GV2, and $167,740,004 for SCELP. The final version of the PSA was signed on February 18, 2017 and the ROFR notices were sent to Greta and GG2 on February 23, 2017. If Greta or GG2 exercised their respective ROFR, or if 217's consent to the sale of SCELP was not secured, BluEarth would still be obligated to purchase all remaining assets at the prices set out in the PSA.

[10] Greta was interested in purchasing Veresen's interest in two of the assets, GV1 and GV2. Fengate Capital Management ("Fengate") agreed to assist Greta with exercising its ROFRs in exchange for Fengate acquiring all of Veresen's 75% interest in either GV1 or GV2. Greta made five requests for documents and information from Veresen between January and March 2017. Fengate ultimately approved an investment in GV2, not GV1, and on March 14, 2017 Greta informed Veresen that it would be exercising its ROFR on GV2 and waiving the ROFR on GV1.

[11] BluEarth's acquisition of Veresen's interest in GV1 was conditional on a corporate reorganization. Greta refused to consent to the reorganization unless

BluEarth paid its legal fees and demonstrated that the purchase price allocation had not been “gamed”. Greta was concerned with the price allocation between GV2 and SCELP, believing it to be too high for GV2. Greta refused to provide its consent and challenged BluEarth and Veresen’s explanation of how the prices were not “gamed”. As a result, BluEarth’s acquisition of GV1 was not completed.

[12] Greta and GG2 alleged that Veresen and BluEarth conspired to manipulate the price of the assets being sold by Veresen in a bad faith attempt to prevent them from exercising their ROFRs. Greta and GG2 alleged that Veresen and BluEarth knowingly misled them as to the *bona fide* nature of the price allocation for the assets resulting in a breach of the duty of good faith. Greta and GG2 sought damages for conspiracy against Veresen and BluEarth, damages for an *ad hoc* breach of fiduciary duty against Veresen, and damages for inducing breach of contract against BluEarth.

The motion judge’s decision

[13] BluEarth and Veresen’s motions for summary judgment were granted. Greta and GG2’s motion for summary judgment was dismissed. The motion judge found that Veresen set up a legitimate process to sell its assets and BluEarth engaged in that process. Further, it was not commercially unreasonable for BluEarth to pay a price for any or all of the assets that would pressure the ROFR holder not to exercise its rights.

Veresen did not breach its duty of good faith

[14] The motion judge found that Veresen was required to act in good faith towards the ROFR holders when it solicited offers, accepted them, and negotiated the terms of sale, and that it did not breach its duty of good faith and honest performance in the ROFR process. First, it was not unfair to require bidders to bid for the *en bloc* package and to defer pricing allocation until the bidding process concluded. Second, Veresen did not encourage BluEarth to inflate the price of GV2 and had no obligation to object to any proposed reallocations. Third, Veresen did not take any steps to dissuade Greta or GG2 from exercising their ROFRs.

No fiduciary duty was owed

[15] The motion judge found that Veresen did not owe a fiduciary duty to Greta or GG2. There was no implied or express undertaking to act in the best interests of Greta or GG2 in the PSA. Although the agreement allowed Veresen to reject an unreasonably low price allocation, this was merely intended to protect Veresen from unreasonable bids for individual assets. There was no evidence that Veresen undertook to favour Greta or GG2's interests over its own.

No conspiracy

[16] The motion judge found that BluEarth and Veresen did not conspire against Greta and GG2. The pricing reallocation was not predominantly intended to frustrate the exercise of the ROFRs or harm Greta and GG2.

No inducement of breach of contract

[17] Finally, the motion judge found that BluEarth's conduct did not amount to inducement of breach of contract. BluEarth did not owe a duty of good faith to Greta and GG2 and was entitled to act in its own self-interest. There is nothing nefarious about having a bid strategy that could discourage the exercise of a ROFR so long as the strategy was not unreasonable. BluEarth had no intention to cause Veresen to breach its contractual obligations with Greta and GG2. It participated in its own sales process, performed its own due diligence, presented its findings to its Board, received approval, and submitted a bid. It did not conspire with Veresen to get it to ignore its ROFR obligations.

Issues on appeal

[18] It is not disputed that this case was appropriate for summary judgment. The issue before the court was whether the respondents worked together to manipulate the price of the assets being sold in a bad faith attempt to prevent the appellants from exercising their ROFRs over GV1 and GV2. The appellants argue that the motion judge erred:

1. In recognizing and applying the duty of honest performance;
2. In failing to properly consider BluEarth's liability for inducing breach of contract; and
3. In applying the tort of conspiracy.

The focus of the argument at the hearing of the appeal was on the first issue. The latter two issues can be addressed briefly.

DISCUSSION

[19] The appellants argue that the motion judge made a palpable and overriding error in finding that GV1, GV2, and SCELP were "very different assets that had been in operation for different lengths of time. Each charged a different rate for the electricity it generated and had different amounts of debt associated with it". The appellants argue that this error, along with the motion judge's alleged failure to achieve a necessary appreciation of the evidence, resulted in a failure to assess the essential evidence relevant to the core of the dispute.

[20] We disagree.

[21] The motion judge's findings as to the nature of the assets were open on the record before her, which included the evidence of Nick Boyd and Andrew Cogan, as well as the evidence of George Cholakis in cross-examination. It is not this court's role to revisit these findings on appeal. The burden is on the appellants to establish that there was a palpable and overriding error and they have failed to discharge that burden.

The duty of honest performance was not breached

[22] The appellants argue that the respondents were required to honour the terms of their existing contract both when they were soliciting offers and chose to

allow pooled offers, and when they selected offers and negotiated formal documents to close the transaction. The appellants argue that Veresen was required to disclose the process it engaged in with the respondent BluEarth in allocating the price among the assets. According to the appellants, the motion judge applied too high a standard by requiring them to prove a specific intention to "eviscerate" the ROFR, a test set out in *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. C.J.), at para. 72.

[23] We do not accept this argument.

[24] The motion judge found that the respondent Veresen set up a package bidding process on the advice of TD bank in an attempt to obtain a better price. The purchase price was allocated among the assets only because it was required by the ROFR notice. There was no evidence that Veresen consciously permitted and encouraged BluEarth to artificially inflate the price of GV2. On the contrary, she found that BluEarth reallocated the price for legitimate reasons. This was a competitive bidding process that entailed upward pressure on prices.

[25] The motion judge accepted that there was no correct price for a ROFR; there was only what the vendor offered and the purchaser was willing to accept. Thus, fair market value was not determinative of whether the respondent Veresen acted in good faith. In any event, no expert evidence on the fair market value of the assets was tendered by Greta or GG2.

[26] As for disclosing information to the appellants, as the motion judge noted, *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, 452 D.L.R. (4th) 44 does not impose a duty of disclosure so long as a party does not knowingly mislead the other party. However, the motion judge found that Veresen provided all documents requested in the five separate requests for information made by the appellants, and the appellants' evidence was that they had sufficient information to determine whether or not to waive the ROFR. The motion judge's conclusion that the appellants were not misled is supported by the record and is entitled to deference. In short, this is not a case in which the appellants were precluded from exercising their ROFRs as in *GATX*; they were able to exercise the ROFRs and did so when they chose to match the BluEarth offer for GV2.

BluEarth did not induce a breach of contract

[27] The appellants acknowledge that the motion judge stated the law correctly, as set out by this court in *Correia v. Canac Kitchen*, 2008 ONCA 506, 91 O.R. (3d) 353, but submit that she erred in finding that BluEarth could not be liable so long as it was willing to complete the transaction. They characterize the motion judge as holding that BluEarth had "no duties whatsoever" to the ROFR holder.

[28] We reject this submission.

[29] The motion judge found there was no evidence BluEarth intended to cause a breach of contract, no evidence that it had in fact caused a breach of contract,

and no damages in any event. She found that, at most, BluEarth may have intended to discourage the appellants' exercise of the ROFRs but, as she explained, the dynamic between the ROFR holder and the third party is a competitive one: the respondents were entitled to attempt to discourage the exercise of the ROFR and did not "eviscerate" the appellants' rights. These findings were open to the motion judge on the record before her. The appellants have not established a palpable and overriding error in the judge's findings and there is no basis for this court to intervene.

BluEarth and Veresen did not conspire to avoid the ROFRs

[30] The appellants argue that the motion judge correctly identified the elements of the tort of conspiracy but erred in applying them, effectively holding that the respondents' intention was irrelevant so long as their timing was right – that is, that they reached their agreement to change the pricing allocation before they disclosed the draft PSA to the appellants.

[31] We reject this submission.

[32] The motion judge carefully reviewed the evidence, including the parties' correspondence. She found that BluEarth priced its assets in a manner intended to discourage the exercise of the ROFR on GV2 and that it was entitled to do so. She found no evidence that the price was deliberately manipulated to prevent the exercise of the ROFRs or harm the appellants. Veresen did not reject BluEarth's

price reallocation because it was prepared to accept the revised price for GV2 and SCELP. And in the end, the ROFR on GV2 was exercised.

[33] The appellants have not established any palpable and overriding error in the motion judge's findings and there is no basis for this court to intervene.

Disposition

[34] The appeal is dismissed.

[35] The respondents are entitled to costs, fixed at the agreed amount of $40,000 all inclusive. The intervener is neither entitled to costs nor liable for them.

"E.E. Gillese J.A."
"Grant Huscroft J.A."
"L. Sossin J.A."