Court of King's Bench of Alberta

Citation: Kensington Park Capital v Franjon Excavating, 2025 ABKB 441

Date: 20250722
Docket: 2401 06479
Registry: Calgary

Between:

Kensington Park Capital Ltd

Appellant

- and -

Franjon Excavating & Trucking Ltd

Respondent

Reasons for Decision
of the
Honourable Justice M.H. Hollins

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[1] Kensington Park Capital Ltd (the Tenant) registered a caveat against the commercial property of Franjon Excavating & Trucking Ltd (the Landlord), claiming an interest in that land by virtue of a right of first refusal (ROFR) in the lease, which reads as follows:

> In the event that the Property is offered for sale during the term of this Lease, the Tenant will be notified as soon as possible, and given first right of refusal to purchase the property as noted above. If the tenant does not exercise this right of first refusal, any new owner must not breach this lease.

[2] The prior tenant of this property assigned its rights under the lease, including the ROFR, to this Tenant. At that time, the Landlord had already listed the property for sale at an initial listing price of $1.7M, which was known to the Tenant.

[3] Some months later, the Landlord reduced the listing price to $1.499M, after which it received several offers to purchase. None of these were provided to the Tenant.

[4] Within a few weeks of the listing price reduction, the Tenant offered to purchase the property for $1.2M. Later that same day, the Landlord received a third-party offer of $1.4M, which it accepted without informing the Tenant of the offer or allowing the Tenant to re-offer on the property.

[5] The Tenant filed a caveat against the property, claiming an interest under the ROFR. The Applications Judge discharged the caveat, finding that the Landlord had complied with the ROFR. The Tenant appeals.

[6] The issue for me to determine on this appeal is whether the Landlord breached the ROFR by failing to notify the Tenant of the third-party offer to purchase the property. The Tenant says yes, because:

1. this was a true ROFR and not, as argued by the Landlord, a right of first offer; and
2. the Landlord breached its implied duty of good faith.

[7] I agree and allow the appeal for the reasons given herein.

Standard of Review

[8] This is not, as is often said, an appeal *de novo*, but rather an appeal on the record; Rule 6.14(3) of the *Alberta Rules of Court*. As clarified by the Court of Appeal, a true *de novo* hearing would require the complete absence of deference. In fact, no transcript would be needed. An appeal on the record requires me to determine if the decision was correct, raising a rebuttable presumption of the fitness or correctness of the decision of the Applications Judge; *Pacer Construction Holdings Corp v Pacer Promac Energy Corporation*, 2018 ABCA 113 at para.66.

[9] That said, I find that the Applications Judge was not correct in finding that the clause in question could not and did not function as a true right of first refusal.

1. Contract Interpretation – is this an enforceable ROFR?

[10] In interpreting any contract, the court is to read the contract as a whole, with reference to the particular factual matrix of the case, to determine the intent of the parties when they signed it; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras. 47-50. While it does not fall to me to re-write a contract for the parties, the contract should be interpreted to give effect to the parties' intentions if possible.

[11] The Tenant says that the ROFR is a true ROFR, intended to provide it with the right to receive and match any offer to purchase received by the Landlord. The Landlord says that the ROFR does not provide this right to the Tenant as the wording lacks the particulars of a typical ROFR. However, the cases cited by the Landlord for this proposition do not address that issue.

[12] For example, in *Meewasin Valley Authority v Olfand Land Co*, the Saskatchewan Court of Queen's Bench was asked to decide a very narrow issue – whether a ROFR created an interest running with the land or merely a contractual right. Dielschneider, J held that the ROFR could only be an interest in land once an offer to purchase was received by the lessor, converting the ROFR into an option to purchase; 1987 CarswellSask 41 QB at para.24 (aff'd 1988 CarswellSask 468 (CA).

[13] There are many cases - going back to *Canadian Long Island Petroleums Ltd v Irving Wire Products*, 1974 CarswellAlta 99 (SCC) – which deal with the conversion of a ROFR into an option to purchase in the context of the rule against perpetuities and the point at which a ROFR becomes an interest in land, capable of enforcement by specific performance. This includes *1244034 Alberta Ltd v Walton International Group*, 2007 ABCA 372, which was mentioned by the Applications Judge. Those cases are not helpful to a determination of whether the language in this lease has created an enforceable ROFR.

[14] Similarly, *Municipal Savings & Loan Corp v Oswenda Investments Ltd* – relied on by the Landlord - was a case involving a ROFR on one parcel of land being sold as part of a larger block of properties. The court found that the ROFR had not been converted into an option because, among other things, it was not possible to determine the selling price of the single parcel; 1989 CarswellOnt 607 at para. 40. Again, for all their historical interest, the "allocation" cases have no application here.

[15] It is true that this Court has said, in *obiter*, that ROFRs are to be "strictly construed"; *Zust Bachmeier International Air Cargo Inc v Klapatiuk*, 2006 ABQB 633 at para.17. However, that case concerned only the operation of the ROFR, not its validity. Further, McMahon, J found that the clause was sufficient to create the ROFR but that it had not been triggered and thus the application to enforce it was premature.

[16] The present appeal is not about the allocation of a purchase price in a block sale, nor about whether or when the ROFR was converted into an option to purchase or even whether specific performance is available to the Tenant. It is solely concerned with whether the language is sufficient to create an enforceable right, given that this ROFR is missing some of the more typical clauses found in rights of first refusal, most notably, the time within which the lessee must exercise that right.

[17] There are many cases where similarly imperfect language was sufficient for the court to uphold the rights of the ROFR holder. For example, an arguably even more vague ROFR was at issue in *McFarland v Hauser*. It read:

> Both parties hereby agree that in the event of the land being sold, the lease will terminate at the end of the term then in progress, being further agreed that the Lessee shall at all times have the first option to meet or decline the purchase offer.
>
> McFarland v Hauser, 1977 CarswellAlta 127 (Alta SC, App Div)

[18] The trial judge found the above clause created an enforceable ROFR, which in turn gave rise to dower rights and other caveatable interests in land. On appeal, the Court of Appeal agreed that the language was clear enough to be enforceable; McGillvray JA at para.63 and Morrow, JA in concurring reasons at para.234:

> In my opinion there is no difficulty in reading the above language to require Hauser to put the above terms up to McFarland and request him to say "yes" or "no". All McFarland had to say was "yes" or "no". If "yes" then he took over as if he was Sutherland [the third-party offeror] and had every obligation set forth in the option, no more and no less. I fail to see any uncertainty in this respect.

[19] This was affirmed on further appeal, although the case was reversed on other grounds; *McFarland v Hauser*, 1987 CarswellAlta 127 (SCC) at paras. 23-24.

[20] The *McFarland* case was followed by the Ontario Court of Appeal in *SBS Sealants*, where the subject clause read:

> If the landlord, during the term of this lease, finds a qualified purchaser for the building, the tenant will be given the right of first refusal to purchase same.
>
> SBS Sealants Inc. v Robroy Industries Inc, 2002 CarswellOnt 1306 (ONCA)

[21] The Court of Appeal reversed the trial judge, who had found this clause too vague to be enforceable. Although the citation of the passage from the *McFarland* decision is incorrect (it was Morrow, JA not Clement, JA), the Court followed the *McFarland* case, saying as follows:

> I can see no material difference between the clause under consideration in *McFarland* and the one before this court....
>
> The purpose of the right of first refusal was to give the tenant an opportunity to match any offer the owner was prepared to accept. Such offers might be open for hours or days and the time for presentation, consideration and an election must, of necessity, be whatever is reasonable in the circumstances.
>
> *SBS Sealants* at paras. 15-16

[22] Here, the Applications Judge found that the ROFR clause in this case was an "imperfectly drafted clause", with which I completely agree. She also found that "on its face, [the ROFR] appears to say that the tenant will be notified as soon as possible if the property is offered for sale and then it is given the first right of refusal to purchase the property" (p.17 transcript). However, notwithstanding this, she concluded that there was insufficient information included about how the ROFR would be exercised, including the determination of the purchase price and the time for exercising the right to make a competing offer.

[23] A ROFR would not typically include a purchase price, as that is determined by the competing offer made by a third party and accepted by the owner. Nor do I agree that the absence of a mechanism or even a time limit within which a competing offer must be matched renders this ROFR unenforceable. Many cases, including those considering rights of first refusal, have implied an obligation to exercise that right within a reasonable time; *Di Millo v 2099232 Ontario Ltd*, 2018 ONCA 1051 at para. 38.

[24] Nor does it lie for the Landlord to say that this was a "right of first offer", allowing the Tenant to offer to purchase the property with reference to the listing price. That flies in the face of the plain language of the subject clause and further, makes no sense. What is the benefit to the Tenant to simply be allowed to make an offer based on the listing price when literally anyone can do that? This would render the granting of the ROFR virtually meaningless. The fact that the parties intended this covenant to bind future assignees of the landlord tells me they both recognized it conveyed some particular right or advantage to the Tenant.

[25] The ROFR was intended to and did convey to the Tenant the right to be informed of and to match any offers made by other parties to the Landlord to purchase the leased premises. Notwithstanding its clear obligation to do so, the Landlord never informed the Tenant of any offers. This appeal concerns only the discharge of the caveat, so nothing more need be said here beyond the finding that the caveat should, for now, remain on title.

2. Duty of Good Faith

[26] Contractual obligations must be performed honestly and in good faith, with "appropriate regard to the legitimate contractual interests of the contracting partner". This duty of good faith does not require a contracting party to serve the interests of the other but prohibits undermining those interests in bad faith; *Bhasin v Hrynew*, 2014 SCC 17 at para. 65.

[27] The Landlord is correct that any application of the duty of good faith must still accord with the principles of contract law; *Bhasin* at para.71. The lease in question here is the "first source of fairness" between the parties; *CM Callow Inc v Zollinger*, 2020 SCC 45 at para. 47.

[28] However, as I have found that the Landlord had a contractual obligation to inform the Tenant of the third-party offer and give the Tenant the chance to match that offer, it is not contrary to the contract to require the Landlord to do so in good faith. The rights and obligations of the parties must be exercised and performed "as stated by the organizing principle, honestly and reasonably and not capriciously or arbitrarily"; *CM Callow* at para.47.

[29] The case law is replete with examples of creative ways in which parties sought to circumvent rights of first refusal, but almost always to no avail. Some have argued that a ROFR is ineffective in the context of a block sale of properties. Some have alienated property subject to a ROFR to non-arms length parties, in an attempt to avoid triggering the ROFR while allowing the related purchaser to further alienate the property to others free of the ROFR.

[30] In *Hanen v Cartwright*, the Defendant signed an agreement with a third-party promising to sell him the land as soon as the time-limited ROFR held by the Plaintiff expired. Erb, J found the irrevocable offer to sell at a price certain, albeit in the future, triggered the Plaintiff's ROFR; *Hanen v Cartwright*, 2007 ABQB 184 at para. 39. Albeit in *obiter*, she also found that the Defendant's arrangement with the third-party "defeated or eviscerated the [Plaintiff's] contractual rights"; *Hanen* at para. 47.

[31] The Alberta Court of Appeal affirmed the decision in *Hanen*. Although they did so on the basis of the contractual interpretation and thus declined to comment on the operation of the duty of good faith, they concluded:

> ...the transaction was structured as it was to avoid triggering the right of first refusal. The principles of contractual interpretation do not permit reading the right of first refusal in a way that deprives it of any meaning in reality.
>
> Hanen v Cartwright, 2007 ABCA 388 at para. 9

[32] A similar approach was tried by the majority shareholder in a company where the minority shareholder had a ROFR in the shareholder agreement. The majority shareholder structured a transaction in which its shares would be transferred to a subsidiary and then sold to a third party. The Ontario Court cited the obligation of the majority shareholder to act reasonably and in good faith, not "in a fashion designed to eviscerate the very right which has been given"; *GATX Corp v Hawker Siddeley Canada Inc*, 1996 CarswellOnt 1434 (Ont CJ, Gen Div) at para. 73.

[33] In *Landymore v Handy*, a case also referred to by Erb, J in *Hanen*, the defendant owners tried first to offer the property to the plaintiffs, who had a ROFR, but the plaintiffs would not buy at that price. The owners then secretly incorporated a company to make a seeming arms-length offer which the plaintiffs would be forced to match, but the scheme was discovered and the court

concluded this was not a *bona fide* offer; *Landymore v Handy*, 1991 CarswellNB 102 (NSSC, Trial Division)

[34] Like *Hanen*, I have determined that the language of the ROFR is sufficient to create an enforceable right of first refusal for the benefit of the Tenant and so need not decide this appeal on an alleged breach of the duty of good faith in the performance of a contract. However, the Landlord knew that– at a minimum – it had a contractual obligation to notify the Tenant of other offers to purchase. Its failure or refusal to do even that cannot be described as anything other than depriving the Tenant completely of the benefit of its ROFR.

Conclusion

[35] In its application before the Applications Judge, the Landlord sought and was granted an order discharging the caveat filed by the Tenant against the leased property. Ashcroft, J of this Court subsequently granted an interim injunction preventing the conveyance to the third-party offeror, pending this appeal. Apparently, both the third-party offeror and the Tenant still desire to purchase the property.

[36] The issue of the Tenant's entitlement to specific performance, and thus its interest in land supporting the caveat, was never raised – not before the Applications Judge and not on appeal. I understand that the Tenant has now filed an application for that relief and adjourned it *sine die*, pending this decision.

[37] As it was not before me, I make no comment on the Tenant's right to specific performance: the caveat may yet be discharged on that basis. However, on the narrow issue before me on this appeal, I have found that the language of this ROFR was sufficient to grant the right described by the Tenant, namely to be informed of third-party offers received by the Landlord and the opportunity to match any such offer. As that was the basis on which the Applications Judge discharged the caveat, it shall remain on title subject to agreement of the parties or further order of this or a higher court.

[38] If the parties cannot agree on costs, they may inform my office.

Heard on the 24th day of April, 2025.
Dated at the City of Calgary, Alberta this 22nd day of July, 2025.

M.H. Hollins
J.C.K.B.A.

Appearances:

Mandeep Singh
for the Appellant

Christopher Handel
for the Respondent