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Swift Judgment in a Complex Commercial Case

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Case commented on: *Blaze Energy Ltd v Imperial Oil Resources*, 2014 ABQB 326

The Commercial Court of the English High Court is well known for its capacity to give swift judgments in complex commercial cases. This decision confirms that the Alberta Court of Queen's Bench can offer the same service provided that the parties can agree on the procedures to be followed.

The statement of claim in this matter was filed on April 23, 2014 and on April 29 Chief Justice Wittman granted a Consent Order for an expedited trial confined to three issues. Absent an Agreed Statement of Facts the trial proceeded on the basis of filed affidavits and the transcripts of cross examination on those affidavits. The Consent Order provided that there would be no questioning or *viva voce* evidence. The trial concluded on May 26 and Justice Frederica Schutz acceded to counsels' request and gave well written reasons for judgement on May 30.

The case involved two transactions (A and B) involving the purchase and sale of oil and gas assets and an interest in a natural gas processing plant (Plant) and rights of first refusal rights (ROFR) arising under two distinct agreements (the 1960 Lands Agreement and the Plant Agreement).

In Transaction A, Imperial agreed to sell its interests in certain lands to Whitecap. The sale included lands subject to the 1960 Lands Agreement which were part of a block of lands known as the West Pembina Area lands. The sale also included Imperial's 90% interest in the West Pembina Gas Plant. This Plant which was built in 1988 processes gas from the West Pembina Area including gas from lands subject to the 1960 Lands Agreement. The ownership and operation of the Plant was governed by a Construction Ownership and Operation Agreement (the 1988 CO & O Agreement or Plant Agreement). Imperial concluded that Transaction A triggered the ROFR provision in the 1960 Lands Agreement and accordingly gave notice to Blaze of the proposed sale. Imperial attributed a value of $17 million to its interest in the 1960 Lands Agreement properties in a total transaction of $855 million. In response, Blaze made inquiries as to the additional interest (Blaze already had an 8% interest) that it might be able to acquire in the Plant if it exercised its ROFR rights under the Lands Agreement. Imperial ultimately took the view that Blaze had failed to exercise its ROFR rights under the Lands Agreement in the manner prescribed by the relevant clause.

Imperial concluded that the sale of its interest in the Plant did not trigger the ROFR in the 1988 CO & O Agreement on the grounds that the disposition fell within an exception to ROFR obligations. The exception provided that "Any Owner may, without restriction, dispose of an interest in the Plant in conjunction with the disposal of the Owner's corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant." Imperial advised the relevant parties, including Blaze, that it was taking this position.

In Transaction B, Whitecap agreed to sell Keyera a portion of the assets that it had acquired from Imperial, specifically an 85% interest in the Plant and a corresponding interest in Gas assets in the West Pembina Area. Whitecap provided Blaze with a ROFR notice under the Lands Agreement but, relying again on the exception referred to above, did not provide a ROFR notice under the CO & O Agreement. Blaze exercised its ROFR rights under the 1960 Lands Agreement and then took the position, crucial to this litigation (at para 64) that if it acquired Whitecap's interest in these lands Whitecap could no longer be said to be selling a "corresponding working interest" in the West Pembina Area Gas Lands to Keyera. Thus, Blaze argued, Whitecap could not take advantage of the exception in the CO & O Agreement and must therefore offer Blaze the opportunity to acquire at least some level of additional interest in the Plant.

The Consent Order directed an expedited trial of three issues:

(a) Does Blaze have the ROFR rights it claims to have in relation to Transaction A?
(b) Does Blaze have the ROFR rights it claims to have in relation to Transaction B?
(c) If Blaze has ROFR rights is it entitled to specific performance?

Justice Schutz concluded that Blaze failed on all three grounds.

(a) Does Blaze have the ROFR rights it claims to have in relation to Transaction A?

Blaze claimed a right to acquire a 4% interest in the Plant as a result of Transaction A. Blaze fixed on 4% on the basis that the 1960 Lands provided about 4% of Imperial's production to the Plant from the West Pembina Area over the previous five years.

The short answer to this claim is that neither the 1960 Lands Agreement nor the CO & O Agreement gave Blaze any such right. Furthermore, the Agreements could not be read together to produce such a result since there was no evidence that the two agreements were intended to be connected. One only has to refer to the dates of the two agreements (1960 and 1988) and the different lands served by these two agreements to see that this must be the case.

> [17] Put plainly, the 1960 Lands Agreement has nothing whatsoever to do with rights or interests in the Plant and nothing subsequent to the 1960 Agreement has changed that fact.

Blaze also claimed that Imperial's notice under the 1960 Lands Agreement was defective on the basis that it failed to connect the Lands transaction with the Plant transaction and the later Disposition B (see para 108). For the reasons already stated this submission was doomed to failure insofar as it depended on being able to read the Agreements together, but it also meant that Blaze had failed to exercise its ROFR rights under the Lands Agreement. That was fatal: see

para 123 and subsequent discussion of *Pierce v Empey*, [1939] SCR 247 and *Chase Manhattan Bank of Canada v Sunoma Energy Corp*, 2002 ABCA 286, at paras 161 et seq.

(b) Does Blaze have the ROFR rights it claims to have in relation to Transaction B?

There appears to be no issue with respect to Blaze's rights as against Whitecap under the 1960 Lands Agreement. However, Justice Schutz had no hesitation in concluding that the exercise of Blaze's rights under the Land Agreement could have no effect on the ability of Whitecap to claim the benefit of the exemption under the CO & O Agreement. This must be right. The two agreements are independent (at para 148) and in any event, as Justice Schutz points out (at para 144), the CO & O Agreement uses the term "corresponding" and not "identical".

(c) If Blaze has ROFR rights is it entitled to specific performance?

Justice Schutz gave three reasons for concluding that specific performance would not be available. First, and with respect to the alleged Plant ROFR entitlement arising under Transaction B, the alleged interest was far too contingent to permit an order of specific performance (at para 158): "Blaze cannot persuade me … that there is unambiguous content or object or subject-matter to the claimed Plant ROFR … Blaze resorts to altering the express contractual language … and contorts the plain meanings" of the relevant clauses in the two agreements. Second, and with respect to the Lands ROFR under Transaction A, Blaze had failed to comply with the terms of the ROFR (see references above to *Pierce* and *Chase Manhattan*). And finally Justice Schutz was prepared to apply the clean hands doctrine to forestall claims to relief on the grounds that there was evidence that Blaze was in default under the CO & O Agreement. While this latter hardly seems to be closely enough connected to be a relevant consideration, the first two grounds are convincing. Interestingly, Justice Schutz did not find it necessary to refer to *Semelhalgo v Paramadevan*, [1996] 2 SCR 415 although it was certainly provided to her.