SUPREME COURT OF NOVA SCOTIA
Citation: 3233954 Nova Scotia Ltd. v **Systemcare Cleaning & Restoration Ltd.**, 2011 NSSC 22

Date: 20110125
Docket: Hfx 323940
Registry: Halifax

Between:

3233954 Nova Scotia Limited

Applicant

v.

Systemcare Cleaning & Restoration Limited
-and-
Systemcare Environmental Limited

Defendants

Revised decision: The text of the original decision has been corrected according to the erratum dated January 31, 2011. The text of the erratum is appended to this decision.

Judge: The Honourable Justice Gregory M. Warner

Heard: November 8 and 9, 2010, in Halifax, Nova Scotia

Counsel: **Jason T. Cooke**, counsel for the applicant 3233954 Nova Scotia Limited

James D. MacNeil, counsel for the respondents Systemcare Cleaning & Restoration Limited and Systemcare Environmental Limited

By the Court:

A. *The Dispute*

[1] On July 31, 2009, a Nova Scotia numbered company ("Siepco") owned by Sybern "Siep" Vander Zwagg Sr. purchased 50% of the issued shares of Systemcare Cleaning & Restoration Limited ("SCR") and Systemcare Environmental Limited ("SE") from corporations controlled by Daniel Murray ("Murray").

[2] Bernard Dunlap ("Dunlap"), the owner through a family trust of the other 50% of two Systemcare companies, refused to recognize the share transfer, to permit the Systemcare companies to effect the transfer of the shares on the share registry or to issue new share certificates. Dunlap claims that the share sale violated the right of first refusal provisions of a Shareholders' Agreement entered into by Murray and Dunlap when Murray purchased 50% of the SCR shares from Dunlap on December 31, 2003.

[3] Siepco makes this Application in Court against SCR, SE and Dunlap for an order to recognize and effect the transfer of shares on the share registry, to issue new share certificates and to exercise its shareholder rights, including access to SCR's financial records. SE is apparently inactive and without assets; therefore, it is not a factor in this contest.

[4] The evidence consists of affidavits of Murray, "Siep" Vander Zwagg Sr., Sybern "Bren" Vander Zwagg Jr. and Dunlap, as well as partial discovery transcripts. The affiants were cross-examined in court.

B. *Background*

[5] Dunlap founded SCR many years ago. It was initially operated as a cleaning and restoration service provider in the Windsor, Nova Scotia area. In 1990, he turned his business into a franchiser of cleaning and restoration service providers.

[6] Murray is a "certified restorer." He has worked in the disaster restoration business for more than 25 years and the environmental remediation business for more than 20 years. He started, and from 1983 to 1988 owned a disaster restoration business in Fredericton, New Brunswick, as a franchisee of a national firm, ServiceMaster of Canada Limited. Murray expanded his business to Halifax. His ServiceMaster franchise in Halifax grew to a 3.5 million-dollar business during the next ten years. In 1998 he became responsible for 69 Canadian franchise locations for ServiceMaster of Canada. He left ServiceMaster in 2001.

[7] In 2002, and again in the spring of 2003, Dunlap sought to hire Murray to assist in growing the marketing and sales side of SCR. Murray became interested when he was offered an ownership interest.

[8] Murray purchased 50% of the shares of SCR for $155,000.00 in 2003. Together Dunlap and Murray ran and grew SCR as well as created a new company, SE, to franchise environmental remediation service providers.

[9] On December 31, 2003, at the closing of the share purchase agreement between Dunlap and Murray, they executed a Shareholders' Agreement prepared by Gary Nelson, the lawyer for SCR and Dunlap. The agreement was amended on March 31, 2005, to permit Dunlap to transfer his interest to a family trust.

[10] Attached as an appendix to this decision are the important provisions of the Shareholders' Agreement. For this Application, the important provisions are Part IV (subsections 7.11 and 7.12, creating the right of first refusal), Part II (subsections 7.02 to 7.04, describing the method of payment if the right of first refusal is exercised), and section 5.00, the Good Faith clause.

Relations between Murray and Dunlap

[11] Murray was not cross-examined on the parts of his affidavit dealing with how Murray came to purchase his interest in SCR and the creation of SE; Murray's work (which resulted in more franchisees coming on board, the sales of SCR tripling, and SCR became profitable) (¶¶ 13-30); their relationship issues (¶¶ 31-38); their efforts to sell SCR (¶¶ 39-48), as well as Murray's efforts to purchase from, and sell to, Dunlap his interest in SCR (¶¶ 49-78). Dunlap made no reference to these circumstances in his affidavit. I therefore accept Murray's account. It provides important context for my analysis of the good faith obligations of Murray and Dunlap in the general law of contracts and expressly set out in section 5.00 of the Shareholders' Agreement.

[12] Murray acknowledged that the intended franchising of environmental remediation services by SE was not successful. By August 2008, Murray had paid Dunlap for the purchase of his shares in SCR in full.

[13] From Murray's point of view, problems arose between him and Dunlap that caused him concern about his participation in SCR. Murray's complaints were that:

- he was being excluded from discussions regarding SCR's finances;
- his suggestions were being ignored;
- he and Dunlap agreed that each would have five weeks' annual vacation but Dunlap was taking far more (12 weeks in 2008) without prior agreement;
- franchisees were unhappy; and
- he was contributing more than Dunlap to the business.

[14] In 2007, Steamatic of Canada, a national cleaning and restoration company, approached Dunlap and Murray with interest in buying SCR; however, Dunlap did not want to pursue a sale.

[15] Next, Murray approached Belfor (Canada) Inc., a part of the largest international restoration firm, about a possible purchase of SCR. Dunlap took the lead in, and excluded Murray from, these discussions. Murray's evidence was that Belfor made a lucrative tentative offer for the shares of SCR, but Dunlap scared them off.

[16] By the fall of 2008, Murray decided that one had to buy the other out. His accountant estimated that the value of SCR was between $740,000.00 and $1,200,000.00.

[17] On December 5, 2008, Murray offered to buy Dunlap out for $400,000.00. Dunlap rejected this offer and counter offered to buy Murray out for Murray's 2003 purchase price of $155,000.00. Relations between Murray and Dunlap became tense. This led to a loss of morale amongst franchisees.

[18] In January 2009, Dunlap left for three weeks vacation without notice to Murray. Murray contacted some franchisees to join him in an offer to buy out Dunlap. On February 2nd, 2009, when Dunlap returned, Murray offered to buy out his interest in SCR and the Dartmouth franchise for one million dollars. The next day Dunlap asked Murray who his partners were. Thereafter Dunlap declined Murray's offer and countered with a statement that he would buy Murray out.

[19] During this period, Murray became anxious and his health suffered.

[20] On February 12th, 2009, Dunlap offered to buy Murray's shares for $100,000.00, and release Murray from all SCR liabilities; the transaction would close in seven days. On February 19th, Murray's lawyer received a letter from Dunlap's lawyer (Gary Nelson) confirming that he had prepared an agreement. The draft agreement was forwarded to Natalie J. Woodbury (Murray's lawyer) on February 26th.

[21] Murray's lawyer commented on the draft and requested a March 6 closing date. On March 4th, Dunlap's lawyer said the earliest closing would be March 31st. On March 27th, Murray's lawyer received a revised draft Agreement, with a proposed closing on March 31th. The revised draft Agreement was now subject to a new condition on financing.

[22] On April 1st, Dunlap's lawyer advised that due to financing arrangements, the deal had to close on April 1st or 2nd, 2009, or would be delayed to the end of April. Murray agreed to close on April 1st or 2nd, 2009, subject to some conditions.

[23] On April 8th, Dunlap's lawyer advised Murray's lawyer that Murray's shares had no value and Murray had to close on Dunlap's terms. Murray states that he agreed to those terms and the closing was set for April 17th.

[24] On April 17th, 2009, Dunlap's lawyer advised that the deal would not close because of "issues" with Dunlap's proposed investors.

[25] On May 11th, 2009, Dunlap confirmed that the purchase he had proposed with other investors was off. He made a new offer to Murray to purchase his shares for $1.00. Murray rejected this offer and started to look elsewhere for a purchaser.

[26] On May 11th, 2009, Murray had a lunch with "Bren" Vander Zwagg, who was the Bridgewater franchisee for SCR. Murray advised Bren Vander Zwagg that he intended to leave SCR and had offered to sell his shares to Dunlap for $100,000.00 but that Dunlap had been unable or unwilling to purchase. Murray asked if Bren Vander Zwagg was interested in purchasing his shares. Murray advised him of Dunlap's right of first refusal. Bren Vander Zwagg indicated that he was interested in purchasing Murray's shares but expected that Dunlap would exercise the right of first refusal.

[27] On May 19th, Bren Vander Zwagg's lawyer (Kelly L. Greenwood) sent Murray's lawyer an offer to purchase the SCR/SE shares for $200,000.00 with $100,000.00 payable on closing and the remaining $100,000.00 over 36 months, with interest. The offer stated that Bren Vander Zwagg "or my assignee(s)" will purchase the shares. Bren Vander Zwagg's lawyer authorized Murray's lawyer to disclose to Dunlap an attached letter that outlined the offer but not the identity of the purchaser or any of the other terms (other than the purchase price). The purchaser's identity and other terms were not to be revealed to Dunlap without Bren Vander Zwagg's prior written consent.

[28] On May 20th, Murray's lawyer sent to Dunlap's lawyer (Gary Nelson) a letter setting out the offer that Murray was prepared to accept, giving notice to Dunlap of Murray's offer to sell his shares to Dunlap for $200,000.00 pursuant to Section 7.11 of the Shareholders' Agreement, and giving Dunlap sixty days to accept. Attached was an offer to sell to Dunlap signed by Murray, together with a copy of Ms. Greenwood's letter to Ms. Woodbury confirming her client's offer for the shares of $200,000.00, $100,000.00 payable on closing, and $100,000.00 payable in 36 equal monthly installments with interest at 4%.

[29] In e-mail exchanges between Dunlap's lawyer and Murray's lawyer, between May 29th and June 1st, Dunlap offered to buy Murray's shares for $100,000.00 and suggested that the third party offer was no longer in play. Dunlap repeated this offer in e-mails between June 3rd and June 12th. He eventually proposed a closing of June 17th.

[30] On June 16th, Murray's lawyer e-mailed to Dunlap's lawyer that, if Dunlap did not accept Murray's May 20th offer, Murray intended to close the third party *bona fide* offer for $200,000.00 as soon as possible after July 19th.

[31] On June 17th, Dunlap's lawyer, as solicitor for SCR, on the instructions of Dunlap and without consulting Murray, wrote to Bren Vander Zwaggterminating his Bridgewater SCR franchise.

[32] On cross-examination during the hearing, the parties differed as to whether Mr. Dunlap was aware of the identity of Bren Vander Zwagg as the proposed purchaser of Murray's shares. While it is not essential to, or determinative of, this decision, I accept the evidence of Murray and Bren

Vander Zwagg that, shortly after Bren Vander Zwagg's offer to Murray was conveyed to Dunlap, Dunlap was told and knew that Bren Vander Zwagg was the proposed purchaser.

[33] In a June 24th e-mail to Dunlap's lawyer, Murray's lawyer complained that the termination of Bren Vander Zwagg franchisee agreement was conduct intended to discourage Bren Vander Zwagg from further involvement in the offer to purchase of Murray's shares and further evidence of Dunlap's bad faith, which bad faith included his "offers" to buy Murray out. Murray rejected Dunlap's last offer to purchase Murray's shares for $100,000.00.

[34] In a July 2nd reply, Dunlap's lawyer noted that Bren Vander Zwagg was in serious default in his franchise obligations. The June 17th letter to Bren Vander Zwagg was not made to thwart Murray's proposed sale. Nelson wrote that all Dunlap had asked for was to be provided with proof that Bren Vander Zwagg offer was:

> ... indeed a *bona fide* offer, which means it is capable of being completed, including the prospective purchaser having the financial means to complete. Any price can be offered if there never is any possible way to pay it. ... That agreement does not require a response to all offers but only to a *bona fide* offer.

[35] Nelson continued the July 2nd letter as follows:

> However, Mr. Dunlap wishes to conclude this matter as soon as possible. In that regard, he has instructed me to advise you that he formally rejects Mr. Murray's offer, although Mr. Dunlap still questions whether it is a *bona fide* offer, subject to the condition that the third party transaction be completed within 30 days. (My emphasis). Any completion date later than that date will be considered a new offer with all the provisions of the Shareholders Agreement attaching to it anew. Secondly, as an alternate, Mr. Dunlap makes the following offer to your client:
>
> 1) he will purchase all the Murray controlled shares for $100,000.00, subject to the conditions set out in our previous correspondence;
> 2) he will purchase the Murray interest in the head office building at 140 Thorne Avenue, Dartmouth for ½ the equity in the building as determined from an appraisal by a qualified independent appraiser; and
> 3) each part of this offer closes on or before July 16, 2009.
>
> The alternate offer gives your client a choice between a dubious offer that will not be fully paid for a number of years, if ever, and a sure offer for cash in 2 weeks. Your client knows both the respective parties and can make his decision accordingly.

[36] When Bren Vander Zwagg was made aware of this letter, he realized for the first time that his offer had a real prospect of closing. He acknowledged that he did not, by himself, have the means to complete the purchase or to borrow money from a bank. He had spoken to three other franchisees about joining him in the purchase but none were interested.

[37] Bren Vander Zwagg then contacted his father Siep Vander Zwagg. Siep Vander Zwagg had an interest in purchasing Murray's shares and had the ability to close the deal. He had already incorporated a numbered company ("Siepco") in January 2009 for investment purposes. Siep Vander Zwagg, through Siepco, then concluded the agreement Bren Vander Zwagg had made with Murray for the purchase of Murray's shares. The purchase price remained $200,000.00 with $100,000.00 paid on closing and $100,000.00 paid over three years (but with three annual installments instead of thirty-six monthly installments).

[38] Siep Vander Zwagg owned certain recreational property in another corporation. Murray lent him $50,000.00 on the security of a first mortgage on the recreational property, which $50,000.00 was advanced by Siep Vander Zwagg to Siepco. It was part of the $100,000.00 paid to Murray on July 31st.

[39] Since the July 31, 2009 closing, the recreational property has been sold and the $50,000.00 repaid to Murray.

C. *Counsel's Argument*

[40] The only issue is whether the sale of Murray's share to Siepco was made in contravention of Dunlap's right of first refusal ("RFR") under the Shareholders' Agreement.

Siepco's Argument

[41] Siepco states that Murray received a *bona fide* offer and gave the notice required pursuant to section 7 of the Shareholders' Agreement; Dunlap waived its RFR on July 2, 2009. Murray closed in compliance with both the Shareholders' Agreement and the conditions set out by Dunlap in his July 2nd waiver of his RFR.

[42] In its analysis of the law respecting first refusal agreements, Siepco cited: *Landymore* v *Hardy*, 1991 CarswellNS 102 (NSSC); *GATX Corp* v *Hawker Siddeley Canada*, 1996 CarswellOnt 1434 (OSCJ) and *Bracken* v *Gilbart*, 1996 CarswellBC 2110 (BCSC). In its reply brief, it also referred the Court to *Ventas* v *Sunrise Senior Living Real Estate Investment Trust*, 2007 CarswellOnt 170 (ONCA).

[43] Siepco further argued that the Respondents are estopped from challenging the *bona fides* of the offer because Murray and Siepco were entitled to rely on Dunlap's July 2nd waiver of its RFR. Siepco cites *Sears Canada* v *Wilson*, 1990 CarswellNS 452 (NSCA).

Respondents' Submission

[44] The Respondents submit that the May 20th notice from Murray to Dunlap did not trigger the RFR under subsection 7.11 of the Shareholders' Agreement because:

• the May 19th offer to Murray, conveyed to Dunlap on May 20th, was not a *bona fide* offer at the time it was made, or at any time, and

• the sale completed between Murray and Siepco differed from the offer contained in the notice given by Murray to Dunlap on May 20th.

[45] The Shareholders' Agreement expressly prohibited transfer of shares, other than in accordance with the Agreement. Subsection 7.11 required the disposing shareholder to give the remaining shareholder a written offer to purchase the shares at "the price at which the disposing shareholder proposes to sell such shares to any prospective purchaser who has made a *bona fide* offer to purchase such shares."

[46] The Respondents cite *Brookside Farms* [1988] BCJ No. 2554 (BCSC) and *Kopec v Pyret* [1987] SJ N. 204(SCA) for the proposition that an offer to the holder of the RFR is a precondition to the exercise of the right of first refusal. They cite *Landymore* v *Hardy*, at ¶¶ 98 and 99, for the proposition that the law implied a duty of good faith and reasonableness in dealings between the holder and the giver of the RFR. Specifically, the vendor must act *bona fides* in setting out the price in the offer that he or she is prepared to sell for.

[47] The Respondents argue that the offer presented to Dunlap was never *bona fides* in the sense that the offer "did not in effect crystallize until after Siepco was capable of meeting the offer met." In effect, it only became a *bona fide* offer after Dunlap declined or waived his right of first refusal on July 2nd. Said differently, at the time the offer was made, Bren Vander Zwagg did not have the means to come up with the money to close the deal on the basis of the offer made.

[48] Furthermore, the Respondents argue that there were differences between the offer presented to Dunlap and the sale that was eventually concluded between Siepco and Murray. The differences were the identity of the purchaser, and the manner in which the deferred portion of the purchase price was paid. First, the purchaser changed from Bren Vander Zwagg to Siepco. Second, while the purchase price remained $200,000.00 with $100,000.00 down, the remaining $100,000.00 became payable in three equal annual instalments with interest at 4%, instead of 36 equal monthly instalments with interest at 4% in Bren Vander Zwagg's offer that was conveyed to Dunlap. In addition, the respondents note that on closing Murray gave Siepco a RFR to purchase Murray's interest in the building out of which SCR operated (owned by Dunlap and Murray separately from SCR or SE).

Siepco's Response

[49] Regarding the respondents' first argument, Siepco argues that to be a *bona fide* offer did not require that Bren Vander Zwagg have the ability to fund the offer at the time of the offer. Often offers are made before financing has been arranged. The offer specifically stated that Bren Vander Zwagg could assign the offer. When Bren Vander Zwagg was notified that Dunlap waived his RFR and he was unable to finance the purchase, he assigned it to Siepco, as he could under his agreement with Murray. The identity of the purchaser was not a term or condition of the RFR between Dunlap

and Murray (subsection 7.11), and was not part of the formal offer made by Murray to Dunlap on May 20th. The fact that Dunlap asked, and I find was told by Bren Vander Zwagg, that he had made the offer, did not make the identity of the proposed purchaser a term or condition of the RFR offer. The agreement by Murray to lend fifty thousand dollars to Botany Woods Developments Incorporated, (another corporation owned by Siep) on the security of a mortgage on real property, did not make the deal any less *bona fides*. *Bona fides* means, in the context of this transaction, that the offer was a real offer by a real third party for a genuine purchase price, and that it was not artificial in any way.

[50] With respect to the Respondents' second point, Siepco acknowledges that there were two changes between the original offer and the final agreement, but submits that neither change leads to a breach of the RFR provisions in the Shareholders' Agreement. The two changes were firstly, that the term for the payment of the remaining $100,000.00 changed from 36 equal monthly instalments to three equal yearly instalments, together with interest at 4%, and secondly, that Murray gave Siepco an RFR to purchase his interest in the building (owned by Murray and Dunlap but not SCR or SE) out of which SCR operated.

[51] Siepco submits that the first change (respecting the frequency of payments of the deferred portion of the purchase price) was of no consequence in the context of the RFR contained in the Shareholders' Agreement between Murray and Dunlap. Subsection 7.04 of the Shareholders' Agreement provides that "should the purchase price of any shares in the Company purchased or sold pursuant to any provision or provisions of this Section 7.00 of this Agreement (entitled "Buy-Sell Provisions") [which would include the proposed sale by Murray to Bren Vander Zwagg or his assignee pursuant to subsections 7.11 and 7.12] be or became payable over a period of time or other than in full on completion of such purchase and sale, then . . . the purchase price may be paid at the option of the purchasing shareholder . . . by (a) 25% down . . . and (b) the balance by a promissory note payable over three years with interest at 4%." This means that, because 50% of the purchase price between Murray and Siepco was not to be paid on completion or closing, Dunlap had the right to purchase Murray's shares, if he accepted the RFR, in accordance with 7.04 and not in accordance with the terms for payment of the deferred portion of the purchase price as between Murray and Siepco.

[52] All parties appear to have agreed on this interpretation of subsection 7.04 of the Shareholders' Agreement. Siepco argues that, because part of the purchase price between Murray and Siepco was not payable on completion, the only relevant information for the offer by Murray to Dunlap was the total purchase price and the fact that part of the purchase price was not payable on completion. Based on those two facts, Dunlap was entitled, pursuant to subsection 7.04 and Murray's May 20th "Offer to Sell Shares", to pay Murray fifty thousand dollars on completion, and the remaining one hundred and fifty thousand dollars "over a period of three years from date of completion . . . with interest *at at* a rate of4% per annum . . ." Said differently, the change from monthly to annual payments was irrelevant to Dunlap and his RFR under the Shareholders' Agreement, and Murray's May 20th "Offer to Sell" specifically expressed the fact that Dunlap's purchase terms were those in the Shareholders' Agreement, not the offer from the anonymous third party.

[53] With respect to the Respondents' third point, the right of first refusal on the building was not as it appeared at first glance. SCR guaranteed to the Royal Bank the mortgage on the building held by Murray and Dunlap. Siepco was purchasing Murray's shares in SCR. Siepco's RFR to purchase Murray's interest in the building arose only, according to the express terms of the Share Purchase Agreement (Exhibit 1, Tab A) if the owners of the building (Dunlap and Murray) defaulted on the mortgage and SCR was obligated to pay the Bank under the guarantee. In other words, the RFR only arose if SCR (for which Siepco was purchasing Murray's shares) became liable for Murray's mortgage obligations under the mortgage.

[54] Subsections 7.11 and 7.12 only required that Murray offer Dunlap a right to buy his shares in SCR for the price at which he proposed to sell such shares to any prospective purchaser who has made a *bona fide* offer. It did not provide that any other terms of a bona fide offer, whether related to SCR or any other entity, be offered to Dunlap. In this case, Siepco's RFR respecting the building was not an unfair enhancement of the consideration for Siepco's purchase. It simply protected Siepco from a default by Murray of his mortgage obligations. Pursuant to Siepco's RFR (Exhibit 8), Siepco would still have to pay Murray for his interest in the building for the price and on the terms of any offer that Murray was prepared to accept from a third party.

D. **Analysis**

[55] This analysis addresses five interrelated questions:

1. What is the proper interpretation of the RFR in Section 7 of the Shareholders' Agreement?
2. Was the May 19th offer a *bona fide* offer?
3. Did the differences between the May 19th and the July 31st share purchase agreement with respect to:
    a) the identity of the purchaser (from Bren Vander Zwagg to Siepco);
    b) changing the deferred portion of the purchase price from 36 equal monthly instalments to three equal annual instalments; and,
    c) Murray granting Siepco an RFR in respect of the building owned jointly by Murray and Dunlap

breach Section 7 of the Shareholders' Agreement or nullify the notice and offer conveyed by Murray to Dunlap on May 20th, 2009?
4. If the answer to Number 3 is yes, is Dunlap estopped, by reason of its July 2nd, 2009, waiver of the right of first refusal, from arguing that the May 19th offer to Murray was not a *bona fide* offer?
5. What effect does the principle of utmost good faith, contained in Section 5.00 of the Shareholder's Agreement have on this analysis?

[56] I will deal with the last (fifth) question respecting good faith first.

[57] While this is an application by Siepco to require the respondents to recognize and register Siepco's purchase of Murray's shares in SCR and SC on the company books and records, and it is not an application by Dunlap or Murray for an oppression remedy under the *Nova Scotia's Companies Act*, the express importation by Section 5.00 of a "duty of utmost good faith" in respect of all dealings between the parties incorporates a similar analysis to that found in corporate oppression cases.

[58] In *Landymore*, Saunders J, as he then was, stated at ¶¶ 97 to 99:

> . . . The grantor of a right of first refusal is not entitled to frustrate it by conveying the property in such a way as to avoid having to give the right in the first place: *Gardner* v *Coutts & Co*., [1968] 1 W.L.R. 173, [1967] 3 All E.R. 1064 (Ch. Div.)
>
> 98 Relations between the giver and the holder of a right of first refusal must be characterized by good faith and reasonableness.
>
> > *The vendor must, of course, act bona fide in defining the price to be included in the offer*. This is a matter of fact ... If she [the vendor] is proposing to sell by private treaty the price to be specified in the offer would be the price intended to be named in the estate agent's particulars, *or the lower price, if any, to which the vendor is, as a matter of fact, prepared to descend on such a sale*.
>
> [Emphasis added.] (*Smith* v *Morgan*, [[1971] 1 W.L.R. 803,], [1971] 2 All E.R. 1500 (Ch. Div.) [at p. 1504 All E.R.].)
>
> 99 Consider as well the observation of V. Di Castri, *The Law of Vendor and Purchaser*, 3d ed. (looseleaf) (Toronto: Carswell, 1988), vol. 1, at p. 6-8:
>
> > As to the giver of the right, the law implies a duty of reasonableness and good faith on his part in entering into a cash and property exchange transaction. The duty is not discharged if the essential purchase of the sale to the third party is to frustrate the right of first refusal.

[59] These paragraphs from *Landymore* and Justice Saunders' approach to analysing a right of first refusal agreement between co-owners of real property, was adopted by Rosenberg, J., as he then was, in *Downtown King West Development* v *Massey Ferguson*, (1993) 14 OR (3d) 528 at p. 540, and by Blair J., as he then was, in *GATX* v *Hawker Siddeley*, at ¶ 73, where he also added:

> . . . It is well established that the grantor of a right of first refusal must act reasonably and in good faith in relation to that right, and must not act in a fashion designed to eviscerate the very right which has been given. This is an illustration of the application of the good faith doctrine of contractual performance, which in my view is a part of the law of Ontario.

[60] Blair J.'s statement in *GATX* was adopted in a similar RFR decision: *CanBev Sales & Marketing* v *Natco Trading*, (1996) 30 OR (3d) 778 (OSCJ) (upheld on appeal) at page 789. In *CanBev*, Lederman J. noted (at page 790) that the RFR provisions in *GATX* differed from those in *CanBev*, but, despite that: ". . . similar principles apply. There is a duty of reasonableness and good faith imposed upon Natco and Al-Ali in seeking CanBev's permission to overcome the restriction on the transfer of Natco's shares."

[61] At page 794, Lederman J. found the selling shareholder acted in good faith and not in breach of the RFR. In the circumstances of that case, if the non-selling shareholder wanted more information, it had the duty to ask.

[62] This case law pertaining to rights of first refusal reflects the good faith duty of parties to contracts in general. In *The Law of Contract in Canada*, Fifth Edition (Toronto: Carswell, 2006), **G. H. L. Fridman** suggests that there is no duty to negotiate in good faith (pp. 79 and 80), but clearly a duty to perform a contract in good faith, including any performance that includes the exercise of discretion (pp. 539 to 541).

[63] In *Canadian Contract Law*, First Edition, (Markham: LexisNexis, 2006), **John Swan** discusses good faith; in particular, at pp. 243 to 259, pp. 467 to 470 and pp. 698 to 707. He concludes that, at a minimum, good faith means dealing honestly and exercising discretion or power fairly and on proper grounds without, in any way, subrogating one's interest to that of the other.

[64] Murray and Dunlap expressly agreed to act in utmost good faith in all their relations as shareholders, directors and officers. For this reason the distinction some courts and writers have made between conduct during negotiations and conduct after a contract is entered is irrelevant in the circumstances of this case. The duty applied to the extended negotiations when Murray sought to sell his shares to Dunlap or purchase Dunlap's shares. It applied to Murray's Notice and Offer to sell to Dunlap of May 20th, 2009, to Dunlap's responses to the Notice, and the subsequent closing between Murray and Siepco on July 31th, 2009.

Question #1 What is the proper interpretation of the RFR in Section 7 of the Shareholders' Agreement?

[65] For general principles of interpretation of a contract, I incorporate my analysis in four recent decisions: *Kings County* v *Berwick*, 2010 NSSC 128 at ¶¶ 29 to 31 and three other decisions cited at ¶ 30 of that decision. In particular, *BC Rail Partnership* v *Standard Car Truck Co*, 2009 NSSC 240, ¶¶ 25 and 26, which read as follows:

> [25] I take guidance from these principles (being mostly a precis of Fridman's analysis):
>
> a) the primary source of knowledge of the parties' intention is the written word, and effect must be given to their express language. The true meaning

of a document must be given without doing undue violence to the language used, unless this would result in an absurdity. Words of ordinary use must be construed in their ordinary and natural sense; the paramount test of meaning is the parties' intention determined, in the operative sense, by reference to the surrounding circumstances of signing of the contract. (**Fridman**, pp. 440-441)

b) the common law recognizes circumstances in which evidence other than the express written contract may be admitted to discover the nature and extent of the contractual obligations, as aides to interpreting the intrinsic meaning of the language. The parol evidence rule and its exceptions recognize the impossibility in some circumstances of confining persons to the language used. Underlying this concern, that an injustice not be done, is that the contract should be understood in the way the language would appear to the ordinary, reasonable person looking at it objectively, but with an exception for language sometimes used in a special sense because of past dealings, idiosyncracies of a trade or business, or custom and practice. (**Fridman**, pp. 442-443)

c) the basic rule respecting parol evidence is that if the written contract is clear and unambiguous, no extrinsic evidence may be admitted to alter, vary or interpret the written words. For example, extrinsic evidence may not be admitted to contradict the written contract. See: *Hawrish* v *Bank of Montreal*, [1969] S.C.R. 515, followed in *Bauer* v *Bank of Montreal*, [1980] 2 S.C.R. 102. (**Fridman**, pp.443-444)

d) exceptions exist, in general terms, to explain incomplete documents, prove an unfulfilled condition precedent and assist to ascertain the parties' intentions; and in particular:

i) to prove that the contract was obtained by fraud, misrepresentation, mistake or other mitigating conduct by the other party (technically not to interpret, but to invalidate the contract). (**Fridman**, p.445)

ii) where the contract is ambiguous on its face, to admit evidence of surrounding circumstances to resolve the ambiguity. (**Fridman**, p.446)

iii) without contradicting the contract, to explain the contract language, especially to fill in a gap when the parties have plainly omitted something. (**Fridman**, p.447-448)

iv) in some limited circumstances, and subject to some dispute in the case law, to establish an oral collateral agreement that modifies, qualifies or explains the contract so long as it does not contradict or significantly impact on the contractual obligations. Different approaches (that are difficult to reconcile) are evident in, for example, *Sinclair* v *Brady*, 1991 CarswellNS 527 (NSSC, Roscoe J, as she then was) at ¶¶ 10-12, and *Gutierrez* v. *Tropic International Ltd.*, [2002] O.J. 3079 (OCA) at ¶¶ 19 and 20. (**Fridman**, pp. 448-451)

e) admissible sources of parol or extrinsic evidence to explain ambiguous terms of a contract include:

i) conduct, including statements, made prior to the contract, such as earlier dealings between the parties, and the contents of a prior (but not contradictory) agreement. The extent of prior conduct and statements is not without some controversy. While some courts have held that prior negotiations leading to the execution of the agreement or contract are admissible, not to change the terms of a written contract but as a surrounding circumstance to aid in interpretation, in accord with *Chisholm v. Chisholm* (1915) 49 NSR 174 at 181 (NSCA) and the principles enunciated by the House of Lords in *Prenn* v *Simmonds*, [1971] 3 AER 237 and *Reardon Smith Line* v *Hansen-Targen*, [1976] 3 AER 570, other Canadian courts appear to follow the opposite admonition of Estey, J. in *Indian Molybdenum Ltd.* v. *The King*, [1951] 3 DLR 497 at pp. 502-503.

ii) conduct contemporaneous with the making of the contract; that is, 'the state of facts and circumstances as known to and affecting the parties at the time.' "The language used . . . must be interpreted, wherever possible, in the sense which the parties understood it." (**Fridman**, p. 452).

iii) conduct and statements after the agreement is put in writing. **Fridman** writes that while such conduct and statements are not admissible in England, they are clearly admissible in Canada on the basis that there is no better way of determining what parties intended than to look at what they did under the contract.

[26] **Geoff Hall's** useful cannons or precepts can be summarized as follows:

a) Contractual interpretation is all about giving proper meaning to the words selected by the parties themselves to govern their relations, understood in the context in which those words are used.

b) A contract is to be construed as a whole with meaning given to all of its provisions. This is the first aspect of context. Disputed language is interpreted in the context of the language of the agreement as a whole.

c) The factual matrix is the second aspect of context. Disputed agreements are interpreted within the context of the factual matrix (surrounding circumstances) that gave rise to the contract. It is in this second aspect of context that most controversy arises in the case law. It is clear that the subjective intentions of the individual parties, and prior or collateral oral agreements that contradict the written contract are not admissible. It appears that evidence of the negotiations between the parties is not part of the factual matrix. (See *Prenn v. Simmonds*, p. 241; *Indian Molybdenum*, pp. 502-503). Evidence is restricted to evidence of the factual background known to the parties at or before the date of the contract including evidence of the genesis and objectively the aim of the transaction.

d) Interpretation is an objective exercise. Contractual interpretation seeks to give effect to what the parties objectively manifested by the words they used, not what they subjectively intended.

e) Commercial contracts are to be interpreted in a manner that promotes commercial efficacy, determined on an objective basis. This requires contextual evidence that places the court in the position of the parties. The corollary of the promotion of good business sense is the avoidance of what is commercially absurd.

f) Every effort should be made to find a meaning. Court should be loath to hold contracts void for uncertainty. It should be assumed that the parties clearly intended to be legally obligated, even if they used inarticulate, imprecise or incomplete language to express their joint intention.

g) A contract is to be interpreted as of the date it was made. Unlike statutes and the constitution whose interpretation may change over time, the meaning of a contract does not change or evolve after the date of formation.

h) The parol evidence rule is a holdover from an era in which context and surrounding circumstances did not have nearly the importance they have today. The basic concept is that evidence extrinsic to a contract is not admissible to add to, subtract from, vary or contradict a written agreement. It does not apply where the written agreement is incomplete or there is a collateral oral agreement or where there is an ambiguity in the written document. In essence, it only applies to preclude evidence of subjective intention and evidence that directly contradicts the written contract. Many Canadian trial and appellate decisions seem to have gone beyond the restrictions to the resort to parol evidence set out in *Eli Lilly* ,as has English case law, as evidenced by *Prenn*, *Reardon Smith Line*, and most importantly *Investors Compensation Scheme* v *West Bromwich Building Society*, [1998] 1 WLR 896 (HL). (See *J&P Reid* v *Branch Tree Nursery*, 2006 NSSC 226,at ¶¶ 62-65, and *Gates* v *Croft*, 2009 NSSC 184 at ¶¶ 33-41). While more astute attention is being paid to context (in the sense of the document as a whole and surrounding factual matrix) in the interpretation of language, Geoff Hall may be optimistic in suggesting, absent a reassessment of *Eli Lilly* by the Supreme Court, that resort to parol evidence, when no ambiguity exists, is less circumscribed than in the past.

i) The *contra preferentem* rule is another rule whose significance and applicability are narrowed to those circumstances where parties are of unequal bargaining power (guarantees and insurance policies) and only in circumstances where an ambiguity exists.

[66] For the purposes of this application, there are no common law or statutory restrictions on the rights of the two shareholders to sell their shares in SCR or SE. The only rights relevant to this

application are those incorporated in Section 7 of the Shareholders' Agreement which apply to the shares of SCR only. The buy-sell provisions in this agreement cover four circumstances:

I death of a shareholder (Section 7 Part III);
II right of first refusal during lifetime (Section 7 Part IV);
III the disability, retirement or loss of control of shares by shareholder (Section 7 Part V); and
IV the insolvency or bankruptcy of a shareholder (Section 7 Part VI).

[67] Of the four circumstances, only the right of first refusal during lifetime is relevant to this application.

[68] In all four circumstances, the payment of the purchase price is governed by Section 7 Part II, and the terms and conditions of the sale of shares are governed by Section 7 Part VII.

[69] While RFR provisions may generally be viewed as having a common purpose, the rights of shareholders respecting an RFR provision depend upon the wording of the provision itself. The wording of RFR provisions is not common to all contractual relationships. There are many methods, and varying degrees, to which parties who own assets or shares may wish to agree to bind or restrict themselves in respect of their assets or shares.

[70] For example, the RFR provisions in the *Landymore*, *GATX* and *Bracken* decisions all differ from each other and the wording in the case at bar. The differences are important to the analysis of the extent to which the shareholders in SCR expressed their intent to restrict the sale of their shares. Because parties are presumed to intend what they expressly stated in their agreement, analysis of the words in Section 7 of this agreement constitutes the first and paramount consideration.

[71] In *Landymore,* the critical terms are set out in ¶¶ 36 and 37 of the decision:

> [36] At p. 1
> [The Landymores] shall have right of first refusal to purchase the premises described in Schedule 'A' hereto ... on the terms of any bona fide written offer received by ... [Andrea Hardy] which ... [Andrea Hardy] is willing to accept.
>
> [37] At p. 2
> [Andrea Hardy] further agrees that she shall not enter into a contract of sale for the premises and property or a listing agreement without first granting to ... [the Landymores] for a period of thirty (30) days a right to acquire the said premises and property at the price and on the terms and conditions of which ... [Andrea Hardy] is willing to accept from third parties.

[72] In *Landymore,* the non-selling property owner's right was described as the right to purchase the seller's interest in the property "on the terms of any bona fide written offer received by the seller

which she was willing to accept" or "at the price and on the terms and conditions of which the seller was willing to accept for third parties."

[73] In *GATX*, the crucial terms are set out in ¶ 14 of the decision. I precis them as follows:

2. Neither party will sell or otherwise dispose of any common shares without the written consent of the other party except to the other party, except upon the performance of the following terms and conditions:

(a) In the event the Offeror receives and proposes to accept a *bona fide* offer in writing from a third party the Offeror shall first furnish a copy of the said offer to the Offeree

(c) The Offeree shall have thirty (30) days to accept it in whole, but not in part;

(d) The sale and purchase pursuant to an offer and acceptance, shall be completed within ten (10) days after the expiration of the thirty (30) day period limited for acceptance, and the consideration shall be paid in cash or by certified cheque.

[74] In *GATX*, the RFR entitled the non-selling shareholder to receive a copy of the *bona fide* offer, and to purchase the seller's shares in accordance with the terms of the *bona fide* offer for consideration paid in cash or by certified cheque.

[75] In *Bracken*, the crucial terms are described in ¶ 4 of the decision. I precis them as follows:

2.01 No shareholder shall transfer his interest in shares of the company except for consideration payable entirely in lawful money unless he has obtained the prior written consent of all shareholders or has first offered his entire interest in the shares to the other shareholders pursuant to Article 3.

Article 3.09 applies to all transactions. It permits a shareholder to waive the benefits of Article 3 generally or for a specific transaction.

3.01 If a shareholder proposes to sell his shares to anyone, before such an offer is made or before any offer is accepted, he shall deliver to the others a Notice specifying:

a) the interest in shares he desires or proposes to sell or transfer;

b) the price stated in terms of lawful money of Canada at which and the terms on which he proposes to sell or transfer his interest; and,

c) whether he has received a *bona fide* offer from, or proposes to sell the offered shares, to any particular person and, if so, the name, occupation and address of that person.

3.03 The remaining shareholders may accept the offer in the Notice and the seller is bound to sell and the remaining shareholders who accept the offer are bound to purchase all of the interest being sold at 75% of the price and on the terms specified in the Notice.

3.04 If no remaining shareholders accept the offer in the Notice, the seller may complete the sale "at the price and on the terms specified in the Notice."

[76] The crucial terms in the Dunlap/Murray agreement respecting the RFR for shares of SCR differ from those in the *Landymore*, *GATX* and *Bracken* decisions. The two important terms are Subsection 7.11 and 7.04.

[77] Subsection 7.11 states that neither shareholder may sell any of his shares in SCR unless he offers to sell them to the other at the lesser of (a) the price determined by 7.02 or (b) "the price at which the seller proposes to sell the shares to any prospective purchaser who has made a *bona fide* offer and the other shareholder has either rejected or has not accepted the offer in writing within sixty days."

[78] Subsection 7.04 provides that if the purchase price of any third party offers that the selling shareholder is prepared to accept, is payable over time or otherwise than in full on completion (closing), the purchasing shareholder, who accepts an offer contained in the Notice given pursuant to 7.11, may at his option pay 25% down and the remainder by a Promissory over three years with interest at 4%.

[79] On its face, 7.11 requires no more than that the selling shareholder give the non-selling shareholder a written offer to sell at a price that he proposes to sell to "any prospective purchaser who has made a *bona fide* offer." On its face, 7.04 entitles the non-selling shareholder, who accepts an offer which is not payable in full on closing, to pay the selling shareholder 25% down and the remaining 75% by a Promissory Note payable over three years with interest at 4%, regardless of the terms of the third party offer.

[80] In some of the case law cited to the Court, the non-selling shareholder is expressly entitled to receive a copy of the third party offer and/or the identity of the purchaser. Neither is a term of this Shareholders' Agreement.

[81] Courts in some of reported decisions suggest that the purpose of an RFR provision is to protect a shareholder from having an unwanted co-shareholder foisted on him or her.

[82] Should I infer that the identity of the purchaser and/or the terms for payment of the deferred portion of the purchase price are implied terms in Section 7.11? There is nothing in the preamble, purpose or any other provision of this Shareholders' Agreement from which either intention can be inferred. The only extrinsic evidence of the factual matrix at the time of the entering into of the Shareholders' Agreement was evidence relating to efforts by Dunlap to hire Murray, which efforts bore fruit when Dunlap offered to sell Murray 50% of SCR.

[83] In the agreement itself, the holder of 40% of the shares is entitled to appoint one of two directors of SCR. In the Shareholders' Agreement, Dunlap and Murray are named the President and Secretary respectively of the Company.

[84] Nothing in the Shareholders' Agreement entitles a holder of 50% of the shares to obtain employment with the Company or become an officer of the Company.

[85] I conclude that the identity of the purchaser was not an express or implied term of the RFR provision in the Shareholders' Agreement.

[86] Consequently, it is not a breach of the RFR provision in the Shareholders' Agreement that Siepco was not identified on the May 20th Notice to Dunlap as the proposed purchaser, nor does it nullify the May 20th Notice.

[87] The second difference between the May 20th Notice and offer to Dunlap and the final agreement between Murray and Siepco was the change in the frequency of the payments of the balance of the purchase from thirty-six equal monthly instalments to three equal annual instalments. The total purchase, the amount payable on closing, time for the payment of the balance and the interest rate on the unpaid balance remained the same as identified in the May 20th Notice to Dunlap.

[88] In the circumstances of this case, the change in the term for payment of the balance from monthly to annually does not constitute a breach of the RFR provisions or nullify the May 20th Notice to Dunlap.

[89] The only substantive information that the non-selling shareholder was entitled to receive was the total purchase price and whether it was payable fully on closing. Disclosure of the price of any *bona fide* offer was expressly required by 7.11. The terms for the payment of the price may, in some circumstances, affect the "real" purchase price. Deferral of payment of all or part of a purchase price without interest or at a reduced interest rate may alter the real purchase price in the sense that the present value of the deferred payment may be less than a purchase price payable in full on closing. Such was not the result of the change in the frequency of payments in this case.

[90] Moreover, the fact that the purchase price is not fully payable on closing entitled Dunlap to purchase Murray's shares for the purchase price of $200,000.00 but in accordance with 7.04; that is, at Dunlap's option by paying 25% down and the balance ($150,000.00) over three years with interest at 4%. The fact that the July 31st share purchase agreement between Murray and Siepco provided for payment of the $100,000.00 by three annual payments with interest at 4% rather than thirty-six monthly payments was not relevant to Dunlap's obligation to pay Murray pursuant to the May 20th Notice to Dunlap, nor the attached offer executed by Murray and to be executed by Dunlap if he accepted Murray's offer.

[91] My recollection is that counsel for the Respondents did not argue against, but rather accepted, this interpretation of 7.04 as it relates to an offer made pursuant to 7.11.

[92] In summary, Dunlap was entitled to be notified of the total purchase price and whether it was fully payable on closing. Because that scenario would trigger 7.04 and because, on the evidence, the payment of the deferred portion of the purchase price by annual versus monthly payments over the same three-year period, in both cases at an interest rate of 4% per annum did not change the purchase price. The change in the term for the payment of the deferred portion of the purchase price did not breach 7.11, nor nullify the May 20th Notice and offer.

[93] The third difference between the May 19th offer by Bren Vander Zwagg to Murray and the July 31 share purchase agreement was the inclusion of Section 4.1(f) and Schedule B (Exhibit 8) - the right of first refusal respecting the building.

[94] Siepco's right to receive written notice of any *bona fide* offer that Murray may receive for his interest in the building together with a true copy of the *bona fide* offer, and the right to purchase Murray's interest in the building for the price and upon the terms and conditions contained in the offer (less credit for one-half of all amounts paid by SCR on its guarantee of Murray and Dunlap's mortgage obligations on the building) is not a term required to have been disclosed to Dunlap. It did not affect the price at which Murray sold his shares in SCR to Siepco. Failure to include it in the May 20th Notice and offer from Murray to Dunlap does not breach 7.11, nor nullify the notice for two reasons.

[95] First, Dunlap was not entitled to receive a copy of the offer or the terms and conditions of the May 19th offer, excepting as they related to the price of the SCR shares. This provision respecting a right of first refusal to Siepco could only arise in the event that Dunlap and Murray defaulted in their mortgage on the building and SCR, which Company guaranteed the mortgage, had made payments to the Bank. Second, the RFR did not alter in any way the purchase price of the SCR shares.

Question #2 Was the May 19th offer a *bona fide* offer?

[96] As noted in ¶¶ 44 to 48, the Respondents submit that the May 19th offer was not *bona fide* in two respects. First, Bren Vander Zwagg did not have the ability to back up the offer he made when he made it; therefore, when Murray gave Dunlap the Notice and offer on May 20, no *bona fide* offer existed. Second, the deal that closed on July 31st was not the offer that Dunlap was given notice of and waived.

[97] The factual foundation of their first submission is in the discovery evidence of Bren Vander Zwagg. He acknowledged that, when he made the first offer,

(a) he expected Dunlap to exercise the RFR because it was a very good deal;
(b) he knew he could not afford to buy the shares on his own (either with his own money or bank financing);
(c) he intended to ask three other franchisees to join him as purchasers if Dunlap waived the RFR, but he had not spoken to them before May 19th; and,
(d) only after Dunlap waived his RFR on July 3rd (by letter dated July 2nd) did Bren Vander Zwagg put together the deal with his father that eventually closed.

[98] The factual foundation for their second submission is that the July 31st share purchase agreement. It differed from the May 19th offer in respect of:

(a) the purchaser;

(b) the change from monthly to annual payments of the deferred portion of the purchase price;

(c) the loan made by Murray to Botany Woods Developments; and,

(d) the RFR given by Murray to Siepco respecting the building.

[99] Siepco said that the May 19th offer was a *bona fide* offer. It was a real offer as opposed to an artificial offer. The purchaser was at arms length to the seller and not associated with him in any way. While Bren Vander Zwagg knew that he did not have the ability to complete the deal as offered (if Dunlap's RFR was waived) on his own, he expected, at the time he made the offer, to have other franchisees join him as purchasers. His offer to Murray clearly provided that he or his assignee would complete the purchase.

[100] I do not agree with the respondents that, to be a *bona fide* offer, the May 19th offer had to be one that Bren Vander Zwagg knew, when the offer was made, he could close in the sense that he alone, or with others with whom he had already entered into an arrangement, had the means to complete it.

[101] The parties' submissions on the meaning of a '*bona fide* offer' revolved around the duty of reasonableness and good faith outlined in *Landymore* and *GATX*. At one point, counsel for the Respondents used the words "*bona fide*" and "valid" interchangeably.

[102] Saunders J, in *Landymore*, adopted a statement from a 1971 English decision to the effect that a seller must act *bona fide* in defining the price to be included in the offer (¶ 97). He further described *bona fide*, in the context of price, as the price "that some other person was prepared to give . . . the test is objective. The price cannot simply be one that the Offeror thinks he or she can obtain from a third party, rather it must be a price that can be objectively shown to be sum a third party would offer" (¶ 92).

[103] He adopted the view that the offeror was entitled to negotiate a deal with a third party for a price based on cash and monies' worth, but that the total value could not be less than the cash price at which the assets or share was offered to the offeree. (¶ 95).

[104] As Blair J. noted in *GATX* at ¶ 106, the offer in *Landymore* was neither *bona fide* nor an arms-length third party offer, as the price had been artificially inflated and the proposed purchaser was simply a 'corporate emanation of the giver' of the RFR.

[105] Blair J. noted that the offer in the *GATX* case was a *bona fide* offer in writing by a third party. To be a *bona fide* offer, he held that the offer must not only be one which the selling shareholder receives in accordance with the provisions of the RFR, but must also be an offer which that party "proposes to accept." (¶ 76 and ¶ 105). At ¶ 107 he added: "There is nothing wrong with a market driven price being put forward to trigger a right of first refusal. The inequity arises when an attempt is made to structure the transaction in a fashion that will deprive the holder of that right."

[106] In *Rosenberg* v *Waterloo Terrace*, 1990 CarswellOnt 592 (OSCJ), Osler J. described a *bona fide* offer sufficient to trigger the RFR in ¶¶ 8 and 9 as follows:

> . . . What was required to trigger the option, however, was a "bonafide offer to purchase." There is authority for the proposition that a transaction may well be bona fide, even though not at arm's length. (*Whittal v. Minister of Finance for B.C.*) [1977] 2 WWR 182 . . . Seaton J.A. [in *Whittall*] took for guidance what was said by Cozens-Hardy M.R. in *A.G.* v *Duke of Richmond (No. 1)*, [1908] 2 KB 729 (CA), at 741, as follows:
>
> > 'Bona fide' is a perfectly well-known term; it is used again and again throughout this statute and in other similar statutes and, after all, it means neither more nor less than created in good faith, not as a sham or as a mere paper transaction, not collusively or as part of a scheme to defraud anybody, but it must be an encumbrance created, and being in fact what it is in form, a genuine transaction, intended to have, and having, in truth, all the effect that its form enables it to have. In my view, it is quite unimportant to consider, when a mortgage is made by an owner of an estate, what his motive may be in effecting the mortgage.
>
> 9 In the present case, . . . the transaction, which was contemplated and which did in fact take place, was real; the consideration was reasonable, even though somewhat lower than the price set for the exercise of the plaintiff's option, and I find that the offer received by Waterloo Terrace Limited and made by Mr. Weisz was "a bonafide offer to purchase."

[107] In *Ventas* v *Sunrise Senior Living REIT*, 2007 CarswellOnt 1705 (ONCA), Blair J.A. described a *bona fide* offer at¶¶ 60-61:

> 60 There was much debate about the meaning of "*bona fide*". The application judge viewed it as meaning acting "in good faith; sincere, genuine", relying upon *The Oxford English Dictionary*, [FN7] She found that the HCP1 Acquisition Proposal was not *bona fide* because it was made in breach of the HCP1 Standstill Agreement, which Sunrise was obliged by s. 4.4. to enforce. The appellants agree that *bona fide* means "genuine" or "made in good faith" but submit that a *bona fide* Acquisition Proposal, as contemplated by the Purchase Agreement, is one that is "genuine" or "authentic" in the sense that it is not a sham and is reasonably capable of becoming a Superior Proposal, and that this decision must be made in the context of the entire situation. 61 In the end, there is not much difference between the parties as to the meaning of the term "*bona fide*". As with the principles of contract interpretation, they differ on the application of the term in the circumstances of this case. Given the language of the Purchase Agreement, and the context in which it was negotiated - particularly the language

> "that did not result from a breach of this Section 4.4 in sections 4.4(2) and 4.4(3) - I do not think the application judge erred in her assessment and the use of the term "*bona fide*" here.

[108] In *CanBev*, CanBev waived its RFR and consented to the sale by the majority shareholder (Natco) of its shares in Allen's Food Industries after it had asked about the sale price and was shown a "term sheet" showing a figure of 10.2 million dollars. This figure was not qualified. This figure was not the actual sale price. After deductions and adjustments, it was approximately 6.5 million dollars.

[109] Osler J., after adopting the *GATX* and *Landymore* analysis to the effect that parties are obligated to act reasonably and in good faith, determined that Natco acted in good faith - *bona fide* in defining the price. It held that if CanBev wanted more information respecting the unqualified figure in the term sheet, a crucial piece of information in its decision not to exercise its RFR, it should have asked more questions.

[110] In this case, I have considered whether the offer to Murray was a *bona fide* offer in the following three senses:

1. Whether it was a genuine or real offer;
2. Whether it was a sincere offer as opposed to a sham or subterfuge; and,
3. Whether the offer was made in good faith.

Genuine or Real Offer

[111] The offer of $200,000.00 was a genuine or real price.

[112] Murray had paid $155,000.00 for the shares in 2005, and SCR had grown substantially in sales and profitability since then. Murray had consulted an accountant about the value of the SCR shares when he made his initial offer to Dunlap to either buy his shares or sell his own. Before Bren Vander Zwagg's offer, Murray and Dunlap had conducted negotiations, initiated by Murray whereby Murray offered to buy Dunlap's 50% for $400,000.00. Dunlap responded to Murray's offers with his own offers; first offering to pay $155,000.00, and thereafter interchanging between offers to pay $100,000.00, and $1.00.

[113] The only offers not made in good faith; that is, that were not *bona fide* offers, were Dunlap's offers. They were made when Dunlap thought Murray had no other option but to sell to him. They were made when Murray was ill and frustrated. They were on-and-off again offers. They were made in June and on July 2nd when Dunlap believed that Bren Vander Zwagg, the proposed purchaser, did not have the ability to complete a purchase.

[114] There is no evidence that when Bren Vander Zwagg made the offer that he did not intend to close. He acknowledged in discovery that he did not have the means to close it by himself when he made the offer and that he expected Dunlap would exercise his RFR because the deal was, in his

view, such a good deal. However, the fact is that, at the time he made the offer, he expected other franchisees to join him as purchasers. When this did not happen, he talked his father, through Siepco, into taking an assignment of the agreement and closing it. It closed at the same price and on terms very similar to those contained in the May 19 offer.

[115] Murray and Bren Vander Zwagg / Siepco were clearly not related parties or affiliated in any way. There is nothing in their negotiations to suggest that the price of $200,000.00 was not the actual price for the transaction, which price was the closing price on July 31.

[116] Murray's loan to Botany Woods Developments was for valuable consideration and properly secured. Nothing in the evidence suggests that it had the effect of reducing the real price.

[117] Absent direct opinion evidence on the fair value of Murray's shares in SCR, and based on all the evidence, it appears that $200,00.00 was likely a fair price for the Murray shares. (This assumes that the other shareholder, director, and officer would act in a reasonable manner, and in accordance with 5.00 of the Shareholders' Agreement.)

Sincere Offer v Subterfuge or Sham

[118] Nothing in the evidence or sequence of events suggests that the May 19th offer, that closed on July 31st,was a sham. It closed, and for the same purchase price as set out in the May 19th offer. There is no evidence that Murray is still, in some indirect way, the owner of the shares.

[119] Bren Vander Zwagg acknowledged that he never expected to be called upon to close the deal when he made the offer. It was such a good deal that he expected Dunlap to exercise his RFR. He was a credible witness generally, and, in my view, on this point. His expectation that he would not get the opportunity to complete the purchase did not make the offer a sham. The fact that he did not have the means on his own to complete the deal he offered, did not, in the circumstances of this case, make it a sham. He had a plan as to how he intended to complete it. When that plan did not work, he found another way to complete the deal.

Made in Good Faith

[120] There is no evidence that between Murray and Bren Vander Zwagg, or later between Murray and Siepco, there was any lack of good faith in their negotiations or in the final agreement. Both sides made accommodations necessary to close the deal within the short time frame set by Dunlap.

[121] In summary, I conclude that the offer of May 19th was a *bona fide* offer, even though Bren Vander Zwagg knew he did not have the means, on his own, to close it at the time he made the offer. The offer clearly provided that the purchasers may be assignees of Bren Vander Zwagg.

[122] Hindsight can sometimes show a party's true colours. In this case, hindsight confirms that the offer was a *bona fide* offer. The deal closed at the same price and on very similar terms to those contained in the May 19th offer.

Question #3 Did the differences between the May 19th offer and July 31st share purchase agreement constitute a breach of 7.11 of the Shareholders' Agreement or nullify the May 20thNotice and offer to Dunlap?

[123] For the reasons set out in the answers to the first question, the answer to this question is no. At the risk of redundancy, the identity of the purchaser was not a part of 7.11, the change in the instalments of the deferred portion of the purchase price from monthly to annual did not change the purchase price, and Murray's granting to Siepco of an RFR in respect of the building owned by Murray and Dunlap in the limited circumstance where Murray and Dunlap defaulted and Siepco would be otherwise holding the loss did not change the purchase price.

Question #4 Is Dunlap estopped by reason of his July 2nd, 2009, waiver of the right of first refusal (conveyed to Murray on July 3rd) from arguing that the May 19th offer is not a *bona fide* offer?

[124] If I am wrong in the above analysis, I would find that Dunlap is estopped by reason of the wording of his waiver. In the July 2nd letter (emailed July 3rd) from Dunlap's lawyer rejecting Murray's offer, he expounded at length on Dunlap's view that the May 19th offer was not a *bone fide* offer and rejecting Murray's position that it was a *bona fide* offer. He then writes: "However, Mr. Dunlap wishes to conclude this matter as soon as possible. In that regard, he has instructed me to advise you that he formally rejects Mr. Murray's offer, although Mr. Dunlap still questions whether it is a bona fides offer . . ."

[125] This Court recently wrote regarding the principle of estoppel in *Kings County* v *Berwick,* 2010 NSSC 128 at ¶ 60. It reads as follows:

> The proper approach to the estoppel issue is that explained by Chiasson, J.A. for the British Columbia Court of Appeal in *Dunn* v. *Vicars*. He adopts the broad approach consistent with the English case law, primarily enunciated by Lord Denning. Lord Denning's conclusion in *Amalgamated Investment* v. *Texas Commerce* at p. 584 is the modern law of equitable estoppel. He wrote:
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. . .. It has evolved during the last 150 years in a sequence of separate developments: proprietory estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: ... All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to

> misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the court will give the other such remedy as the equity of the case demands.

[126] It is clear from the July 2nd letter rejecting Murray's offer that Dunlap considered Bren Vander Zwagg's offer to be a "dubious offer that will not be fully paid for a number of years, if ever, . . ." I find as a fact that the reason he rejected Murray's offer was because he assumed that Bren Vander Zwagg would not be able to close the deal. He intentionally and knowingly took the chance that Murray would take his lower offer rather than the other "dubious" offer.

[127] Estoppel is an equitable remedy. It would be unfair and unjust in light of the knowledge Dunlap had at the time he rejected Murray's offer (made pursuant to 7.11) to permit Dunlap, after the fact, to seek to undo something he consented to with his eyes wide open.

E. Conclusion

[128] For the reasons above, Siepco is entitled to the remedy sought. The parties agreed on November 9th, 2010, that the successful party should have costs of this Application in the all-inclusive amount of $7000.00. I so order.

J.

Appendix A

THIS SHAREHOLDERS' AGREEMENT made this 31st day of December, 2003 between Bernard Dunlap and Murray Franco Holdings and Systemcare Cleaning and Restoration

5.00 **GOOD FAITH**

The principle of the utmost good faith shall govern the parties, in all their relations as Shareholders, directors and officers.

7.00 **BUY-SELL PROVISIONS**

The Shareholders agree that:

PART I ***EXEMPT TRANSFER***

(Not relevant)

PART II ***PURCHASE PRICE OF SHARES***

...

7.04 ***Payment of Purchase Price*** - Should the purchase price of any shares in the Company purchased and sold pursuant to any provision or provisions of this Section 7.00 of this Agreement (entitled "*Buy - Sell Provisions*") be or become payable over a period of time or other than in full on the completion of such purchase and sale, then, unless otherwise specified in this Agreement, the purchase price may be paid at the option of the purchasing Shareholder or Shareholders (the "Purchaser") by:

(a) ***Initial Payment*** - Paying twenty-five per cent (25%) of the purchase price or such greater amount as the Purchaser in his sole discretion deems appropriate, in cash to the selling Shareholder or Shareholders ("the Seller") or the legal representative of the Seller; and

(b) ***Promissory Note for balance*** - Giving a promissory note drawn in favour of the Seller or the estate of the Seller for the balance of the purchase price, which promissory note shall be:

(i) payable over a period of three (3) years from date of completion of the purchase and sale transaction;

(ii) with interest at a rate of 4% per annum on the outstanding principal balance from time to time, unless a different rate of interest is specified at the time of that transaction;

(iii) fully open as to additional payments of principal without notice, bonus or penalty; and

(iv) payable in full, should any default there under continue for thirty (30) days after written notice thereof is received by the Purchaser.

PART III ***COMPULSORY TRANSFER OR PURCHASE FOLLOWING DEATH***

(Not relevant)

PART IV ***RIGHT OF FIRST REFUSAL DURING LIFETIME***

7.11 ***Right of First Refusal*** - None of the Shareholders shall dispose of all or any part of his shares in the Company during his lifetime, except to a company of which that Shareholder is the controlling shareholder, unless the disposing Shareholder has offered in writing to sell such shares to the remaining Shareholders at the lesser of:

(i) the price specified in subparagraph 7.02 of this Agreement, and

(ii) the price at which the disposing Shareholder proposes to sell such shares to any prospective purchase who has made a *bona fide* offer to purchase such shares, and the other Shareholder has either rejected or have not accepted the offer in writing within sixty (60) days.

7.12 ***Completion of Right of First Refusal Purchase*** - The purchase price for any sale of shares between the Shareholders pursuant to subparagraph 7.11 preceding shall be paid in accordance with subparagraph 7.04 of this Agreement.

PART V ***CALL OPTION ON DISABILITY, RETIREMENT, LOSS OF CONTROL OF SHARES***
(Not relevant)

PART VI ***OPTION ON INSOLVENCY, BANKRUPTCY***
(Not relevant)

PART VII ***TERMS AND CONDITIONS OF SALE OF SHARES***

7.19 ***Terms and Conditions on Sale*** - The purchase and sale of any shares pursuant to any provision or provisions of this Section 7.00 of this Agreement (entitled "*Buy-Sell Provisions*") shall be subject to and completed upon the following terms and conditions

(i) the purchase and sale shall be for all, and not less than all of the shares in the capital of the Company beneficially owned by the selling Shareholder

(ii) the shares purchased and sold shall be free and clear of any liens, mortgages, charges and encumbrances whatsoever and the selling Shareholder shall have good and marketable title thereto;

(iii) upon completion of the transaction, the selling Shareholder shall, and shall cause his nominee(s) to resign from all offices and positions with the Company;

(iv) the expressions "completion of the transaction", "completion of the purchase and sale" and any combination or variation thereof shall mean or be deemed to mean when the payment of the purchase price of the Shares being purchased and sold, is made by the purchasing Shareholders, whether such payment is for case or part case and part promissory note, and shall not mean or be construed to mean when such promissory note is paid;

(v) each purchasing Shareholder shall use his best efforts and take all reasonable steps to cause the selling Shareholder to be fully released from all obligations under any guarantees or indemnities which have been given by the selling Shareholders for or in respect of any debts, liabilities or obligations of the Company, and

(vi) the terms "selling Shareholder" and "Seller" shall include, where applicable, his legal or personal representative(s).

...

9.00 **TERMINATION**

The Shareholders agree that:

9.01 ***Termination of Agreement*** - This Agreement has an indefinite term, subject to earlier termination in the event of:

(i) the liquidation, dissolution, winding up or other termination or the corporate existence of the Company;

(ii) an agreement in writing of all the Shareholders;

(iii) at the unanimous option of the other Shareholders, if one of the Shareholders violates any provisions of this Agreement; or

(iv) all of the voting shares being owned by a single Shareholder.

10.00 **PROVISOS**

The Parties hereto agree that the following provisions apply to this Agreement and Schedule or document ancillary hereto:

10.01 ***Time of Essence*** - Time shall be of the essence in this Agreement, every part hereof, any amendment hereto and any supplementary or ancillary document.

...

10.03 ***Further Assurances*** - Each of the Shareholders covenants and agrees that he and his heirs, executors, administrators, executors, administrators, successors and assigns will sign such further agreements, assurances, waivers and documents, attend such meetings, or pass such resolutions and exercise such votes and influence, do and perform or cause to be done and performed such further and other acts and things as may be necessary or desirable from time to time in order to give full effect of this Agreement and every part hereof.

...

10.05 ***Successors and Assigns*** - This Agreement shall be binding upon and enure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

...

10.08 ***Other Actions*** - The parties shall do all acts and things and execute all documents which may be reasonably necessary or advantageous to enforce this Agreement according to its tenor and intent.

SUPREME COURT OF NOVA SCOTIA
Citation: 3233954 Nova Scotia Ltd. v **Systemcare Cleaning & Restoration**, 2011 NSSC 22

Date: 20110125
Docket: Hfx 323940
Registry: Halifax

Between:

3233954 Nova Scotia Limited

Applicant

v.

Systemcare Cleaning & Restoration Limited
-and-
Systemcare Environmental Limited

Defendants

Revised Decision:	The text of the original decision has been corrected according to the erratum below, dated January 31, 2011
Judge:	The Honourable Justice Gregory M. Warner
Heard:	November 8 and 9, 2010, in Halifax, Nova Scotia
Counsel:	**Jason T. Cooke**, counsel for the applicant 3233954 Nova Scotia Limited
	James D. MacNeil, counsel for the respondents Systemcare Cleaning & Restoration Limited and Systemcare Environmental Limited

Erratum:

[1] In line 1 of ¶ 49, the words "*bona fides*" should read "*bona fide*".

[2] In line 4 of ¶ 49, the comma between the word "RFR" and "and" should be removed.

[3] In line 4 of ¶ 57, the phrase "of Section 5.00" should read "by Section 5.00".

[4] In ¶ 67, the word “the” between the words “during” and “lifetime” should be removed.

[5] In ¶ 86, the word “Notice” between the words “20th” and “to” should be capitalized.

[6] In the second sentence of ¶ 90 the date “July 31th” should read “July 31st”.

[7] In ¶ 93, the date “July 31th” should read “July 31st”.

[8] In ¶ 96, the date “July 31th” in the last sentence should read “July 31st”.

[9] In ¶ 98, the dated “July 31th” in the first sentence should read “July 31st”.

[10] In ¶ 98, clause (c), the word “Bay” should read “Woods”.

[11] In ¶ 106, the word “deficient” should read “sufficient”.

[12] In the first sentence of ¶ 113, the semi-colon between “is” and “that” should be a comma and a comma should be inserted between the words “offers” and “were”.

[13] In ¶ 114 the word “intent” in the first sentence should read “intend”.

[14] In the last sentence of ¶ 117, the word “would” should be inserted between “officer” and “act”.

[15] In the first sentence of ¶ 118, the word “that” should be removed between “events” and “suggests”.

[16] In the first sentence of ¶ 126, the name “Vander Zwagg” should read “Bren Vander Zwagg”.

[17] In the second sentence of ¶ 127, the words “made pursuant to 7.11" should be in brackets.