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Case No. 5526-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETER BRINCKERHOFF, INDIVIDUALLY AND AS TRUSTEE OF THE PETER R. BRINCKERHOFF REV. TR U/A DTD 10/17/97,	:	
Plaintiff,	:	
v.	:	**C.A. No. 5526-VCN**
ENBRIDGE ENERGY COMPANY, INC.; ENBRIDGE, INC.; ENBRIDGE ENERGY MANAGEMENT, LLC; ENBRIDGE EMPLOYEE SERVICES, INC.; MARTHA O. HESSE, JEFFREY A. CONNELLY, DAN WESTBROOK, GEORGE K. PETTY, STEPHEN J.J. LETWIN, TERRENCE L. MCGILL and STEPHEN J. WOURI,	:	**Supreme Court No. 574, 2011**
Defendants,	:	
and	:	
ENBRIDGE ENERGY PARTNERS, L.P.,	:	
Nominal Defendant.	:	

SUPPLEMENTAL MEMORANDUM OPINION ON REMAND

Date Submitted: May 15, 2012
Date Decided: May 25, 2012

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NOBLE, Vice Chancellor

This matter was remanded by the Supreme Court with directions to determine "the sufficiency of Plaintiff-Below/Appellant Brinckerhoff's claims for reformation and rescission under Court of Chancery Rule 12(b)(6) in the first instance."[1] As an initial matter, the Complaint does not allege a separate, discrete claim, in the sense of a cause of action, for either reformation or rescission. The Complaint, however, does request, as an alternative remedy to money damages, rescission of the JVA or reformation of its terms. Thus, the Court will determine whether Brinckerhoff has a viable claim that may be remedied through reformation or rescission.

The parties disagree about the scope of the Remand Order. Brinckerhoff argues that the Supreme Court determined that he did not waive his requests for reformation and rescission. The Defendants argue that the Supreme Court did not make any such determination, and thus, that this Court may address the issue of waiver in the first instance. On its face, the Remand Order does not preclude an examination of waiver by this Court, and the Court ultimately determines that

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[1] *Brinckerhoff v. Enbridge Energy Co., Inc.*, No. 574, 2011, at ¶ 2 (Del. Mar. 28, 2012) (ORDER) (the "Remand Order"). The parties filed supplemental briefing on remand, and oral argument was heard on May 15, 2012.

This Court granted the Defendants' motions to dismiss the Complaint in *Brinckerhoff v. Enbridge Energy Co., Inc.*, 2011 WL 4599654 (Del. Ch. Sept. 30, 2011) (the "Memorandum Opinion" or "Mem. Op."). The relevant background facts are set forth in the Memorandum Opinion and will not be rehashed here. In addition, defined terms from the Memorandum Opinion are used here for convenience.

A complaint will survive a motion to dismiss unless it fails to "assert sufficient facts that, if proven, would entitle the plaintiff to relief." *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011).

Brinckerhoff's requests for reformation and rescission were waived. Nevertheless, this Court will also address the merits of Brinckerhoff's requests for reformation and rescission. Assuming those requests were not waived, Brinckerhoff has stated a claim that is potentially remediable through reformation, but his request for rescission fails as a matter of law.

* * *

"Issues not briefed are deemed waived."[2] For example, in *Hokanson v. Petty*,[3] this Court explained:

> [T]he plaintiffs assert in the Complaint that the defendant directors breached their duty of loyalty by failing to "disclos[e] all aspects of the Merger to Plaintiffs." . . . The defendants responded to this charge in their opening brief. . . . The plaintiffs did not address their disclosure argument in any way either in their answering brief or at oral argument, and have therefore waived it.[4]

The circumstances here are analogous to the circumstances in *Hokanson*. In the Complaint, Brinckerhoff's primary request for relief was money damages.[5] In the alternative, the Complaint sought reformation or rescission,[6] and this Court recognized that the Complaint sought those alternative forms of relief.[7] The Defendants moved to dismiss the Complaint in its entirety. The opening brief of

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[2] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (citation omitted).
[3] 2008 WL 5169633 (Del. Ch. Dec. 10, 2008).
[4] *Id.* at *6 n.22 (citing *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003)).
[5] *See, e.g.*, Compl. ¶¶ 10, 99, 129, 137, 149, 158, Wherefore Clause ¶ A.
[6] *See, e.g.*, *id.* at ¶¶ 10, 129, Wherefore Clause ¶ C.
[7] *See* Mem. Op., 2011 WL 4599654, at *4 ("In the alternative, Brinckerhoff seeks rescission of the JVA, or reformation of its terms.").

EEP, EEP GP, Enbridge Management, and several EEP GP Board members, which was expressly joined in by the other Defendants,[8] laid out the relevant language of Article 6.8(a) when discussing the terms of the LPA relevant to the Court's decision.[9] Moreover, that opening brief also cited the language of Article 6.8(a) in its argument section.[10] In his answering brief, Brinckerhoff recognized that the Defendants had cited Article 6.8 of LPA to the Court, and recognized that it was an exculpatory provision.[11] Furthermore, it is clear from the face of Article 6.8 that it provides exculpation from money damages. The Defendants also addressed the issue of exculpation during oral argument on their motions to dismiss.[12] Yet nowhere in his answering brief and at no time during oral argument on the Defendants' motions to dismiss did Brinckerhoff make any argument regarding

[8] *See* Defs. Enbridge Inc., Enbridge Employee Servs., Inc., George K. Petty, Stephen J.J. Letwin and Stephen J. Wuori's Opening Br. in Supp. of their Mot. to Dismiss at 1.
[9] DB at 9.
[10] *Id.* at 23 n.11.
[11] Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss Pl.'s Amended Compl. at 42 n.13. In his answering brief, Brinckerhoff seemed to suggest that the Court should not consider the effect of Article 6.8(a) on a motion to dismiss because it is an exculpatory provision. *See id.* ("Without argument from defendants, it is impossible to know why defendants quote . . . [Article 6.8(a)] (for example, it may be that defendants eschew any argument because they know that exculpation is an affirmative defense)."). The Court, however, may consider an exculpatory provision on a motion to dismiss. *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1092 (Del. 2001) ("The Section 102(b)(7) bar may be raised on a Rule 12(b)(6) motion to dismiss . . . .").
[12] *See* Oral Arg. Tr. at 17-18 (June 25, 2011) ("There's case law that says when directors have exculpation provisions that allow them to be immune from liability absent a showing of subjective bad faith, then that's enough—a tenuous conflict . . . will not preclude them from being independent enough to consider a demand. . . . [H]e has no real liability unless they can show a basis for subjective bad faith, and they have not done that.")

reformation or rescission. Thus, any request for reformation or rescission was waived and cannot now withstand the Defendants' motions to dismiss.[13]

* * *

If Brinckerhoff did not waive his request for reformation, the Complaint states a claim that is potentially remediable through reformation. Article 6.6(e) of the LPA provides: "Neither . . . [EEP GP] nor any of its Affiliates shall sell, transfer or convey any property to, or purchase any property from, the Partnership, directly or indirectly, except pursuant to transactions that are fair and reasonable to the Partnership." A transaction will be deemed to have been fair and reasonable to EEP if the terms of that transaction "are no less favorable to the Partnership than those generally being provided to or available from unrelated third parties."[14] Although the Defendants argue that the requirements of Article 6.6(e) are satisfied by Tudor's opinion that "the terms of the JVA are representative, in all material respects, of those that would have been obtained by the Partnership in an arm's length transaction,"[15] this Court has interpreted language akin to that in Article 6.6(e) as requiring something similar, if not equivalent, to entire fairness

[13] If a plaintiff has alleged a sufficient basis to allow her complaint to move beyond the motion to dismiss stage, she should point those grounds out in the papers she files in an effort to keep her action alive and not wait to develop them in her capacity as an appellant. If there are good reasons to avoid dismissal, there is no reason to encourage a plaintiff not to set them forth. It serves little purpose to reward a party who could have raised her contentions in a way that would have facilitated a full consideration of the issues during a motion to dismiss with yet another opportunity to debate the merits.

[14] LPA, Art. 6.6(e)(ii).

[15] Mem. Op., 2011 WL 4599654, at *3 (citation and internal quotations omitted).

review.[16] On a motion to dismiss, the entire fairness standard cannot readily be satisfied by an investment banker's opinion.[17] Moreover, even if the burden is on Brinckerhoff to allege a lack of fairness because he is asserting a claim in the nature of contract under the LPA, as opposed to challenging an interested transaction at common law, the Complaint adequately pleads that the JVA was not fair to EEP.[18]

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[16] *See, e.g., Auriga Capital Corp. v. Gatz Props., LLC,* 40 A.3d 839, 857-59 (Del. Ch. 2012) (explaining that a transaction between a limited liability company and its "Manager" was subject to something similar to the common law entire fairness standard where the entity's governing document provided that "[n]either the Manager nor any other Member shall be entitled to cause the Company to enter . . . into any additional agreements with affiliates on terms and conditions which are less favorable to the Company than the terms and conditions of similar agreements which could be entered into with arms-length third parties . . . ."). A requirement that a conflicted transaction must be "fair and reasonable" imposes a contractual duty reflecting concepts embedded in the familiar fiduciary duty of loyalty even though the LPA had limited that duty. *See* LPA, Art. 6.10(d) ("Any standard of care and duty imposed by this Agreement or under the Delaware [Revised Uniform Limited Partnership] Act [the 'Delaware Act'] or any applicable law, rule or regulation shall be modified, waived or limited as required to permit the General Partner to act under this Agreement or any other agreement contemplated by this Agreement and to make any decision pursuant to the authority prescribed in this Agreement, so long as such action is reasonably believed by the General Partner to be in the best interests of the Partnership.").

[17] Under Article 6.10(b) of the LPA, EEP GP is conclusively presumed to have acted in good faith when it takes action in reliance on the opinion of an investment banker, and EEP GP appears to have relied on Tudor's opinion in deciding to enter into the JVA. Just because a person acts in good faith, however, does not necessarily mean that she acts fairly. Moreover, the benefits (or protections) of Article 6.10(b) only accrue to EEP GP and not to the broad collection of Indemnitees who are relieved of liability for money damages under certain circumstances pursuant to Article 6.8. Presumably, in the context of an effort to reform the JVA, only the parties to it—EEP and Enbridge—have a primary interest in the LPA's protective provisions.

[18] *See, e.g.*, Compl. ¶ 53 ("Enbridge made a 'lowball' proposal (on April 1, 2009) of a 75% to 25% split, expecting to modify it a bit, to give the illusion of 'bargaining' with the subservient and ill-informed . . . Special Committee and thereby camouflage the unfair dealing that permeated the transaction. EEP would not receive any compensation in return for already owning the project, for having the exclusive right to build the U.S. portion of the pipeline, for obtaining the necessary permits, negotiating the tariff agreements, or for, as of February 2009, having already spent $150 million on the project.").

In their reply brief on remand, the Defendants suggest that the Court need not reach the Article 6.6(e) issue in light of Article 6.9(a) of LPA, which provides in part:

> In the absence of bad faith by the General Partner, the resolution, action or terms so made, taken or provided by the General Partner with respect to such matter shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other law, rule or regulation.

The Defendants contend that the Court has already determined that Brinckerhoff failed to allege that EEP GP acted in bad faith, and therefore, that, under Article 6.9(a) of the LPA, EEP GP's decision to enter into the JVA "shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other law, rule or regulation."[19]

The Court, however, may not invoke Article 6.9(a) in this instance. Article 6.9(a) begins with the language "[u]nless otherwise expressly provided in this Agreement . . . ." Although a plain reading of Article 6.9(a) arguably suggests that the "unless otherwise" language in Article 6.9(a) does not modify the "in the absence of bad faith" language, which appears several sentences later in that

[19] LPA, Art. 6.9(a).

article,[20] the Defendants seem to have conceded for purposes of their motions to dismiss that the "unless otherwise" language applies to all of Article 6.9(a), and thus, that Article 6.6(e) is not subject to Article 6.9(a).[21]

The reformation remedy that Brinckerhoff seeks, however, is rarely sought and obtained. Generally, "[r]eformation is appropriate only when the contract does not represent the parties' intent because of fraud, mutual mistake or, in exceptional cases, a unilateral mistake coupled with the other parties' knowing silence."[22] Although Brinckerhoff is correct that this Court has broad remedial power, he has only pointed to one case employing anything resembling the remedy he seeks.

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[20] The "in the absence of bad faith" sentence highlighted by the Defendants is the last sentence in Article 6.9(a), and could reasonably be viewed as completely separate from the first sentence of that article, which contains the "unless otherwise" language. Moreover, between its first and last sentences, Article 6.9(a) provides:

> The General Partner shall be authorized in connection with its resolution of any conflict of interest to consider (i) the relative interests of any party to such conflict, agreement, transaction or situation and the benefits and burdens relating to such interest; (ii) any customary or accepted industry practices and any customary or historical dealings with a particular Person; (iii) any applicable generally accepted accounting or engineering practices or principles; and (iv) such additional factors as the General Partner determines in its sole discretion to be relevant, reasonable or appropriate under the circumstances. Nothing contained in this agreement, however, is intended to nor shall it be construed to require the General Partner to consider the interests of any Person other than the Partnership.

Thus, there is language in Article 6.9(a), after the "unless otherwise" language, which suggests that the latter part of Article 6.9(a), including the sentence highlighted by the Defendants, controls other parts of the LPA.

[21] *See* DB at 16 n.7 ("The Partnership Agreement also provides, absent some other express standard that applies, such as Section 6.6(e) which applies here, that in the absence of bad faith, the resolution of any conflict of interest by the General Partner shall not constitute a breach of the Partnership Agreement. (P.A., 6.9(a).)").

[22] *James River-Pennington Inc. v. CRSS Capital, Inc.*, 1995 WL 106554, at *7 (Del. Ch. Mar. 6, 1995) (citations omitted). *See also Waggoner v. Laster*, 581 A.2d 1127, 1135 (Del. 1990) ("It is a basic principle of equity that the Court of Chancery has jurisdiction to reform a document to make it conform to the original intent of the parties.") (citations omitted).

Specifically, in *In re Loral Space and Communications Inc.*,[23] the Court reviewed a stock sale for entire fairness and determined that a damages remedy would be difficult to craft because the stock sale implicated change of control issues and the benefits of control are difficult to quantify. Therefore, the Court chose to craft a unique remedy to address the unique circumstances of that case:

> Addressing the unusual features of the Preferred Stock in an effective way through precise surgery, would be cumbersome and leave Loral with an unnecessarily complicated balance sheet, simply because the defendants chose to engage in a strange, conflicted exercise in capital raising. Valuing the Preferred Stock as it is would require me to come up with an estimate about the economic value of the additional control rights that would be less than ideally precise. . . . The most equitable remedy is therefore to take MHR and the Special Committee up on their desire to avoid a *Revlon* deal, and to reform the Securities Purchase Agreement to convert the Preferred Stock that MHR received into non-voting common stock on terms fair to Loral.[24]

The circumstances of this case share little in common with the circumstances in *Loral*. The gravamen of the Complaint is simple—Enbridge did not pay enough for its share of the ACP. Moreover, there has been no suggestion that the ACP is uncommonly difficult to value.

It is also important to note how Brinckerhoff describes his request for reformation. Brinckerhoff states:

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[23] 2008 WL 4293781 (Del. Ch. Sept. 19, 2008).
[24] *Id.* at *31-32.

> The reformation sought herein is different from and not duplicative of money damages and, therefore, may be awarded. Plaintiff's request for damages sought a sum certain based retroactively upon the difference in values of the investment versus the percentage interest acquired. Thus, plaintiff sought recovery of the difference between the price Enbridge paid for its share of the . . . [ACP] and the price it should have paid for that interest (*i.e.,* a fair and reasonable price). Plaintiff's request for equitable relief seeks a different remedy. Rather than require that Enbridge pay more, plaintiff requests that the Court reform the JVA prospectively by reducing Enbridge's share in the JVA from 66% to a share that is fair and reasonable to the Partnership based upon its investment of $800 million.[25]

What Brinckerhoff fails to mention is that Enbridge and EEP receive cash flows from the ACP based on their ownership interests. Thus, although Brinkerhoff is correct that his request "for reformation does not seek to have the Court order [D]efendants to write a check or pay any past damages,"[26] he does seek to reduce the cash flows that Enbridge will receive from the ACP and, as a practical matter, redirect them to EEP. Brinckerhoff appears to be seeking something very similar in effect to garnishment, and garnishment is a way of recovering money damages.[27] The Court, however, will not expand the exculpatory rights of an alternative entity's controller beyond the protections clearly provided in the governing agreement. If the governing agreement only provides exculpation from money damages, and a plaintiff adequately pleads entitlement to an equitable remedy, the

[25] Pl.'s Opening Br. on Remand at 9.
[26] *Id.*
[27] *Delaware Trust Co. v. Partial*, 517 A.2d 259, 261 (Del. Ch. 1986) ("Why has plaintiff, in this instance, not proceeded in the conventional way in the Superior Court on this claim for money damages, by filing his complaint in that court and seeking the issuance of a mesne writ of garnishment?").

plaintiff states a claim that may survive a motion to dismiss.[28] Moreover, at this stage, it at least appears possible that the Court could reform the JVA if a remedy is appropriate. The Court could conceivably determine what portion of the ACP would have been fair for Enbridge to receive for its investment, and reform the JVA to provide Enbridge with that percentage of the Project. Therefore, assuming Brinckerhoff has not waived his request for reformation, he has stated a claim under Article 6.6(e) of the LPA, and it is at least conceivable that he might be entitled to some sort of reform remedy.[29]

* * *

On the other hand, even if Brinckerhoff's request for rescission was not waived, he did not state a claim for rescission. As an initial matter, at oral argument on the Remand Order, counsel for Brinckerhoff acknowledged that this remand is primarily about reformation, and made no arguments in favor of

[28] Here, whether Brinckerhoff has pled an entitlement to reformation is a difficult question. Brinckerhoff does not contend that, as in *Loral*, the alleged harm is difficult to quantify or to measure in dollars. Rather, under the LPA, Brinckerhoff cannot get money damages, and thus, he is seeking, through equity, something similar to money damages. And the similarity is striking. Brinckerhoff seeks to increase EEP's ownership interest in the JVA and correlatively to decrease Enbridge's ownership interest in the JVA, where the parties' ownership interests are directly related to the amount of cash flow each receives from the ACP. That is, at best, one step removed from money damages.

[29] This conclusion could have wide-ranging consequences. Before a transaction has been consummated, this Court often employs equitable remedies to address issues with the transaction because money damages are routinely viewed as an inadequate remedy for an improvidently consummated transaction. After a transaction has been consummated, however, the Court typically remedies any wrongs, where possible, with an award of money damages. Brinckerhoff essentially seeks to implement a principle that, at least where a defendant is contractually exculpated from money damages, any claims brought after a transaction has been consummated may be remedied in equity through reformation.

rescission. To the extent Brinckerhoff is still seeking rescission, it "requires that all parties to the transaction be restored to the *status quo* ante, i.e., to the position they occupied before the challenged transaction."[30] Moreover, "[t]he party seeking rescission bears the burden of establishing that the court can restore the status quo between the parties."[31] Brinckerhoff has failed to meet this burden; he has not explained how the Court could restore the parties to the positions they were in before they entered into the JVA.

Brinckerhoff asks to rescind an agreement to construct a pipeline from Canada to Wisconsin that was completed in April 2010. If there is a way to do that, Brinckerhoff has not told the Court what it is. As this Court explained when addressing a motion to dismiss in *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*: "It would be impossible more than four years after the fact for this court fairly and equitably to rescind a complex . . . deal where value has doubtlessly been affected by the intervening events . . . ."[32] Therefore, regardless of whether Brinckerhoff waived his request for rescission, it fails as a matter of law because Brinckerhoff has not explained how it would be possible for the Court to

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[30] *Strassburger v. Earley*, 752 A.2d 557, 578 (Del. Ch. 2000) (citing *Norton v. Poplos*, 443 A.2d 1, 4 (Del. 1982); *In re MAXXAM, Inc.*, 659 A.2d 760, 775 (Del. Ch. 1995)).

[31] *Creative Research Mfg. v. Advanced Bio-Delivery LLC*, 2007 WL 286735, at *7 (Del. Ch. Jan. 30, 2007) (quoting *Obara v. Moseley*, 692 A.2d 414, 1997 WL 70652, at *1 (Del. Jan 31, 1997) (TABLE)).

[32] 2010 WL 363845, at *8 (Del. Ch. Jan. 27, 2010) (citing *Stegemeier v. Magness*, 728 A.2d 557, 565 (Del. 1999)).

return Enbridge and EEP to the positions they were in before they entered into the JVA.

* * *

Brinckerhoff's requests for reformation and rescission were waived. If Brinckerhoff did not waive his request for reformation, he has stated a claim, found in Count I of the Complaint, under Article 6.6(e) of LPA that is potentially remediable through reformation. No request for rescission can survive the Defendants' motions to dismiss. Because Brinckerhoff's only potential remedy is reformation, he still cannot state a claim for aiding and abetting or tortious interference, and thus, Counts II and IV were properly dismissed.[33] In addition, in the Memorandum Opinion, the Court held that Count III failed to state a claim for breach of the implied covenant of good faith and fair dealing. Where there is no claim, there can be no remedy, equitable or otherwise. Thus, if Brinckerhoff did not waive his request for reformation, Count I states a claim that could conceivably lead to a reformation remedy, but the balance of the Complaint was properly dismissed.

[33] Moreover, the only relief Brinckerhoff appears to have requested with regard to Counts II and IV was damages. *See* Compl. ¶ 137 ("By reason of the foregoing, plaintiff, on behalf of EEP, and the Class are entitled to recover damages from the foregoing defendants, by way of restitution or otherwise, in such amounts as the Court may determine at trial."); *id.* at ¶ 158 (same).

IT IS SO ORDERED.

/s/ John W. Noble
Vice Chancellor