Court of Queen's Bench of Alberta

Citation: Desoto Resources Limited v. Encana Corporation, 2010 ABQB 448

Date:20100705
Docket: 0401 09040
Registry: Calgary

Between:

Desoto Resources Limited

Plaintiff

- and -

Encana Corporation and Pan Canadian Petroleum Limited

Defendants

Memorandum of Decision
of the
Honourable Mr. Justice W.A. Tilleman

Appeal from the Decision by
J.L. Mason, Master in Chambers
Dated the 02nd day of June, 2009
(2009 ABQB 337)

Introduction

[1] The Plaintiff, Desoto Resources Limited ("Desoto"), appeals the Master's decision to summarily dismiss its claim against the Defendants, Encana Corporation ("Encana") and Pan Canadian Petroleum Limited ("Pan Canadian").

[2] Desoto seeks a declaration as to the validity of their beneficial interest in the petroleum and natural gas leases at issue.

History

Factual History

[3] Petroleum and natural gas leases (the "Leases") were granted in 1974 and 1975 by Pan Canadian (predecessor to Encana) to Penn West Petroleum Ltd ("Penn West") for sections 5 and 7 of 38-24-W4M and section 13 of 38-25-W4M (the "Lands")

[4] The Leases were issued for primary terms ranging from 3 to 5 years and contained a habendum clause that said:

> "if at the expiration of the primary term each well drilled on the said lands by the Lessee is abandoned and the Lessee is then drilling a further well on the said lands for the leased substances, this Lease shall remain in force so long as such drilling is diligently and continuously prosecuted and so long thereafter as any of the leased substances is being produced or is capable of production in paying quantities from the said land from the well so drilled"

[5] A number of wells were drilled on the Lands by the lessees and their successors, the interest in which was ultimately acquired by Desoto's predecessor, Jofco Resources Inc ("Jofco").

[6] The wells were shut in by an Energy and Utilities Board ("EUB") order in June 1998, and an abandonment notice was issued to Jofco by the EUB in September 1998. As a result of an order by the EUB relating to the payment of a well abandonment deposit, by the end of 1998 *none of the wells drilled on the Lands was in production*.

[7] In 1999 Jofco entered bankruptcy proceedings. Its trustee in bankruptcy filed a series of proposals which were circulated among Jofco's creditors and stakeholders, including Pan Canadian, which was an unsecured creditor in the amount of $56,000 arising from unpaid royalties.

[8] Jofco's creditors accepted a proposal involving the assignment of Jofco's interests in the Leases to a third party, Numac Energy Inc. ("Numac"). In exchange for priority over other unsecured creditors, Pan Canadian agreed to forgo its right to terminate the Leases. This proposal was approved on July 15, 1999 by Cairns J.

[9] Numac executed a Unilateral Declaration of Trust effective July 15, 1999 whereby Jofco acquired a beneficial interest in the Leases.

[10] On December 1, 1999, Numac and Pan Canadian acted as if the Leases were valid and signed agreements reducing royalty rates payable by the lessees with respect to the Leases.

[11] On March 2, 2000 Numac assigned 50% of its interest in the Leases to Cansearch Resources Ltd. ("Cansearch"). Penn West became the successor in interest to Numac, resulting in Penn West and Cansearch being trustees of Jofco's interest in the Leases. On January 29, 2002 Penn West and Cansearch entered into a declaration of trust agreement with Desoto (Jofco having changed its corporate name to Desoto) confirming that they were equally holding legal title to Desoto's beneficial interest in the Leases and Lands as trustees.

[12] In May 2001, Desoto registered caveats regarding its beneficial interest in the Lands.

[13] On December 23, 2002, Desoto's agent notified Encana of its intention to drill a well 11-13-38-25 located upon NW-13-38-25-W4M of the Lands. Encana provided its coal waiver on December 30, 2002.[1]

[14] In March 2003, Desoto advised Encana it wanted to drill new wells in sections 7 and 13 of the Lands. In response, Desoto was advised that Encana was taking the position that the Leases were no longer valid.[2]

[15] On July 16, 2003, Encana served a Notice of Lease Termination on lessees Penn West and Cansearch. Penn West and Cansearch, by letter dated September 24, 2003, agreed that the Leases had terminated by their terms.

[16] On April 19, 2004, Encana served Desoto with notices to take proceedings on caveats it had filed on the Lands with respect to Desoto's claimed beneficial interest.

[17] Desoto filed this action in response, alleging a beneficial interest in the Leases by virtue of the trust agreement with Penn West and Cansearch and claiming "the Pan Canadian Leases are currently producing oil and gas in paying quantities or alternatively, are capable of producing oil and gas in paying quantities."

[18] After filing this action, Desoto applied (without giving notice to Encana) for a licence and drilled a well, notwithstanding Encana's application to the EUB to review the licence and its own commitment *not* to drill.

Judicial History

[1] In oral argument, counsel for Desoto suggested that the Court interpret this action as evidence of Encana encouraging the validity of the Leases.

[2] In an email to Desoto dated March 14, 2003, Encana stated that "A default on the existing leases will be issued to PennWest. (As DeSoto is not a registered lessee on the leases, the notice will only be issued to PennWest)".

[19] Over the course of this action to date, the parties have brought numerous applications before the court. To summarize:

> On October 11, 2007, Master Laycock granted a Consent Order compelling the Plaintiff's Officer to appear for examinations for discovery.
>
> On January 27, 2009, Master Alberstat granted a Consent Order adjourning the Defendant's motion for summary judgment to May 4, 2009.
>
> On June 2, 2009, Master Mason granted an Order summarily dismissing the Plaintiff's claim.
>
> On September 9, 2009, Justice Romaine granted an Order adjourning the appeal of Master Mason's summary dismissal.
>
> On December 21, 2009, Justice Jeffrey granted an Order denying the Plaintiff's application to amend its statement of claim.
>
> On January 15, 2010, Justice Strekaf granted a Consent Order adjourning the appeal of Master Mason's summary dismissal and setting out deadlines for filing documents for the appeal.
>
> On April 9, 2010, a panel of the Court of Appeal, Justice F. Slatter, Justice J.D.B. McDonald, and Justice Colleen Kenny, dismissed the Plaintiff's appeal of Justice Jeffrey's decision denying amendment of the Plaintiff's statement of claim.

Issues

1. What is the standard of review on appeal from a decision of a Master?
2. What is the test for summary dismissal?
3. Are the Leases valid and does estoppel apply to Encana?

Analysis

Initial Matters

[20] At the outset of this hearing I was asked to rule on the admissibility of an affidavit filed by Desoto after a Court-imposed deadline.

[21] In the January 15, 2010 Consent Order, Justice Strekaf adjourned the special chambers application to June 14, 2010, and ordered the following deadlines:

a. The Plaintiff shall file and serve any additional affidavit and make any further court applications by April 16, 2010.

b. The Defendants shall file and serve any additional affidavit and make any further court applications by April 23, 2010.

Yet the Plaintiff sought to rely on the affidavit of Jarwin Martin which was filed by the Plaintiff on May 28, 2010, over a month after the Court-imposed deadline.

[22] The court has the inherent jurisdiction to control its process: *De Shazo v. Nations Energy Company Ltd.*, 2006 ABCA 400, 401 A.R. 142 at para. 12; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at para. 15. Imposing schedules and deadlines are mechanisms though which such control may be achieved. In *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*, 2008 ABQB 397, 451 A.R. 100 at paras. 78-82, Justice Lee recently summarized the case law on court imposed deadlines[3].

---

[3] Justice Lee said:

> 78. Furthermore Court imposed deadlines must be complied with as,
>
> > [c]ounsel cannot unilaterally extend deadlines once they have been set, nor can they simply agree, amongst themselves, to ignore court orders imposing timetables, in order to move at their own pace: *Victory Community Credit Union Ltd. v. Van Huizen*, 2000 CarswellOnt 2802 (Ont. Master) at 7.
>
> 79. As stated in *Victory Community Credit Union Ltd. v. Van Huizen* at para. 8, it is not open to Counsel to file affidavits outside the prescribed time limit: —
>
> > If events arise which hinder the progress of an action, such that the deadlines imposed by a timetable can no longer be achieved, it is up to counsel to be alert to same. At that stage, they should move for a variation of the court order. Ideally, this should occur before the deadline has expired and prior to the scheduling of other events that may be affected by such a change.
>
> 80. The failure to comply with Court imposed deadlines can be a serious issue that warrants action be taken. In *Paszkowski v. R.* (1998), 141 F.T.R. 149 (Fed. T.D.) the Court did not allow in an Affidavit that was filed outside of a Court imposed deadline. The Court went further and struck certain paragraphs from the Respondent's Factum that relied on material provided in the late filed Affidavit.
>
> 81. In *Burgoin v. Burgoin* (1997), 35 R.F.L. (4th) 135 (Alta. C.A.) the chambers judge specifically set deadlines for examinations on affidavits, "specifically stating that there should be no new or late affidavits filed. . . ". The Court of Appeal held that the chambers judge made no reviewable error in his refusal to consider the late filed Affidavit.
>
> 82. In *Young Estate, Re*, 2003 ABQB 607 (Alta. Q.B.) at para. 9 the Court imposed a filing deadline which they extended when counsel faxed the Court notice that he was unable to meet the deadline. However, the Court was clear to state that: —
>
> > This is a very serious matter for [counsel] and he should be aware that if he fails to comply with this extension and file his Affidavit, and copies of the documents listed in the Affidavit that his action will be struck for failure to comply with Court imposed deadlines...

[23] Plaintiff's counsel gave me no legitimate reason for the late filing of the documents in breach of the Court-imposed deadline. He acknowledged being aware of the filing deadline, but when asked for the reason that the affidavit was filed late, Plaintiff's counsel communicated to me that he was of the country between April 23 and May 21, and that they had not sharpened their minds to the issues until they were preparing the brief for today's application. Upon my further inquiring, Desoto's counsel indicated that he had not contacted opposing counsel in the days surrounding the filing deadline to notify them that an affidavit would be filed late. Moreover, no mention was made as to why the Plaintiff did not apply to the Court for extension of the filing deadline.

[24] The Court was told that the affidavit at issue concerned a pooling agreement. Plaintiff's counsel indicated that the pooling agreement had not found its way through the discovery process and had not been provided to him until this time, although counsel admitted that there was reference in the pleadings to negotiations involving pooling. Plaintiff's counsel did not give reasons why this document or information had not been brought to light before. Additionally, Plaintiff's counsel did not indicate how it obtained the document, nor are they alleging that the other side withheld this information.

[25] I decline to open up Strekaf J.'s order, and in drawing that conclusion I note multiple adjournments have been granted with respect to this appeal already. Moreover, Justice Romaine's September 9, 2009 adjournment was granted to allow the Plaintiff the opportunity to obtain further evidence through the discovery process: 2009 ABQB 512.

[26] Court orders should be followed. I appreciate there are competing values at play in every case and that it is important that a party be able to put its best foot forward on a summary judgment application. However, this must be considered in light of the serious toll on justice that will occur where parties are permitted to take actions inconsistent with court orders resulting in prejudice to the other side. In my view, fairness cuts both ways and from all of the above, it weighs against admission of the late filed affidavit.

1. Standard of Review

[27] In Alberta, an appeal from a Master to a Justice is a hearing *de novo* and the standard of review is correctness: *United Utility Workers' Assn. of Canada v. Transalta Corp.*, 2004 ABCA 200, 354 A.R. 58 at para. 20.

[28] The parties agreed that because the Plaintiff took a substantially different position before the Court on this appeal than was put before Master Mason, this hearing would be primarily a hearing *de novo* as opposed to a review of Master Mason's decision.

2. Test for Summary Dismissal

[29] Encana sought summary judgment, before Master Mason, by application of Rule 159(2) of the *Alberta Rules of Court*

> 159(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.

[30] The Supreme Court of Canada recently summarized the purpose of summary judgment in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 10:

> It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[31] Summary judgment may be granted only where "there is no genuine issue of material fact requiring a trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27; *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380, 401 A.R. 88 at para. 9; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126 at para. 13. In *Trottrup* at para. 10 our Court of Appeal held that where a defendant seeks summary dismissal, it bears the evidentiary burden of proving that there are no material issues for trial:

> It is in the context of this type of summary judgment application that the cases sometimes say it must be "plain and obvious", or "clear" or "beyond real doubt" that the action should be summarily disposed of.

[32] On a summary judgment application, each side must "put its best foot forward" to demonstrate the existence or non-existence of material issues for trial: *Transamerica Life Insurance Co. v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 at 434 (Gen. Div.); *Lameman* at para. 11. Parties to a summary judgment application may not rely on evidence of what they may plead or demonstrate in the future. However, the Supreme Court of Canada has recognized that a chambers judge may make inferences of fact based on undisputed facts before the court where the inferences are strongly supported by the facts: *Lameman* at para. 11; *Guarantee* at para. 30.

[33] Even though the Plaintiff must put its best foot forward to present evidence in favor of its case, this evidence does not need to prove the Plaintiff's case on a balance of probabilities. In order to avoid summary dismissal of its claim, all that the Plaintiff needs to demonstrate, is that there is a genuine issue for trial. For Desoto, this would be a challenge.

3. Are the Leases Valid and does Estoppel Apply to Encana?

a. Did the Leases terminate in accordance with their terms?

[34] The Alberta Court of Appeal has made a decision affecting Desoto's case and it is relevant contextually: *Desoto v Encana*, 2010 ABCA 110. The Court said, *inter alia*:

> 9 The original pleading was, firstly, about the Notices of Termination and whether there was paying production, or alternatively whether the respondents were estopped from alleging termination and, secondly, about some discrete misrepresentations to the appellant's pooling partner. The proposed amendments are about different misrepresentations to third parties made before the appellant was restructured, and breach of a contract described as the Forbearance Agreement which had not previously been mentioned. The conduct, transactions and events that underlie the production or lack of production from the lands, and the resulting Notices of Termination are different from the conduct, transaction and events that led to the restructuring via the proposal in bankruptcy, and the alleged breach of the Forbearance Agreement with resulting damage. ....
>
> ...
>
> 11 The chambers judge correctly held that the amendments are not sufficiently connected to the original pleading, and the appeal is dismissed. We decline to say anything about the scope of the existing estoppel pleading.

[35] In oral argument, Plaintiff's counsel conceded that in light of the Court of Appeal's decision the Plaintiff's argument (on whether there was actual production or capable of production under the Lease) no longer applies, and all that remains is the Plaintiff's argument in estoppel.

[36] To be as fair as I can to the Plaintiff, I will briefly address the Plaintiff's arguments on the status of the Leases, as found in the written brief. My view of the effect of the Court of Appeal's decision on estoppel will be discussed in detail below.

[37] Both parties agree that there has been no production of oil and gas from any well on the Leases since 1998, and therefore the Leases cannot continue on the basis of actual production.

[38] In order for the Lease to continue on the basis of the wells being capable of production, wells drilled in the primary term must obviously be capable of production. In the original summary judgment decision (2009 ABQB 337), Master Mason took a strict interpretation of the terms of the oil and gas Lease, citing *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, 2005 ABCA 46. She said:

> There has been no production since 1998, and there is no evidence to support capacity for production in paying quantities from wells drilled in the primary term. The clear words in the habendum clauses of the Leases dictate that absent production or capacity to produce from a well drilled in the primary term, the Leases terminate. The record before the court permits this determination, consistent with *Tottrup v. Clearwater (Municipal District) No. 99*. [at para. 30]

.

[39] No new evidence has been adduced on this issue, without which Master Mason was correct in her finding that a well drilled in 2007 could not fulfil the requirement of being drilled during the primary term. There is no triable issue as to whether the Leases continued on that basis.

[40] Desoto argues that the Leases could also be extended by agreement and suggests that the Court should infer from the evidence that the interactions that occurred between Jofco's trustee in bankruptcy and Encana that had led to the extension of the Leases term with respect to the rights on termination. I have already found that there is no merit to the arguments that the Leases continued on the basis of actual production or on the basis of the wells being capable of production, therefore the Leases terminated in 1998 when production ceased. Thus, extension of the Leases after termination of the Leases could occur only through estoppel (which will be addressed below) or the formation of a new contract.[4]

b. Estoppel

[41] At the end of the day, all that is left for Desoto is estoppel.

[42] Estoppel operates to prohibit a person from acting contrary to their representation, even though the representation does not amount to a binding contract, when it would be inequitable to allow them to go back on their representation: *Coombe v. Coombe*, [1951] 1 All E.R. 767 at 769-770 (C.A.). The doctrine of estoppel is often described as being underpinned by the principles of fairness and equity: *Fisher v. Brooker*, [2009] UKHL 41, [2009] Bus. L.R. 1334 at para. 63; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 at para. 51. In *Fisher*, a recent decision of the House of Lords involving estoppel by acquiescence, Lord Abbotsbury held that the doctrine of estoppel is permeated by the fundamental principle that the purpose of equity is to prevent unconscionable conduct. Furthermore, in *Ryan* at para. 51 the Supreme Court of Canada accepted Lord Denning's articulation of the doctrine of estoppel in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1981] 3 All E.R. 577 at 584 (C.A.), that estoppel operates where there would otherwise be unfairness or injustice:

[4] However, the issue of whether a new contract was formed has been disposed of by the Court of Appeal's holding that allegations of an agreement resulting from Jofco's restructuring in bankruptcy were not sufficiently connected to the proceedings to be added to the existing action under s. 6(2) of the *Limitations Act*, R.S.A. 2000, c. L-12 and are statute barred. Therefore, because this argument is statute barred it cannot be considered by this Court.

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary 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: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. 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 — 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 courts will give the other such remedy as the equity of the case demands. [Emphasis Added]

[43] Desoto argues that Encana is estopped from denying the existence of the Leases on the basis of (a) promissory estoppel, (b) estoppel by acquiescence and (c) estoppel by deed. In oral argument I tried to pin them down at the very outset on what type of estoppel they relied on, but it was difficult to get a firm answer so I will look at all three. But in doing so, I am keeping in mind Lord Denning's principle that a party cannot go back on an assumption if it is unfair, unjust or unconscionable to do so.

[44] Prior to addressing each of the types of estoppel I will again address an important matter of evidence. As I pointed out above, the Court of Appeal recently declined to allow Desoto to amend their statement of claim to allege misrepresentations to third parties made before Jofco was restructured, and breach of the Forbearance Agreement, 2010 ABCA 110 at para. 9. In making this decision the Court of Appeal held that the amendments would result in prejudice or surprise to the Defendants because they do not arise out of the same conduct, transactions and events as the original pleadings (para. 9-10). Specifically, the Court stated that:

> The conduct, transactions and events that underlie the production or lack of production from the lands, the resulting Notices of Termination are different from the conduct, transaction and events that led to the restructuring via the proposal in bankruptcy, and the alleged breach of the Forbearance Agreement with resulting damage. (at para. 9)

Additionally, the Court (at para. 10) found that "[t]he documents and other evidence that would be needed to prove the appellant's new allegations would differ significantly from those required to prove the originally pleaded facts".

[45] Although the Court of Appeal declined to comment on the scope of the existing estoppel agreement, query whether the amendments on estoppel would have been the same as the original pleadings. Since the Court of Appeal recognized that one of the original pleadings was "whether the respondents were estopped from alleging termination" it logically follows that the Court did not find that the original estoppel argument included "conduct, transactions and events that led to

the restructuring via the proposal in bankruptcy, and the alleged breach of the Forbearance Agreement". Therefore, because the allegations in the amended statement of claim are statute barred I find that the Plaintiff is not able to adduce these arguments under the guise of the equitable doctrine of estoppel. I make this decision notwithstanding the fact that Master Mason permitted the Plaintiff to rely on the now barred evidence in the original summary dismissal hearing as Master Mason did not have the benefit of the Court of Appeal's decision.

i Promissory Estoppel

[46] Promissory estoppel prevents A from going back on its promise to B where B changed its position in reliance on A's promise, and where it would be inequitable to allow A to act otherwise than in accordance with its promise: John McGhee, *Snell's Equity*, 31st ed. (London: Thomson, 2005) at para. 10-09 ("*Snell's Equity*"). The Supreme Court of Canada applied promissory estoppel in two cases involving petroleum and natural gas leases: *Canadian Superior v. Paddon-Hughes Development Co. Ltd.*, [1970] S.C.R. 932, and *Weyburn Security Co. v. Sohio Petroleum Co*, [1971] S.C.R. 81. In both cases, the primary terms of the leases had expired pursuant to their terms, and the lessees argued that the conduct of the lessors subsequent to termination estopped the lessors from alleging that the leases had come to an end. In both cases Justice Martland expressed doubts as to whether promissory estoppel could be applied to revive a contract that had terminated by its own terms prior to the conduct relied upon as founding estoppel, as promissory estoppel requires that there is an existing legal relationship between the parties when the representation or promise is made: *Paddon-Hughes* at 938; *Weyburn* at 85.

[47] Similarly, Desoto is unable to rely on the doctrine of promissory estoppel to prevent Encana from denying the existence of the Leases, as there was no existing legal relationship between the two parties at the time of the alleged representations. As I found above, Jofco and Pan Canadian's legal relationship terminated in 1998 with the expiry of the Leases; therefore, this situation is similar to those in *Paddon-Hughes* and *Weyburn*, and the principle that promissory estoppel cannot save a relationship that has come to an end before any representation is made applies. Regardless of whether evidence on Jofco's restructuring in bankruptcy is permitted, Desoto has not demonstrated that there is any triable issue with respect to promissory estoppel.

ii. Estoppel by Acquiescence

[48] Desoto argues that Encana is estopped from denying the validity of the Leases on the basis of estoppel by acquiescence and, furthermore, that the estoppel argument raises a real issue that should proceed to trial.

[49] Estoppel by acquiescence prohibits A from insisting on its legal rights where A's acquiescence amounts to fraud: *Paddon-Hughes* at 938; *Silver's Garage Ltd. v. Bridgewater (Town)*, [1971] S.C.R. 577 at paras. 27-30. A's acquiescence will amount to fraud where A knew of B's mistake as to B's legal rights, A encouraged B to act on the basis of this mistake, B did in

fact act on the basis of its mistake, and it would thus be inequitable to allow A to insist on their legal rights: *Willmott v. Barber* (1880), 15 Ch D 96 at 105.

[50] The Supreme Court of Canada in *Paddon-Hughes* and *Weyburn*, held that a terminated lease could be subsequently enforced under the doctrine of acquiescence. Unlike promissory estoppel, estoppel by acquiescence may be founded on representations occurring after the termination of the lease, where the representations or acquiescence amounts to a fraud perpetrated on the other party: *Weyburn* at 85; *Paddon-Hughes* at 938; *Voyager Petroleums Ltd. v. Vanguard Petroleums Ltd.* (1983), 47 A.R. 1 at para. 72 (C.A.).

[51] In this context, the term "fraud" has been recognized as not requiring "actual" fraud but rather as referring to equitable or constructive fraud: *Voyager* at para. 73. Lord Justice Scarman commented on this term in *Crabb v. Arun District Council*, [1975] 3 All E.R. 865 at 877 (C.A.):

> But it is clear that whether one uses the word "fraud" or not, the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable or unjust.

[52] The *Voyager* case outlined five requirements of estoppel by acquiescence all of which must be met.[5] You will see that although the Plaintiffs are able to fulfill the first two parts of the five part test, the Plaintiffs fail to produce any evidence to demonstrate a triable issue with respect to the final three steps of the *Voyager* test. I will review each of the five parts in specific reference to the parties in this case.

---

[5]The Alberta Court of Appeal accepted the five-part test for estoppel by acquiescence in *Voyager*, where it was stated at para. 16:

> The classic statement of the constituent elements of estoppel by acquiescence is that of Fry L.J. in *Willmott v. Barber* (1880), 15 Ch. D. 96 at 105-106 affirmed 17 Ch. D. 772 (C.A.), where his Lordship says:
>
> > It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

1. Did the Plaintiff made a mistake as to its legal rights?

[53] Desoto claims it was under the mistaken belief that the Leases were valid after 1998 when the actual production ceased. (I found above that the Leases terminated in 1998 when actual production ceased.) Desoto's actions in 1999 and later suggest that it was mistaken as to the validity of the Leases. These actions include: Jofco accepting a proposal assigning Jofco's interest in the Leases to Numac in 1999, Desoto registering caveats in 2001 regarding its beneficial interest in the Lands, and Desoto expressing an intention to drill a well on the Lands in December 2002. This part of the *Voyager* test has been met.

2. Did the Plaintiff expend some money or take some action on the basis of its mistaken belief?

[54] Desoto claims to have expended $20,000 on licensing, surveying and landman work with respect to the proposed drilling of a well. However, continuation with this drilling plan was halted when Desoto was advised in March 2003 that Encana would be issuing a default on the existing Leases. In oral submissions, Encana argued that the $20,000 expended by Desoto in accordance with its mistaken belief in the validity of the Leases does not constitute sufficient reliance to found estoppel in these circumstances. Encana further argued that, given the equitable basis for the doctrine of estoppel, it must be considered whether the $20,000 expenditure would lead to an unfair or unconscionable result considering the potential value of the Leases.

[55] The Supreme Court of Canada has defined reliance as requiring a finding that the party seeking to establish estoppel changed his or her course of conduct resulting in the alteration of their legal position (*Ryan* at para. 69). I have not found any guidance in the jurisprudence as to a minimum expenditure to constitute reliance; furthermore, the Nova Scotia Court of Appeal has held that in order to be sufficient, reliance must not come within "the maxim *de minimus non curat lex": Jollymore v. Acker* (1915), 49 N.S.R. 148 at 157. Despite Encana's position that $20,000 is a relatively small amount of money in relation to the possible lucrative profits that may be gained from the Leases, Desoto's expenditure of $20,000 supports a sufficient change in reliance of their belief that they held valid Leases, and is not *de minimus*. On this point I disagree with Encana.

[56] However, I take Encana's point regarding the nature of equitable relief; the totality of the circumstances does play a role and perhaps it is a disproportionate remedy to have a lease continue indefinitely on the basis of $20,000.[6] That said, the only question I have to address on this part of the five-part test is whether there was reliance.

---

[6] Although it should be considered that the Voyager test is a test for Fraud and if all five parts have been met, the fraudulent party, given their "unclean hands" would have a difficult time setting aside the estoppel on the basis of equity and a claim that the remedy would be disproportionate.

3. Did the Defendant know of the existence of its own right which is inconsistent with the right claimed by the Plaintiff?

[57] The Supreme Court of Canada in *Anderson v. South Vancouver (Municipality)* (1911), 45 S.C.R. 425 at 463, held that:

> ...a party cannot, because of mere silence or inaction, be held to have acquiesced unless he was fully cognizant of his adverse right, *Earl Beauchamp v. Winn*, L.R. 6 H.L. 223, 225; *Wilmot [Willmott] v. Barber*, 15 Ch. D. 96, 105; [i]f he be ignorant of his right, the duty to speak, upon the failure to discharge which the equitable estoppel is based, does not arise. "Silence is innocent and safe where there is no duty to speak." *Chadwick v. Manning*, 1896, A.C. 231, 238.

[58] There is no evidence to indicate that Encana was aware that the Leases were not valid until some time between December 30, 2002, when Encana provided a coal waiver, and March 2003, when Encana advised Desoto that it was issuing a default on the existing Leases. In fact, Encana's actions with respect to the royalty agreement in 1999 and the coal waiver in 2002 support the position that Encana was acting under the belief that the Leases continued. Furthermore, the statement in the 1999 letter from Jofco's trustee to Jofco's creditors that "Pan Canadian is prepared to forego its rights of termination in return for its claim against the Company having priority"[7] indicates that the Defendants rightly or wrongly thought the Leases could be extended and were in force.

[59] Desoto gave evidence that an employee of the Defendants was aware that there was no actual production after 1998, and suggested that the Court take this as evidence of Encana's knowledge that the Leases were not valid. However, apart from actual production, the Leases would still be valid if the wells were capable of production, and therefore, knowledge regarding actual production under the Leases does not necessarily translate into knowledge of the validity of the Leases. Moreover, part three of the *Voyager* test is not whether Encana could have known that the Leases were invalid, but whether Encana actually knew that the Leases were invalid. Mutual mistakes by the parties on the validity of the lease does not amount to estoppel: *Weyburn* at 87; *Calvan Consolidated Oil & Gas Co. v. Manning* (1957), 10 D.L.R. (2d) 738 at 157.

[60] In result, there is no evidence that the third part of the *Voyager* test was met at the relevant time. And whether I am right or wrong on the above, there are two important hurdles remaining for Desoto to overcome.

4. Did the Defendant know of the Plaintiff's mistaken belief?

---

[7] This statement is from a letter of recommendation sent by Jofco's trustee in bankruptcy to Jofco's creditors. There is no mention of Encana forgoing its right of termination in the order or proposal approved by Justice Cairns on July 15, 1999.

[61] There is no evidence that the Defendant, prior to learning of their own rights in early 2003 knew of the Plaintiff's mistaken belief. As I indicated above, the evidence supports this being a case of mutual mistake.

5. Did the Defendant encourage the Plaintiff in his actions?

[62] There is no evidence before the Court to support the claim that Encana had any knowledge of their rights and encouraged the Plaintiffs on the basis of this knowledge prior to the events that Desoto is relying on as evidence of their change in legal position. Furthermore, once Encana became aware of their legal rights in 2003, there is no evidence that they took any steps to encourage or induce Desoto to take any step.

[63] Although at this juncture Desoto is not required to prove acquiescence, it must prove that there is a genuine issue to be tried. The summary judgment rule balances the right to a full hearing with the proper operation of the justice system by preventing claims or defences that have no chance of success from proceeding to trial: *Lameman* at para. 10. Since there is no evidence to support parts three, four and five of the *Voyager* test, I must conclude that the facts of this case fail to support the claim of estoppel by acquiescence and there is no material issue for trial. It is "plain and obvious" that the argument should be disposed of summarily.

iii. Estoppel by Deed

[64] Estoppel by deed prevents a party to a written agreement, close to but *not* a binding contract, from arguing that a statement of fact in the contract is not true: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 406. Our Court of Appeal addressed estoppel by deed in *Canadian Superior Oil Ltd. v. Jacobson* (1991), 115 A.R. 391 (C.A.), and cited with approval *Horton v. Westminster Improvement Commissioners* (1852), 7 Exch. 780 at 791:

> The principle has again been stated as "that the parties agree, *for the purpose of a particular transaction* to state certain facts as true; and that, so far as regards *that transaction*, there shall be no question about them."

[65] Estoppel by deed is limited in scope and only applies to "that transaction" contained in the agreement. *Chitty on Contracts*, 29th ed. (London:Sweet & Maxwell, 2004) at para. 1-091, discusses the scope of estoppel by deed further indicating that the doctrine only "applies when an action is brought to enforce rights arising out of the deed and not collateral to it". Furthermore, estoppel by deed does make an agreement valid that would without the estoppel be void on the basis of illegality or *ultra vires*: *Jacobson* (1989) 103 A.R. 161 at para. 42 (Q.B.); George Spencer Bower, *Estoppel by Representation*, 3rd ed. by Alexander Kincome Turner (London: Butterworths, 1977) at 168. It is on this basis that "if the deed were executed in contravention of a

statute there could be no estoppel": *Maritime Electric Co. v. General Dairies Ltd.*, [1937] 1 D.L.R. 609 at 615 (P.C.).

[66] Desoto argues that there are two possible agreements that may constitute estoppel by deed such that Encana cannot deny the validity of the Leases. These alleged agreements are the assignment of the Lease from Jofco to Numac on November 29th, 1999 and the amending agreement between Numac and Pan Canadian reducing the royalty rates on December 1, 1999. Once again, there is no triable issue with respect to the argument that the assignment of the leases from Jofco to Numac results in an estoppel by deed as Desoto is barred by the limitation period from alleging that these circumstances resulted in a valid contract. Furthermore, there is no triable issue as to whether Encana is estopped as a result of the existence of the royalty agreement from denying the validity of the Leases as estoppel by deed would apply only to the rights under the royalty agreement and not those collateral to the agreement such as the Leases. The Plaintiff is unable to raise a material issue on the basis of estoppel by deed.

Conclusion

[67] Based on the above, I have concluded that summary judgment is appropriate. As a result, the appeal of the order of Master Mason granted on the 3rd day of June, 2009 is dismissed.

Heard on the 14th day of June, 2010.
Dated at the City of Calgary, Alberta this 5th day of July, 2010.

W.A. Tilleman
J.C.Q.B.A.

Appearances:

Brian Silver
Mason Silver
for the Plaintiff

Katherine Reiffenstein
Christian Popowich
Code Hunter LLP
for the Defendant