

## Successful application for summary dismissal in an oil and gas lease validity case

By Nigel Bankes

### Cases Considered:

[\*Desoto Resources Limited v Encana Corporation\*](#), 2009 ABQB 337

In this case Jodie L. Mason, Master in Chambers, granted summary dismissal of an action brought by Desoto as proceedings to justify the continuation of its caveat. I have blogged on this fact pattern on a previous occasion as a [comment](#) on the Board's decision to suspend Desoto's licence.

### The facts

Between 1974 and 1975, Encana (or its predecessor in title), granted petroleum and natural gas (PNG) leases to Penn West or a predecessor in interest with primary terms of between 3 and 5 years. The leases were originally continued on a unitization but the unit terminated in 1998. In 2003 Desoto (who claimed an interest in the leases in and below the Viking) advised Encana that it intended to drill wells on the leased lands whereupon Encana served a notice of termination on Penn West (who acknowledged same) and served Desoto with notice to take proceedings on its caveat.

Desoto claimed that the leases continued because the leases were still capable of production and in the alternative, that Encana was estopped from contending that the leases had terminated on the basis that Encana had acknowledged that the leases were valid in bankruptcy proceedings relating to Desoto's predecessor Jofco in 1999 and then again in correspondence with the Energy and Utilities Board (EUB) in 2002.

After filing its action, Desoto applied (without giving notice to Encana) for a licence and drilled a well, notwithstanding Encana's application for a review and its own undertaking not to drill pending that review. On its review the EUB concluded that Desoto did not have an interest in the minerals to support its application for a licence under s.16 of the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6.

Following the Board's decision, Encana brought this application for summary judgement.

### Decision

Master Jodie.L. Mason granted the application.

The evidence showed that there had been no production from the lands since 1998 and while there was evidence as to reserves, there was no evidence as to the wells drilled that might be capable of production or as to the costs of production.

There was no basis for an estoppel argument since the fact that Encana might have acknowledged lease validity in 1999 or 2002 did not mean that it was estopped now from questioning the continuation of the lease. Furthermore there had been no reliance to detriment by Desoto.

## **Comment**

In my earlier post on this fact pattern (on the Board's decision) I predicted that there would be no appeal. I was wrong on that. Desoto did seek leave on the basis that the Board lacked jurisdiction to determine the validity of the lease ([2008 ABCA 349](#)) but that application was summarily, and I believe appropriately, dismissed by Justice Elizabeth McFadyen in Chambers:

[2] There is no merit to the argument that the Board does not have jurisdiction to deal with the validity of the lease, at least to the extent and only to the extent of establishing entitlement to apply for the well licence.

[3] The Board could not have issued the well licence without having been satisfied as a result of information provided that the lease was valid. That information did not disclose the existing litigation between Desoto and Encana, and when that matter was brought to the attention of the Board the Board properly conducted a hearing to determine whether at least for the purposes for the issuance of the well licence, the Board was satisfied that Desoto had the entitlement to drill.

In that earlier post I also indicated that the Board had got it correct on the facts and law as presented; the lease had terminated.

But that still raises the question whether this was an appropriate case for summary judgement? And on that, and perhaps surprisingly, given the trenchant manner in which I expressed my earlier views, I have my doubts. But that is largely because of the estoppel issues raised by Desoto, which the Board did not pass upon. Such claims tend to be very fact specific.