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Summary judgement on an oil and gas lease termination case

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Decision commented on:
P. Burns Resources Limited v Locke, Stock and Barrel Company Limited, 2013 ABQB 129.

In this appeal from an unreported decision of Master Laycock, Justice Bensler granted partial summary judgement on an application for a declaration that a petroleum and natural gas lease had expired during its secondary term for want of production or working operations. The evidentiary basis for this conclusion consisted primarily of production records filed with the Energy Resources Conservation Board (or its predecessors). On the appeal before Justice Bensler in the Court of Queen's Bench the lessee supplemented the record with evidence of one of its employees and one of its consultants.

The decision

Burns, as owner of the mines and minerals other than coal in section 13, granted an oil and gas lease for a one year primary term on December 19, 1984 to Locke, Stock and Barrel's (LSB) predecessor in title. The third proviso to the habendum to the lease provided that:

> If at any time after the expiration of the said term production of the Leased substances has ceased and the Lessee shall have commenced further drilling or working operations within ninety (90) days after the cessation of said production, then this Lease shall remain in force so long as any drilling or working operations are prosecuted with no cessation of more than ninety (90) consecutive days. (...) If drilling or working operations are interrupted or suspended as the result of any cause whatsoever beyond the Lessee's reasonable control or if any well on the said lands or on any spacing unit of which the said lands or any portion thereof form a part, is shut-in, suspended or otherwise not produced for any cause whatsoever which is in accordance with good oil field practice, the time of such interruption or suspension or non-production shall not be counted against the Lessee.

Burns alleged that there were two periods after the end of the primary term during which the well on the lands did not produce for more than a period of 90 days and on that basis sought a declaration that the lease had terminated for want of production and for damages. Master Laycock awarded partial summary judgment in favour of Burns based on cessation of production during the second of the two periods. He was of the view that there was some evidence of production (albeit insignificant) during the first period. Master Laycock left the issue of damages to be determined at trial. LSB appealed. Rule 6.14(3) allows the parties to supplement the record before the master with "additional evidence that is, in the opinion of the judge hearing the

appeal, relevant and material." On the appeal LSB led new evidence from its "pumper" (Ferner) who was in charge of the well and from Anderson who advised LSB on the operation and management of the well.

The judgement

Justice Bensler held that the lease terminated for want of production or working operations at the end of the first period of non-production. The additional evidence adduced on the appeal made it clear that there was (as alleged by Burns) no production whatsoever during each of the two periods. While the production records did show an increase in inventory in one of the months in the first period (from $4.4m^3$ to $4.5m^3$) Ferner insisted that there was no production and that was the only firsthand knowledge of production at the well. Accordingly, whether the Court was applying a volumetric standard (i.e. some production however small) or an economic standard, as apparently endorsed by the Court of Appeal in *Omers Energy Inc v Alberta*, 2011 ABCA 251 (an appeal from an ERCB decision and involving a differently worded lease), the lease failed for lack of production.

Neither was the lease saved by further drilling and working operations. While Ferner occasionally turned the pump on and off, added diesel, and tapped the well, these efforts were minimal and not directed at the production of oil and accordingly were inadequate to fall within the meaning of "working operations." It was significant that once the pump was repaired (at the end of the first period) it was able to produce again within five days (at para 41). LSB could have repaired the pump at any point during the period of non-production but chose not to. During the second period, it was not until the lessee took steps to install a ringgear starter that the lessee engaged in working operations but this occurred during the second of the two alleged periods of non-production and was too late to save lease.

The failure to produce was not beyond the lessee's control. Neither the pump malfunction nor elevated concentrations of wax and acetate were outside the control of LSB (at para 42). Any problems attributable to these conditions were caused by LSB's inattentiveness to the well conditions.

The failure to produce or engage in working operations was not consistent with good oilfield practice (at para 43). General evidence to the effect that LSB's operations with respect to these types in order to maintain production was generalized and not directed to the particular operation carried out by LSB on this particular well.

Commentary

In a previous post (see the full list of posts referred to in "Back to square one: summary judgement on an oil and gas lease validity issue set aside" here I suggested that it would be an unusual case in which the Court would give summary judgement on the death of an oil and gas lease. That particular comment related to a case in which there was at least some basis for thinking that there might be an estoppel argument available to the lessee. But that is not the case here. The production record from the well was clear. And while there was some record of insignificant production during the first period of alleged non-production that was trumped on appeal with the new evidence of the lessee's own employee who was on the site to the effect that there was no production. Given all of that, termination for lack of production seems like the only possible decision. Similarly, the case seems to be a reasonable application of the decision of the

Saskatchewan courts in *Montreal Trust v Williston Wildcatters Corp*, 2001 SKQB 360, aff'd 2002 SKCA 91 to the effect that isolated acts in and around the well could not qualify as working operations. Such activities need to be directed at securing production. Equally reasonable is the conclusion that the failure to produce or carry out working operations was not for a cause that was beyond the control of the lessee. On this point Justice Bensler remarks that counsel had not referred her to relevant authority and that "the case law is sparse in this area" (at para 28). One relevant authority is the Court of Appeal's decision in *Canada Cities Services Petroleum v Kinninmonth* (1963), 44 WWR 392, (aff'd by the SCC on other grounds [1964] SCR 439) (a road ban case) but nothing turns on this since the decision fully supports the conclusion that Justice Bensler reached.