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Estoppel arguments fail once again in an oil and gas lease case

By Nigel Bankes

Cases Considered:

Desoto Resources Limited v. Encana Corporation, 2010 ABQB 448

In this case Justice William Tilleman dismissed an appeal from Master Jodi Mason's decision in chambers in which she had granted summary judgement in favour of the defendant in the action, Encana. Desoto had been seeking a declaration that it had a number of valid leases notwithstanding that the primary term of the leases had expired in the 1970s and that there had been no production on the leases for a period beginning in the late 1990s. This was apparently, at least at the outset, as a result of the properties being shut-in by order of the Energy Resources Conservation Board because of the failure of the then lessee to pay well abandonment deposits.

I blogged on Master Mason's decision – see Successful application for summary dismissal in an oil and gas lease validity case.

On appeal, Desoto focused on estoppel arguments urging that the leases should survive on the basis of promissory estoppel, estoppel by acquiescence, or estoppel by deed.

All of the arguments failed. Promissory estoppel failed on the basis that promissory estoppel can only be relied upon if there is an existing relationship. Here the legal relationship was already dead because each of the leases had expired of their own terms by virtue of the absence of production.

Estoppel by acquiescence failed because there was nothing in the pleadings to suggest that Desoto would be able to establish all of the five "probanda" of *Wilmott v Barber* (1880), 15 Ch.D. 96 and in particular the last two: Encana's knowledge of Desotos's mistaken belief as to its entitlement, and encouragement by Encana to Desoto for it to continue spending money on the property.

And estoppel by deed failed because …. well, actually, I am not entirely sure why it failed because the reasoning offered at paras. 64 – 66 seems a little cryptic to a reader not engaged in the actual litigation. There seems to be some suggestion that Desoto is statute barred from relying on one agreement but *quaere* how this could be so when limitations rules deal with causes of action and not evidence and in any case this was an application for a declaration. Justice Tilleman also emphasises that in estoppel by deed there must be a clear and close nexus between the subject of the deed and the rights that the plaintiff seeks to enforce. This is not contentious, but Justice Tilleman seems to go on to suggest that an agreement between relevant parties compromising the royalty payable (apparently under the terms of the leases) cannot be

used as a foundation for an estoppel by deed argument in relation to the validity of the leases (at para. 66). That seems very demanding.

There is nothing particularly unusual about this decision but two matters are worthy of comment. The first is simply to note that Justice Tilleman is unequivocal (at para. 50) in asserting that estoppel by acquiescence can revive a dead lease. This may or may not be the case. Justice Tilleman relies on three decisions for this conclusion: *Canadian Superior v. Paddon-Hughes Development Co Ltd.*, [1970] SCR 932; *Weyburn Security v. Sohio Petroleum Co.*, [1971] SCR 81 and *Voyager Petroleums Ltd. v. Vanguard Petroleums Ltd.* (1983), 47 AR 1. All of the estoppel arguments fail in the first two cases. The estoppel by representation argument succeeds in *Voyager* but the Court of Appeal in dealing with the estoppel by acquiescence argument is at pains to emphasise that the five probanda of *Wilmott* must be satisfied as of the "click" date of the lease (in other words before the lease would otherwise terminate). In short, Justice Tilleman may well be correct to think that estoppel can serve to create\revive interests (this is certainly true of proprietary estoppel) but the cases cited do not unequivocally establish that in the case of estoppel by acquiescence.

Second, and as suggested above, the estoppel by deed reasoning does seem very demanding. A right to a royalty exists by virtue of the lease. An agreement that compromises the royalty payable in the future under the terms of the lease seems to me to be an agreement that relates directly to the lease and not an agreement that is merely collateral to the lease (as might be the case, for example, with an agreement dealing with processing the gas produced from the leased property). But then, as I acknowledge above, it is hard to push this critique any further in light of the limited information as to these agreements that is available in the actual decision.