Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

July 31, 2013	Afternoon Session
Master Robertson	Court of Queen's Bench of Alberta
M.B. Niven, Q.C.	For the Plaintiff/Defendant by Counterclaim
H.L. Treacy, Q.C.	For the Defendant/Plaintiff by Counterclaim
M.A. Yuen	For the Defendant/Plaintiff by Counterclaim
S. Lucas	Court Clerk

THE COURT CLERK: Order in chambers. All rise.

THE MASTER: I thought it had become an ex parte application.

MS. TREACY: I apologize, Sir, we were just in the back room.

THE MASTER: Oh, okay.

Reasons for Judgment

THE MASTER: This case involves the energy industry and area of mutual interest, which I will call an "AMI" agreement, and the standard operating procedure terms of agreement in the form created by the Canadian Association of Petroleum Landmen, which I will call "CAPL", 2007 version.

The plaintiff, Bernum Petroleum Ltd., or "Bernum", was the operator, and the defendant, Birch Lake Engineer -- or, Energy Inc., "Birch Lake", was the non-operator of two wells located near the community of Springbank, Alberta. The first one drilled was referred to as 4-3 because it was in legal subdivision 4 of section 3 in a particular township. The second one was referred to as 16-19 because it was in legal subdivision 16 of section 19 of the same township. The lands had been part of an area of mutual interest, but the area of mutual interest had, by its terms, expired December 31, 2010.

A head agreement dated December 15th, 2009, had been entered into by different parties than those now before the Court, but Bernum had become a party to it at least by March 31st, 2011, when it entered into an inclusion agreement with Frac Energy Inc., which was one of the original parties. Birch Lake took over Frac Energy Inc.'s position by an assignment dated December 1, 2011. Thereafter, the parties to the agreement were Bernum and Birch Lake. Bernum was to hold a 60 percent interest and Birch Lake 40

percent.

The head agreement included within it, as schedule 'B', the capital operating procedure which the head agreement said would apply to the mutual interest lands acquired jointly under the head agreement. The head agreement said that the AMI would expire December 31st, 2010. It said it was the entire agreement, but it also said in paragraph 4(b) that the terms of the AMI "made be amended with the mutual agreement of the parties hereto" which, in light of the subsequent acquisitions by the parties, meant Bernum and Birch Lake. However, it did not say that the mutual agreement to amend the term must be in writing. This particular provision left open the possibility that, if there were an agreement in writing or not, the term can be extended.

The CAPL operating procedure says that amendments to "this agreement" must be made in writing and executed by all parties, clause 1.09. "Agreement" is defined in the CAPL operating procedures as meaning the head agreement and the schedules, including the operating agreement. In this case, if the head agreement said that the term of the AMI can be amended by mutual agreement with no specific reference to that agreement being in writing, must it be in writing?

The expiry date of the AMI was not changed in writing. Birch Lake says that it operated on the understanding that the AMI was in place even though, on their face, the document said the term had already expired before Birch Lake acquired an interest in the agreement at all, and before the inclusion agreement because there were many offers made to Birch Lake by Bernum to participate in certain wells, but none of those offers said they were made because of the continued existence of the AMI.

The inclusion agreement did not expressly say that the AMI was extended even though it was entered into after the expiry of the AMI. It said that the agreement was "in respects ratified and confirmed, and all terms, provisions and covenants thereof shall remain in full force and effect". One of those terms ratified, of course, was paragraph 4(b) which said that the term of the AMI could be amended with the mutual agreement of the parties without saying that that agreement must be in writing.

The head agreement contained much detail because, among other things, it attached the capital operating procedure as an important part of the agreement, but the capital operating procedure was adopted to apply to "any mutual interest lands acquired jointly hereunder", paragraph 4(d). Therefore, Bernum says that the execution of the inclusion agreement, although it made reference to the head agreement, did not expressly re-establish the AMI which, by its terms, had already expired. In fact, Bernum says that it confirmed the terms. The AMI had expired. Any drilling done in the areas subject to the leases that were listed in the inclusion agreement would be done pursuant to the

capital operating agreement to the extent that Birch Lake chose to participate. But the head agreement appears only to have adopted the capital operating procedure for mutual interest lands, causing one to ask why there was an inclusion agreement at all if there could no longer be any lands that fell within the AMI and be caught by the head agreement.

In late 2012 and early 2013, Bernum drilled the 4-3 and 16-19 wells. There is no question that Birch Lake had participated in those wells to the extent of its 40 percent interest, the other 60 percent being held by Bernum. It signed all of the appropriate documents and, although the wells did not go well, particularly the 16-19 well, Mr. Petrie of Birch Lake wrote to Mr. Ponto of Bernum by e-mail of January 21, I think it was, 2013 - yes, January 21, 2013 - and said that he again acknowledged Birch Lake's signed AFE, authorization for expenditure, for 16-19, and Birch Lake's "obligation to pay the approximate $1.34 million cash call invoice to drill and case the originally-intended 16-19 vertical strat test of the Cardium and subsequent horizontal component".

He went on to say that the company had encountered some financing problems because of the "less than expected initial flow results from the 4-3 well and the common knowledge in the industry of the technical concerns about casing and fracking a new lateral". He declined to participate in the redrilling of the horizontal component of 16-19. Later in that e-mail he said, "Finally, I reaffirm our commitment to paying the 16-19 cash call and appreciate your patience in this matter."

But Birch Lake did not pay the cash calls and Bernum sued and quickly brought this application for summary judgment.

Initially, Birch Lake's response was two affidavits of Mr. Petrie that complained about gross negligence, questioned the amount of the claim regarding the 16-19 well, and also complained about the loss of an interest in another section, section 17, which was directly related to the two wells that had been drilled. The complaints about gross negligence was in stark contrast to the e-mail I have quoted above in which Mr. Petrie said that Birch Lake would pay its share with no hint that there was any complaint about Bernum's performance as operator. The complaint about section 17 was essentially that the lease on section 17 was part of the AMI and should have been protected by Bernum. Bernum says that the AMI had expired because that occurred December 31st, 2010. Birch Lake claims damages and equitable setoff of $5,600,000 by way of counterclaim for the loss of the section 17 lease.

Birch Lake now says that it was a victim of Bernum's gross negligence in the drilling of both the 4-3 well and the 16-19 well, but when Mr. Petrie was cross-examined on his affidavit, if there was any doubt about his ability to express an opinion as to the alleged

gross negligence of Bernum, the doubt was removed by his own admissions. In fact, he admitted that, in respect of 4-3, he had not accused Bernum of incompetence or gross negligence as to what happened at 4-3, despite what he said in his affidavits. He said, "We did not accuse Bernum. We speculated internally."

He repeatedly admitted in cross-examination that he has no expertise in any of the areas in which Bernum was now said to be guilty of gross negligence. The question of gross negligence is important because clause 4.02 of the CAPL operating procedures says that the operator will not be liable to the non-operator for: (as read)

> . . . any losses and liabilities resulting from or in any way attributable to or arising out of any act, omission or failure to act, whether negligent or otherwise, of the operator . . . in the performance of the operator's duties under this agreement (including those in planning or conducting any joint operation) except insofar as:
>
> (a) those losses and liabilities are a direct result of or are directly attributable to the gross negligence or wilfulness conduct of the operator, its affiliates or the respective director's officers, employees, agents or contractors;
>
> (b) the operator may otherwise be liable to any party for breach of its contractual obligations as operator under this agreement other than for its duties under clause 3.04, subclause 3.05(a) or subclause 3.10(a) or;

- and then paragraph (c) is irrelevant.

> Insofar as paragraph 4.02(a), (b) or (c) apply to impose obligations on the operator for certain losses and liabilities, the operator will, subject to clause 4.04, be solely liable for them and, in addition, indemnify and save harmless each non-operator . . . However, all such losses and liabilities will initially be for the joint account until the operator's responsibility therefore is finally determined, at which time it will promptly affect any required adjustment of accounts.

Clause 3.04 says that: (as read)

> The operator will conduct joint operations in a good and

> workmanlike manner in accordance with good oilfield practice.

However, it also it also says that:

> A breach of those obligations will not result in any form of liability, whether in tort, contract or otherwise, except insofar as the conduct which the breach pertains constitutes gross negligence or wilful misconduct for which the operator is solely responsible under article 4.

The passage quoted from above is from clause 4.02 of article 4.

Accordingly, the question becomes whether Bernum might have been guilty of gross negligence in carrying out its duties as operator on 3-4 or 16-19 or both. If it might be, then there is a case for trial as to damages suffered by Birch Lake and its claim for equitable setoff.

So, what amounts to gross negligence? Not surprisingly, it is a defined term in the CAPL operating procedures. The definition joins it with wilful misconduct and, although there was no suggestion here that Bernum was guilty of wilful misconduct, the definition says this: (as read)

> "Gross Negligence or Wilful Misconduct" means any act, omission or failure to act (whether sole, joint or concurrent) by a person that was intended to cause, or was in reckless disregard of, or wanton indifference to the harmful consequences to the safety or property of another person or to the environment which the person acting or failing to act knew (or should have known) would result from such act, omission or failure to act. However, Gross Negligence or Wilful Misconduct does not include any act, omission or failure to act insofar as it: (i) constituted mere ordinary negligence; or (ii) was done or omitted in accordance with the express instructions or approval of all Parties insofar as the act, omission or failure to act otherwise constituting Gross Negligence or Wilful Misconduct was inherent in those instructions or that approval.

What is clear is that ordinary negligence is not gross negligence. Something in the nature of reckless disregard or wanton indifference to the consequences is required for there to be gross negligence, not mere error, not mere violation of ordinary oilfield practices.

Mr. Petrie's affidavits do not help Birch Lake's cause in this regard. His opinion was

eroded by his own admissions but, in any event, he cannot give an independent opinion. I would pay little attention to his opinion in any event unless there were facts disclosed that showed an issue of gross negligence that did not require any expert opinion, but he essentially admitted that he was speculating about negligence.

Birch Lake filed, rather late in the day, an affidavit sworn by Larry Smith, a professional engineer with over 30 years' experience as a petroleum engineer in Alberta. He had acted as a consultant to Birch Lake and he may not be sufficiently independent for his opinion to be admissible at trial. However, this is a summary judgment application and I am not called upon to make that determination. But his opinion only alleges that Bernum made errors; he said that Bernum violated common industry practice regarding pressures and that the frac pumping pressure limitations were set based on the worst pressure ratings of the liner without consideration for the collapse pressure ratings which he says led to the collapse of the production line because Bernum failed to consider all aspects of the frac procedure. All of his opinion was only in respect of the 4-3 well and he said nothing at all in his affidavit about the 16-19 well. Nowhere in his affidavit did he say that Bernum's operations were carried out in a manner that was significantly at variance from industry practice, or use any words expressing an opinion that what Bernum did might properly allow a Court to conclude that there was reckless indifference or wanton disregard for the consequences so as to amount to gross negligence.

Courts in Alberta have stated the test to be applied on a chambers application for summary judgment in a number of different ways.

For example, in 201, the Court of Queen's Bench said that the test was whether there is a genuine issue for trial beyond doubt, *Condominium Corporation No. 0425177 v. Jessamine*, 2011 ABQB 644, para 9; although an earlier decision of the Court of Appeal, which I will discuss in a few minutes, addressed the use of the word "doubt" and suggests that beyond doubt is no longer the standard.

In 2006, the Court of Appeal said that the test was whether there is "genuine issue of material fact requiring a trial or whether the outcome of the case is "plain and obvious", *Lameman v. Canada (Attorney General)*, 2006 ABCA 393, para 14, reversed on other grounds at 2008 SCC 14.

About ten years ago, the Court of Appeal said that neither the expression "*prima facie* case" or "beyond a reasonable doubt" were appropriate expressions of the test to be applied when determining whether summary judgment should be granted, *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298, para 16.

This may have been intended to modify the test expressed by the Court of Appeal in 1995 in *Mellon (Next Friend of) v. Gore Mutual Insurance Co.* 174 A.R. 200, para 3, where the Court had said that the applicant for summary judgment must show that it is "clear beyond a reasonable doubt that there is not a triable issue raised on the pleadings".

Sometimes, the Court of Appeal has described what might be described as a shifting onus in summary judgment applications. It was described in *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, and *Murphy Oil Co. Ltd. v. Predator Corp. Ltd.*, 2006 ABCA 69, and *Tottrup v. Clearwater (Municipal District No. 99)*, 2006 A.J. No. 1532, para 10.

In 2011, Madam Justice Veit said in the *Manufacturers Life Insurance Company v. Executive Centre at Manulife Place Inc.*, 2011 ABQB 189, that the parties before her agreed that the "new rule 7.3 has not amended the test developed in Alberta jurisprudence for summary judgment under old rule 159." But, more recently, Justice Graesser said in *MGN Constructors Inc. v. AXA Pacific Insurance Company*, 2013 ABQB 216, at paragraph 30, that: (as read)

> . . . the philosophy of the new *Rules* is less supportive of letting the parties have their day in court, and the *Rules* are more focussed on weeding out claims with no merit and determining what the real issues (worth trying) are. Thus, the old test of "no genuine issue for trial" which suggested that serious questions of law required a trial has been replaced with no genuine issue of "material fact" requiring trial. The difference is perhaps a subtle change, but if there are sufficient material facts on which to make determinations of law, a trial may not be necessary. The material facts must still be made out on the basis of either admissions or admissible evidence. Contested material facts generally still require a trial.

Trials are primarily held to determine questions of fact and a trial is not required if the facts are not in dispute and the legal issues involved are sufficiently settled such that the case can be fairly decided on the record before the Court on the summary judgment application, *Encana Corporation v. ARC Resources Ltd.*, 2011 ABQB 431, citing *Tottrup v. Clearwater* which I have cited above at paragraphs 11 and 12.

The Court of Appeal has said that on a summary judgment application the Court should not assess the quality or weight of the evidence as this is a function reserved for the trial judge, *De Shazo v. Nations Energy Co.*, 2005 ABCA 241, Court of Appeal. I note that the Court of Appeal has more recently than the -- than ten years ago once again referred

to "beyond a doubt" in some of its decisions, including the *Tottrup v. Clearwater* case.

In the context of the *De Shazo* case that I just mentioned, I understand the descriptors "quality" and "weight" of the evidence to refer to whether it appears that the evidence is going to stand the test of relevance, credibility and reliability at trial. For example, if an eyewitness did not have a good vantage point and his or evidence might or might not be accepted by the trial judge, then summary judgement should not be granted. If an expert witness gives an opinion at the summary judgment application, but the witness's credentials are an issue, that is for the trial judge to consider. There is no voir dire at the chambers application to address the admissibility of expert's qualifications. And, of course, if there is conflicting testimony or conflicting expert reports on a factual matter, they are not to be addressed at the summary judgment stage where witnesses are not observed and there may not even have been any cross-examination. In cross-examination, it is not likely that a witness will admit that his or her evidence is wrong. Often there is no point in cross-examining on an affidavit for a chambers application as the risk is that the witness will simply repeat his evidence and sometimes strengthen it with more detail. But at a summary judgment application, each side must put its best foot forward with respect to the existence or non-existence of material issues to be tried, *Transamerica Life Insurance Co. v. Canada Life Assurance Co.* 28 O.R. (3d) 423 at page 434, as cited in the *Canada v. Lameman* decision which I have already cited at paragraph 11.

It has been said that the opponent of a summary judgment application need only show that their case is not hopeless, *Braunwarth v. BMO Bank of Montreal*, 2004 ABQB 790 at paragraph 32.

Regardless of the shifting onus that I mentioned before, at the end of the day, the Court must look at all of the material that has been placed before it and, bearing in mind the fact that the respondent has put its best foot forward, decide if the outcome at trial is plain and obvious in favour of the applicant. The description by our Court of Appeal of the shifting onus is helpful because it makes it clear that the respondent does have an evidentiary onus on a summary judgment application. It does not succeed by alleging facts that might be found to be in its favour. It does not succeed by showing that there is some evidence that makes its case sympathetic. It succeeds only by showing that there is at least some evidence that, if accepted by the trial judge, could lead to an outcome in its favour, that is, that its position is not hopeless on the facts. It can do that in a variety of ways: by simply reviewing the affidavit of the applicant and showing discrepancies, for example; or cross-examining the applicant's deponent and demonstrating weaknesses; or submitting its own affidavit; or even relying on the applicant's cross-examination on the respondent's affidavit.

Some cases talk about circumstances where there is a legal argument that should be left to

the trial judge because of the complexities, such as *Tottrup v. Clearwater* at paragraph 12. This would seem more likely to arise in cases where there (INDISCERNIBLE) is mixed facts -- fact and law, where there is complexity in applying the facts to the law, or there is some discretion that the trial judge must exercise in light of all of the facts. Otherwise, the Court hearing a summary judgment application where there is no dispute over the relevant facts is in the same position as the trial judge, only a lot less time, effort and legal fees, and other costs, will have been expended up to this point.

I have reviewed all of this to explain that a summary judgment is not granted or dismissed based on the evidence that might or might not be presented at trial. The application is to be decided based on the evidence that is actually presented at the chambers application. If that evidence admits of almost any doubt, then the application should be dismissed. I say "almost any" because the Court of Appeal may have moved away from the requirement of proof beyond a reasonable doubt, the criminal standard in the *Pioneer Exploration* case that I mentioned earlier.

In any event, the courts are now asked by the Court of Appeal to consider:

(a) whether there is any genuine issue of material fact requiring a trial, not just any imaginable issue or one involving a factual dispute on immaterial points, and

(b) where the outcome is seen as being plain and obvious.

The test of the trial will be on a balance of probabilities, not reasonable doubt. Approaching the summary judgment application with that in mind, not bringing to bear the strict approach followed at criminal trials, seems more helpful. A question might be posed - based on the evidence that is now presented, is there any realistic chance that a trial judge might agree with the respondent's position? When asking this question, the Court hearing the chambers application must bear in mind that the trial judge might see or hear more evidence, not just the current evidence, but primarily that evidence would only be expected to augment, reinforce and corroborate the current evidence. In asking the question, the court hearing the chambers application is entitled to expect that the respondent has put its best foot forward and has not played peek-a-boo with bits of evidence that is has perhaps augmented with suggestions of evidence that it imagines that it might find if it can only spend enough time examining the opposite party at questioning, the fishing expeditions that sometimes occur.

Once the applicant proves that it has a good case on a balance of probabilities, the respondent must be able to show at an early stage that its case is not hopeless. If it cannot, the opposite party should not be required to go through significant legal costs and delay getting to an outcome that is already plain and obvious. Where documents have not

yet been produced, it might be appropriate to deny the summary judgment to avoid mischief where the applicant's own records show that there is a factual or legal issue and the application has been brought in hopes that the respondent will not see them before summary judgment is granted.

But the approach described here is particularly appropriate where affidavits of records have already been exchanged and there was an opportunity to review each other's records before the application was brought. If there is no genuine issue to go to trial at that point, creative litigants should not be encouraged to keep fishing in hopes that they might find something eventually.

Here, there is no evidence of facts supporting the position that Bernum was guilty of gross negligence. There is merely uncontroverted evidence of error, in my view, as to the operations of the wells, bearing in mind that if the defendant has put its best foot forward, if the best that it can say is (a) the business person, Mr. Petrie, thinks there was gross negligence perhaps because Bernum was rushing just before Christmas and because it shut in the well for a period of Christmas, as Mr. Petrie alleges, although the work was restarted without incident, and (b) the expert engineer can only say that there were some errors, and only then in respect of one of the wells, there is no genuine issue on a material fact to send the case to trial. Cases don't get sent to the trial on wishful thinking and a wing and a prayer that the questioning will disclose some defence not initially apparent. And so, the money dispute on well 16-19, the plaintiff has conceded a mathematical error and reduced its claim appropriately; the mathematics have been resolved.

The remaining issue is the inclusion agreement, whether the AMI was still in effect and whether the interest in section 17 should have been offered to Birch Lake. In cross-examination, Mr. Ponto of Bernum admitted that Bernum had first commenced discussions with Petrel Energy Limited in early February 2013, even before the lapse of the section 17 lease. Petrel Energy has apparently acquired a 40 percent interest in section 17 as of March 27th, 2013. Bernum did not advise Birch Lake that it was pursuing an agreement with respect to those lands with a third party and it appears that that was because, as Mr. Ponto said more than once in cross-examination, the AMI to which Birch Lake had rights had expired. Rather than renewing the lease on section 17, it appears that Bernum entered into a new lease with Petrel Energy now holding a 40 percent interest.

I recognize that, at the time the lease expired, the claim against Birch Lake was already in the court. It seems difficult to accept that Birch Lake was going to take a 40 percent interest in section 17, and for the reasons expressed earlier in this judgment, there is some real doubt in my mind whether the AMI had actually expired and been left expired, or whether the inclusion agreement had essentially renewed it. The CAPL operating

procedure seems to have been adopted to apply to mutual interest lands. If the inclusion agreement was not to apply to mutual interest lands, what was its purpose? I do not answer this question. Clearly, Birch Lake thought it applied to all the lands by the actions of the parties following Birch Lake taking an assignment of the interest of Frac Energy Inc.

Birch Lake claims damages for its interest essentially being taken from them and, if it has a valid claim for damages regarding that alleged loss, then there is a claim of equitable setoff -- or, it has a claim of equitable setoff.

Bernum says that that claim, even if it is valid, is too remote to amount to a right of equitable setoff in respect of the claims for the cash calls which would, in turn, amount to a defence on the merits. I think there is doubt about that. The two wells on which money was spent drilling were all part of the same relationship that Bernum, holding 60 percent, and Birch Lake, holding 40 percent, the section 17 right, if there was one, was all part of that same arrangement. Whether it was too remote is for a trial judge to decide. Those arguments will turn on the facts of the case that require evidence of witnesses given in court.

In light of my conclusions and in light of the provisions of rule 7.3(3), I am giving consideration to granting summary judgment for the amount of the plaintiff's claim, but to stay it pending the trial in relation to section 17. And what I am interested in is your submissions in that regard, that is, I don't see any point in having a trial on the two wells drilled and on the issue of gross negligence, but this loss of section 17 is not clear to me; I -- I see an issue there.

MR. NIVEN: Thank you, Mr. Master.

THE MASTER: Maybe you want an adjournment --

MR. NIVEN: No, no --

THE MASTER: -- at least for ten minutes or so to give it some thought and --

MR. NIVEN: No, no, I'm okay.

THE MASTER: Okay.

MR. NIVEN: If it's okay with you?

THE MASTER: No, it is fine with me. I --

MR. NIVEN: Okay.

THE MASTER: -- I have obviously given this some thought and --

MR. NIVEN: Yeah -- no --

THE MASTER: -- and I am springing --

MR. NIVEN: Yeah.

THE MASTER: -- on you, so I --

Submissions by Mr. Niven (Other)

MR. NIVEN: No, no, no, because we -- you -- you raised this yesterday. The doubt in your mind appears to arise from the inclusion agreement, and what effect that had, and what the parties were up to. Is that fair?

THE MASTER: Yes.

MR. NIVEN: Okay.

THE MASTER: And the meaning of the agreement and the discussions that would have surrounded that, the subsequent correspondence, the --

MR. NIVEN: Right.

THE MASTER: -- all of that.

MR. NIVEN: Right.

So, the first thing I would like to point out is that all of the leases detailed in the schedule to the inclusion agreement predate the expiry of the AMI. It was, in our view, a tidying up agreement to make sure that all the parties were on the same page with respect to what leases were brought under the head agreement by the operation of clause 4(a), the AMI clause.

You're absolutely correct that the agreement is clear that there can be no amendment to

the head agreement except in writing. There was no agreement in writing between the parties to state, Yeah, we're extending the AMI.

THE MASTER: My point on that was that the head agreement and the -- which included the -- the CAPL operating procedure --

MR. NIVEN: Yes.

THE MASTER: -- said what you said, but when it specifically came to the term of the AMI, it said the term may be extended by agreement --

MR. NIVEN: Yes.

THE MASTER: -- and it didn't say "only in writing".

MR. NIVEN: Right, but that --

THE MASTER: So, it leaves open the possibility of an agreement made between the parties referenced by their other actions --

MR. NIVEN: Right.

THE MASTER: -- with each other, perhaps a handshake. I --

MR. NIVEN: I don't agree with that --

THE MASTER: The -- I know you don't agree with that, but --

MR. NIVEN: -- because --

THE MASTER: -- but it -- but it is a kind of curious thing --

MR. NIVEN: Right.

THE MASTER: -- every -- elsewhere they are saying no -- no changes except in writing; that would require a change to the head agreement that said the term of the AMI may be extended by agreement which didn't say "in writing", a change to that would have to be in writing, but the head agreement specifically said the term may be extended by agreement - period. I am paraphrasing when I say "period" --

MR. NIVEN: Right.

THE MASTER: -- but it didn't reference any -- it -- it is a curious drafting anomaly.

MR. NIVEN: Well, I -- I -- I think I can explain that by saying the following - I don't see anything in the inclusion agreement that changes any term of the head agreement.

THE MASTER: No, I am not --

MR. NIVEN: Right.

THE MASTER: -- I am not suggesting --

MR. NIVEN: Okay.

THE MASTER: -- it does, except that the head agreement had already expired.

MR. NIVEN: No, no, the head agreement had not expired --

THE MASTER: Sorry -- sorry, the AMI had already expired --

MR. NIVEN: Right.

THE MASTER: -- yes.

MR. NIVEN: Yeah, and that's a -- that's a critical distinction, is that the -- the head agreement continues as long as the parties own lands together. The AMI expired December 31st, 2010. There is no term in the inclusion agreement that says we are amending anything in the head agreement.

THE MASTER: I got all of that.

MR. NIVEN: And, if that's correct -- if that's correct, then the clause -- the -- if that's -- if that's correct, if -- if this Court accepts that that's correct then, in my submission, it necessarily follows that the rule about no amendment except in writing must continue.

THE MASTER: I agree that it says no amendment except in writing, but the clause that I am talking about specifically -- very specifically talks about

extending the term by agreement and it doesn't say that it must be -- may -- may only be extended in writing. So, that clause wasn't changed when you signed -- when your client signed the inclusion agreement. It is a curious anomaly but, Mr. Niven, I am not asking for submissions on the underlying issue. I am asking for submissions on how to deal with the fact that I am entitled to grant summary judgment for part of the claim, leave part of a claim outstanding, and what I had in mind was that you would be given summary judgment for what I am colloquially describing as the cash calls --

MR. NIVEN: Yeah.

THE MASTER: -- but that that be stayed to reflect the -- the right, if there is any, for equitable setoff, but to limit the trial to the section 17 issue, and, frankly, impose some other terms to make sure that that happens promptly, that it doesn't just drift. Because there may be a point where I can see that Birch Energy might not have any interest in going to trial --

MR. NIVEN: I --

THE MASTER: -- you know, but -- but --

MR. NIVEN: No --

THE MASTER: -- so I am interested in moving the case along, but --

MR. NIVEN: I hear you.

THE MASTER: -- limiting what the trial is about.

MR. NIVEN: I -- I am -- if -- if -- if I cannot convince this Court that the head agreement and the AMI clause and the inclusion agreement all flange out nice and tight - and I think that's where you're at, right?

THE MASTER: It is not so much that you -- you can't convince me, you have to show that -- that your friend has no argument to go to trial on that issue.

MR. NIVEN: Okay. My --

THE MASTER: I am not necessarily disagreeing with you. I am saying that there is an argument to be made --

MR. NIVEN: Right.

THE MASTER: -- that is as far as I am deciding at --

MR. NIVEN: Right, okay. Well, my --

THE MASTER: -- at this point.

MR. NIVEN: Well, my sub -- my submission in that regard then would be two-fold. I don't think the determination of -- of that point would revolve around facts in evidence. I think the determination in that point revolves around the material in front of this Court. I don't think there is much in the way of external evidence that's not before this Court that would change that, and I would refer you back to those letters, exhibits 'O' through 'X' or whatever, where it's made clear every time. I would refer you to what Mr. Ponto said under cross-examination, right?

THE MASTER: I appreciate what Mr. Ponto said. He -- he said it was -- it was not done because the AMI was still --

MR. NIVEN: Right, and --

THE MASTER: -- in existence.

MR. NIVEN: And --

THE MASTER: I get all of that.

MR. NIVEN: And, as my -- as the -- as the cross-examination of my client, I am entitled to rely on that evidence.

THE MASTER: No, I appreciate --

MR. NIVEN: Yeah.

THE MASTER: -- you are entitled to rely on that, but --

MR. NIVEN: Right. And the only other point I guess I would make is that, you know, it's -- it's -- it's heartening and -- and I'm glad that the Court is making a finding that there was no gross negligence, but to then stay that while we have a trial on this legal issue is -- you know, it's -- it's -- it --

THE MASTER: Maybe a summary trial on that legal issue is appropriate.

MR. NIVEN: -- kind of a hollow victory.

THE MASTER: Well -- well, but I am suggesting to you that -- that there would be some terms and I -- what I would like to do is hear from your friend as to what she thinks and I -- and -- and maybe I should start with telling you what I have in mind --

MR. NIVEN: Yes, please.

THE MASTER: -- to -- to see if we are all --

MR. NIVEN: If it fits, yes.

THE MASTER: What I have in mind is that the judgment be granted for what I call cash calls.

MR. NIVEN: Yeah.

THE MASTER: It would be stayed until the earlier of the resolution of the case or the expiry of one year. So, they have one year or less to get to trial, with leave to reapply to extend that depending on how things are going in the future.

Also, that -- because, as I said in my -- my judgment, I -- it -- it is -- it is difficult to accept that Birch Lake was going to try to participate in that and lost $5,600,000 when we already heard that they were having financing difficulties and didn't even take part in the rest of 16-19. I get that. So, you are now looking at a trial with a company that has already told you it has financing difficulties, didn't participate, and it is -- there is a kind of a -- it is a bit of a stretch to believe that section 17 was going to be picked up. So, I have in mind that -- that Birch Lake be required to post costs before proceeding with its trial. There are a number of cases - the Court of Appeal has -- has confirmed this - that this is allowed by the -- the courts hearing summary judgment applications in what Justice Cote called near-miss cases, to require the plaintiff - in this case it would be --

MR. NIVEN: Right.

THE MASTER: -- Birch Lake - to post costs or they don't get to proceed with their claim.

MR. NIVEN: The cost of the trial?

THE MASTER: The cost of the trial -- cost of the steps going forward for that portion of the trial where effectively they are the plaintiff and your -- and your client is the -- is the defendant.

MR. NIVEN: Would it be appropriate for my friend and I to step out and chat?

THE MASTER: I am happy to give you an adjournment. As I say, I appreciate that I am springing this all on you --

MR. NIVEN: Well, we're slow learners (INDISCERNIBLE) --

THE MASTER: I don't think you are slow learners.

MS. TREACY: And I -- I am happy, I have some submissions on this as well.

THE MASTER: I am sure you do, but do you want to make them before you go out, or do you want to talk and then come back in --

MS. TREACY: Well, I'll just make a few comments, if I could, and then maybe my friend and I can go out.

Submissions by Ms. Treacy (Other)

MS. TREACY: You know, we obviously would support the position of a stay simply because it's argued that, even in considering the section 17 issue, the Court is going to have to consider the same legal agreements and basically the same facts. I just -- and, again, the claim of equitable setoff, if our client is successful for $5.6 million is completely going to vitiate this amount.

THE MASTER: That is why I was anticipating that it should be stayed to allow --

MS. TREACY: Right.

THE MASTER: -- not to take away that right, if you have that right --

MS. TREACY: Yes --

THE MASTER: -- or if your client has that right.

MS. TREACY: -- and then I -- the one thing that I think is important though is Bernum is currently setting off from the production of the 4-3 well as against Birch Lake currently. So, it is already actually enforcing a remedy. So, it is not entirely -- and, you know, I think a question is should that process be stayed as well? I know you've mentioned perhaps posting costs, but it already is -- has been exercising that type of remedy and, unless that is stayed, will continue to do so. So, I just throw that in to the mix because I think that's another important consideration.

THE MASTER: Another reason to get your case to trial quickly and get it resolved and --

MS. TREACY: Right, and --

THE MASTER: -- figure out where you stand.

MS. TREACY: -- and certainly it is my client's intent to want to do that as well.

But I am happy to have some discussions --

THE MASTER: Okay --

MS. TREACY: -- with my friend --

THE MASTER: -- I hadn't given any thought to that setoff of the -- of the production. So, why don't you --

MS. TREACY: I --

THE MASTER: -- talk to each other --

MS. TREACY: I just think it's important because my client, you know, is -- that is difficult financially on it, it's losing that revenue, and then to require it to post costs, I don't think it should be extremely onerous on my client.

THE MASTER: I haven't made a decision on this. I was

throwing out ideas. As I say, I appreciate I am springing it on you.

MS. TREACY: Yes.

THE MASTER: So, why don't you -- why don't we -- why don't you just perhaps let the clerk know when -- when you are ready to come back?

MR. NIVEN: We won't be long.

THE MASTER: But I am thinking of, like, 15 minutes or something at most.

MR. NIVEN: It won't be long.

THE MASTER: Okay.

MS. TREACY: Thank you.

MR. NIVEN: We have good communication.

THE COURT CLERK: Order in chambers. All rise.

(ADJOURNMENT)

THE COURT CLERK: Order in chambers. All rise.

THE MASTER: Please be seated.

MR. NIVEN: My friend and I have spoken and I think we've both taken instructions.

So, just to be clear, what my friend and I were doing was talking about the ideas that you had put forward. Neither my friend or I are entering into any sort of consent judgment here, right? Right. And my friend has not, in any way shape or form given up any of her rights of appeal, for example; that's all --

THE MASTER: Right.

MR. NIVEN: -- that's all right. So, where I understand the Court to be is we get judgment for the cash calls, but that is stayed for a certain period of time and the court will make an order that the section 17 AMI should proceed to a

summary trial resolution and that be --

THE MASTER: Is that what you have talked about? I -- I was just saying "trial", and then, when you were saying how straightforward it is, I suggested maybe a summary trial then is appropriate. I wasn't --

MR. NIVEN: Okay.

THE MASTER: I am not -- I wasn't going to order that.

MS. TREACY: Right, I would prefer just to leave it at trial because --

THE MASTER: Right.

MS. TREACY: -- I think we have to reflect on it further.

THE MASTER: Sure.

MR. NIVEN: Okay. And I suppose it's up -- it's open to me then to bring whatever application I think is appropriate to move it to a summary trial proceeding if I want.

THE MASTER: Another thought that occurred to me after I left the courtroom is maybe I simply -- if you think it is that straightforward, after questioning, you know, maybe you think it's appropriate to bring a summary judgment application again. I am not trying to --

MR. NIVEN: Right.

THE MASTER: -- either speed up - well, not speed up, that's not the right word - I -- do want to speed up in the sense that I -- I don't want that trial to drift, but I don't want to predetermine anything how that trial was conducted.

MR. NIVEN: Okay.

THE MASTER: I just want to make sure that the case moves along, that's all.

MR. NIVEN: Okay. So, we -- as I understand where the Court is that, we get judgment for the cash calls, that is stayed for a period that the Court

will set to allow us to get the section 17 issue to trial, and that's without prejudice to rights of appeal or my right to bring back the section 17 issue by way of summary judgment application, right?

On the question of costs, I, of course, am in favour of the idea of the respondent having to post some costs if he wants to take that section 17 issue to trial for a couple of reasons.

The first is that the gross negligence issues are off the table. The Court has decided those and those, I think, form the -- the main thrust of the respondent's case here. Those being off the table, we have judgment -- although it's stayed, we have judgment for the amount of the cash calls, and because we have that judgment, I think, in view of what the Court has seen in terms of Birch Lake's ability to pay, it would be appropriate for costs to be posted.

My second submission would be that it would be entirely appropriate, in view of the fact that judgment is rendered, for Bernum to continue to set off against the amount of that judgment Birch Lake's share of production from the 4-3 well. Bernum has paid, apart from the amounts -- on the un -- on the unpaid portion of that well, Bernum is carrying those a hundred percent, and it would be unfair for Bernum to be precluded from continuing to take what it can from production to try and offset that bleeding.

Is that it? Those are my submissions.

THE MASTER: Thank you.

MR. NIVEN: Thank you.

THE MASTER: Ms. Treacy?

MS. TREACY: Thank you, Sir.

Sir, obviously I agree with the comments my friend made about the stay with those qualifiers attached to it. So, what I wish to address is just the issue of the posting of costs and the setoff remedy. Obviously, our position is that costs should not be required to be posted because there is the ongoing remedy of the setoff.

THE MASTER: How much production are we talking about --

MS. TREACY: Well, my --

THE MASTER: -- like, what -- what dollar figures are we

discussing?

MS. TREACY: Well, my friend and I actually had some discussion about that. I think the well has been producing most recently 22 barrels a day. Prior to that, I believe it was 30 to 40 barrels a day in the answers to undertakings of Michael Ponto. So, you know, I don't know what that would equate to in a dollar value, I've got some sense, but I would be speculating. But I -- I do think that that actually would cover the type -- well cover the type of costs that would be required to be posted in this case.

The other thing too is, I mean, if the judgment in fact is truly stayed because there is a counterclaim which may exceed --

THE MASTER: Yes.

MS. TREACY: -- they're in fact getting a benefit by continuing to --

THE MASTER: Yes.

MS. TREACY: -- set off.

THE MASTER: Just so we are clear - I had meant "stay" in the sense of stay of execution; you couldn't send the bailiff out, all of that sort of stuff.

MS. TREACY: Right.

THE MASTER: I wasn't -- I hadn't given any thought to the fact that there was production coming in which is -- now seems naive --

MS. TREACY: Right.

THE MASTER: -- on my part. I just didn't --

MS. TREACY: So, I mean, even if it is -- the execution is stayed, in essence, this is a form of --

THE MASTER: I -- I understand that.

MS. TREACY: -- execution.

THE MASTER: M-hm.

MS. TREACY: So, I think in fairness that is a remedy. I have taken instruction from my client about that and I think it would be extremely punitive to require both the posting of costs and setting off.

So -- and -- and also I -- I do just want to clarify - my friend has indicated that all gross negligence issues are off the table. As I understand it, the judgment of the Court today is in relation to the summary judgment application of the plaintiff. There is, in fact, no application before the Court to summarily dismiss any aspect of the counterclaim as it relates to the 4-3 or 16-19 well.

THE MASTER: Isn't that premised on gross negligence?

MS. TREACY: It -- it is premised, but there isn't really an application before the Court dismissing that counterclaim, and that may have led to slightly different evidence before the Court if that application had been before it. So --

THE MASTER: Isn't one inherent in the other? It doesn't become *res judicata*? I -- I mean, I have made a decision that -- that there is no evidence of --

MS. TREACY: Well, and I -- I guess that's what I want to clarify today is the judgment at the same granting judgment but dismissing part of my client's counterclaim.

THE MASTER: Well, the intent was to dismiss -- summarily grant judgment in respect of the claims that Bernum was putting forward for the 40 percent share that Birch Lake --

MS. TREACY: M-hm.

THE MASTER: -- should have paid. The argument for not paying it on that was -- was that Bernum had -- was guilty of negligence --

MS. TREACY: M-hm.

THE MASTER: -- gross negligence ultimately was your argument, and I am saying there wasn't -- isn't any, an opportunity to put forward your best -- put your best foot forward, as the cases say, and there wasn't anything. So, I didn't intend to grant judgment on it, but not grant judgment on it. That doesn't make

any sense to me. I don't know how it would work --

MS. TREACY: Okay. And that's -- I just simply want to clarify --

THE MASTER: Yes.

MS. TREACY: -- so that I ensure the decision that's being made today. Okay.

THE MASTER: I -- I think -- I think that -- that was inherent in -- in what I was saying --

MS. TREACY: Yeah.

THE MASTER: -- that they -- you can't -- you can't come back and -- for another kick at the cat on exactly the same issue.

MS. TREACY: Okay. So then, I think my final comments then, you've heard about the setoff versus the posting of costs.

THE MASTER: Thank you.

MR. NIVEN: And the only response I would make to that is that the -- that --

THE MASTER: Sorry - I forgot to turn my phone off --

MR. NIVEN: -- that --

THE MASTER: -- before I came into the courtroom.

MR. NIVEN: I've never done that.

The only -- the only comment I would make is that the -- a setoff isn't a form of execution; it's what's provided in the contract that the other party signed.

THE MASTER: M-hm.

MR. NIVEN: They're -- this is an inherent self right under the -- it's a -- it's a -- it's a right that Bernum has under the CAPL quite set and apart

from anything this Court might order.

THE MASTER: Yes.

MR. NIVEN: It's a contractual right that they have under the CAPL, article - I think it -- where's the CAPL - I think it's in article 5.

THE MASTER: Well, it is -- it was even, I thought, in the passage that I quoted.

MR. NIVEN: 505 is the applicable clause and it's 505(c). It's on page 20 - set off the amount. So, I mean, that's a contractual right that he has quite set and apart from --

THE MASTER: Well, it is also in -- in -- in clause 4 --

MR. NIVEN: Anything that --

THE MASTER: -- it says all such losses and liabilities even if there is any liability whatsoever under things other than 3.04 and will -- will be -- initially be for the joint accountant until the operator's responsibility therefore is finally determined.

MR. NIVEN: Right.

THE MASTER: What I -- I -- sorry, I didn't mean to cut you off. Is there something else you wanted to say before --

MR. NIVEN: No, that's --

THE MASTER: Okay.

MR. NIVEN: -- the -- the point I was trying to make, is that my client inherently has that self-help right quite apart from anything, and the Court, I -- I don't think that it would be appropriate for this Court to interfere with that, and I don't think that's properly before this Court.

THE MASTER: Well, what -- okay, well, let me -- let me make an order on this then, the -- the terms of going ahead.

Order

THE MASTER: The judgment is -- in favour of Bernum is stayed for one year from today's date, just to pick a nice hard deadline so that people know what it is. The parties have leave to come back and extend that or even shorten it on proper evidence of, you know, some grounds for doing that. What I have in mind, frankly, is if -- if you are able to get your case set down for trial September of next year, then an expiry July 31st doesn't make much sense.

Order (Other)

THE COURT: I am not going to direct that any costs be posted. The purpose of doing that was to provide you with some security, as well as ensure that the case moved along quickly. I am satisfied that, because of the setoff which I am going to not stop, that is, when I say the judgment is stayed, it means that you can't take enforcement proceedings outside of the flow of money that is already going on between the two parties. So, there will no award for security -- or, no posting of security for costs because I think that will force the parties to get on with the case and get it to resolution, the fact that you are not paying the -- the production until the -- your claim is paid.

Is there anything that I have forgotten in there that --

MR. NIVEN: So, we will get judgment, we are entitled to file that judgment, but not execute a point?

THE MASTER: That is right, no writ of enforcement.

MR. NIVEN: Thank you.

THE MASTER: That -- okay.

Submissions by Mr. Niven (Costs)

MR. NIVEN: And then the -- there's the matter of the cost of this application, and it would be my submission that because we were successful on the bulk of the application which, you know, most of the -- of the affidavit evidence, and most of the cross-examinations, and most of the time today was taken up --

THE MASTER: Not today --

MR. NIVEN: -- not today --

THE MASTER: -- two days ago.

MR. NIVEN: -- two days ago - seems like yesterday - were -- were -- because most of that was -- had to do with the gross negligence, it would be my submission that it would be appropriate for Bernum to receive its costs of this application.

THE MASTER: Ms. Treacy?

Submissions by Ms. Treacy (Costs)

MS. TREACY: I'm sure you can anticipate what my submissions are.

THE MASTER: I could make the arguments for both of you at this point, yes.

MS. TREACY: Obviously, my submission that costs should simply be in the cause; the costs for this application can be determined at the end of the trial dealing with the section 17 as well. I think that's most fair in the circumstances. You know, again, my client could be entirely successful on the counterclaim and this -- there may be nothing left of this particular judgment. So, I think costs in the cause would be fair to both parties.

Ruling (Costs)

THE MASTER: In light of the potential entitlement for equitable setoff overall I am inclined to award costs in the cause.

MR. NIVEN: I'll prepare an order, thank you.

THE MASTER: Now, I am away after today. If you need to come back to get the terms clarified, because this is perhaps a little more complicated, Ms. McKenzie will know how to reach me for me to --

MR. NIVEN: Okay.

THE MASTER: -- view the wording and perhaps get back to you if necessary.

MR. NIVEN: When are you back?

THE MASTER: August 28th, but --

MR. NIVEN: Okay. Well, we'll --

THE MASTER: -- but if you are going to do this, please do it soon because, once I am on vacation, my mind is going to be somewhere else.

MS. TREACY: Fair enough - which I hope so. I'm sure my friend and I can work it out.

MR. NIVEN: Yeah.

MS. TREACY: We have a history of working on files, so I think we should be able to.

THE MASTER: Okay, well, thank you very much.

MR. NIVEN: Thank you, Mr. Master. Have a good holiday.

THE MASTER: Thank you.

MS. TREACY: Thank you very much.

PROCEEDINGS CONCLUDED

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