2008 ABCA 214
Alberta Court of Appeal

Adeco Exploration Co. v. Hunt Oil Co. of Canada Inc.

2008 CarswellAlta 1043, 2008 ABCA 214, [2008] A.W.L.D. 3288, [2008] A.W.L.D. 3311, [2008] A.W.L.D. 3312, 171 A.C.W.S. (3d) 453, 433 W.A.C. 33, 437 A.R. 33, 48 B.L.R. (4th) 161, 94 Alta. L.R. (4th) 270

Adeco Exploration Company Ltd., Shaman Energy Corporation and Rana Resources Ltd. (Respondents / Plaintiffs) and Hunt Oil Company of Canada, Inc. (Appellant / Defendant) and Adeco Exploration Company Ltd. and Shaman Energy Corporation (Respondents / Third Parties)

K. Ritter, C. O'Brien, P. Rowbotham JJ.A.

Heard: March 12, 2008
Judgment: June 9, 2008
Docket: Calgary Appeal 0701-0176-AC

Proceedings: affirming *Adeco Exploration Co. v. Hunt Oil Co. of Canada Inc.* (2007), 2007 CarswellAlta 1953 (Alta. Q.B.)

Counsel: C.A. Crang for Respondents / Plaintiffs
M.E. Killoran, K. Osaka for Appellant / Defendant

Subject: Natural Resources; Contracts; Torts; Estates and Trusts; Property

Headnote

Natural resources — Oil and gas — Exploration and operating agreements — Joint operating agreement

Parties entered into operating agreement regarding exploration and drilling for oil wherein defendant had 75 per cent interest, and plaintiffs A and S had 16.6675 percent interest and 8.3325 percent interest respectively — On application by defendant, Crown refused to grant continuation of certain section of parties' leased property unless they could provide additional evidence of productivity — Plaintiffs were not made aware of Crown's requirement for further evidence — Defendant did not provide evidence, and leases were not continued — Plaintiffs' action for damages for breach of operating agreement, breach of fiduciary duty, and negligence was allowed — Defendant appealed — Appeal dismissed — Trial judge erred in finding that defendant owed plaintiffs fiduciary duty — However, defendant was grossly negligent in failing to continue leases and consequently, defendant was solely responsible for plaintiffs' losses.

Torts — Negligence — Duty and standard of care — Fiduciary duty

Parties entered into operating agreement regarding exploration and drilling for oil wherein defendant had 75 per cent interest, and plaintiffs A and S had 16.6675 percent interest and 8.3325 percent interest respectively — On application by defendant, Crown refused to grant continuation of certain section of parties' leased property unless they could provide additional evidence of productivity — Plaintiffs were not made aware of Crown's requirement for further evidence — Defendant did not provide evidence, and leases were not continued — Plaintiffs' action for damages for breach of operating agreement, breach of fiduciary duty, and negligence was allowed — Defendant appealed — Appeal dismissed — Trial judge erred in finding that defendant owed plaintiffs fiduciary duty — However, defendant was grossly negligent in failing to continue leases and consequently, defendant was solely responsible for plaintiffs' losses.

Torts — Negligence — Duty and standard of care — Gross negligence

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APPEAL by defendant from judgment reported at *Adeco Exploration Co. v. Hunt Oil Co. of Canada Inc.* (2007), 2007 CarswellAlta 1953 (Alta. Q.B.), finding defendant liable for plaintiffs' losses.

K. Ritter J.A.:

1 The appellant, Hunt Oil Company of Canada Inc. ("Hunt Oil"), appeals the trial judge's decision finding Hunt Oil liable to the respondents, Adeco Exploration Company Ltd. ("Adeco") and Shaman Energy Corporation ("Shaman"), for failing to continue oil and gas leases of joint interest, and solely liable to Rana Resources Ltd. ("Rana") for losses it will incur as a result of the discontinuation of those same leases. The appeal raises issues of contractual interpretation, negligence, gross negligence and breach of fiduciary duty, and is of significance to the oil and gas industry in Alberta since it involves the interpretation of an agreement commonly used in the industry.

Background

2 Hunt Oil, Adeco, and Shaman jointly owned certain oil and gas leases issued by the province of Alberta, respecting lands in an oil play in central Alberta known as the Rosevear Bluesky A Oil Pool. Hunt Oil's interest in the leases was 75%, Adeco owned 16.66675% and Shaman owned an 8.3325% interest in the leases. Rana was a royalty owner, holding a 3% royalty interest respecting production from the leases.

3 Effective September 23, 1993 Hunt Oil, Shaman, Adeco and Rana entered into a royalty agreement. The leases at issue, acquired at a provincial land auction held in May 1996, were not initially covered by the royalty agreement, but the agreement was amended in 1998 to include them. The two leases at issue each had a primary term of five years, from May 2, 1996, and included the right to extend the primary term upon certain obligations being fulfilled.

4 On March 17, 1994, Hunt Oil, Adeco and Shaman entered into a joint operating agreement (the "JOA"), which incorporated the terms of the 1990 version of the Canadian Association of Petroleum Landmen Operating Procedure (the "CAPL"), and assigned Hunt Oil the role of operator. On February 26, 1997, Hunt Oil, Adeco and Shaman entered into an inclusion agreement, making the two leases at issue part of, and subject to, the terms of the JOA and, by extension, the 1990 CAPL.

5 Wells on the lands covered by the JOA were first drilled in 1998, and first production was achieved in August 1998. Thereafter, Hunt Oil, as operator, drilled a number of wells within the Bluesky pool, both for production and to offset other wells. In the two quarter sections at issue in this appeal, covered by the leases, no wells were ever drilled. Nevertheless, the lessees met their obligation, pursuant to the leases, to permit renewal for those two quarter sections, as each undrilled quarter section was surrounded by four offsetting wells in other quarter sections covered by the leases. The two undrilled quarter sections came up for lease renewal in May of 2001.

6 On April 3, 2001, Hunt Oil's employee, Chantal Duval, wrote to Adeco and Shaman indicating Hunt Oil's recommendation, as operator, that the leases on the two undrilled quarter sections be continued. Both Adeco and Shaman agreed and on May 2, 2001, the final date for renewal, Ms. Duval submitted a continuation application to

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Alberta Energy, enclosingwell logs and recent production data related to wells on quarter sections surrounding the two undrilled quarter sections.

7 At trial, Brenda Allbright, Director of Tenure Operations with Alberta Energy, testified that when a continuation application related to non-producing parcels, s. 15(1)(e) of the regulations was applicable, requiring that at least one interpretive map be submitted with the application. She also stated that during her employ with Alberta Energy, since 1988, it had always been the standard that mapping was essential to continueundrilled production spacingunits. She stated that providing only well logs and production data was not sufficient for a continuation under s. 15(1)(e) of the regulations; that it was the applicant's responsibility to provide the necessary mapping; that there was a guide available to applicants which set forth the requirements for a continuation application; and that the guide is referred to in the continuation application, along with a website at which further direction is made available. Ms. Allbright added that only the designated representative (in this case Hunt Oil) can make the continuation application and that if the application is deficient, Alberta Energy provides the designated representative with an additional month to submit further supporting materials.

8 On August 3, 2001, Alberta Energy wrote two letters to Hunt Oil in response to the continuation application, advising that the continuation would only be granted for lands other than the two undrilled parcels at issue. The letters advised Hunt Oil that it could supply additional evidence of productivity to support its application within one month of the date of the letters, i.e., September 3, 2001.

9 On August 22, 2001, Nancy Wilkey, a senior land administrator at Hunt Oil, received the letters and marked them to the effect that she sent copies to Adeco and Shaman. She had no independent recollection of doing so, but testified that doing so was in keeping with her standard practices. She also contacted the land agent responsible for the two parcels, Tricia Hyman. On August 29, 2001, Hyman responded to Wilkey stating, "we'll have to let them expire - we have no additional information to submit". Hyman did not have an independent recollection of the event, but maintained that it is her practice to contact the technical person involved, a geologist, to obtain additional information or materials, and that if anything had resulted she would have acted on it.

10 Wilkey never contacted Alberta Energy to enquire why the letters were dated August 3, 2001, yet only received by Hunt Oil much later in the month, nor did she bring the issue to the attention of anyone further up Hunt Oil's management structure. As a result, no additional information was submitted and the leases for the two parcels expired on September 3, 2001.

11 On January 21, 2002, Rana's president noticed that the terminated parcels were posted for sale by Alberta Energy. He immediately contacted the presidents of Hunt Oil and Adeco, inquiring as to the status of the leases. On February 1, 2002, Hunt Oil's president sent an internal email to Hunt Oil's employees asking those involved to gather information regarding the Crown leases and the continuation application. Thereafter, Hunt Oil placed bids for the terminated parcels in the sum of $75,000.00 per parcel, but its bids were not successful.

12 At trial, Adeco, Shaman and Rana called expert evidence which established that Hunt Oil had all the information it needed to prepare and submit the mapping called for by Alberta Energy. In fact, it would have been easy for Hunt Oil to have done so.

13 After Hunt Oil failed to re-obtain leases to the two parcels at issue, Adeco and Shaman commenced legal proceeding against Hunt Oil for losses incurred by them. They alleged Hunt Oil breached its contractual duty to keep the leases in good standing; that Hunt Oil was negligent in its renewal process; and that Hunt Oil owed them a fiduciary duty to maintain the leases in good standing. Hunt Oil defended on the basis that it met the standard of care contemplated by the JOA and incorporated 1990 CAPL, both on a negligence standard and a gross negligence standard. With respect to any contractual duty to keep the leases in good standing, Hunt Oil defended that its obligations are met so long as it is not grossly negligent in its performance.

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14 Hunt Oil advanced the defence of contributory negligence on the part of Adeco and Shaman, relying on evidence it says discloses that the principals of Adeco and Shaman, though aware of what Hunt Oil was providing to Alberta Energy in attempting to renew the leases and of the fact that those materials were deficient, nevertheless failed to take reasonable steps to ensure the leases were renewed. I will refer to the evidence regarding this issue in greater detail when I analyse the issue of contributory negligence.

15 Hunt Oil also appeals the trial judge's determination that it owed Adeco and Shaman a fiduciary duty with respect to the renewal of the leases. Again, I will refer to facts relating to this issue when I analyse it.

16 Finally, Rana sued Hunt Oil for its royalty losses, both on the basis that Hunt Oil breached the royalty agreement and that it breached fiduciary obligations owed to Rana. On this claim, Hunt Oil sought indemnityfrom Adeco and Shaman on the basis that the royalty agreement obligates each of Hunt Oil, Adeco and Shaman to compensate Rana for its losses based on their respective interests in the leases. Adeco and Shaman defended this third party claim, alleging that the participation agreement entered into by the parties altered the royalty agreement such that liability was now to be determined on the basis of responsibility under theJOA,which rendersHunt Oil fully responsible to Rana.

Contract Terms at Issue

17 Several grounds of appeal in this case involve the interpretation of contract. Other grounds are affected by various contractual provisions. At the centre of this appeal is the JOA between Hunt Oil, as operator, and Adeco and Shaman, as non-operators. Although the JOA refers to Adeco and Shaman as Joint Operators, under its terms they are precluded from "operating"; hence, to avoid confusion, I will refer to them as non-operators.

18 The following provisions of the 1990 CAPL, incorporated into and forming part of the JOA, are at issue:

101 Definitions - In this Operating Procedure, the following words and phrases shall have the following respective meanings, namely:

. . .

(o) "for the joint account" means for the benefit, interest, ownership, risk, cost, expense and obligation of the parties in proportion to their respective working interests.

. . .

(q) "joint operation" means an operation conducted hereunder for the joint account.

. . .

(u) "Operator" means the party appointed by the Joint-Operators to conduct operations hereunder for the joint account, except as provided in Clause 1004.

. . .

ARTICLE III - FUNCTIONS AND DUTIES OF OPERATOR

. . .

303 Independent Status of Operator - The Operator is an independent contractor in its operations hereunder. The Operator shall supply or cause to be supplied all material, labor and services necessary for the exploration, development and operation of the joint lands and the operation of any production facilities for the joint account. The Operator shall determine the number of employees respecting its operations, their selection, their hours of labour

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and their compensation. All employees and contractors used in its operations hereunder shall be the employees and contractors of the Operator.

304 Proper Practices in Operations - The Operator shall conduct all joint operations diligently, in a good and workmanlike manner, in accordance with good oilfield practice and the Regulations.

. . .

309 Maintenance of Documents -

(a) Except as otherwise provided herein or in the Agreement, the Operator shall, on behalf of the parties and for the joint account, comply with all the terms and conditions of the title documents including: ... (iii) the performance of all things necessary to maintain the title documents in good standing and in full force and effect. ...

(b) The Operator shall consult with the parties in a timely manner with respect to any applications it proposes to make under the Regulations to maintain any of the title documents in good standing, including, without restricting the generality of the foregoing, continuation and grouping applications and any other material decisions which are required to be made to maintain any of the title documents in good standing. The Operator shall provide the parties in a timely manner with copies of material correspondence pertaining to the maintenance of the title documents.

. . .

ARTICLE IV - INDEMNITY AND LIABILITY OF OPERATOR

401 Limit of Legal Responsibility - Notwithstanding Clauses 303 and 304, the Operator, its Affiliates, directors, officers, servants, consultants, agents and employees shall not be liable to the other Joint-Operators, or any of them, for any loss, expense, injury, death or damage, whether contractual or tortious, suffered or incurred by the Joint-Operators resulting from or in any way attributable to or arising out of any act or omission, whether negligent or otherwise, of the Operator or its Affiliates, directors, officers, servants, consultants, agents and employees in conducting or carrying out joint operations, except:

. . .

(b) when and to the extent that such loss, expense, injury, death or damage is a direct result of, or is directly attributable to, the gross negligence or wilful misconduct of the Operator or its Affiliates, directors, officers, servants, consultants, agents and employees, provided that an act or omission of the Operator or its Affiliates, directors, officers, servants, consultants, agents and employees shall be deemed not to be gross negligence or wilful misconduct, insofar as such act or omission was done or was omitted to be done in accordance with the instructions of or with the concurrence of the Joint-Operators.

To the extent that the conditions in Subclauses (a) or (b) of this Clause apply (but subject to the exceptions provided therein), the Operator shall be solely liable for such loss, expense, injury, death or damage and, in addition, shall indemnify and save harmless each other Joint-Operator and its Affiliates, directors, officers, servants, consultants, agents and employees from and against the same and also from and against all actions, causes of action, suits, claims and demands by any person or persons whomsoever in respect of any such loss, expense, injury, death or damages, and any costs and expenses relating thereto. However, in no event shall the responsibility of the Operator prescribed by this Clause extend to losses suffered by the Joint-Operators respecting the loss or delay of production from the joint lands, including, without restricting the generality of the foregoing, loss of profits or other consequential or indirect losses applicable to such loss or delay of production.

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402 Indemnification of Operator - Except as otherwise provided in Clause4.01, theJoint-Operators hereby indemnify and save harmless the Operator, its Affiliates, directors, officers, servants, consultants, agents and employees from injury, death or damage respecting any person, which may be brought against or incurred or suffered by the Operator, its Affiliates, directors, officers, servants, consultants, agents or employees or which the Operator, its Affiliates, directors, officers, servants, consultants, agents or employees may sustain, pay or incur by reason of, or which may be attributable to or arise out of, any act or omission of the Operator or its Affiliates, directors, officers, servants, consultants, agents, contractors or employees in conducting joint operations. All such liabilities shall be for the joint account and shall be borne by the Joint-Operators in the proportions of their respective working interests.

19 Paragraphs 11.01 11.02 and 13.01 of the Royalty agreement are relevant to Rana's claim for loss of royalties and to Hunt Oil's claim for contribution from Adeco and Shaman. They provide:

11.01 Grantor to Keep Leases in Good Standing - The Grantor shall pay all rentals, royalties, taxes and charges payable under the provisions of the Said Leases or with respect to the Lands and the production therefrom, either directly or by reimbursing the Royalty Owner, and shall keep the Said Leases in good standing until surrender thereof as herein provided for and shall not allow the Said Leases to terminate or become subject to forfeiture.

11.02 Notice Obligations on Surrender - The Grantor shall not surrender any portion of the Lands without giving notice of such proposed surrender in writing (hereinafter called "the Surrender Notice") to the Royalty Owner at least sixty (60) days before the next ensuing anniversary date of the lease covering the lands or interest therein which it proposes to surrender. Within thirty (30) days after receipt of the Surrender Notice, the Royalty Owner may elect in writing to acquire such interest and if it does so the Grantor shall, without warranty, forthwith transfer or assign such interest to the Royalty Owner. The Overriding Royalty shall thereafter cease to be payable with respect to the interest so assigned to the Royalty Owner. If the Royalty Owner fails to make the election as provided for herein, the Grantor may surrender thelands specified in the Surrender Notice.

. . .

13.01 Grantor's Responsibility - The Grantor shall:

(a) be liable to the Royalty Owner for all losses, costs, damages and expenses whatsoever (whether contractual or tortious) which the Royalty Owner may suffer, sustain, pay or incur; and

(b) in addition, indemnify and hold harmless the Royalty Owner and its directors, officers, agents and employees against all actions, causes of action, proceedings, claims, demands, losses, costs, damages and expenses whatsoever which may be brought against or suffered by the Royalty Owner, its directors, officers, agents and employees or which they may sustain, pay or incur;

insofar as they are either a direct result of or directly attributable to any act or omission (whether negligent or otherwise) of the Grantor with respect to operations or activities conducted by it or on behalf of it.

20 Adeco and Shaman argue that the responsibilities of Hunt Oil, Adeco, and Shaman to Rana is really governed by the inclusion agreement. Paragraph 1 of that agreement provides:

Effective May 2, 1996 the Leases and the Lands set out in Schedule "A" shall be governed by the terms and conditions of the Agreement."

The inclusion agreement defines "Agreement" as the JOA.

The Trial Judge's Reasons

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21 The trial judge provided oral reasons for his decision, and in them referred to the parties' involvement in the Bluesky play, and the continuation process relating to the undrilled quarter sections that were ultimately forfeited. He held the original continuation application was "doomed to fail", and found that Hunt Oil was the only party who knew that corrective measures were required in August 2001. Even if Adeco and Shaman had become aware that corrective measures were required, the trial judge held they would only have been made aware of this need sometime after August 22, 2001. In any event, he found Adeco and Shaman did rely, and were entitled to rely, on Hunt Oil, in its role as operator, to do what it had contracted to do and to take the steps necessary to ensure the leases were not forfeited. The trial judge held that clause 401 of the 1990 CAPL should be narrowly interpreted, and that Hunt Oil breached its "clear obligation under Section 309 to maintain title documents".

22 With respect to Rana, the trial judge held that para. 11.01 of the royalty agreement, stating that the grantors "shall not allow the said leases to terminate or become subject to forfeiture", made it clear that Hunt Oil, who had taken over all responsibility of maintaining titles as the operator, was alone liable to Rana for its losses.

23 Regarding Hunt Oil's fiduciary obligations, the trial judge considered (1) whether Hunt Oil possessed ability to exercise some discretion or power; (2) whether Hunt Oil could unilaterally exercise that power so as to affect Adeco, Shaman and Rana's interests; and (3) whether Adeco, Shaman and Rana were peculiarly vulnerable to Hunt Oil's exercise of discretion or power. He concluded that the actions of Hunt Oil with respect to Adeco, Shaman, and Rana raised a fiduciary duty that was breached by Hunt Oil. He also found that although Hunt Oil did not gain, but rather suffered a loss, as a result of its breach, it still owed and breached its fiduciary duty.

24 The trial judge concluded that Hunt Oil was negligent in the steps it took, or failed to take, in renewing the leases. In arriving at this conclusion, he noted that Hunt Oil was simply wrong in concluding the leases could not have been renewed or continued, and considered the email from Hunt Oil's president, asking for a report from all who had involvement in the lease continuation process, a classic "smoking gun". In effect the trial judge considered that email to be an admission of error.

Issues and Standard of Review

25 The following issues are raised in this appeal:

1. What effect do clauses 401 and 402 of the 1990 CAPL have on HuntOil's duties to Adeco and Shaman?

2. Was Hunt Oil negligent in the steps it took to continue the leases forthe forfeited parcels of land?

3. Was Hunt Oil grossly negligent in failing to continue the leases?

4. Were Adeco and Shaman contributorily negligent in failing to takeany steps to correct what Hunt Oil was doing with respect tocontinuing the forfeited leases?

5. Did Hunt Oil owe a fiduciary duty to Adeco and Shaman, and/or to Rana?

6. Does the inclusion agreement alter the terms of the royalty agreement so that Hunt Oil alone is responsible to Rana for its losses?

26 The standard of review for issues of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 8. For issues of fact, including inferences drawn from proven facts, the standard of review is palpable and overriding error: *Housen* at paras. 10 & 25. For issues of mixed fact and law, the standard of review is palpable and overriding error, unless there is an extricable question of law, in which case the issue is reviewed on the correctness standard: *Housen* at paras. 27 & 36.

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27 Interpretation of contract involves issues of law, reviewable on a correctness standard: *Meyer v. Partec Lavalin Inc.*, 2001 ABCA 145, 281 A.R. 339 (Alta. C.A.) at para. 11, leave to appeal to S.C.C. ref'd (S.C.C.); *Jager v. Liberty Mutual Fire Insurance Co.*, 2001 ABCA 163, 281 A.R. 273 (Alta. C.A.) at para. 14. The legal question of whether a fiduciary duty exists is one of mixed fact and law, of characterizing a particular relationship in order to determine liability. Absent an error in articulating the applicable test for the imposition of a fiduciary, the finding of whether a fiduciary duty exists warrants considerable deference: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.) at 426, citing *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (B.C. C.A.), at 318 -19. Similarly the question of negligence is one of mixed fact and law, warranting a palpable and overriding error standard of review, absent an extricable legal issue: *Housen*. This applies to the tests for gross negligence and contributory negligence as well.

Analysis

1. Do clauses 401 and 402 of the 1990 CAPL work to exclude Hunt Oil from liability in respect of Adeco and Shaman's claims?

28 This part of the analysis proceeds on the assumption that Hunt Oil either breached its contractual obligations to Adeco and Shaman, or negligently caused them to suffer harm. Later in these reasons I will consider whether Hunt Oil was negligent or failed to perform its contractual obligations.

29 Hunt Oil argues that Adeco and Shaman must prove gross negligence, pursuant to clause 401 of the 1990 CAPL, in order to hold Hunt Oil accountable to them for failing to continue the leases, either on the basis of contract or negligence. Adeco and Shaman argue that clause 401 of the 1990 CAPL provides Hunt Oil with, at best, protection from third party claims and claims by Adeco and Shaman arising from clauses 303 and 304 of the 1990 CAPL. They argue their claim, pursuant to clause 309 of the 1990 CAPL, is not subject to the gross negligence exclusion contained in clause 401.

30 Hunt Oil argues the CAPL is designed to deal with the reality that it is common for multiple oil and gas companies to own interests in single oil and gas leases. It makes for good oilfield practice to have one of the owners act as the operator of the lease, given that entity's vested interest in ensuring maximum efficiencies and production. In consequence, the oil and gas industry in Alberta designed and adopted the CAPL as its standard operating agreement. In that agreement, the Alberta oil and gas industry incorporated several provisions, reflective of the fact that one of the owners of a lease will also be its operator, and which address liability consequences to the owner who assumes greater risk than the others, by being the active, on site operator. Therefore, contends Hunt Oil, clause401 ofthe1990 CAPL precludes non-operators from successfully advancing claims against an operator for either negligence or breach of contract, unless the non-operators prove that the operator was grossly negligent. It argues that amendments reflected in clause 401 of the 1990 CAPL make it clear that limiting causes of action by non-operators against operators to instances of gross negligence is the correct interpretation of that section.

31 Conversely, Adeco and Shaman argue that those amendments, at most, preclude non-operators from successfully advancing claims against the operator, absent gross negligence, for breaches of clauses 303 and 304 of the 1990 CAPL. They argue that clause 401, as an exclusionary clause limiting liability, must be narrowly interpreted. In doing so, they rely on the case law with respect to the CAPL, as it was before 1990, which restricted the operation of clause 401 to third party claims only, and submit the only intent that can be inferred from the addition to that clause of the words "notwithstanding clauses 303 and 304", is that clauses 303 and 304 are subject to a gross negligence exclusion, but the rest of the 1990 CAPL is only subject to the ordinary principles of breach of contract and negligence. Finally, Adeco and Shaman argue that interpretation of clause 401, having regard to the entire agreement, leads to an interpretation limiting the gross negligence exclusion to clauses 303 and 304 only, especially since the non-operators are required to fulfill their responsibilities to the operator on the basis of ordinary standards relating to contract performance and negligence. They suggest that a bizarre result ensues if they are accountable to Hunt Oil on a more rigorous standard than Hunt Oil is accountable to them, given that Hunt Oil, as operator, has full control of what occurs on the lease and they have no control whatever.

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32 The proposed interpretation advanced by Hunt Oil limits its liability to circumstances involving gross negligence, when the norm would be ordinary negligence or simple breach of contract. It therefore excludes all conduct short of gross negligence. Normally, exclusion clauses are strictly construed, particularly in the context of insurance policies: *Amoco Canada Petroleum Co. v. Quantel Engineering (1981) Ltd.*, 2002 ABQB 521, 318 A.R. 335 (Alta. Q.B.) at para. 53; *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, [1993] 2 W.W.R. 433 (S.C.C.) at 444. However, in the context of a commercial transaction and parties with equal bargaining power, the construction should not be overly protective: *McCain Produce Co. v. Canadian National Railway* (1980), 30 N.B.R. (2d) 476 (N.B. C.A.) at 496, aff'd [1981] 2 S.C.R. 219 (S.C.C.).

33 Generally, the intention of contracting parties is determined using the ordinary meaning of the words, within the context of the contract as a whole: *Morel v. Lefrancois* (1906), 38 S.C.R. 75 (S.C.C.); *Brinkerhoff International Inc. v. Numac Energy Inc.* (1997), 209 A.R. 195 (Alta. C.A.) at para. 11; *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.) at 901. It is therefore necessary to seek the meaning of clause 401 of the 1990 CAPL, keeping in mind both the ordinary meaning of its words and the fact that exclusion clauses are usually subject to strict interpretation.

34 The starting point for interpreting clause 401 is the decision of Hunt J. (as she then was) in *Erehwon Exploration Ltd. v. Northstar Energy Corp.* (1993), 15 Alta. L.R. (3d) 200, 147 A.R. 1 (Alta. Q.B.). Although that decision involved interpretation of clause 401 as it was before the 1990 amendment, it is instructive in terms of determining how the 1990 amendment affects or changes the analysis and outcome dictated by *Erehwon*. Clauses 401 and 402, as considered by Hunt J., provided:

> 401 LIMIT OF LIABILITY - The Operator shall not be liable to the Joint-Operators for any loss or damage incurred by any of them relative to any operations carried out pursuant to this Operating Procedure except that:
>
> > (a) the Operator shall be solely responsible for and shall indemnify and save harmless each Joint-Operator from and against all actions, causes of action, suits, claims and demands by any person or persons whomsoever in respect of any loss, injury, damage or obligation to compensate to the extent of the risks against which the Operator is required to carry insurance as provided in Clause 311 and within the limits of such insurance, except that if an insurer is financially unable to pay all or any portion of a valid claim, the Operator shall be released from the indemnity and responsibility assumed by it under this Clause to the extent only of such inability to pay; and
> >
> > (b) in addition to the provisions of Subclause (a) of this Clause, the Operator shall be solely liable for any loss or damage of whatsoever nature when such loss or damage is caused by the Operator's gross negligence or wilful misconduct but no act or omission of the Operator, its agents or employees, shall of itself be deemed gross negligence or wilful misconduct if it is done or omitted at the instruction of or with the concurrence of the Joint-Operators. If the Operator is liable under this Clause, the Operator shall indemnify and save harmless each Joint-Operator from and against all actions, causes of action, suits, claims and demands by any person or persons whomsoever in respect of any loss, injury, damage or obligation to compensate.
>
> 402 INDEMNIFICATION OF OPERATOR - Except as provided in Clause 401 all liabilities incurred by the Operator in the carrying out of any operations pursuant to this Operating Procedure, whether contractual or tortious, shall be for the joint account and shall be borne by the parties in accordance with their respective participating interests.

35 In *Erehwon*, the operator turned to clause 401 for protection respecting four instances in which the plaintiff claimed the operator acted inappropriately or levied inappropriate charges. The operator argued the accounting disputes were all, as per clause 402, contractual liabilities "... incurred by the Operator pursuant to [the] Operating Procedure". The

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operator also argued that unless those liabilities were insured under 401(a), or involved gross negligence under 401(b), 402 required that they be borne by the joint account: *Erehwon* at para. 60.

36 In her analysis, Hunt J. rejected the 'gross negligence' requirement, reasoning that it pertained to third party claims and not claims between the operator and non-operators. In reaching this conclusion, she noted that clause 304 obliged the operator to use good oilfield practices and found it hard to imagine the parties intended that the operator could meet its accounting obligations on a gross negligence standard. She held that it was more likely that the parties intended to stand behind the operator with respect to third party claims, since the operator was required to carry out its operations in ahigh risk environment. Finally, she concluded that if the gross negligence standard applied to the operator's accounting to non-operators, the operator could act in "a sort of tyrannical role" vis-a-vis the non-operators: *Erehwon* at para. 66.

37 Hunt Oil does not dispute *Erehwon*, but argues that the amendments reflected in clause 401 of the 1990 CAPL show that the parties to the JOA, and by incorporation the 1990 CAPL, intended to depart from *Erehwon* and to require that Hunt Oil be grossly negligent before becoming liable to Adeco and Shaman for any breach of the JOA. I therefore turn to the 1990 CAPL.

38 Unlike the former version of clause 401, analysed in *Erehwon*, clause 401 in the 1990 CAPL provides for its application, notwithstanding clauses 303 and 304. Clause 303 states that the Operator enjoys separate status from the non-operators. It was not referred to by anyone in argument or in the factums. Clause 304 is the 'good oilfield practices' clause. It provides that the operator is to use good oilfield practices in its operations for the joint account. Since the CAPL does not govern standards of care in dealings with third parties, nor contracts between the operator and third parties, the only possible purpose of clause 304 is to require the operator to use good oilfield practices vis-a-vis the non-operators. Based on Hunt Oil's interpretation of clause 401, the operator is only responsible to non-operators if its breach of the CAPL involves gross negligence, meaning it need not use good oilfield practices at all, since everything short of gross negligence is without consequence.

39 Hunt Oil argues that clause 304 still serves a purpose, as the JOA contemplates replacement of an operator that defaults in its obligations under the 1990 CAPL. One such obligation would be the use of good oilfield practices.

40 The CAPL is a standard industry agreement. It reflects the concern that one owner bears the risk of operating oil and gas plays while the other owners remain on the sidelines, without any substantial obligations. When the CAPL was considered in *Erehwon*, the concepts of liability and indemnity were mixed in clauses 401 and 402. The amendments to those provisions, reflected in the 1990 CAPL, clearly separate liability from indemnity.

41 Hunt Oil argues that renewing or continuing leases, as part of good oilfield practice, are activities caught by the notwithstanding provision of clause 401. However, clause 309 of the 1990 CAPL specifically requires Hunt Oil to keep the leases in good standing. I conclude that the notwithstanding provision, which does not mention clause 309, does not affect the issue of whether lease renewal is an activity subject to the gross negligence standard imposed by clause 401 of the 1990 CAPL. However, even if the notwithstanding provision is excised from clause 401, what remains is this:

> The operator ... shall not be liable to the [non-operators] ... for any loss ... whether contractual or tortious ... arising out of any act or omission, whether negligent or otherwise, of the operator ... in conducting or carrying out the joint operations, except:
>
> (a) [the Insurance exception]
>
> (b) when ... such loss ... is attributable to ... the gross negligence ... of the operator ....
>
> [Emphasis added.]

42 This language is clear and unambiguous. The concepts of liability and indemnification are no longer mixed since the indemnification of the operator is isolated to clause 402 of the 1990 CAPL. Here, what Hunt Oil failed to do in

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continuing the lease, constitutes an omission in conjunction with Hunt Oil carrying out the joint operation. Pursuant to the plain and ordinary meaning of the words in clause 401 of the 1990 CAPL, Hunt Oil is only responsible to the non-operators, Adeco and Shaman, if its omission amounted to gross negligence. For more discussion on this issue, see John Petch, "The Operator's Standard of Care in Wellsite Operations: Part I" (Summer 2002) 5:4 PJVA Newsletter 4.

43 Although Adeco and Shaman argue that renewal of the lease was not an "operation" given the meaning of that word as contemplated by the CAPL, I reject that argument. Clause 401 refers to a joint operation which is a defined term meaning an operation for the joint account. Clause 309 states that the renewal obligations of Hunt Oil are for the joint account. Therefore, failure to renew is an omission relating to a joint operation, and that omission is caught by clause 401 of the CAPL.

44 I conclude that the trial judge erred in law in his interpretation of clause 401 of the 1990 CAPL. In order to succeed on the basis of either contract or tort, Adeco and Shaman had to show that Hunt Oil was grossly negligent when it failed to continue the leases on the undrilled quarter sections.

2. Was Hunt Oil Negligent in Failing to Continue the Leases?

45 In the event that I am incorrect in my analysis regarding clause 401 of the 1990 CAPL, and that clause is correctly interpreted as not applying to continuation of leases, the issue of whether Hunt Oil was negligent in its continuation efforts remains on the table, and I will consider it in that context. Since Hunt Oil also contracted, by virtue of clause 309, to keep the leases in good standing, and since it did not meet that obligation, it also would be liable to Adeco and Shaman for breach of contract, whether or not it was negligent. Nevertheless the trial judge also found that Hunt Oil was negligent when it failed to continue the leases.

46 Hunt Oil argues that the determination of negligence cannot be sustained on the facts. The standard of review regarding that determination is palpable and overriding error, and the evidence clearly supports the trial judge's finding. The evidence from Alberta Energy discloses that the continuation process was a long standingprocedure. It was not overly complicated and Hunt Oil had all the information necessary to secure the continuation. The problem was that the persons tasked with seeing to the continuation did not know what to do to achieve it. Systems were not in place to deal with rejected applications; the trial judge referenced lack of training and supervision. It is a simple procedure to require that rejections be referred to persons up the administrative chain for their review and input, yet no such system existed at the time.

47 The trial judge made no reviewable error in his negligence analysis or determination. He was not palpably wrong. In fact, as will be seen in my analysis of the cross appeal for a finding of gross negligence against Hunt Oil, I conclude that Hunt Oil's conduct does not even approach the minimal standard of care expected of it.

3. Was Hunt Oil Grossly Negligent in Failing to Continue the Leases?

48 This issue arises from the Adeco and Shaman cross-appeals. The trial judge found Adeco and Shaman were not required to show that Hunt Oil was grossly negligent, so he did not consider this issue. I, however, have reached a different conclusion regarding the interpretation of clause 401 of the 1990 CAPL, so must now consider whetherHunt Oil's failureto continue the leases amounted to gross negligence.

49 Normally, when an appeal court considers an unaddressed issue it is left with two options. The first is to direct a trial on the issue. The second is for the appeal panel to review the record and attempt to arrive at a conclusion with respect to the missed issue. Each approach is less than ideal. The cost of another trial often outweighs any benefit either party might derive. On the other hand, it is often difficult for panel members to reach common conclusions regarding facts based on the record. In some cases it may be impossible. This, however, is not one of those cases and I will therefore proceed with the panel review approach.

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50 The facts relating to the issue of gross negligence involve two time frames, the first being when Hunt Oil's employee initially filed the continuation applications on the very last possible day before a deadline would have been breached. Simply filing a document on the last possible day does not constitute negligence, let alone gross negligence. If it is done correctly, no harm arises. However, leaving matters to the last possible day may be indicative of an attitude or of common practices in place. Cavalier attitude is a factor in reaching a conclusion of either negligence or gross negligence.

51 The second relevant time frame is between August 17, 2001 and September 3, 2001, when Hunt Oil was aware that its May applications were deficient. The evidence shows that although the letter from Alberta Energy was dated August 3, 2001, and although Hunt Oil did not receive it until August 17, 2001, no one at Hunt Oil thought to contact Alberta Energy and ask for additional time, or to make any enquiry regarding the reason for the delay between the date the letter was allegedly sent and the date of its receipt. Again, given what then transpired it is evident that gaining a few extra days would have gained Hunt Oil nothing in any event. However, this is another factor which goes to attitude and, more importantly, to the existence of effective systems to deal with contingencies.

52 After receiving the deficiency letters, Hunt Oil's employee charged with the responsibility of dealing with them contacted Hunt Oil's land agent responsible for the Bluesky play and asked her if the missing information was available. Hunt Oil's land agent testified that it was her normal practice to check with Hunt Oil's technical personal before responding to such a request. She responded to the effect that there was nothing more and that Hunt Oil would have to let the leases lapse, which is precisely what occurred.

53 It is clear that continuation in this case was a simple matter. What was missing was available to Hunt Oil or could have been produced by it with minimal effort. When Hunt Oil's land agent responded to the request for more information, either she was clearly wrong or the technical person who informed her was clearly wrong. Moreover, the process of renewal had been in place for many years. What was required for renewal was readily available to Hunt Oil on a guide provided by Alberta Energy and on its website, referred to in that guide. Most importantly, although Hunt Oil says that it had a system in place for continuing leases, that system was dreadfully deficient. No alarm bells rang when the rejection letters were received by it. The employee who filed the initial application clearly did not know what was required to ensure continuation of the leases, nor did the employee who received and dealt with the rejection notices. It would have been an easy matter to have in place an employee who knew and understood the continuation process, or to arrange oversight by such a person. It would also have been an easy matter to require that all rejections be referred to someone up the management chain.

54 The system that existed at Hunt Oil, at the relevant time, was largely *ad hoc* and last minute. Little surprise arises from that system's failure, especially when it is coupled with personnel providing advice that is clearly wrong.

55 It is evident from this discussion that Hunt Oil was negligent, but was it grossly negligent? The case law directs that gross negligence amounts to "very great negligence": *Kingston (City) v. Drennan* (1897), 27 S.C.R. 46 (S.C.C.) at 60. It has been described as "conscious wrongdoing" or "a very marked departure" from the standard of care required: see *McCulloch v. Murray*, [1942] S.C.R. 141 (S.C.C.) at 145; *United Canso Oil & Gas Ltd. v. Washoe Northern Inc.* (1991), 121 A.R. 1 (Alta. Q.B.) at para. 345. In *Holland v. Toronto (City)*, [1927] S.C.R. 242, 59 O.L.R. 628 (S.C.C.) at 634, Anglin C.J.C. described "the character and the duration of the neglect to fulfill [the] duty, including the comparative ease or difficulty of discharging it" as "important, if not vital, factors in determining whether the fault (if any) ... is so much more than merely ordinary neglect that it should be held to be a verygreat, or gross, negligence". Conscious indifferenceequates to gross negligence: *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S.W. 408 (U.S. Tex. S.C. 1888) at 411.

56 Hunt Oil argues it was not consciously indifferent since it had a system for renewal in place. However, as I have stated, that system involved a great deal of *ad hoc* response to crises by personnel lacking requisite knowledge and skills. It was a system that contemplated no problems, and no doubt worked so long as the continuation involved leases on producing lands. It did not come close to addressing what was required for continuations on non-producing lands.

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57 What Hunt Oil did may be likened to a system in a law office in which an untrained, unknowing person, tasked with ensuring claims are filed in time to meet limitations, upon having a claim rejected by the relevant filing office, checks with someone else, who has no understanding of the process. In turn, the person checked with either provides a response that we are doomed, or, checks with another person who erroneously provides that response. I would have no hesitation in determining the responsible lawyer or firm to be grossly negligent in relying on such a system. It amounts to no system at all. It relies on luck to ensure that claims are filed in time.

58 I conclude that Hunt Oil was grossly negligent by failing to continue the leases. Therefore, regardless of its success regarding other issues on this appeal, it remains liable to the respondents under the terms of the agreements among the parties.

4. Were Adeco and Shaman Guilty of Contributory Negligence?

59 Hunt Oil argues that Adeco and Shaman both had the requisite knowledge to take corrective procedures or warn Hunt Oil that its continuation efforts were deficient, but failed to do so. Hunt Oil says they were therefore contributorily negligent. In advancing this argument, Hunt Oil focuses on two points in time. First, Hunt Oil says the evidence established that it gave Adeco and Shaman everything it had submitted to Alberta Energy in May 2001, contemporaneously with its application for continuance. Second, it says that on receipt of the August 3, 2001 letter of rejection from Alberta Energy, it immediately sent copies of the letter to each of Adeco and Shaman. Hunt Oil argues that Adeco and Shaman were well aware of what it sent to Alberta Energy and that, as experienced oil and gas entities, they were also well aware of what was necessary to obtain continuances for the forfeited parcels. Hunt Oil submits that by failing to alert it of the need to supply the missing maps to Alberta Energy, or taking steps to continue the leases themselves, Adeco and Shaman were contributorily negligent.

60 The trial judge found as a fact that neither Adeco nor Shaman were given copies of the materials Hunt Oil sent to Alberta Energy with its continuation application in May 2001. The trial judge's fact finding is supported by evidence from Adeco and Shaman that only copies of the application were received by them and not the supporting documentation. The best Hunt Oil can do to refute this fact finding is point to evidence of Hunt Oil's employees' standard practices. The trial judge's finding in this regard does not meet the palpable and overriding error standard.

61 The second time frame Hunt Oil points to is late August 2001, when it sent copies of Alberta Energy's rejection letter to each of Adeco and Shaman. Hunt Oil argues that Adeco and Shaman were negligent in failing to ascertain what the true state of affairs was, and in failing to take any corrective steps. The problem with this argument is that it requires an assumption on the part of Adeco and Shaman that Hunt Oil, as operator, was and would continue to be negligent, and that it would fail to fulfill its contractual obligations. The trial judge found that it was not unreasonable for Adeco and Shaman to assume that Hunt Oil, as a good operator, would do what the operation agreement required it to do. In the words of the trial judge "[Hunt Oil] was obligated to do it and [was] paid to do it. There was no cost to [Hunt Oil] to do it and it was a slam dunk. It made sense that [Hunt Oil] would protect its interests and everyone else's ..." (A.B.D., F7, ll. 24-27).

62 On the palpable and overriding error standard, this conclusion cannot be upset on appeal. Adeco and Shaman were not contributorily negligent. Hunt Oil's appeal on this ground is dismissed.

5. Did Hunt Oil owe a Fiduciary duty to any of Adeco, Shaman, and Rana?

63 The trial judge held that Hunt Oil owed a fiduciary duty to each of Adeco, Shaman and Rana, and that included within that duty was an obligation on Hunt Oil's part to continue the leases. He held that the relationship between Hunt Oil and each of the respondents possessed three general characteristics: (1) Hunt Oil had the scope for exercise of some discretion or power; (2) Hunt Oil could unilaterally exercise that discretion or power so as to affect the respondents' beneficial interests; and (3) each of the respondents was peculiarly vulnerable to, or at the mercy of, Hunt Oil in its exercise of discretion or power.

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64 Hunt Oil argues that any fiduciary duty it may have owed was contracted away by virtue of clause 401 of the 1990 CAPL. I reject this argument for two reasons. First, it does not apply to Rana since Rana is not privy to the JOA or the 1990 CAPL. Second, the exclusion in clause 401 is, by its own terms, limited to contract and tort breaches. It must be assumed that the parties intended to limit liability to contract and tort only under clause 401, as Hunt Oil itself argues the amendments reflected in the 1990 CAPL were a response to *Erehwon*, where the Court imposed a fiduciary obligation on the operator, and because exclusion clauses are strictly construed. If that was not the intention, the industry would simply have added the category of fiduciary obligation to clause 401's wording. It is therefore unnecessary to consider whether the courts' supervisory role in imposing fiduciary obligations can ever be ousted by the parties contracting the imposition of such an obligation away.

65 Hunt Oil also argues that the trial judge erred generally by imposing a fiduciary duty in the circumstances of this case. The test for the imposition of a fiduciary duty is, in a rough and ready sense, that set out by the trial judge: also see *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) at 135-136, per WilsonJ. (dissenting), cited with approval in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at 599; *Erehwon* at para. 8. Fiduciary obligations are trust-like in nature, involving concepts like fidelity, control, and advantage. They are creatures of equity and are designed to fill in gaps in which justice demands that strict application of the common law be augmented by additional relief.

66 In this case, the trial judge's exercise of the mixed fact and law function is sparse. In fact, it consists of him simply saying the test is met with respect to all three respondents. When analysis consists of a conclusion alone, it is owed little deference unless the result is obvious. On the evidence before him, the trial judge should have considered issues such as: whether Hunt Oil gained any advantage in failing to continue the leases, and whether the respondents were vulnerable to Hunt Oil's actions. Each of these questions is at least a factor in the analysis of whether a fiduciary duty should be imposed.

67 Here, each of the respondents entrusted Hunt Oil with a property right; namely, keeping the leases in good standing. Each was vulnerable to Hunt Oil exercising that right to its advantage or to their disadvantage. However, Hunt Oil gained no advantage in failing to renew the leases; in fact, its losses are greater than anyoneelse's. Theconduct complained about was not wilful; rather, it falls within the negligence sphere.

68 Although there may be fiduciary aspects of an operator's duties, not every duty imposed on it by its agreement with non-operators will be fiduciary: *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 162 A.R. 35 (Alta. C.A.) at para. 56, leave to appeal to S.C.C. ref'd [1995] 3 S.C.R. vii (S.C.C.). In *Erehwon*, the court imposed a fiduciary duty with respect to the operator's handling of money received for the benefit of the non-operators. However, that is different in essence from a failure to renew or continue leases because of human error.

69 Most cases in which courts impose a fiduciary duty involve intentional conduct. In *Erehwon*, for example, the operator dealt with money in a way that it considered correct under the relevant regime. However, the non-operators, and the Court, took a different view, resulting in an imposed fiduciary duty on the operator. Although its conduct was meant to comply with the relevant regime, and erroneously did not, it was nevertheless intentional, not inadvertent.

70 In this appeal, there is no evidence that anything played a part in motivating Hunt Oil's failure to continue the leases other than human error. The circumstances of this case are more in line with those in *Luscar*, where, at para. 83, Conrad J.A. stated:

> "The failure here was simply a breach of contract through an honest mistake or oversight in failing to give notice. That is not the type of unilateral exercise of power contemplated by Wilson J. In *Frame*. She was talking about the exercise of a power that a fiduciary has because of its unique position or relationship. An honest mistake or oversight in failing to give notice was not an event that resulted from the exercise of a discretion arising from the strength of this relationship, nor were there facts to suggest the required type of vulnerability. Had the parties wished, they

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could have specifically provided that a failure to give notice extended the time or created a fiduciary duty. They did not do so.

71 In addition, whether there has been an advantage gained from the breach is a factor in imposing a fiduciary duty. In *A. (C.) v. C. (J.W.)* (1998), 60 B.C.L.R. (3d) 92 (B.C. C.A.) at para. 85, the British Columbia Court of Appeal held:

> ... I conclude that it would be a principled approach to confine recovery based upon fiduciary duties to cases of the kind where, in addition to other unusual requirements such as vulnerability and the exercise of a discretion, the defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage. This excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty. In effect this redirects fiduciary law back towards where it was before this experiment began but with much broader remedies, such as damages, when fiduciary duties are actually breached.

72 The duty itself plays a role in this analysis. Perfect results are not required. Rather a fiduciary duty requires that those subject to it will act loyally, will avoid conflicts of interest, and will not profit at the expense of the beneficiary. In this case, there is no evidence that Hunt Oil did not act loyally, that it was in a conflict of interest, or that it benefited at all. Its acts were neither intentional nor self-directed.

73 Hunt Oil also argues lack of vulnerability on the part of Adeco, Shaman and Rana. It says that each is a long time, sophisticated oil and gas player. I conclude that Adeco, Shaman and Rana were nevertheless vulnerable to the economic consequences of Hunt Oil's failure to continue the leases, which Hunt Oil had a contractual obligation to do. Each of the respondents was entitled to assume that Hunt Oil would do what it contracted to do, without their having to act in an oversight capacity. The fact that officers of each of the respondents were aware that continuation was in progress, or that further steps were required to complete it, does not alter the fact that they relied on, and were entitled to rely on, Hunt Oil in terms of seeing to the continuation. It rings hollow when Hunt Oil now argues that the respondents should have expected Hunt Oil to fail in doing so.

74 Nevertheless, I conclude that a fiduciary duty cannot be imposed in the circumstances of this appeal and the trial judge erred in doing so. In determining this question of mixed fact and law, he committed an extricable error of law by failing to consider relevant factors at all. Hunt Oil succeeds on this ground of appeal.

6. Is Hunt Oil Alone Responsible for Rana's Losses?

75 I turn to the final issue of liability to Rana. In this respect, Hunt Oil calls on Adeco and Shaman to pay Rana's losses to the extent of their interest in the leases that have been forfeited. It points to clause 1.00(f) of the royalty agreement. If that were the only agreement at play with regard to dealings between Rana and Hunt Oil, Adeco and Shaman, I would agree with Hunt Oil's interpretation. However, the inclusion agreement, which added the forfeited leases to the mix of properties involved, amended or altered the royalty agreement and imposed on it the terms of the JOA. Included in those terms is clause 401 of the 1990 CAPL, which renders Hunt Oil solely responsible for any omission by it that constitutes gross negligence. Since I have determined that Hunt Oil's failure to continue the leases was a result of its gross negligence, and since Rana's losses flow from that gross negligence, Hunt Oil is solely responsible for them.

Conclusion

76 The result of the trial is maintained and Hunt Oil's appeal from that result is dismissed

Appeal dismissed.

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