

CANADA / JUDGMENT

Aber Resources Ltd. v. Winspear Resources Ltd.

2000 BCSC 463**COURT**

Supreme Court of British Columbia

DECIDED

10 April 2000

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Citation:	Aber Res. v. Winspear Res.
Date:	20000410 2000 BCSC 463
Docket:	C991653 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	ABER RESOURCES LTD. PLAINTIFF
AND:	WINSPEAR RESOURCES LTD. DEFENDANT

REASONS FOR JUDGMENT**OF THE****HONOURABLE MR. JUSTICE SHAW****Counsel for the Plaintiff:**

Howard Shapray, Q.C.

Counsel for the Defendant:

Robert G. Ward and

David M. Towill

Dates and Place of Trial:

February 28 - 29, 2000 and March 1 - 2, 2000

Vancouver, B.C.

- [1] The plaintiff Aber Resources Ltd. and the defendant Winspear Resources Ltd. are participants in a joint venture to exploit a diamond property known as the Camsell Lake Property in the Northwest Territories. There were originally four parties to the venture, but over recent years the number of parties has been reduced to two, the plaintiff Aber and the defendant Winspear.
- [2] The defendant Winspear holds a majority interest in the venture and, under the Joint Venture Agreement, is the Operator of the project.
- [3] The Joint Venture Agreement provides for periodic projects to be developed and carried out for the exploration of the property. Each party may elect to provide its share of the funding of the exploration programs in accordance with that party's percentage interest in the venture. According to the Agreement, if a party elects not to participate in the funding of an exploration program, then the other party may provide 100% of the funds. Should this occur, the Agreement provides for the percentage interest of each party to change in accordance with the overall contributions by each party to the exploration costs.
- [4] The issues in this case involve the 1999 exploration program.
- [5] Prior to the 1999 program, Winspear held a 67.76% interest in the Camsell Lake Property and Aber held the other 32.24% interest.
- [6] The defendant Winspear contends that the plaintiff Aber elected not to fund the 1999 program, thus giving Winspear the right to pay 100% of the cost and thereby increasing its percentage interest in the venture and decreasing the interest of Aber.
- [7] Over Aber's objection, and despite Aber tendering its share of the funding, Winspear fully funded the 1999 program. Thus, according to Winspear, it now holds an approximately 84% interest in the venture and Aber's interest has been reduced to approximately 16%.
- [8] Aber claims that Winspear improperly prevented Aber from funding the 1999 program. Aber seeks a declaration that it has the right to fund its proportionate share of the 1999 exploration budget. Aber also claims consequential relief.
- [9] Aber is applying for judgment pursuant to a summary trial held under Rule 18A of the Rules of Court.
- [10] Winspear submits that this case is not suitable for disposition in a summary manner. It contends that there are contentious issues of fact which cannot be fairly decided without hearing the witnesses.

- [11] The summary trial has taken four days. Extensive references have been made to examinations for discovery, affidavits, cross-examinations on the affidavits, numerous documents and the law. With respect to the issue upon which this judgment is based, I am satisfied that this case is suitable to be disposed of in a summary manner.
- [12] In my view, the determinative issue is unjust enrichment. Winspear bases its position of increased sharing in the diamond property upon an allegation that Aber failed to give timely notice of its intention to contribute to the 1999 exploration program. I have concluded, however, that Winspear itself failed to give timely notice and, in the particular circumstances, Aber has a valid claim for restoration of its interest.

THE FACTS

- [13] As noted above, the Joint Venture Agreement appoints Winspear as the Operator of the project. The Agreement requires the Operator to prepare draft programs for consideration by the Management Committee. Draft programs are to contain estimates of the exploration costs to be incurred. It is up to the Management Committee to decide whether to adopt a proposed program. The Management Committee is comprised of representatives from Winspear and Aber.

- [14] The foregoing duties are set out in Articles 7.01 and 7.02 of the Agreement as follows:

7.01 The Operator shall prepare draft Programs for consideration by the Management Committee. The draft Program shall contain a statement in a reasonable detail of the proposed Mining Operations and estimates of all Exploration Costs to be incurred.

7.02 The Management Committee shall review the Program prepared and, if it deems fit, adopt the Program with such modifications, if any, as the Management Committee deems necessary.

- [15] In late 1998, Winspear prepared a draft program for 1999. The budget set out in the draft 1999 program was \$12,425,000, stated to be shared as follows:

Winspear share of budget @ 67.76%

\$8,419,180

Aber share of budget @ 32.24%

\$4,005,820

- [16] On December 16, 1998, the Management Committee met to consider the draft 1999 program. At that meeting the Management Committee unanimously adopted the program.
- [17] Article 7.03 of the Joint Venture Agreement provides that within 30 days of receipt of the adopted program each party may give notice to the Operator (Winspear) committing itself to contribute its proportionate share of the exploration costs of the adopted program. Article 7.03 reads:

7.03 The Operator shall forthwith submit the adopted Program to the parties. Each party may, within 30 days of receipt of the program, give notice to the Operator committing to contribute its Proportionate Share of the Exploration Costs on that Program. A party which fails to give that notice within the 30 day period shall be deemed to have elected not to contribute.

[18] I find as a fact that Winspear was in receipt of the adopted program on December 16, 1998. Winspear's Vice-President of Exploration and Chief Financial Officer, Dr. John McDonald, was questioned on examination for discovery as to when the adopted program (Exhibit 18) was in his possession and in the possession of Winspear's President, Mr. Randy Turner:

Q Now Exhibit "18" then was in your possession on December 16, 1998 a copy of it?

A Yes.

Q And Mr. Turner, who was also at the meeting, also had a copy of Exhibit 18?

A Yes.

[19] The foregoing finding of fact is important because it establishes December 16, 1998 as the base date for the calculation of the 30 day notice period under Article 7.03. I will address the calculation later in these reasons.

[20] By letter of December 18, 1998, Winspear caused copies of the adopted program and the minutes of the December 16 meeting to be delivered to Aber. The letter was written by Dr. John McDonald of Winspear to Mr. Ken Hanna, President of Aber. The letter was copied to Winspear's President, Mr. Randy Turner, and its counsel, Mr. Randolph Scott. The letter reads:

December 18, 1998

Aber Resources Ltd.

930 - 355 Burrard Street

Vancouver, B.C.

V6C 2G8

Attention: Mr. Ken Hanna

Dear Ken,

Enclosed please find the following:

- 1) A copy of the minutes of the Camsell Lake Joint Venture meeting of December 16, 1998.
- 2) A copy of the adopted 1999 Camsell Lake Program.
- 3) An acknowledgement dated November 2, 1998.

Please contact me if you have any questions or concerns regarding the above.

Yours sincerely,

WINSPEAR RESOURCES LTD.

"John A. McDonald"

John McDonald

Vice-President, Exploration

Encl.

cc: R.Turner

G.Scott

[21] On January 19, 1999, Winspear gave notice to itself as the "Operator" of the Joint Venture of its intention to contribute its proportionate share of the exploration costs of the 1999 program. The letter reads:

January 19, 1999

Winspear Resources Ltd.

1410 - 650 West Georgia Street

Vancouver, B.C.

V6B 4N8

Re: Camsell Lake Joint Venture

Winspear Resources Ltd., in its capacity as a Participant, hereby gives notice to the Operator of the joint venture of Winspear's election to contribute to the 1999 Program and Budget adopted at the Management Committee meeting held on December 16, 1998.

Yours truly,

WINSPEAR RESOURCES LTD.

Per: "Randy Turner"

[22] No copy of the notice letter was sent to Aber. On his examination for discovery, Dr. McDonald was asked why no copy of the notice was sent to Aber:

Q Now, do you know why Aber - excuse me, Winspear did not give a copy of this document to Aber?

A Why should they?

Q That's your answer, sir?

Dr. McDonald gave no response to the latter question.

[23] The January 19 letter was the first time that Winspear had ever written a letter to itself confirming its intention to fund. Mr. Turner, on his cross-examination, was asked the following questions and gave the following answers:

Q My question to you is: Is the letter of January 19th, 1999 the first time Winspear ever wrote a letter which only Winspear was going to sign to itself confirming an intention to fund?

A In the 1998 we had signed off on a sheet and this is the first formal letter adhering to the agreement.

Q Well, that sheet also had a place for Aber to sign.

A That's correct.

Q So the January 19th, 1999 letter was the very first time Winspear ever wrote a letter to itself which only Winspear would be signing confirming an intention to fund?

A That's correct.

[24] In past years, the usual practice of Winspear as Operator was to prepare "sign-off sheets". The parties had generally signed side-by-side on the sign-off sheets to signify their agreement to contribute to the funding of the adopted program. Dr. McDonald, on his examination for discovery, was asked the following questions and gave the following answers:

Q Okay.

And you sent a letter by courier on December 18th enclosing a copy of the approved budget and a copy of the minutes as well as an acknowledgement dated November 2nd, 1998, I'm referring to plaintiff's document 185.

A That's correct.

Q Okay.

And you didn't include any document which constituted a signoff sheet, did you?

A No.

Q And that was the practice that you had followed for as long as you were involved in the preparation of the document for the joint venture, isn't that true?

A That's correct.

[25] Winspear did not send a copy of its notice letter of January 19, 1999 to Aber. Winspear did not tell Aber that it had given notice until March 3, 1999, when it advised Aber that it claimed the right to fully fund the 1999 program.

- [26] Winspear's notice of January 19, 1999 was the first time that Winspear had chosen to write a formal letter of notice to itself as Operator, and do so without advising Aber. I say this not to suggest bad faith by Winspear (I do not believe I need to determine that issue), but as an indication of a policy adopted by Winspear requiring strict adherence to Article 7.03.
- [27] In the past, Winspear and Aber had enjoyed cordial relations. However, largely because of events which occurred during the course of 1998, Winspear considered that its former cordial relations with Aber had broken down. It was thus that Winspear, without advising Aber, decided to treat its relations with Aber on a strictly formal basis.
- [28] Aber did not deliver a formal notice of election to contribute to the 1999 program to Winspear within the required 30 days. This was not due to Aber wishing to decline to contribute to the 1999 exploration costs. The evidence indicates and I find that from the time of Aber's approval of the 1999 program, Aber intended to contribute to the 1999 exploration costs.
- [29] By letter dated March 3, 1999 from Winspear's solicitor Mr. Scott to Mr. Hanna of Aber, Winspear advised Aber that it would be contributing 100% of the 1999 exploration costs and that Aber was deemed to have elected not to contribute. The text of the letter reads:

On behalf of our client Winspear, we wish to confirm that, pursuant to paragraph 7.03 of the Agreement, Aber Resources Ltd. is deemed to have elected not to contribute to the 1999 Program and Budget. Winspear has elected to contribute to the said Program and Budget, and therefore will be funding 100% of all Costs.

Aber's deemed election not to contribute to the said Program and Budget constitutes a material change for Winspear, and therefore we enclose a draft news release for your review.

- [30] In purporting to elect to provide 100% of the funding, Winspear was relying upon Article 7.04 which reads:

7.04 If any party elected not to contribute to a Program, the amounts to be contributed by the parties who elected to contribute shall be increased pro rata, subject to the right of any of them to elect not to contribute more than the amount initially committed pursuant to paragraph 7.03 hereof.

- [31] The letter was delivered personally by Mr. Scott to Mr. Hanna. This was the first indication to Aber that Winspear intended to fund 100% of the program.
- [32] The letter refers to an enclosed draft news release. It reads:

NEWS RELEASE

Randy Turner, the President of Winspear Resources Ltd., announces that Winspear's partner in the Camsell Lake Joint Venture is deemed to have elected not to contribute to the 1999 Program and Budget. Winspear has elected to contribute to the said Program and Budget, and therefore will be funding 100% of all costs.

[33] When Mr. Scott delivered the foregoing letter and draft news release to Mr. Hanna, Mr. Hanna took immediate objection.

[34] Mr. Hanna followed up his objection by a letter of March 16, 1999 to Winspear. In this letter Mr. Hanna said that Aber was ready, willing and able to contribute to the 1999 program and would tender the full amount of its share. The letter reads:

You have taken the position, through Mr. Scott's letter dated March 3, 1999, that because Aber has not given notice in writing of its intention to contribute and participate in the 1999 Program, Aber has forfeited its right to participate in this Program and incurred the resulting dilution of its interest in the joint venture assets. That position is inconsistent with the Joint Venture Agreement and inconsistent with the position and established practices of the parties in relation with participation in approved exploration programs.

If any further formal written notice is required, this letter is Aber's notice under paragraph 7.03 of the Joint Venture Agreement. We are ready, willing and able to participate in and contribute to the 1999 Program in accordance with Aber's joint venture interest of 32.24%. We will tender the full amount of Aber's participation in this Program shortly unless you confirm that you will provide us with the invoices called upon by paragraph 7.05 of the Joint Venture Agreement in which case Aber will pay its share of those invoices.

[35] By letter of March 23, 1999, Winspear rejected Aber's position. The letter reads:

We are in receipt of your letter dated March 16, 1999. Winspear, through its solicitors, by letter dated March 3, 1999, confirmed that Aber is deemed to have elected not to contribute to the 1999 Program and Budget. Consequently, Aber is not a "Participant" (as that term is defined in the Agreement) in relation to the 1999 Program and Budget.

Paragraph 7.05 of the Agreement provides for the manner in which the Operator is entitled to invoice each Participant.

Winspear, as Operator under the Agreement, will not be invoicing Aber for any Exploration Costs incurred under the 1999 Program and Budget because Aber is not a Participant.

[36] On March 30, 1999, Aber commenced this court action against Winspear.

[37] On April 20, 1999, Winspear filed its Statement of Defence.

[38] By letter of April 28, 1999, Aber's solicitors tendered to Winspear's solicitors a certified cheque in the amount of \$4,005,820 for its 32.24% share of the exploration program. The letter reads:

Our client Aber Resources Ltd., hereby tenders payment of Aber's share of the 1999 Exploration Program under the Camsell Lake Joint Venture Agreement dated the 5th day of February 1993, as amended ("Joint Venture Agreement") in the form of a certified cheque in the amount of \$4,005,820 representing 32.24% of that Exploration Program. The said funds are sent to your client through your office on the trust condition that they only be used for the purpose of funding the said 1999 Exploration Program and for no other purpose.

The said certified cheque is delivered on your undertaking to send it back to us forthwith in the event that Winspear either refuses to accept this tender or takes the position that the tender has not been made strictly in accordance with the procedural requirements of the Joint Venture Agreement.

[39] By letter of April 29, 1999, the tender cheque was returned by Winspear's solicitors to Aber's solicitors. The letter reads:

This is further to our correspondence of yesterday. I have now had an opportunity to take instructions on this matter.

I have been instructed to return the certified cheque in the amount of \$4,005,820.00, and I do so herewith.

Aber Resources Ltd. did not give notice to the operator committing to contribute its proportionate share of the costs for the 1999 exploration program within the time required by paragraph 7.03 of the Camsell Lake Joint Venture Agreement, with the result that Aber Resources Ltd. elected not to contribute to the 1999 exploration program. There is no provision for Aber to re-elect.

[40] Winspear fully funded and carried out the 1999 exploration program. As a result, it is Winspear's position that its interest in the venture has increased to approximately 84% and Aber's interest has been reduced to approximately 16%. In this regard, Winspear invokes Article 7.09 which reads in relevant part as follows:

7.09 If a party elected not to contribute to the Exploration Costs of any Program the Interest of that party shall be decreased and the Interest of each Participant contributing in excess of its Proportionate share of the Exploration Costs shall be increased so that, subject to paragraph 7.10, at all times during the Exploration period the Interest of each party will be that percentage which is equivalent to its Exploration Costs and Prior Exploration Costs expressed as a percentage of the Exploration costs and Prior Exploration costs of all parties.

[Paragraph 7.10, noted above, has no application to the facts of this case.]

ABER'S POSITION

- [41] Aber bases its claim on the proposition that it gave the requisite notice under Article 7.03 by its representative at the Management Committee meeting of December 16, 1998 saying "We're In". This issue is disputed by Winspear.
- [42] Alternatively, Aber invokes the law of estoppel, waiver, unjust enrichment, breach of fiduciary duty and relief from forfeiture.
- [43] For reasons which follow, I am of the view that Aber's claim may fairly be decided under Rule 18A based upon the cause of action of unjust enrichment, and that it is unnecessary to decide what Aber's representative said at the meeting of December 16, 1998.

THE NOTICE ISSUE

- [44] For the purposes of this judgment I will assume, without so finding, that Aber failed to give notice under Article 7.03 within the 30 day limit.
- [45] The issue I will now address is whether Winspear's notice was out of time.
- [46] Winspear relies upon Article 28.01, the relevant part of which reads:
- 28.01 All invoices, notices, consents and demands under this Agreement shall be in writing and may be delivered personally, sent by telegram, fax or telex or may be forwarded by first class prepaid registered mail to the address for each party set out herein or to such addresses as each party set out herein. Any notice delivered or sent by telegraph, fax or telex shall be deemed to have been given and received on the business day next following the date of delivery.
- [47] Winspear contends that the starting date for the notice period should be Monday, December 21, 1998. Winspear asserts that the adopted program was delivered to it on Friday, December 18, 1998, the date of Dr. McDonald's letter to Aber enclosing the adopted 1999 program, copies of which letter were directed to Winspear's President Mr. Turner and its solicitor Mr. Scott. Winspear reasons that, because Article 28.01 deems receipt of "notices" to be the next business day after delivery, the deemed receipt of the adopted program was the Monday following Friday, December 16, that is, Monday, December 21. Thus, according to Winspear, when it gave its notice of contribution on January 19, 1999, that was within 30 days of its "deemed" receipt of the adopted program.
- [48] I cannot accept Winspear's contention. It does not square with my finding of fact that Winspear received the adopted program on December 16, 1998, not December 18. Thus, the deemed date of receipt (assuming that Article 28.01 applies) was only extended from Wednesday, December 16 to the next business day, that being Thursday, December 17. Using December 17 as the starting date for the 30 day period within which Winspear was entitled to give notice, that period had expired before Winspear gave notice on January 19, 1999.

- [49] Aber argues that Article 28.01 has no application to the date of receipt of the adopted program. I need not address this argument because of my finding that Winspear received the adopted program on December 16, not December 18. Thus, whether or not Article 28.01 applies, Winspear's notice was out of time.
- [50] Aber further argues that if the starting date to calculate time is December 18, and if Article 28.01 applies, the next business day was Saturday, December 19. It follows, Aber submits, that the 30 day notice period would have run out on January 18, one day short of when the notice was given. In view of my findings above, I need not address this submission.
- [51] Aber also submits that s.25 of the Interpretation Act, R.S.B.C. 1996, c.23 applies, rather than Article 28.01. Again, because of my finding of fact that actual receipt was December 16, this submission need not be addressed.
- [52] In summary, I conclude that the 30 day notice period ran out before Winspear's notice letter of January 19, 1999.

UNJUST ENRICHMENT

- [53] It is evident that Winspear is endeavouring to take advantage of an alleged failure by Aber to give 30 days notice as required by Paragraph 7.03 of the Joint Venture Agreement. However, as I have held, Winspear itself failed to give notice within the 30 days. In my view it would be unconscionable to allow Winspear to benefit from Aber's alleged failure when Winspear committed the same error that it alleges against Aber.
- [54] The requirements needed to establish unjust enrichment as a cause of action are:
1. An enrichment;
 2. A corresponding deprivation; and
 3. The absence of any juristic reason for the enrichment.

See *Pettkus v. Becker*, [1980] 2 S.C.R. 834, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *Peter v. Beblow*, [1993] 1 S.C.R. 980, *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *Hunter Engineering Co. Inc. et al. v. Syncrude Canada Ltd. et al.*, [1989] 1 S.C.R. 426; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; and *Atlas Cabinets and Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161 (B.C.C.A.).

- [55] In the present case, the fulfilment of the first two conditions is clear. Winspear, by fully funding the 1999 program and refusing to allow Aber to fund its proportionate share has, in effect, appropriated part of Aber's interest in the diamond property, and Aber has been correspondingly deprived of that part interest.

- [56] The significant question is whether there is any juristic reason for Winspear's enrichment. The answer to this question depends upon whether Winspear increased its interest in the diamond property pursuant to the provisions of the Joint Venture Agreement. If it did, then there is a juristic reason for Winspear's enrichment. If not, then there is an absence of a juristic reason for Winspear's enrichment.
- [57] In order for Winspear to be in a position to take over a portion of Aber's interest, Winspear needed two things to occur: Aber failing to give timely notice to elect to fund the adopted program; and Winspear giving timely notice of its own election. While Winspear claims that Aber failed to give 30 days notice, I have found that Winspear failed to do so itself.
- [58] Where there is a subsisting contract between parties, there is always a question of whether the parties should be restricted to remedies provided for in the contract.
- [59] In *United Canso Oil & Gas Ltd. v. Washoe Northern, Inc.* (1991), 121 A.R. 1, [1991] A.J. No. 1029 (Q.L.) (Alta.Q.B.), Hutchinson J. addressed the question of when unjust enrichment can be invoked where there is a contract between the parties. He said, at p.92 (Q.L.):

The defendants argue that because there are valid and subsisting agreements between the parties there is a juristic reason for the enrichment. They say that the Joint Operating Agreement which incorporates each of the three Conveyance Agreements governs the relationship between the Joint Operators and that if monies have been paid to the Joint Operators, which ought properly have been paid to the plaintiff, then the plaintiff can seek damages for breach of contract.

...

Counsel for the plaintiff readily concedes that restitution cannot be used to subvert bargains. He says his client is simply seeking the fruits of the bargain which the parties agreed to. The plaintiff has framed its action in restitution because their agreement does not contemplate a situation where monies are improperly disbursed.

Hutchinson J. accepted the plaintiff's argument and held:

In my opinion the valid and subsisting agreement between the parties is not a juristic reason for refusing the plaintiff's claim in unjust enrichment.

- [60] In *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 162 A.R. 35, [1994] A.J. No. 864 (Q.L.) (Alta.C.A.), leave to appeal dismissed [1995] S.C.C.A. No. 6 (Q.L.)(S.C.C.), Conrad J.A. for the Court observed at para.117:

The distinction between using unjust enrichment to subvert a bargain and using it to obtain the benefit of a bargain is a proper one.

And further:

In *United Canso* the agreement did not specifically contemplate the situation where moneys were improperly disbursed, and thus, the proper recourse against the holder of the funds was unjust enrichment.

[61] In *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419, the return of payments made under protest was ordered. Kerwin J. for the majority said at p.425:

Here the evidence is plain that the payments were made under protest and they were not voluntary in the sense referred to in the cases mentioned. The circumstances that O.L. Knutson thought that he had a right to insist upon the payments cannot alter the fact that under the agreement of September 16th, 1936, it is clear that he had no such right.

[62] The Joint Venture Agreement does not allow either party to take over sole financing of programs without proper notice under Article 7.03; nor does it provide for what shall happen if one party appropriates for itself the interest of another party when not entitled to do so under the terms of the agreement. In my opinion, it would be unjust to allow Winspear to appropriate Aber's interest. To do so would deprive Aber of the real objective of the contract which is the potential for future profits if the diamond property proves successful. The action for unjust enrichment, particularly when combined with the restitutionary remedy of constructive trust, would not subvert the contract. Rather, it would support the contract by helping to achieve its essential aim of profit sharing in accordance with the levels of expenditures incurred by the parties. I find, therefore, that the fact that unjust enrichment is claimed in a contractual setting, does not, in the circumstances of this case, preclude the application of the unjust enrichment cause of action.

[63] I conclude that this is an appropriate case for unjust enrichment and that all the elements of that cause of action have been established.

CONSTRUCTIVE TRUST

[64] In my opinion, the appropriate remedy called for by the circumstances of this case is in the nature of a constructive trust.

[65] In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, LaForest J. for the majority, said, at pp.673-74:

This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationship, through to *Pettkus v. Becker*, *supra*, where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker*, *supra*, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment.

And further at p.676:

Goff and Jones, *The Law of Restitution*, (3rd ed. 1986), at p.78, take the position that:

the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets, or to allow subrogation to a lien over such assets.

And at p.677:

In their view [referring to Goff and Jones], a proprietary claim should be granted when it is just to grant the plaintiff the additional benefits that flow from the recognition of a right of property.

[66] As noted earlier, the real objective of the interests held by the parties in the Joint Venture is the prospect of future profits if the venture proves successful. I find that this consideration points to a constructive trust as the appropriate remedy.

PAYMENT CONDITION

[67] A constructive trust ruling on the facts of this case must be subject to Aber contributing its share of the 1999 exploration costs, that is, the sum of \$4,005,820. If Aber does not make this payment, it will be in no position to claim that the benefit appropriated by Winspear is unjust. This is because Winspear has already paid for the whole of the 1999 exploration costs. I set 30 days from the date of this judgment as the date by which Aber must make payment to Winspear.

[68] I have considered whether Aber should be required to pay interest, but have concluded that interest should not be required because of Aber's earlier tender and Winspear's refusal to accept the tender.

[69] Should Aber fail to put up the funds within the 30 day period, it will be deemed to have elected not to contribute and the constructive trust will thereby terminate.

DECLARATION

[70] I said earlier that Aber is seeking a declaration that it has the right to fund its proportionate share of the 1999 exploration budget. I make the requested declaration subject to this: that the declared right will terminate if Aber does not pay \$4,005,820 to Winspear within 30 days of the date of this judgment.

RULE 18A

[71] As stated earlier, it is Winspear's contention that a summary trial under Rule 18A is not appropriate in this case. This submission is essentially based on two main areas of dispute which Winspear submits are best left to a trial judge who would hear the witnesses and weigh their testimony.

[72] One area of dispute is whether Aber's Management Committee representative said "We're in" after approving the 1999 program at the meeting of December 16, 1998. In my view, a ruling on this issue is not necessary given my finding that Winspear itself failed to conform with the 30 day notice requirement under Article 7.03.

[73] The second matter of dispute is a contention by Aber that Winspear acted in bad faith. With respect to this point, it is my opinion that bad faith is not a necessary element of Aber's claim based upon unjust enrichment. As was said by McLachlin J. for the majority in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at p.230:

Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Pettkus v. Becker*, supra. [[1980] 2 S.C.R. 824]

[74] The findings of fact that I have made in respect of the unjust enrichment claim are all based upon essentially undisputed evidence. Accordingly, my view is that Aber's claim, based upon unjust enrichment, may properly be decided on this Rule 18A summary trial.

COSTS

[75] Assuming that Aber will make payment to give effect to the constructive trust, Aber will have its costs of this action from Winspear.

SUMMARY

1. The interest of Aber in the Joint Venture appropriated by Winspear as a result of Winspear fully funding the 1999 exploration program is subject to a constructive trust in favour of Aber, provided that the constructive trust will terminate if Aber does not pay \$4,005,820 to Winspear as Aber's share of the funding of the 1999 program within 30 days of the date of this judgment.
2. Aber is entitled to a declaration that it has the right to fund its proportionate share of the Joint Venture's 1999 exploration budget, subject to this declared right terminating if Aber does not pay \$4,005,820 to Winspear as Aber's share of the funding within 30 days of the date of this judgment.
3. Aber will have its costs of this action if it makes the foregoing payment.
4. If any further directions or orders are needed to give effect to this judgment, the parties are at liberty to apply.

"D.W. Shaw, J."

The Honourable Mr. Justice D.W. Shaw

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