

CANADA / JUDGMENT

McDonald v. Bode Estate

2018 BCCA 140

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 140 McDonald v. Bode Estate

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McDonald v. Bode Estate,

2018 BCCA 140

Date: 20180418

Docket: CA44401

Between:

Laurie McDonald, Misty Hebert, and 0743769 B.C. Ltd.

Appellants

(Petitioners)

And

Hans Wilhelm Bode (deceased), The Estate of Hans Wilhelm Bode,

Elsa Luise Bode (deceased), The Estate of Elsa Luise Bode,

and ConocoPhillips Canada Operations Ltd.

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Savage

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia,
dated March 30, 2017 (McDonald v. Bode Estate, 2017 BCSC 515,
Vancouver Registry S147599).

Counsel for the Appellants:

G. Kim

Counsel for the Respondents - Estates of Hans Wilhelm Bode and Elsa Luise Bode:

G. Whidden

Place and Date of Hearing:

Vancouver, British Columbia

January 4, 2018

Place and Date of Judgment:

Vancouver, British Columbia

April 18, 2018

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Savage

The Honourable Mr. Justice Hunter

Summary:

The appellants sought to have an assignment of rents in favour of the respondents struck from title to their real property. The assignment was a bare assignment, not a reservation of rents in the initial transfer of the property. The chambers judge dismissed the application, holding that the assignment of rents ran with the land. Held: appeal dismissed. An assignment of rents payable pursuant to a surface lease, like a reservation of rents, is capable of creating an interest in land, provided that the parties intend that it does so. Registration of the assignment is not proof of its validity but may provide some evidence of the parties' intentions. In this case, the chambers judge's finding that the parties intended the assignment to run with the land is entitled to deference; the judge committed no error that would entitle this Court to overturn this finding.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] This is an appeal from an order dismissing an application to strike a charge registered against the title to real property: an assignment of the rents due under a surface lease. At issue is whether the assignment of rents in this case runs with the land or simply creates obligations personal to the parties to the agreement.

Background

- [2] In May 2010, the numbered company that is an appellant purchased District Lot 155, Peace River District, British Columbia, from Foothills Land & Cattle Co. Ltd. ("Foothills"). In December 2012, the numbered company sold one-third of its interest in the land to the appellant, Laurie McDonald, and one-third of its interest to the appellant, Misty Hebert. At the time the property was purchased by the numbered company, and at the time interests in the property were conveyed to the appellants Ms. McDonald and Ms. Hebert, there were two assignments of rents registered against the title to the property: an assignment of surface lease T6190 and an assignment of surface lease PL67828.
- [3] Surface lease T6190 was made and registered on February 22, 1983. It has subsequently expired; its terms are irrelevant for our purposes.
- [4] Surface lease PL67828 was entered into between the prior owners of the property, Hans and Elsa Bode, as lessors, and Canadian Hunter Exploration Ltd. ("Hunter"), as lessee, on October 9, 1997. It granted to the lessee those portions of the lands shown on a plan attached to the lease:

To be held by the Lessee as tenant for the term of TWENTY FIVE (25) YEARS from the date hereof for the purposes of exploration, development, production or storage of petroleum and natural gas and related hydrocarbons and/or substances produced in association therewith in consideration of the payments to be paid by the Lessee to the Lessor .

- [5] The lease required the payment of rent annually in the amount of \$2,270. It required the lessee to operate and maintain the demised premises in accordance with good oilfield practices. It required the lessee, upon the abandonment of the demised premises, to leave them, to the extent practical to do so, in the condition that existed immediately prior to the entry. It provided for renewal of the lease for a term of 25 years and subsequent renewal for a further 25-year term. It also provided:
15. The demised premises covered by this lease shall not be used for purposes other than those set out in this lease unless the Lessor consents in writing to such use.

18. The parties hereto may delegate, assign, or convey to other persons or corporations, all or any of the powers, rights, and interests obtained by or conferred upon the parties hereunder and may enter into all agreements, contracts and writings and perform all necessary acts and things to give effect to the provisions of this clause. The assigning party shall notify the other in writing of any delegation, assignment, or conveyance of the said lease;

and

25. These presents and everything herein contained shall enure to the benefit of and be binding upon the Lessor, his heirs, executors, administrators, successors and assigns and upon the Lessee, its successors and assigns.

[6] The lease was registered on December 9, 1997, together with a "Form C" in the Land Title Registry.

[7] In December 1997, the Bodes sold Lot 155 to Foothills. The contract of purchase and sale is not in evidence. There is no evidence of a reservation of rents in the transfer of the property to Foothills. Foothills executed an assignment of rents agreement in favour of the Bodes that was registered in the Land Title Office under number PL070091 (the "Assignment of Rents" or the "Assignment").

[8] The Assignment of Rents contained the following relevant provisions:

WHEREAS:

A. The Assignee has been the registered owner of the following described lands, situate, lying and being in the Peace River Assessment District, in the Province of British Columbia, namely:

District Lot 155, Peace River District Except the West 25 m

B. On October 9, 1997 a surface lease was granted over a portion of the Lands as detailed in a Lease in favour of Canadian Hunter Exploration Ltd. registered in the Prince George Land Title Office on December 9, 1997

C. The Assignor is now or will be the occupier and owner of the Lands, and but for this assignment, the party entitled to receive all annual rental payments payable pursuant to the Lease (the "Compensation");

D. It was a term of the transfer of title by the Assignee to the Assignor that, concurrent with registration of the transfer, the Assignor would grant the Assignee an assignment of the Compensation.

1. The Assignor does hereby assign and transfer unto the Assignee all of the right, interest and title of the Assignor in and to the Compensation.

2. The Assignee shall have full power and authority for the Assignor to demand, sue for, recover, receive and give effectual receipts, releases and discharges for the Compensation and to negotiate any change in the Compensation.

[Emphasis added.]

- [9] The Assignment suggests there was no reservation of rents in the conveyance, given the words I have emphasized in Recital C.
- [10] Foothills covenanted to comply with the provisions of the lease and covenanted and agreed that "[t]he within Assignment shall continue to be effective in respect to and notwithstanding any modifications, extensions or replacements to the Lease".
- [11] The Assignment also provides:
 7. These presents and everything contained herein shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.
- [12] Hunter paid rent directly to the Bodes until ConocoPhillips Canada Operations Ltd. ("ConocoPhillips") acquired its interest in the surface lease.
- [13] The appellants did not contest that they had notice of both the lease and the Assignment of Rents when they acquired the property.
- [14] In May 2014, counsel for the appellants wrote to the respondents demanding that they provide the appellants an accounting of the rental payments made pursuant to the lease from December 21, 2012 to the date of the demand. They demanded the respondents, Mr. and Mrs. Bode, cooperate in transferring the interest in the Assignment to the appellants. They also demanded ConocoPhillips "henceforth make payments of the Rental Payments directly to the present landowners."
- [15] On October 2, 2014, the respondents having refused to comply with the demands made of them, the appellants filed a petition seeking: a declaration that the Assignment of Rents expired on or after December 21, 2012; cancellation of the charges on the lands; a declaration that they were entitled to receipt of all rental payments payable pursuant to the surface lease; and an order requiring ConocoPhillips to pay the future rent payable pursuant to the surface leases to the appellants.
- [16] The petition came on for hearing on March 16, 2017. The Court, for reasons indexed as 2017 BCSC 515, denied the orders sought.
- [17] After reviewing the jurisprudence, the chambers judge concluded the petition would be determined by resolving the question whether the parties to the Assignment of Rents intended the document to create an interest in the property.
- [18] He held:

- [53] I have determined that it was the intention of the Bodes and Foothills to create a registerable interest in land to secure the payment of the Rental Payments. Their intention is manifest from the wording of the Assignment of Rents itself and their conduct.
- [54] To start with, and after describing the transfer of title by the Bodes to Foothills, the Assignment of Rents specifically records that it is a term of the transfer of title of the Property that Foothills would grant an assignment of the annual rent to the Bodes.
- [55] "Compensation" is defined in the Recital "C" to mean "all annual rental payments payable pursuant to the Lease."
- [56] Further evidence of the parties' intention is gleaned from other clauses in the document.
- [57] The Assignment of Rents did not prohibit Foothills from assigning its rights under the Lease to another entity. To the contrary, I infer from its language that the parties contemplated that Foothills could assign its rights under the Lease to another party. Specifically, Recital "E" states that "The Lessee or its successor in title is hereinafter called the "Occupant".
- [58] To assign or otherwise deal with the Lease, Foothills must obtain the Bodes' consent. ...
- [59] Foothills gave to the Bodes full power and authority to deal with any subsequent occupant of the Property, to have all of Foothills rights, interest, and title to the Rental Payments, and to make demands for payment, provide receipts and releases, and to negotiate changes to the payment .
- [60] Foothills was provided the right to assign the Rental Payments, but clause 4 c) made any such assignment conditional, so that it must reflect the parties' intentions as reflected in their agreement.
- [61] Lastly, and also of significance is that, according to clause 4 e), the Bodes' interest in the Rental Payments is to survive even where the Lease is "replaced" .
- [62] Moving away from the contents of the contract documents, I find that the actions taken by Foothills and the Bodes in retaining a lawyer to prepare and file with the Land Title Office a Form "C" - General Instrument, which they had executed as part of the closing documents, is additional evidence in this case of their intention to create an interest in land.
- [63] When Foothills assigned its interest in the Rental Payments to the Bodes, it, along with the Bodes, intended to create an interest in land in favour of the Bodes. The Bodes protected their interest in documents created to effect the purchase and sale of the Property. They also did so when they, along with Foothills, submitted a General Instrument - Form "C" for registration to the Land Title Office, attaching the Assignment of Rents. Those documents were accepted for filing and registered against title to the Property.

[19] He rejected the argument that the appellants would be prejudiced in the event the Bodes remained entitled to the rental payments, due to the loss of use of their property. The appellants had notice of the Assignment of Rents as a charge against title and should have known that the common law permitted agreements concerning rents or royalties arising from leases for oil and gas exploration to create interests in land.

Grounds of Appeal

[20] The appellants submit that the judge erred by:

- a) misinterpreting or misapplying the law to find that, in the absence of express statutory authority, assignments of rents are capable of creating an interest in land in British Columbia;
- b) misapplying the laws of contractual interpretation by:
 - i) finding that the language of the Assignment of Rents created an interest in land in favour of the Bodes;
 - ii) finding that the Assignment of Rents was enforceable as against non-parties to the agreement;
 - iii) reviewing extrinsic evidence to find that the Assignment of Rents created an interest in land in favour of the Bodes;
 - iv) finding that the Bodes specifically retained the right to rents as a term of sale of the Lands when there was no basis in the evidence (i.e. no evidence from any agreement of sale); and
- c) failing to properly consider the circumstances surrounding the rental payments in the context of equity.

Applicable Law

[21] This is said to be a case of first instance in this province. However, the question whether an assignment of rents payable pursuant to a surface lease can create an interest in land has been considered and specifically addressed by statutory provisions in Alberta and Saskatchewan. In Alberta, legislation providing that assignments of rents can be registered and create interests in land was introduced in 1985 and is currently embodied in s. 63 of the Law of Property Act, R.S.A. 2000, c. L-7. A similar statutory provision was first introduced in Saskatchewan in 1995 and is now embodied in s. 144 of the Land Titles Act, 2000, S.S. 2000, c. L-5.1, which explicitly applies to interests created after April 1, 1995. Prior to these amendments, the courts in Alberta and Saskatchewan had held that at common law a bare assignment of rents did not create an interest in land. By contrast, a reservation of rents from a conveyance could create an interest in land, at common law, in Saskatchewan. The status of reservations of rents was unsettled in Alberta.

- [22] Counsel advise us that neither the effect of a reservation of rents nor the effect of an assignment of rents on the rights of subsequent third-party landowners has been considered in British Columbia.
- [23] Many of the cases to which we have been referred were decided before the Supreme Court of Canada expanded the type of interests capable of running with title to land in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7 [Dynex]. In that case, the Court, dealing with the status of royalty interests, held there was no convincing policy reason for maintaining the common law prohibition on the creation of interests in land separated from the reversion. Major J., for the Court, held:
21. In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a profit à prendre, if that is the intention of the parties.
- [24] The Court accepted the following succinct statement from *Vandergrift v. Coseka Resources Ltd.* (1989), 95 A.R. 372 (Q.B.) at para. 29:

it appears reasonably clear, that under Canadian law, a "royalty interest", or an "overriding royalty interest", can be an interest in land if:

- 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
- 2) the interest, out of which the royalty is carved, is itself, an interest in land.

[25] The questions on this appeal are:

- a) whether, at common law, in light of the decision in *Dynex*, an assignment of rents payable pursuant to a surface lease can create an interest in land; and
- b) if so, was the trial judge correct in concluding that in the circumstances of this case the Assignment created such an interest?

Can an assignment of rents payable pursuant to a surface lease create an interest in land?

[26] This question is addressed by Di Castri, in *Registration of Title to Land* (Toronto: Thomson Reuters, 1987) (loose-leaf updated 2016, release 2), ch. 12 at 58 as follows:

Rent is normally incident to the reversion of the lessor or reversioner and passes with it if he grants it to another. If the rent is severed from the reversion (as where either is assigned without the other) it becomes a rent in gross.

The question of whether or not an assignment, separately from the reversion, of rents by a lessor to a registered mortgagee constitutes an interest in land was answered in the negative in [*Canada Trustco Mortgage Co. v. Skoretz* (1983), 45 A.R. 18 (Q.B.)].

- [27] Skoretz is one of the cases in which the position at common law was canvassed in Alberta before the legislative amendment. The question in that case was described by Miller J., at para. 1, as follows: "At issue in this matter is whether an assignment of Rent Agreement is an interest in land enabling the assignee to maintain a caveat on the title to the land for the purpose of giving notice of his assignment to any interested party."
- [28] The Court quickly dealt with the question whether registration in itself confirmed the existence of an interest in land. The legislation in Alberta provided that a person claiming an interest in land could register a charge. The registration itself was notice of a claim, not evidence of its validity.
- [29] Turning to the nature of the interest created by the assignment, Miller J. noted:
- [21] There are many instances in reported cases when a contractual right involving a piece of land has been held by courts not to give the right holder an "interest in land". The following are some examples of these situations.
- (a) An agreement by a purchaser to share profits of resale of the land with another does not give the latter an interest in the land but "simply a right, when it is sold, to receive one-half of the profits realized."
 - (b) A right of first refusal (i.e., purchase) is a pure contractual right which may convert into an option to purchase. It is only at the latter point that the person holding the option owns an equitable interest in the land and it is only at this point that a caveat may be filed.
 - (c) A solicitor's lien in connection with services and disbursements to foreclose on a mortgage is insufficient to found a caveat.
 - (d) A real estate agent's commission cannot be secured by way of a caveat.
 - (e) The right of a tenant in common who has made repairs to property from which his co-tenant has taken benefit, does not acquire a charge against the property. The industrious tenant only has a personal right to recover .

[Citations omitted; emphasis in original.]

- [30] After canvassing at length the conflicting authorities (including, among those that narrowly restrict the scope of obligations that may be said to give rise to an interest in land: *Badger v. Megson* (1980), 14 Alta. L.R. (2d) 49 (Q.B.); and *Seel Mortgage Investment Corp. v. Tri-Dell James Construction Ltd.* (1981), 32 A.R. 299 (Q.B.); and among those that expansively define interests that are capable of running with the land: *Ex parte Hall*; *In re Whitting* (1878), 10 Ch. D. 615 (C.A.); *Hopkins v. Hopkins* (1883), 3 O.R. 223 (C.A.); *Dodds v. Thompson* (1865), L.R. 1 C.P. 133; and *Finch v. Gilray* (1889), 16 O.A.R. 484), he concluded:
- [35] To my mind, one of the key indicators as to whether an Assignment of Rent Agreement gives the assignee an interest in the land relates to the remedies available to the assignee if, and when, an assignee tries to exercise rights under the agreement.

- [36] One of the reasons that a lessor has been held to have an interest in the land is that he can recover the property when the lease terminates, either through performance or cancellation. He can also enter upon the property and distrain for rent arrears. It is clear that the assignee of rents has no right to recover the real property should the tenant default. In fact, it has been held by our own Court of Appeal that an assignee of rents does not even have the right to distrain under an Assignment of Rent Agreement. This decision was made in the case of *In re Edmonton Law Stationers Ltd. (In Liquidation) and The Canadian Bank of Commerce*, [1919] 3 W.W.R. 406. The only remedy available to an assignee under an Assignment of Rent Agreement would be to sue the tenant in the ordinary way for rent due and unpaid and to execute after obtaining judgment. Surely this is a far cry from a landlord's right to relief and is yet another indication that all an assignee receives under the assignment is a chose in action for a debt once the rent becomes due.
- [37] On the first issue before me, I find that the plaintiff, in this action did not acquire an interest in the property in question under the Assignment of Rent Agreement dated the 7th of May, 1980, and accordingly had no right to file a caveat against the title giving notice to the world of its position as assignee of present or future rents accrued or to be accrued from the property.
- [31] In *Northland Bank v. Van der Geer*, 1986 ABCA 252, Irving J.A. dismissed an appeal from the decision of a master, confirmed in the Court of Queen's Bench, to the effect that an assignment of rents did not create an interest in land, despite the fact it had been registered pursuant to the land titles legislation in force at the time. He held:
- [13] The assignment of rents obtained by Northland in March of 1983 did not convey to Northland any interest in the lands[.] Should the property be rented and rents become payable, the most Northland would have as the assignee would be the chose in action to enforce their payment. The assignment of [r]ents does not provide Northland with any right capable of crystallizing into an interest in the lands.
- [14] This issue and the case law were reviewed in depth in *Canada Trustco Mortgage v. Skoretz*. We agree with the conclusion of Miller, J. that the general assignment of rents does not create an interest in lands and therefore a caveat cannot be filed to give notice of such assignment.
- [32] The status of assignments of rents after the 1985 statutory amendment in Alberta was canvassed in *Pegg v. Pegg* (1992), 128 A.R. 132 (Q.B.):
- [14] It seems clear that at common law, rentals payable are incorporeal hereditaments, which run with the land (see Victor Di Castri, Q.C., *The Law of Vendor and Purchaser*, vol. 2 (Toronto): Carswell, 1989, at 14-16). The distinction is consistently made that rent already accrued due is personal property, a mere chose in action whereas unaccrued rent is an incorporeal hereditament which follows the reversion. This position is amply supported by the three authorities noted in the plaintiff's submission: *Kennedy v. MacDonnell* (1901), 1 O.L.R. 250; *Smith v. Love*, [1954] 3 D.L.R. 287; and *Brown v. Gallagher & Co.* (1914), 19 D.L.R.

683. Additional authorities are noted in DiCatri (supra).

- [15] It is also clear that incorporeal hereditaments are rights of property of certain special classes. Their distinguishing feature is that the law of real property applies to them just as it applies to corporeal land (see Megarry and Wade, *The Law of Real Property* (5th ed.) (London: Stephens & Sons 1984) at p. 813. Megarry and Wade at p. 814 note that corporeal and incorporeal hereditaments together make up what is "real property" in the wide sense. Corporeal hereditaments are land. Incorporeal hereditaments are rights in land, which include such things as rent charges, annuities, easements, profits-à-prendre and so on. A line is drawn between real and personal property, each of which are governed by separate sets of rules. Rents are in a category, a species of property which are not physical things but yet must be governed by property law. DiCatri notes, at p. 14-16 that while the transfer of unaccrued rent does not carry with it the reversion as an incident, the answer to the question of whether or not the theory of unaccrued rent being an incorporeal hereditament permits of its grant a separate interest in land is not altogether free from doubt. He notes, however, that in Alberta at least, the matter was put beyond doubt by the 1985 amendment to the Law of Property Act.

[Emphasis added.]

- [33] The judgments in *Skoretz and Northland Bank* were followed in *Canadian Crude Separators Inc. v. Mychaluk* (1997), 207 A.R. 81 (Q.B.), leave to appeal ref'd 1998 ABCA 62, where the central issue was dealt with by McBain J. as follows, at para. 31:

I am convinced that the *Northland* case is clear authority in Alberta for what it does say. It endorses Miller, J.'s, decision that "the general assignment of rents does not create an interest in lands and therefore a caveat cannot be filed to give notice of such assignment."

- [34] The manner in which assignments and reservations of rent have been addressed in Saskatchewan is helpfully reviewed in *Nicolson v. Trozzo*, 2014 SKQB 182. In that case, the applicants sought to discharge from title a registered life interest in rents payable pursuant to a surface lease. The rents had been granted by the beneficiaries of an estate to their mother, who had no other interest in the land. Schwann J. considered it to be settled law in Saskatchewan that, in some instances, a person's interest in compensation payable under a surface lease may constitute a registrable interest in land (citing: *Garland v. Jones*, [1993] 7 W.W.R. 102 (Sask. Q.B.); *Kerr v. PanCanadian Petroleum Ltd.*, 2004 SKQB 404 at para. 33; and *Swenson v. Swenson*, 2006 SKQB 438). He regarded the cited cases as authority for the proposition that a reservation of rents creates an interest in land.

- [35] He noted:

- [26] It is also clear that as a matter of law, and as noted in *Garland*, supra, rentals payable constitute incorporeal hereditaments which are considered to be rights in the land. (Victor Di Catri, *Registration of Title to Land*, looseleaf, vol. 2 (Toronto: Carswell, 1987) at p. 14-39).

- [36] On the other hand, Schwann J. cites and does not take issue with the Alberta decision in *Northland Bank*, to the effect that at common law an assignment of rents does not create an interest in land. He also cites *Swenson* for that proposition.
- [37] Justice Schwann correctly identifies the distinct manner in which reservations of rent had been treated in Saskatchewan. In *Garland* and in *Kerr*, the conveyances of the land in question expressly reserved rents to the vendors. In *Kerr*, the Court held:
- [33] [The] reservation of surface lease rentals to the lessor does create an interest in land. In *The Land Titles Act*, 2000, S.S. 2000, c. L-5.1, "interest" is defined as any right, interest or estate, whether legal or equitable, in, over or under land recognized at law that is less than title. In this jurisdiction, it is well settled that rent accruing due is an interest which can be protected by caveat. See *Garland v. Jones*, [1993] 7 W.W.R. 102; (1993), 111 Sask. R. 134 (Sask. Q.B.).

[Emphasis added.]

- [38] In *Swenson*, there was both a reservation of rents for life and an assignment. Addressing the assignment, and the effect of the recognition of assignments of rents in the *Land Titles Act*, 2000, Dawson J. held:
- [31] The question [the 1995 amendment] raises is whether, prior to April 1, 1995, an assignment of rents is an interest in land. I was unable to find any case law in Saskatchewan which has considered this section. The plaintiff referred the court to the Saskatchewan cases of *Garland v. Jones*, [1993] 7 W.W.R. 102 (Sask. Q.B.) and *Kerr v. PanCanadian Petroleum Ltd.*, 2004 SKQB 404; (2004), 253 Sask. R. 262 (Sask. Q.B.) both of which cases dealt with issues surrounding the reservation of surface lease rental payments.
- [33] Both of these cases, which dealt with the reservation of surface lease rental payments, held that the reservation of rents was an interest in land capable of being caveated.

[Emphasis added.]

- [39] After discussing *Skoretz*, *Northland Bank*, *Pegg*, *Webster v. Brown*, 2004 ABQB 321, and *Mychaluk*, Dawson J. held that the assignment of rents did not create any interest in land and ceased to have any effect upon the title after the conveyance.
- [40] The argument unsuccessfully advanced by the Bank of Montreal in *Dynex* was, as summarized by Major J. at para. 3, that "at common law an interest in land could not arise from an incorporeal hereditament and therefore the respondents' overriding royalties (which arose from a working interest, an incorporeal hereditament) did not rank higher in priority than the appellant's security interest". The interest there under consideration, an overriding royalty, was described by Major J. in the following terms, at para. 2:

Typically, the owner of minerals in situ will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is

a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 Alta. L. Rev. 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted.

[41] The party receiving the benefit of the royalty did not have any interest in reversion over the underlying lands. In this sense, the interest-holder described in *Dynex* is similar to the respondents, who receive the benefit of a bare assignment of rents.

[42] The Alberta Court of Appeal in *Dynex*, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.*) 1999 ABCA 363, summarized the bank's position as follows:

[59] When it comes to overriding royalties, the objection has been raised that there can be "no rent on a rent". As stated by R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 4th ed. (London: Stevens & Sons, 1975) at p. 794:

At common law a rentcharge could be charged only upon a corporeal hereditament. There could be no rentcharge charged upon another rentcharge or other incorporeal hereditament, since obviously there could then be no right of distress.

[60] This longstanding rule of real property law that rent cannot issue out of an incorporeal hereditament was observed by Laskin J., in *Saskatchewan Minerals v. Keyes*, supra at pp. 721-22:

At common law, whether a royalty could be classified as rent, and hence enjoy in its unaccrued state the character of an interest in land, depended on whether it issued out of a "corporeal" interest, as, for example, out of an estate in fee of minerals in place, or whether it was incident to a reversion upon a true lease which also gave a right to extract minerals. In the former case it would be in effect a rent-charge; in the latter, a rent service. Rent at common law could not issue out of an "incorporeal" interest, as for example, a profit à prendre in gross; and whatever it might be called, it would not be an interest in land.

[Emphasis added.]

[43] The Supreme Court of Canada dismissed the bank's argument, holding that an interest in land might be created by a contract that did not give the rights-holder any interest in the reversion. Referring to the dissenting judgment of Laskin J. (as he then was) in *Saskatchewan Minerals v. Keyes* (1971), [1972] S.C.R. 703, Major J. noted:

11 Laskin J. referred to *Berkheiser* [*Berkheiser v. Berkheiser and Glaister*, [1957] S.C.R. 387], where Rand J. held that a royalty was analogous to rent. While that case involved a lessor's royalty, Laskin J. found that although theoretically the holder of a lessor's royalty holds an interest in reversion, whereas the holder of an overriding royalty does not, since in essence the two interests are identical, there should be no distinction between the two royalty interests in their treatment as interests in land. The effect of Laskin J.'s reasons was to render inapplicable, at

least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests.

[Emphasis added.]

[44] After reviewing the numerous cases in which courts had held that royalty interests were not interests in lands, Major J. held:

14 Although each of these cases held that the royalty therein is not an interest in land, they do not support the proposition that a royalty cannot be an interest in land. In each case the court found that the language used by the parties in creating the interest did not evidence the intention to create an interest in land.

15 That royalties can be interests in land finds support in W. H. Ellis's "Property Status of Royalties in Canadian Oil and Gas Law" (1984), 22 Alta. L. Rev. 1, at p. 10:

Royalties, as used in the oil and gas industry, make sense only if they are property interests in unproduced minerals. Owners of mineral rights should be able to create them as such if they make clear their intent to do so.

16 In Oil & Gas Agreements Update (1989), J. F. Newman in his article "Can a Gross Overriding Royalty Be an Interest in Land?" concludes that most parties to an overriding royalty interest intend for such interest to be an interest in land. Evidence of this is the common practice of registering caveats in the Land Titles Office of Alberta seeking to protect that interest.

[45] Three principles emerge from these passages: first, that an interest in land may be created from an incorporeal hereditament without a reversionary interest or a right of distress; second, whether an interest in land is created hinges in part upon the intention of the parties; and third, registration of the interest is evidence of the parties' intention that the interest should run with the land.

[46] The appellants say the ratio of Dynex is that an interest in land may be created by a party with contractual right to payment for the extraction of something tangible from the land. They say the question whether overriding royalties are interests in land is answered by considering whether the holder of the overriding royalty can be said to have obtained a property interest in unproduced minerals.

[47] In my view, Dynex undermines the fundamental proposition relied on by Miller J. in Skoretz which was adopted by the Alberta Court of Appeal in Northland Bank - that an interest in land cannot be created by an agreement that does not give the rights-holder a remedy to recover the real property upon default.

- [48] The rule propounded in the Alberta cases is, thus, an insufficient answer to the question posed by Di Castri: whether an assignment, as distinct from a reservation of rents by a lessor is capable of constituting an interest in land. The two Saskatchewan cases that post-date Dynex and state that an assignment of rents does not create an interest in land - Swenson and Nicolson - merely cite or follow the Alberta line of cases. As a result, their utility in answering the question before us is similarly limited.
- [49] In my view here, as in Dynex, the question is whether there is a good reason in principle to distinguish between reservations of rents and assignments (particularly assignments entered into as a condition of sale and registered against title). In my opinion, just as the overriding royalties considered in Saskatchewan Minerals and Dynex were essentially identical to lessor's royalties, so, the assignment of rents utilized by the parties in this case was essentially identical to a reservation of rents. There is no reason in principle why they should not receive the same treatment in law, provided the parties intend the assignment to be an interest in land.
- [50] The trial judge, for that reason, did not err in concluding that the question before him hinged upon whether it could be said that the parties intended the covenant to run with the land.

Does the Assignment create a negative covenant?

- [51] The appellant's first objection to the running of the assignment with title to the land is their submission that the assignment of rents cannot do so because it imposes positive obligations upon them. Relying upon *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2017 BCSC 71, notice of appeal filed (February 15, 2017) at paras. 44-45; *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268 at para. 16; and *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19 at para. 25, they argue that while the courts will enforce a negative covenant against land, they will not enforce a positive covenant against a successor in title.
- [52] I agree with the respondents' characterization of the Assignment of Rents in this case. It does not impose a positive obligation on the original owners of the land or their successors. The respondents helpfully draw our attention to the decision in *Rhone v. Stephens*, [1994] 2 A.C. 310 (H.L.), where the Court states at 318:

[A] positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property.

- [53] The Assignment of Rents in this case deprives the owners, the appellants, of a right over property, the right to receive the surface rents; it does not compel them to exercise a right or positive obligation.

The effect of registration

- [54] The appellants say the trial judge wrongly emphasized the registration of the Assignment. The fact the Land Title Office accepts assignments of rents for registration, using "Form C", pursuant to s. 5A.17(1)(a) of the Land Title Electronic Forms Guidebook, they say, is of little consequence because there is no express statutory authority for the recognition of assignments of rents as valid charges capable of running with title in British Columbia.
- [55] Our Land Title Act, R.S.B.C. 1996, c. 250, defines a "charge" as "an estate or interest in land less than the fee simple", including encumbrances. The Act does not define "an estate or interest in land". An "encumbrance" is defined broadly to include "a judgment, mortgage, lien, Crown debt or other claim to or on land created or given for any purpose, whether by the act of the parties or any Act or law, and whether voluntary or involuntary" (emphasis added).
- [56] It should be borne in mind that s. 26 provides:
- (1) A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register;
 - (2) Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

[Emphasis added.]

- [57] Section 26(2) is, in my view, dispositive of the argument that the adoption of the Form "C" registration process by the Registrar or the registration of the Assignment of Rents in this case constituted a determination by the Registrar that this, or any such assignment could create an interest in land.
- [58] While I share the view expressed in the Alberta cases that registration of a charge is not evidence of its validity, registration may, nevertheless, be cogent evidence of the parties' intentions. As the judgment in *Dynex* makes clear, some weight can be placed upon the parties' registration of the Assignment as evidence of their intentions. It was for that purpose registration was considered by the trial judge.

The intentions of the parties to the Assignment

- [59] The critical question is whether the parties to the Assignment intended to create an interest in the land. That question should be answered by looking at the objective evidence of their intentions as embodied in the agreement. It is a question of mixed fact and law, calling for the deference described in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

- [60] The appellants refer us to *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746, where the issue was whether a party to a royalty agreement relating to coal licenses obtained an interest in land or simply a contractual right to the royalties. The Court there had the benefit of the judgment in *Dynex* and, as a result, sought explicit references to an intention to create an interest in land in the contract. Fitzpatrick J. reviewed the royalty cases comprehensively, paying particular attention to the wording used by the contracting parties in those cases. That useful summary, in abridged form, follows:
- [54] [In] *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd. and H.W. Bass & Sons, Inc.*, [1963] S.C.R. 482 a participation agreement provided, in clause 10b, that the participant would be paid a "percentage of net proceeds of production".
- [55] The Court found at p. 488, that these rights were rights to receive money as a matter of contract, and not an interest in land .
- [56] [In] *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703 a royalty agreement provided for a royalty per ton on all anhydrous salt "produced and sold from the said leasehold property". At 709, Martland J., for the majority, doubted that the use of the word "royalty" implied any intention to create an interest in land. While not deciding the point, the majority thought the relevant provision was similar to what had been considered in *St. Lawrence* such that only a contractual right, and not an interest in the land, arose.
- [57] [In] *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (Alta. S.C.), the Court found that the language used - payment of a royalty based on production - was an obligation to pay money rather than an interest in the land. In this case, and others that followed *Vanguard*, an important factor was that the royalty was to be paid only once the substances had been removed from the lands.
- [59] This same reasoning was followed in *Vandergrift*, where the royalty was to be paid on petroleum substances "recovered" from the land. Again, the Court, at p. 28, found that the language used evidenced that the parties intended only a contractual right to the payment of the royalty, rather than a conveyance of, or reservation of, an interest in land .
- [60] This type of language is to be distinguished from that discussed in *Bensette and Campbell v. Reece*, [1973] 2 W.W.R. 497 (Sask. C.A) . In that case, at p. 500, the words "royalty in all the minerals which may be found in, under or upon the lands" were found to be sufficient to support the conclusion that there was a conveyance of an interest in the minerals themselves in situ and, therefore, an interest in the land.
- [62] In *Canco Oil & Gas Ltd. v. Saskatchewan*, [1991] 4 W.W.R. 316 (Sask. Q.B.), the Court found that the royalty was an interest in the land. That determination, however, was based on the use of the words "grant, assign, transfer and convey", and also the clear statement in the agreement that the interest conveyed was an interest in land and was to run with the land.

[63] Similar formal words of conveyance are found in *Blue Note Mining Inc. v. Merlin Group Securities Ltd.*, 2008 NBQB 310. There, the agreement provided:

[7] ... East West Caribou Mining Limited hereby grants to East West Minerals N.L. a freely assignable 10% net profits interest in the mine .

[Emphasis added by Fitzpatrick J.]

The highlighted portions of the above agreement were found to evidence an intention to establish an interest in the land.

[64] [In] *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, [1993] 4 W.W.R. 454 (ABQB); aff'd [1995] 1 W.W.R. 316 (Alta. C.A.) [the] court referred to such formal language as establishing an interest in land:

[102] In my opinion O'Leary J. did not give sufficient weight to some of the other words used in cl. 2. I refer in particular to the verbs "grant, bargain, sell, assign, transfer and set over"; to the descriptors "all the estate, right, title, interest, claim and demand whatsoever, both at law and equity"; the words "to have and to hold"; and the words "unto the Trustee, its successors and assigns forever". Taken together, these words seem to me more like words describing in perpetuity property rights than they do words describing a relatively temporary arrangement (such as a contractual right) which would be unenforceable against the Owner once he sold the property.

[65] [In] *St. Andrew Goldfields Ltd. v. Newmont Canada Ltd.*, [2009] O.J. No. 3266; aff'd 2011 ONCA 377, where much of the above reasoning in the authorities was discussed and applied:

[101] The use of the words "covenants and agrees to pay" and "produced" in the description of the Barrick royalty is the first indication that the parties intended to create only contractual rights to the payment of a royalty and not an interest in land.

[103] Other relevant factors to determine the parties' intention to create contractual rights or an interest in land are: whether the royalty holder retains a right to enter upon the lands to explore for and extract the minerals: *Vandergrift v. Coseka Resources Limited*, supra, at pp. 28 to 29; and whether the owner of the lands is in complete control of its interest in the lands acquired with the only right in the royalty holder being to share in the revenues produced from the minerals extracted from the lands: *St. Lawrence Petroleum Limited v. Bailey Selburn Oil & Gas Ltd.* (No. 2), supra, at pp. 32 to 33.

[61] The review of the wording and context in the cases summarized by Fitzpatrick J. illustrates the extent to which, in the words of Sattva at para. 50, this is an exercise in applying the principles of contractual interpretation to the words of the written contract, considered in light of the factual matrix.

- [62] The appellants say the trial judge erred in finding the Assignment created an interest in land when here, as in *Mychaluk and Nicolson*, the subject matter of the contract was expressly described in the recitals as "compensation". In my view, that could only be considered an error in law if an agreement to pay compensation could never convey an interest in land. That is not so.
- [63] The appellants say that in the case at bar, there is no provision, such as in *Canco*, that the Assignment relates to and constitutes an interest in the land. Again, in my view, the absence of such a provision is not determinative and the trial judge cannot be said to have erred in law by failing to consider that to be so.
- [64] The Assignment, in clause 7, is expressly said to "enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns." It does not specifically refer to successors in title. In that regard, it is ambiguous. Having described the assignee as the registered owner, the reference to the assignee's "successors" may be a reference to successors in title to the property, but it may equally refer to his successors as a contracting party. While the Assignment was open to interpretation, particularly in light of the reference in the recitals to a "successor in title" when referring to the lessee, I would not describe the failure to attribute weight to the ambiguity to be an error in law.
- [65] The Assignment was entered into at the time of the conveyance of the property by the Bodes. Uncertainty with respect to their intentions might have been avoided by reserving rents from the conveyance. Further, the Assignment of Rents might have been expressly referred to in the conveyance.
- [66] On the other hand, the trial judge expressly found that the Bodes' and Foothills' intention to create a registrable interest that ran with the land was "manifest from the wording of the Assignment of Rents itself and their conduct". Specifically, he considered that:
- a) the Assignment was given from the purchaser of real property to the vendor and the document itself describes the Assignment as a term of the transfer, to be registered concurrent with the registration of the transfer;
 - b) the compensation under the agreement is defined as rent paid pursuant to a lease for continuing use of the land;
 - c) the Assignment contemplated that the parties to the lease might change, or that the lease would be "replaced", while the Assignment of Rents continued to remain in force;
 - d) the party paying the rent is defined in respect of their status as occupier of the land;
 - e) the rights-holder under the Assignment was granted full authority to deal with any subsequent occupant of the land;
 - f) the title-holder agreed not to terminate or otherwise deal with the lease for use of their land without the consent of the rights-holder of the Assignment.

- [67] Further, as I have mentioned, the trial judge appropriately placed some weight upon the fact that the Bodes attended to the completion of a Land Title Office Form "C" - General Instrument and registered the Assignment.
- [68] In my view, it cannot be said that the trial judge erred in law in taking these factors into account. It is not open to us to re-interpret the contract in the absence of an error in relation to an extricable question of law, or a palpable and overriding error. I would not accede to the argument that the trial judge erred in finding the parties to the Assignment intended to create a registrable interest in land.

Conclusion

- [69] In my opinion, the appellants have not identified the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor in the analysis. Nor have the appellants established a palpable and overriding error in the trial judge's interpretation of the contract. As such, appellate intervention is not justified.
- [70] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Hunter"

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