

**June 6, 2019**

**SURFACE RIGHTS BOARD**

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT  
R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

THE SOUTH EAST  $\frac{1}{4}$  OF SECTION 7 TOWNSHIP 85 RANGE 13  
WEST OF THE 6<sup>TH</sup> MERIDIAN PEACE RIVER DISTRICT  
(The "Lands")

BETWEEN:

James Michael Furze and  
Theresa Michelle Furze

(APPLICANTS)

AND:

Whitecap Resources Inc. and  
Perry Piper

(RESPONDENTS)

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**BOARD ORDER**

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Heard by written submissions

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## **INTRODUCTION AND ISSUE**

[1] James and Theresa Furze purchased the Lands legally known and described as: The South East ¼ of Section 7 Township 85 Range 13 West of the 6<sup>th</sup> Meridian Peace River District, in May 2018. In August 2018, Mr. and Mrs. Furze applied to the Board seeking payment of rent payable under a Surface Lease registered on the Title to the Lands entered in August 4, 1961 between Florence E. Musyowski, the then owner of the Lands, and Imperial Oil Limited for a wellsite and access road (the Surface Lease). Whitecap Resources Inc. (Whitecap) is now the operator of the well and access road on the Lands and the holder of the surface rights granted by the Surface Lease.

[2] In 1978, the then owners of the Lands, Clinton, Bruce and Perry Piper sold the Lands to Stuart and Denise Greer. The Greers and Pipers entered an Agreement dated November 23, 1978 whereby the Greers agreed that rent payable under the Surface Lease would continue to be paid to the Pipers (the Agreement). The Agreement is not registered against the Title to the Lands.

[3] Title to the Lands has changed at least twice between the Greers' purchase and the Furzes' purchase in 2018. Throughout this time, rent payable under the Lease has been paid to the Pipers, including the rent payable as of August 4, 2018, made prior to the Furzes' application to the Board.

[4] The Furzes' submit the rent owing under the Surface Lease should be paid to them, and seek an Order that all rent payable since May 2018 be paid to them. Their application raises a threshold question: are Mr. and Mrs. Furze the persons entitled to receive rent or compensation owing under the Surface Lease within the meaning of section 176 of the *Petroleum and Natural Gas Act*? That

question, in turn, involves determining whether the Agreement creates an interest in the Lands that effectively runs with the Lands. In a decision rendered March 21, 2019, the Board determined it has jurisdiction to determine this threshold issue, and by letter dated March 27, 2019 invited submissions on this issue.

[5] The Furzes submit the Agreement does not create an interest in land and does not run with the Lands. They submit they are the persons entitled to payment of rent under the Surface Lease.

[6] Whitecap takes no position on this issue and offers to make the August 2019 payment into trust pending resolution of who is entitled to receive the rent. Whitecap reserves the right to make submissions on the ultimate issue of whether an order under section 176 of the *Petroleum and Natural Gas Act* should be made following the Board's decision on the threshold issue.

[7] The Pipers, although given the opportunity to provide submissions on the threshold issue, have not done so. The Pipers did provide submissions on the earlier question of the Board's jurisdiction to determine the threshold issue, taking the position the Board did not have jurisdiction.

### **THE AGREEMENT**

[8] The Agreement identifies the Pipers as the "Vendors" and the Greers as the "Purchasers". It identifies the Lands as the "Premises" and the Surface Lease as the "Lease". The Agreement is substantially reproduced below:

WHEREAS in consideration of the Vendor conveying to the Purchaser the lands known and described as:

...the Premises

the Purchaser agreed inter alia to enter into any agreement or agreements necessary to reserve unto the Vendor all rents, profits and other income

and compensation whatsoever payable to the Lessor or owner of the Premises under and by virtue of the ... Lease ....

NOW THEREFORE this Indenture witnesseth the parties hereto agree as follows;

- 1) The Purchaser shall observe all obligations and covenants of the Lessor contained in the said Lease, renewals or modifications thereof, or implied by law, including without limiting the generality hereof, any obligations imposed on the Purchaser as Lessor or as owner of the Premises pursuant to the Petroleum and Natural Gas Act R.S.B.C. 1965 C. 33, replacements amendments and regulations thereto.
- 2) All rents profits or other income or compensation whatsoever payable to the Lessor or to an owner or the owner of the premises as a result of the said Lease, renewals, or modifications thereof, and any applicable legislation, shall remain the property of and be paid to the Vendor.
- 3) The Purchaser shall immediately notify the Vendor of any notice or information given to the Purchaser under the terms of the said Lease or under the provisions of the Petroleum and Natural Gas Act R.S.B.C. 1965 C. 33, replacements, amendments and regulations thereto. The Vendor shall be entitled in the place and stead of the Purchaser, to give any notice, make application, renegotiate, or take nay other action whatsoever that might be taken by the Lessor [indecipherable] to obtain increase or continue the rents, profits, income and compensation referred to in paragraph 2 hereof. The Purchaser shall, if requested by the Vendor, execute such further documents, furnish such evidence and do such other acts and things as may be necessary to give full effect to this paragraph.
- 4) Nothing in this agreement contained shall be construed so as to give to the Purchaser any right, title or interest in the said Lease, any renewals or modifications thereof.
- 5) The Purchaser shall notify the Vendor or [sic] any intended transfer, encumbrance, or conveyance by the Purchaser of the premises or any interest therein, prior to such transfer, encumbrance or conveyance taking place, and shall by written notice bring this agreement to the attention of any prospective purchaser, encumbrancer or transferee of the premises or any interest therein. The Purchaser shall cause a prespective [sic] purchaser or transferee of the Premises to enter into an agreement with the Vendor containing the same terms and conditions as set out in paragraph 1 to 8 [sic] hereof.

- 6) Any notice required or permitted to be given under the terms of this Agreement shall be properly given if mailed, postage prepaid and registered, or delivered to the Purchaser at:  
GENERAL DELIVERY  
GOODLOW, BRITISH COLUMBIA

## **ANALYSIS**

### **Does the Agreement create an interest in land that runs with the Land?**

[9] As determined by the BC Court of Appeal in *McDonald v. Bode Estate* 2018 BCCA 140 (*McDonald CA*), an assignment or reservation of rents payable under a surface lease may create an interest in land in British Columbia if that is the intent of the parties discernable from the objective evidence of their intentions as embodied in their agreement. The exercise of discerning intent is one of applying the principles of contractual interpretation.

[10] In *McDonald CA*, the Court upheld the trial judge's finding (*McDonald v. Bode Estate* 2017 BCSC 515 (*McDonald SC*)) that the parties' "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'". Both Courts' decisions include comprehensive reviews of the case law on the issue of whether agreements for the reservation or assignment of rents or royalties create an interest in the land or simply a contractual right to the rent or royalty. While not discussed in detail in these reasons, I have found their analyses and review of the case law instructive.

[11] The outcome of this dispute over entitlement to rent payable under the Surface Lease is dependent on whether the parties to the Agreement intended the Agreement to create an interest in the Land. I find the language of the Agreement does not demonstrate that intent.

[12] I find evidence of the parties' intent in part from the language that is missing from the Agreement. In particular, there is no language of a "grant", "conveyance" or "transfer" of any "right, title or interest" similar to language in other agreements creating an interest in land. The Agreement expresses that "the parties hereto agree as follows" and thereafter sets out the various matters to which they agree.

[13] At Clause 1, the parties agree that the Purchaser shall observe all of the obligations and covenants of the Vendor. Then at Clause 2, the parties agree that "[a]ll rents, profits or other income or compensation whatsoever payable to the Lessor or to an owner or the owner of the premises as a result of the said Lease...shall remain the property of and shall be paid to the Vendor." The language does not create an assignment of the Lessor's rights to receive rents or compensation under the lease, it simply expresses that the parties agree the rents or compensation payable remains the property of the Vendor. Although it says that rents and compensation payable "to an owner or the owner of the premises", potentially implying an intent that subsequent owners are to be bound by this agreement, later language in the Agreement, in particular that at Clause 5, negates that intent.

[14] Clause 5 provides that the Purchaser shall notify the Vendor of any intended transfer, encumbrance or conveyance by the Purchase of the Lands, shall bring the Agreement to the attention of a prospective purchaser, and shall cause a prospective purchaser to enter into an agreement with the Vendor on the same terms (emphasis added). The language of Clause 5 demonstrates a clear intent that the parties' agreement that the rent would continue to be the property of the Pipers was simply a contractual arrangement between the Pipers and the Greers, and contemplates that another agreement between the Pipers and any subsequent purchaser of the lands would be entered on the same terms. If the

parties' intention was to convey an interest in land that ran with the land, it would not be necessary to cause a prospective purchaser to enter a new agreement.

[15] There is no language in the Agreement with respect to the terms being binding on heirs, successors and assigns, or purporting to bind subsequent owners of the Lands to the same terms in the absence of entering an agreement to that effect. The Pipers cannot assert that the rent or compensation payable under the Surface Lease remains their property, as agreed in Clause 2 of the Agreement, against an owner of the Lands subsequent to the Greers in the absence of that owner entering an agreement with them in the same terms, as agreed at Clause 5 of the Agreement.

[16] The fact that the parties did not take steps to register the Agreement in the Land Title Office, while not determinative, is also evidence that they did not intend the Agreement to create an interest in the Lands.

**Are Mr. and Mrs. Furze the persons entitled to receive rent or compensation owing under the Surface Lease?**

[17] The manifest intent of the Agreement is that it was a contractual arrangement between the Pipers and the Greers that the Pipers would continue to receive the rents payable under the Surface Lease so long as the Greer's owned the Lands, and that a subsequent purchaser was expected to enter a similar contractual agreement with the Pipers if the rents were to continue to remain the property of the Pipers. There is no evidence that subsequent purchasers entered similar agreements and the Furzes have not entered a similar agreement.

[18] I find that the Agreement does not create an interest in land and does not run with the Lands. As the Agreement does not create an interest in land running with the Lands and binding subsequent purchasers beyond the Greers, I find that

the Furzes as the current owners of the Lands step into the shoes of the Lessor under the Surface Lease and are the persons entitled to receive the rent or compensation payable under the Surface Lease capable of bringing an application under section 176 of the *Petroleum and Natural Gas Act*.

**ORDER**

[19] The Board will seek written submissions from the parties as to whether the Board should make an Order under section 176 of the *Petroleum and Natural Gas Act* as sought by the Furzes.

DATED: June 6, 2019

FOR THE BOARD



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Cheryl Vickers, Chair