In the Court of Appeal of Alberta

Citation: ConocoPhillips Canada Resources Corp v Shell Canada Limited, 2024 ABCA 307

Date: 20240925
Docket: 2201-0280AC
Registry: Calgary

Between:

ConocoPhillips Canada Resources Corp.

Respondent
(Plaintiff)

- and -

Shell Canada Limited

Appellant
(Defendant)

The Court:

The Honourable Chief Justice Ritu Khullar
The Honourable Justice Anne Kirker
The Honourable Justice April Grosse

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice J.C. Price
Dated the 1st day of November, 2022
Filed on the 16th day of November, 2022
(Docket: 1401-08603)

Memorandum of Judgment

The Court:

INTRODUCTION

[1] This appeal relates to the ownership of seven wells and related assets in the Northwest Territories. The respondent alleges it sold the wells to the appellant in 1991; the appellant denies that the wells were part of the deal. The dispute arises in the context of reports showing environmental contamination at one of the wells. An applications judge granted partial summary judgment to the respondent in the form of a declaration that the appellant acquired the respondent's interest in the wells pursuant to the 1991 sale agreement: *ConocoPhillips Canada Resources Corp v Shell Canada Limited*, 2019 ABQB 727 (the AJ Reasons). The applications judge concurrently dismissed the appellant's application to extend the time to file and serve a counterclaim. After an unsuccessful appeal to a justice of the Court of King's Bench, the appellant appeals to this Court.

FACTS

[2] The following is a synopsis of the facts. Further detail is found in the AJ Reasons and in the analysis of the grounds of appeal below.

[3] In the 1970s and 1980s, Gulf Canada Resources Ltd. (Gulf) and Shell Canada Limited (Shell) were, along with other companies, engaged in energy exploration in the McKenzie Delta region. Gulf was a participant in two joint ventures through which it held an interest in a number of Significant Discovery Areas (SDAs). Shell was a party to one of these joint ventures.

[4] Under the regulatory regime in place at the time, a Declaration of a Significant Discovery for a Significant Discovery Area and a Significant Discovery Licence (SDL) issued on application of a party who already held an exploration licence and had drilled a well in the area that met certain criteria for demonstrating the existence of hydrocarbons and the potential for sustained production. The SDL gave the holder certain exploration and development rights on the SDA lands and the exclusive right to obtain a production licence if the SDA demonstrated the requisite petroleum reserves. All of the foregoing is taken from the AJ Reasons at paras 10-14 and is undisputed by the parties.

[5] The wells at issue in this appeal were exploratory wells relied upon to obtain SDA Declarations and SDLs. With one exception, on which nothing turns, the wells were physically abandoned prior to the issuance of the respective SDA Declarations and SDLs, and Gulf was the designated operator pursuant to the governing joint venture agreements.

[6] By 1991, Gulf had decided to exit the region and wanted to sell its interest in the SDAs. Shell and Gulf entered an asset purchase and sale agreement (PSA) effective December 1, 1991.

On January 29, 1992, the Department of Indian and Northern Affairs acknowledged the transfer of the SDAs and associated SDLs to Shell.

[7] Whether the abandoned wells in the SDAs were included in the assets Gulf sold to Shell is the dispute that gives rise to this litigation. However, the issue did not become apparent for almost two decades. Between 1992 and 2011, none of the SDAs went into production. Shell sold a well and associated SDL in one of the SDAs in or about 1996. ConocoPhillips Canada Resources Corp. or a related entity (Conoco) acquired Gulf. By 2004, a team of Conoco personnel were participating in a broader industry project to assess and monitor old wells in the Inuvialuit Settlement Region. This team was seemingly unaware of the 1991 PSA. Between 2004 and 2011, they proceeded as though what is known as the I-37 well was owned by Conoco, even though the I-37 well was in one of the SDAs included in the PSA.

[8] The I-37 well is significant in these proceedings because since at least 2004, there has been evidence of hydrocarbon contamination at the I-37 well site and sump. The sump is a hole dug down to the permafrost at the time the well was drilled where drilling mud was deposited. The sump was then capped. The expectation at the time was that the drilling mud would be contained indefinitely in the frozen permafrost, precluding migration to the surrounding environment. This strategy did not work as planned.

[9] In or about late June of 2011, before undertaking some assessment work at I-37, Conoco decided to ascertain ownership. Employees located seven boxes of records offsite and discovered the PSA. Conoco wrote to the Inuvialuit Land Administration in July 2011, advising that I-37 had been sold in 1991. Conoco re-allocated funds that had been earmarked for I-37 to another well site that it was confident it owned.

[10] Conoco communicated with someone at Shell in 2011, who denied that Shell had acquired I-37. In 2014, Conoco formally advised Shell that it considered Shell responsible for I-37 and on August 6, 2014, Conoco filed the statement of claim in this action. Conoco continued to engage in some monitoring and assessment work at the I-37 well site in the years following the filing of the claim.

[11] Conoco's claim was framed in contract and sought several declarations relating to Shell's ownership and responsibilities with respect to the wells in issue, specific performance of the PSA, and damages for costs Conoco incurred or may incur in the future with respect to environmental liabilities related to the assets. Shell filed its statement of defence in December 2014, denying that it acquired any abandoned wells under the PSA, and pleading that Conoco had acknowledged ownership of the I-37 well and the request for declaratory relief was an attempt to circumvent the *Limitations Act*, RSA 2000, c L-12. In the course of record production and questioning, Shell came to understand that Conoco had been aware of contamination concerns at I-37 since at least 2004.

[12] In February 2018, Shell filed an application to extend time for the filing and service of a counterclaim in the action. In May 2018, Conoco filed an application for summary judgment.

[13] The applications were heard by an applications judge in March 2019, who granted Conoco's application in part and dismissed Shell's application. The resulting formal order includes the following declaration:

> It is hereby declared that pursuant to the terms of the Agreement of Purchase and Sale made effective as of December 1, 1991 ... Shell acquired Gulf's interest in seven wells ... and corresponding well sites and drill sumps falling within the boundaries of the Significant Discovery Area Lands described in Schedule "A" to the PSA...

[14] Shell appealed the decision to a justice of the Court of King's Bench, who dismissed the appeal in an unpublished written endorsement.

GROUNDS OF APPEAL

[15] Shell raises the following grounds of appeal:

(a) The chambers justice did not provide sufficient reasons for dismissing the appeal.

(b) The chambers justice erred in granting summary judgment and in particular erred in: ignoring the factual matrix in interpreting the contract; granting summary judgment in the face of major contradictions in the evidence; failing to recognize Shell's laches defence as raising a genuine issue for trial; and granting summary judgment when it was not a just and fair result.

(c) The chambers justice erred in refusing Shell's application to file a counterclaim.

(d) The chambers justice erred in upholding the costs decision of the applications judge.

ANALYSIS

Sufficiency of Reasons

[16] On Shell's appeal of the decision of the applications judge to the chambers justice, the chambers justice stated that the appeal was *de novo* and the standard of review was correctness, and then disposed of the appeal on the merits in two paragraphs:

> [6] The entirety of the record of proceedings before the Application Judge and the referenced additional evidence has been reviewed by me. I do not find that the

> additional evidence aids Shell in demonstrating to the Court that there is a genuine issue requiring a trial.
>
> [7] I have reviewed the comprehensive and well reasoned reported decision of Judge Hanebury (*ABQB 727).* I find that Judge Hanebury did not err in granting partial summary judgment to [Conoco], nor did she err in dismissing Shell's application to file a counterclaim. I adopt the entirety of Judge Hanebury's written reasons as my own and I dismiss Shell's appeal.

[17] Shell argues that these reasons are insufficient in light of the complexity of the case, the extensive factual record and submissions, and in particular, the expert evidence that the appellant tendered before the chambers justice to try to address an evidentiary gap identified by the applications judge.

[18] Whether reasons are sufficient is a question of law, reviewable for correctness: *Custom Metal Installations Ltd v Winspia Windows (Canada) Inc*, 2020 ABCA 333 at para 32.

[19] Reasons need not address every piece of evidence and every argument, and parties are not entitled to a decision of a certain length simply because they put voluminous materials before the court. Assessing sufficiency of reasons is contextual:

> Assessing adequacy of reasons is a contextual inquiry having regard to the particular circumstances of the case: whether the basis of the trial judge's conclusions is apparent from the balance of the record even without articulation, whether the trial judge was called on to address troublesome principles of law, unsettled, confused or contradictory evidence on a key issue, and the time constraints and general press of business in the courts.
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> *Custom Metal* at para 32; see also *Western Energy Services Corp v Savanna Energy Services Corp*, 2023 ABCA 125 at para 68; *R v Sheppard*, 2002 SCC 26 at paras 28-29, 50, 55.

[20] In the specific context of appeals from decisions of an applications judge, it is not an error for a chambers justice to summarily describe their analysis and conclusions with reference to the decision of the applications judge where the same record and same submissions are involved: *HOOPP Realty Inc v Emery Jamieson LLP*, 2020 ABCA 159 at para 41. This contributes to an efficient use of resources and facilitates timely decisions.

[21] However, the tool of disposing of an appeal by reference to the reasons of an applications judge must not be used to the extent that the parties, or this Court on further appeal, are unable to discern why grounds of appeal that challenge the correctness of the decision of the applications judge were rejected. Similarly, if new evidence is adduced before the chambers justice that is

argued to materially affect the result, then the reasons should allow the reader to understand why the chambers justice concluded that the evidence does or does not affect the result. As this Court stated in *University of Alberta v Chang*, 2012 ABCA 324 at para 20:

> The repute of the administration of justice depends in the end on litigants having confidence in and respect for the decisions that affect their rights, whether they won or lost. It is imperative that the litigants feel that they were fairly dealt with, that their arguments and evidence were considered, and that a principled, balanced, transparent, independent and impartial analytical process has been applied in reaching the final decision. To a great extent, whether these objectives are achieved depends on the reasons that are given in support of any particular result.

Because the analysis is contextual, what suffices in one case may not suffice in another.

[22] In this case, the reasons of the chambers justice did not fully address expert evidence presented by Shell that had not been before the applications judge.

[23] One of Shell's arguments before the applications judge was that even if the PSA were interpreted in Conoco's favour, Conoco could not be successful on summary judgment because there was a triable issue on Shell's laches defence. In particular, Shell's position was that during the period in which Conoco acted as owner of I-37 and did not advance any claim against Shell, the contamination at I-37 got worse, rendering remediation more difficult and expensive. Moreover, Conoco knew that this was happening and did not act.

[24] In weighing the equities on laches, the applications judge noted that the only evidence of prejudice due to the passage of time was what she described as an "off-the-cuff statement by an employee" of Conoco that the I-37 contamination was not going to get better and would only get worse: AJ Reasons at paras 228, 232. She referenced the lack of expert evidence "discussing if and how the passage of time would have affected the difficulty and expense of remediation": AJ Reasons at para 232. She concluded that there was insufficient evidence to establish prejudice and that ultimately, in light of the behaviour of both parties and the lack of evidence as to prejudice, laches should not apply: AJ Reasons at para 233.

[25] On appeal to the chambers justice, Shell argued that in all the circumstances known to Conoco and established by the record, including the employee's statement[1], the applications judge erred in refusing to find or infer prejudice and at the very least, in ruling it out. However, to take away any doubt, Shell tendered an expert opinion that the extent and concentration of contamination at the I-37 site likely increased between 1991 and 2016. Shell argued that this new

[1] The materials before this Court suggest that the person who made the statement was a consultant to Conoco, not an employee, but nothing before us turns on that distinction.

evidence addressed the specific gap identified by the applications judge and must lead to a different analysis and conclusion on prejudice and laches.

[26] On their face, the reasons of the chambers justice articulate her conclusion that the additional evidence did not assist Shell in resisting summary judgment, but they give no indication of the basis for that conclusion. The reasons do not explain why the expert evidence did not have the effect that Shell said it should have or how the chambers justice arrived at the same conclusion as the applications judge. The explanation for a conclusion does not have to be long, but it should explain how the conclusion was reached.

[27] More generally, the chambers justice wholly adopted the reasons of the applications judge without reference to any specific grounds of appeal or whether the arguments on appeal were essentially the same as they had been before the applications judge.

[28] Shell's concerns about the sufficiency of the reasons are fair in the circumstances. However, as explained below, we are able to discern from the transcript of oral argument and the totality of the record the basis on which the chambers justice made her decision, including with respect to the new expert evidence, in a manner that permits appellate review. We therefore turn to Shell's other grounds of appeal. Because of the approach of the chambers justice, we will refer more to the applications judge and the AJ Reasons than might otherwise be the case.

Summary Judgment

Laches

[29] Shell's primary argument on the merits of summary judgment is that the chambers justice erred in granting summary judgment because Shell has a viable laches defence.

[30] There is a threshold dispute between the parties as to whether a laches defence is even available, given that Conoco's claim is based in contract. Shell relies on the declaratory nature of the relief sought. The applications judge and the chambers justice assumed, without deciding, that laches could apply but concluded that there was no genuine laches issue for trial on the facts: AJ Reasons at paras 225-234. We are able to dispose of this appeal on the same basis and accordingly, we make no comment on the categorization of the claim.

[31] The parties agree that in order to make out a laches defence, a defendant must establish not only delay but also "acquiescence to the point of waiver, or prejudice or other potential injustice caused by the delay in prosecuting the lawsuit": *681210 Alberta Ltd v Hunter*, 2012 ABCA 83 at paras 31-33. The determination of whether laches applies in a given case is contextual and fact-specific. In the context of Conoco's application for summary dismissal, Conoco bore the burden of establishing the facts necessary to defeat Shell's laches defence on a balance of probabilities

and to otherwise satisfy the court that there was no genuine laches issue for trial: *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at paras 33, 35.

[32] There is no suggestion that the applications judge and the chambers justice applied the wrong test for laches. Rather, Shell argues that they erred in finding that the evidence established there was no genuine issue for trial on laches. The chambers justice's assessment of the evidence and application of the laches test to the evidence is entitled to deference absent a palpable and overriding error. The appellant has not identified any such error.

[33] There is no question that there was significant delay on Conoco's part in bringing its claim. There are also facts and equities favourable to Shell in the laches analysis, including, among others, Conoco continuing to act as though it was responsible for the I-37 well and, even after finding the PSA in 2011, failing to advise Shell of concerns about contamination at I-37.

[34] However, the applications judge and the chambers justice were alive to these points and they determined that the delay did not prejudice Shell or give rise to any other injustice so as to engage the laches doctrine vis à vis the declaration granted. In fact, the justice of the situation balanced in favour of Conoco: AJ Reasons at para 233. That conclusion is supported by the record.

[35] A successful laches defence would, in effect, negate the finding that Shell purchased the wells and assumed responsibility for them under the PSA in circumstances where Shell had taken the benefit of the agreement by re-selling one of the acquired wells to a third party. Like the I-37, that well had been abandoned prior to the PSA.

[36] More importantly, in spite of now knowing for at least ten years that Conoco considered the wells to be Shell's responsibility and knowing about the environmental issues at I-37 since approximately 2016, Shell acknowledges that it has taken no steps, even on a without prejudice basis, to investigate the degree of contamination at the site or to develop a containment or mitigation plan. This is significant in terms of Shell's claim of prejudice and injustice going to laches. It is difficult to accept that Conoco's delay deprived Shell of the opportunity to conduct remediation earlier when Shell took no steps in that direction in the years following 2016. Further, during the period of delay relied upon by Shell, and after the filing of the statement of claim, Conoco continued to undertake some sampling and investigatory work with respect to the contamination at I-37. It is self-evident that some work of this nature would be needed in order to develop a remediation plan. Shell has not identified any further steps that it would have taken.

[37] With respect to prejudice arising from Conoco's delay, as set out above, Shell relies heavily on the expert reports that were not before the applications judge. Those reports conclude that it is "very likely that the extent and concentration of contamination at the I-37 site would have increased over the interval 1991 through 2016" and they explain why that is so. Conoco does not challenge this conclusion. Rather, Conoco argues that whether the contamination increased is a distinct issue from the existence of prejudice or injustice for the purpose of the laches analysis.

The real question, properly identified by the applications judge, is whether the difficulty and expense of remediation increased in a material way during the period of Conoco's delay. The expert evidence is silent on that point.

[38] It is regrettable that the chambers justice did not state, even briefly, why she concluded that the new expert evidence did not aid Shell in resisting summary judgment. However, Conoco's position on this point before the chambers justice was simple and clearly articulated, as set out in the following passage from counsel's oral argument:

> It's not a question of whether the contamination has gotten worse, it's a question of how the passage of time would've affected the difficulty and expense for remediation. Mr. Biggar's report does not address that question. And the Court still has no evidence before it about the difficulty and expense of remediation. That's my submission to you. So, the easiest way to deal with this, and if we agree with Master Hanebury's assessment of the legal test and the other facts relating to laches, we submit it's open to the Court to simply uphold Master Hanebury's decision on the basis that there remains to be no expert evidence on this key issue.

[39] Given the nature of Conoco's argument on the new evidence, this is a case where the basis for the conclusion of the chambers justice is apparent from the record as a whole even without articulation. The only reasonable conclusion is that she agreed with Conoco that additional contamination did not necessarily lead to additional difficulty or expense for remediation, and that there was still no evidence on the latter point. Accordingly, the expert evidence did not materially affect the findings of the applications judge with respect to prejudice, injustice and the application of laches, and with which the chambers justice otherwise agreed.

[40] There is no palpable and overriding error in the conclusion of the chambers justice with respect to the new evidence. As noted, Shell's position assumes that contamination automatically requires remediation, and that increased contamination means increased difficulty and expense in remediation. Intuitive as those propositions may seem, there is no evidence on the record that they are correct. There is no evidence that to date, any regulatory authority has demanded "remediation", and the expert does not speak to the likelihood of any particular remedial measures being required based on the existing evidence of contamination. Management of contaminated sites is a technical and complex field, both from a regulatory and scientific perspective. What may be generically referred to as "remediation" by lay people can involve a variety of standards and methods of contamination management. Removal of contaminated substances may be necessary in some cases, but in others, management may be possible on site.[2] Knowledge and technology

[2] While it is not the regulatory regime applicable to the sites in issue in this case, a brief perusal of Alberta's *Remediation Regulation* and the various Guidelines referenced in section 2(1) thereof gives a sense of the variety of approaches that can apply. They reference not only removal of contaminated substances, but also management of the

available at any point in time may affect the options available. In sum, there is no automatic connection between the amount of contamination and the difficulty or expense in managing it, particularly at different points in time. On the record in this case, it was open to the chambers justice to conclude that Conoco had demonstrated that there was no issue requiring a trial in relation to prejudice, injustice and laches, notwithstanding the expert evidence of increased contamination.

Interpretation of the PSA

[41] Shell argues that the applications judge and the chambers justice ignored factual matrix evidence that there was no regulatory mechanism for transferring ownership of abandoned wells in 1991. Shell did not intend to acquire and assume liability for something that could not be transferred.

[42] On the latter point, the applications judge and the chambers justice declined to rely on evidence from the individuals who negotiated the PSA about their intentions back in 1991. Their assessment of the evidence is entitled to deference. Statements of subjective intent are generally not admissible in any event: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 59; *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 79, leave to appeal ref'd, 37712 (5 April 2018).

[43] More generally, the AJ Reasons adopted by the chambers justice set out a thorough interpretation of the PSA, and they consider the status of the wells as physically abandoned, though without regulatory closure in some cases, and the lack of regulatory mechanism for transferring ownership. Contrary to Shell's assertion, this evidence was not ignored. The applications judge and the chambers justice simply found that the inability to transfer a well from a regulatory perspective did not preclude transfer of the wells as a matter of contract between Gulf and Shell: AJ Reasons at para 190. The abandoned wells still physically existed. They were included implicitly in the definition of P&NG Rights or Miscellaneous Interests in the PSA. More importantly, and rendering it unnecessary for this Court to further analyze which definition applied, the specific provisions in the PSA attributing the risk for environmental liabilities relating to the sold assets, and the "as is" clause, only made sense if the wells were among the assets sold. The wells and associated sumps were the only physical assets in existence.

[44] Contractual interpretation is generally reviewable on a standard of palpable and overriding error as a question of mixed fact and law: *Sattva* at paras 50-52. Shell has not identified any palpable and overriding error in the interpretation of the PSA set out in the AJ Reasons and adopted by the chambers justice.

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substances on the site, "exposure control" and "risk management": *Remediation Regulation*, AR 154/2009. The record before us does not address the regime applicable to the sites in issue in any material way.

[45] Shell also maintains that the factual record does not support a summary resolution of the parties' competing interpretations of the PSA because there are "major contradictions and uncertainties in material facts" that cannot be resolved on the existing record. The assessment of the sufficiency of the record for summary judgment is entitled to deference: *Weir-Jones* at para 10; *PetroBakken Energy v Northridge Energy*, 2020 ABCA 470 at para 22.

[46] The examples of contradictions and uncertainties relied upon by Shell are not persuasive and do not warrant appellate intervention:

- The fact that Conoco's filed application defined terms differently than the PSA is irrelevant on its own. Shell acknowledged in oral argument that the definitions in the application did not find their way into the declaratory relief under appeal. The applications judge and the chambers justice looked at the wording of the PSA itself and were convinced that it transferred the assets in question to Shell.

- The parties having competing interpretations of the indemnity provisions in the PSA and different positions on the effect of changes in wording between the offer letter and the final PSA does not mean that a trial is required. These are not contradictions of fact, but rather differing positions on the weight or legal effect of certain facts.

- With respect to inconsistent evidence as to Conoco's knowledge of the extent of contamination at I-37 at any particular time and whether it was common ground between Gulf and Shell that the wells in issue were abandoned, the AJ Reasons indicate that the applications judge, and by extension, the chambers justice, were live to these issues and considered the record adequate for summary judgment. Further, Shell is unable to explain how the record on these points would likely improve at trial.

Fair and Just Result

[47] Shell submits that it is unfair and unjust for this matter to be decided summarily, and in particular, for the contractual interpretation issue to be decided separately from issues as to apportionment of remediation costs between Shell and Conoco. This argument is not persuasive. The standard of review of the decision of the chambers justice that a fair and just result could be achieved on the existing record is deferential and Shell has not identified any basis for appellate intervention: *Weir-Jones* at para 10. Neither party has undertaken remediation or incurred remediation costs to date. The issue of regulatory responsibility or responsibility to third parties for any contamination is not before the courts in this litigation. The applications judge dismissed Conoco's application for summary judgment as it related to any relief beyond the declaration granted and that part of her decision was not appealed. It is clear that the contractual interpretation issue decided by the applications judge and the chambers justice will affect the parties' positions with respect to their remediation responsibilities going forward. In these circumstances, we see no reviewable error in the approach of the applications judge and chambers justice, which has the

practical effect of breaking the log jam between the parties that would otherwise threaten progress towards remediation for the foreseeable future.

The Counterclaim

[48] In brief, Shell's proposed counterclaim included three claims:

(a) Shell did not acquire the wells in issue under the PSA; the proposed counterclaim requests a declaration to that effect.

(b) Conoco (then Gulf) breached contractual obligations and a duty of care in tort at or around the time of the PSA by misrepresenting that the wells in issue were properly abandoned, by failing to obtain regulatory closure for abandoned wells and by failing to disclose and address a previously discovered leak of diesel fuel at the I-37 well site.

(c) Since approximately 2004, Conoco breached contractual obligations and a duty of care in tort by failing to advise Shell that Conoco considered Shell responsible for the wells in issue and any associated reclamation or remediation, by failing to advise Shell of contamination discovered at I-37, and by failing to undertake remediation.

[49] There is no suggestion that the applications judge and the chambers justice erred in stating the test for amending a pleading to add a counterclaim. The court has a broad discretion, and an amendment is usually allowed unless it is hopeless, attempts to add a new cause of action after expiry of the applicable limitation period, results in an injustice or prejudice not compensable in costs or there was an element of bad faith in not pleading the amendment in the first instance: *Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited*, 2014 ABCA 74 at para 25. In the context of a concurrent application for summary judgment against the party applying to add a counterclaim, the application to add the counterclaim may be dismissed if, in effect, the court is satisfied there is no merit to the proposed counterclaim, applying *Weir-Jones*: *Goodswimmer v Canada (Attorney General)*, 2016 ABQB 384 at para 580. In *Goodswimmer*, the court concluded that, in the procedural context, "it would not be appropriate to allow amendments to the Statement of Claim that could be summarily dismissed on application": para 580. We agree with this approach. It has the same effect as if the application to add the counterclaim were allowed on a standard of "not hopeless", but then the counterclaim were immediately summarily dismissed.

[50] Parts of the proposed counterclaim are easily disposed of. The request for a declaration that the PSA did not transfer the wells to Shell is answered by the contractual interpretation findings in the main claim. Also, Shell acknowledges that the allegations relating to a diesel fuel leak prior to the PSA are no longer viable, because the expert reports tendered before the chambers justice conclude that any such leak is not the source of the I-37 contamination that underlies this dispute.

[51] The main remaining allegation with respect to Conoco's conduct at or about the time of the PSA relates to the failure to obtain regulatory closure with respect to all of the abandoned wells. The applications judge and the chambers justice found that the ten-year ultimate limitation period established in section 3(1)(b) of the *Limitations Act* applied to give Conoco immunity with respect to this claim. The interpretation of the *Limitations Act* is a question of law reviewable on a correctness standard, but the application of the *Limitations Act* to the facts of a particular case is a question of mixed fact and law reviewable for palpable and overriding error: *Weir-Jones* at paras 8-9.

[52] On its face, any claim relating to breaches of duty by Conoco at or about the time of the PSA in December 1991 is caught by the ultimate limitation period. The applications judge and the chambers justice held that section 6 of the *Limitations Act*, which permits the addition of a claim to a previously commenced proceeding notwithstanding that the limitation period for the new claim would otherwise have expired, does not assist Shell. They accepted that section 6 cannot be used to breathe new life into a claim for which the limitation period had expired prior to the existing proceeding being commenced: *R(W) v Alberta (Attorney General)*, 2006 ABCA 219 at paras 29-49; *Royal Well Servicing Ltd v Murphy Oil Company Ltd*, 2018 ABQB 514 at paras 61-63. Shell does not challenge that conclusion.

[53] Rather, Shell argues that Conoco's failure to obtain regulatory closure with respect to the well abandonments constitutes a continuing course of conduct or a series of related acts or omissions pursuant to section 3(3)(a) of the *Limitations Act* such that the ultimate limitation period did not expire prior to Conoco commencing its claim and in fact, has not begun to run at all. Shell argues that the further assurances clause in the PSA, which required both parties to take the steps reasonably necessary to carry out their obligations, supports this argument.

[54] Even if section 3(3)(a) applied, Shell's counterclaim relating to regulatory closure has another fatal limitations problem. The only source of a duty to obtain regulatory closure identified by Shell is paragraph 18(e) of the PSA or an ancillary letter agreement to the same effect. Paragraph 18(e) established a limited exception to Shell's agreement to acquire the assets on an "as is" basis, and to be solely responsible for environmental liabilities attributable or relating to the assets. If, within 180 days of closing, any government or governmental agency demanded or ordered any clean up, well abandonment or reclamation attributable to the assets, and the condition or circumstance giving rise to the order accrued prior to the effective date of the PSA, Conoco (then Gulf) agreed to be responsible for costs and expenses associated with compliance, up to stated monetary limits. Shell's argument is that this provision gave rise to a duty on the part of Conoco to obtain regulatory closure within 180 days.

[55] On Shell's own formulation of the duty that it now says Conoco has breached, and continues to breach, Shell knew, or with reasonable diligence ought to have known, within six months of closing the PSA whether Conoco had failed to comply with its duty. While Shell does not concede this point, it fairly acknowledges that it had an opportunity during and after the 180

days post-closing to determine whether Conoco had obtained regulatory closure and there is no evidence it took any steps in that regard. In our view, the inevitable conclusion is that the limitation period for Shell's counterclaim based on a failure to obtain regulatory closure expired long before Conoco commenced this action pursuant to either section 3(1)(b) or section 3(1)(a) of the *Limitations Act*.

[56] With respect to the third component of the counterclaim identified above - that Conoco breached duties arising in or about 2004 and following - Shell relies on both contract and tort. There is simply nothing in the PSA that would give rise to a duty on the part of Conoco as vendor to advise Shell that it had purchased the wells or that it discovered one of them was contaminated more than ten years after the deal closed. Such a duty would be inconsistent with Shell's express agreement to assume sole responsibility for the assets, including any environmental liability, other than in the case of a demand or order for clean up or reclamation received within 180 days of closing.

[57] The applications judge and the chambers justice also concluded that following the 1991 sale, there was no relationship of proximity between Shell and Conoco giving rise to a duty of care in tort: AJ Reasons at paras 277-280. Shell's factum expressed the alleged error in that finding as follows:

> 103. Shell takes specific issue with the finding below that [Conoco] did not owe a duty to Shell on the unique facts of the case. The evidence demonstrates that [Conoco] knew Well I-37 to have contaminated the surrounding area at least as early as 2004, and undertook further investigations of that contamination in the 2009 through 2011 timeframe. Furthermore, between 1991 and 2011, both [Conoco] and Shell considered [Conoco] to own Well I-37.
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> 104. When [Conoco] concluded that it did not own the Wells in 2011, it failed to alert Shell to the contamination concerns at Well I-37 at that time or any time thereafter, notwithstanding [Conoco]/Gulf's corporate knowledge of such contamination as early as 1991 (and possibly earlier as noted by Shell's expert). [footnote omitted]
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> 105. Even if this Court considered that the PSA is clear and the Wells were transferred to Shell in the Transaction ... it is nevertheless unjust for Shell to be held liable for all remediation costs resulting from [Conoco's] failure to remediate the contamination at Well I-37 at a time when [Conoco] believed and held itself out as owning Well I-37 for many years and [Conoco] knew that the I-37 well site would worsen over time. Shell submits that there must be an apportionment of remediation costs; it is entirely inappropriate to grant [Conoco] declaratory relief (*i.e.* declaring Shell to own the Wells), especially in the face of Shell's laches defence, while

> denying Shell an avenue for achieving some relief for [Conoco's] conduct. [emphasis in original]

[58] Whether a duty of care exists, at least with respect to whether the type of injury to a class of persons of which the plaintiff is a member was foreseeable, is a question of law and the standard of review is correctness: *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at paras 24-26. Even on a correctness standard, Shell's argument does not articulate an error in the analysis of the applications judge and the chambers justice. Neither the proposed counterclaim nor Shell's argument sets out a basis for imposing a duty of care in tort on Conoco following the sale. Shell's view that responsibility for the wells and associated environmental contamination is being unfairly foist upon Shell at this stage, after Conoco's lengthy delay in asserting its position, does not alone give rise to a duty of care.

Costs Appeal

[59] The applications judge issued an oral decision on costs. Based on the complexity of the case and the work required, she found that the appropriate scale of costs was double column 5 of Schedule C, treating the special application as an appeal with two counsel. She went on to consider whether there should be any adjustment based on the conduct of the parties. In particular, she considered Conoco's failure to advise Shell of the contamination at the I-37 site, even when it first filed the statement of claim, and allegations in Shell's proposed counterclaim that she considered tantamount to fraud. She ultimately declined to make any adjustments based on conduct.

[60] The costs award was part of Shell's appeal to the chambers justice, who disposed of the costs appeal as follows:

> [8] With respect to the appeal of Judge Hanebury's oral costs decision, I have reviewed the entirety of the transcript of her oral reasons. As the parties are aware, costs decisions are highly discretionary and will not be interfered with lightly: *Bun v Seng*, 2015 ABCA 165. I did not find a palpable and overriding error in Judge Hanebury's costs decision. Accordingly, the appeal of Judge Hanebury's costs decision is also dismissed.

[61] There is no issue with respect to the standard of review articulated by the chambers justice on costs and Shell does not appeal the costs award for the appeal proceedings before the chambers justice. Rather, Shell argues that the chambers justice overlooked two palpable and overriding errors in the costs decision of the applications judge, both of which stem from the following paragraph in the oral costs decision of the applications judge:

> I will not fault ConocoPhillips at this time for what happened years ago, when the wells were owned by Gulf. Too much time has passed to fairly or accurately point the finger. However, I agree with Shell that ConocoPhillips was not forthcoming

> when the issue of the contamination came to light, and Shell only discovered it after this claim had been filed and document production ensued. While this conduct of ConocoPhillips may be deserving of censure, I note that in response to the claim, Shell alleged conduct on the part of Gulf that was tantamount to fraud. I went into the hearing assuming those allegations were extant, and it was only when the hearing proceeded that it was clear to me and to ConocoPhillips that those allegations were being withdrawn. Allegations of fraudulent behaviour are serious and not something that should be made lightly or used as a tactic.

[62] Shell submits that the applications judge erred in law by declining to hold Conoco responsible for Gulf's conduct, because they are one and the same entity. However, we do not read the AJ Reasons as treating Gulf as a separate entity. Rather, we read them as focusing on the dated nature of conduct that occurred in the period before Gulf became Conoco. This reasoning was open to the applications judge regardless of corporate history and it does not amount to reviewable error.

[63] With respect to whether Shell made allegations tantamount to fraud, Shell's proposed counterclaim alleged that Conoco made representations to Shell about certain wells being properly abandoned when "Gulf Canada knew or ought to have known that that was not the case." Generally, an allegation that a party made a representation that it knew or ought to have known was incorrect is a plea of both fraudulent misrepresentation (knew) and negligent misrepresentation (ought to have known). Shell may not have subjectively intended to allege fraud, but it was not a palpable and overriding error for the applications judge to interpret the proposed counterclaim as including an allegation akin to fraud.

[64] Further, and importantly, the applications judge did not award enhanced costs against Shell because of the fraud allegation. Rather, she took the conduct of both parties into account in deciding not to deviate from what she determined would otherwise be an appropriate costs award. Prior to addressing the conduct of the parties, the applications judge made a thorough assessment of the appropriate scale of costs based on relevant factors such as Conoco's degree of success, the importance of the issues, the complexity of the case, the voluminous evidence, and lengthy arguments. Shell does not identify any errors in this aspect of the costs decision.

[65] It was open to the applications judge to reduce or deny Conoco's costs based on its conduct. However, she thoroughly considered the arguments and exercised her discretion to award costs in any event. That decision was entitled to deference and the chambers justice did not make a reviewable error in failing to intervene.

COSTS OF THE APPEAL

[66] Both parties request costs of the appeal. The usual practice of this Court is to grant costs to the successful party on the same scale as was awarded in the court below, but in this case, we exercise our discretion not to award costs. Both parties shall bear their own costs of the appeal.

We are satisfied that Conoco's conduct, and in particular, the fact that it continued to act as owner of the wells for at least two decades after the PSA closed, materially contributed to the complexity of the issues now on appeal. In these circumstances, and particularly where Shell raised legitimate concerns about the sufficiency of the reasons for the disposition of its first appeal, it is appropriate to relieve Shell of the costs that it would otherwise bear for an unsuccessful appeal.

Appeal heard on March 12, 2024

Memorandum filed at Calgary, Alberta
this 25th day of September, 2024

Khullar C.J.A.

Kirker J.A.

Grosse J.A.

Appearances:

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