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COURT OF APPEALS
STATE OF NEW YORK

BEARDSLEE, et al.

Respondent,

-against-

No. 44

INFLECTION, et al.,

Appellant.

20 Eagle Street
Albany, New York 12207
February 18, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Do you want rebuttal
2 time, counselor?

3 MR. WEST: Pardon me? I would like - - -

4 CHIEF JUDGE LIPPMAN: Do you want any
5 rebuttal time?

6 MR. WEST: - - - two minutes, please.

7 CHIEF JUDGE LIPPMAN: Two minutes, you're
8 on. Go ahead.

9 MR. WEST: Okay. May it please the court,
10 we represent Inflection Energy, Victory Energy, and
11 MegaEnergy, the appellants in this case, relative to
12 construction of what's - - - what's a form lease that
13 was used back in the early 2000s, when these leases
14 were taken.

15 CHIEF JUDGE LIPPMAN: So is there a - - - a
16 force majeure event here?

17 MR. WEST: Well, Your Honor, we - - - we
18 think - - -

19 CHIEF JUDGE LIPPMAN: I don't know if
20 that's - - - how do you pronounce it, counsel?

21 MR. WEST: Force [ma-jure].

22 CHIEF JUDGE LIPPMAN: Force [ma-jure]. Is
23 there a - - - a force majeure event?

24 MR. WEST: That is the first certified
25 question and clearly there is a force - - -

1 CHIEF JUDGE LIPPMAN: Tell us why there is
2 or isn't?

3 MR. WEST: Okay, well, first thing you have
4 to do in analyzing a force majeure case, is decide
5 what kind of case is it. Is it a common law
6 frustration of purpose or an expressed frus - - -
7 force majeure case? This is an expressed force
8 majeure cla - - - case, and you have to look at the
9 language of the force majeure clause itself, which we
10 think is the begin - - -

11 CHIEF JUDGE LIPPMAN: Well, do - - - tell
12 us what you think that language means, before you go
13 to specific words. What is it that we're looking for
14 that would make it that kind of event?

15 MR. WEST: Well, the - - - the clause
16 itself speaks to drilling delays, and I think that is
17 the operative phrase.

18 CHIEF JUDGE LIPPMAN: Drill - - - so we're
19 looking if there's - - - if there's a drilling delay
20 that's what? That's unavoidable - - -

21 MR. WEST: Caused by - - -

22 CHIEF JUDGE LIPPMAN: - - - unforeseeable?
23 What kind of - - -

24 MR. WEST: Foresee - - -

25 CHIEF JUDGE LIPPMAN: - - - drilling delay

1 is there?

2 MR. WEST: Foreseeability is not a
3 requirement of this force majeure clause, because
4 it's - - -

5 CHIEF JUDGE LIPPMAN: So what is? What is
6 the requirement?

7 MR. WEST: What is? It - - - the express
8 language tells us that "results from an order, rule,
9 regulation, requisition of necessity of government,
10 or as the result of any cause whatsoever beyond the
11 control of lessee."

12 CHIEF JUDGE LIPPMAN: So is it like - - -
13 is an Act of God part of this?

14 MR. WEST: Well, Act of God is the - - - is
15 the first element that they express.

16 CHIEF JUDGE LIPPMAN: Yeah.

17 MR. WEST: This is the second element that
18 can create a force majeure event. So the question
19 before this court - - -

20 CHIEF JUDGE LIPPMAN: So what kind of force
21 majeure event is this?

22 MR. WEST: This is the moratorium on high-
23 volume hydraulic frac - - -

24 CHIEF JUDGE LIPPMAN: But is that
25 foreseeable at all?

1 MR. WEST: Your Honor, we don't think it
2 was foreseeable, but again, foreseeability - - -

3 CHIEF JUDGE LIPPMAN: Yeah, yeah, but I'm
4 asking you, was that something that you could have
5 anticipated?

6 MR. WEST: Well, as somebody personally
7 involved with it - - -

8 CHIEF JUDGE LIPPMAN: Yes, tell us.

9 MR. WEST: - - - throughout the process, I
10 - - - I will tell you that we did not anticipate that
11 New York would shut down drilling. In fact, the
12 moratorium in New York State is unprecedented in the
13 regulatory history of New York State.

14 CHIEF JUDGE LIPPMAN: Does it matter what
15 kind of drilling it is?

16 MR. WEST: It does - - -

17 CHIEF JUDGE LIPPMAN: Only - - - only - - -
18 you know, the equivalent of the fracking kind of
19 drilling, or is it any kind of drilling?

20 MR. WEST: That's a great question, Judge
21 Lippman, because if there were other conventional
22 resources available to my clients - - - if they could
23 have drilled wells using verticals wells and can - -
24 -

25 JUDGE READ: Well, they can, can't they?

1 It's just not - - - it's not profitable.

2 MR. WEST: They - - - it's not only not
3 profitable, Your Honor, they - - - they actually did
4 drill holes - - -

5 JUDGE READ: They were dry or - - -

6 MR. WEST: They were dry.

7 JUDGE READ: Yeah.

8 MR. WEST: They were dust - - - what we
9 call dusters in the industry, all right, and - - -

10 JUDGE RIVERA: Could you drill on the
11 property that you leased?

12 MR. WEST: Judge Rivera, the way leases are
13 acquired, they're acquired in clusters. And we
14 drilled on properties of persons who are not
15 plaintiffs, but they were in and around the
16 plaintiffs' properties; even - - - even the
17 respondents conceded - - -

18 CHIEF JUDGE LIPPMAN: Let me - - - but let
19 me ask you a question that comes before that. If you
20 can drill these holes, even if they're not, in Judge
21 Read's words, "profitable", they don't pay out, is -
22 - - is it a requirement of the - - - of the lease
23 here that - - - that it has to be - - - that you
24 could drill and make money from it?

25 MR. WEST: Well, that's two questions.

1 First of all - - -

2 CHIEF JUDGE LIPPMAN: Can't you drill when
3 it's dry?

4 MR. WEST: We can drill when it's dry, and
5 that does us no good. Because the only way to extend
6 a lease - - - hold the lease by production - - - is
7 to have production in paying quantities. Even the
8 lease in question, in paragraph 7, relative to the
9 continuous operations extension, says that it has to
10 be production in paying quantities, which in oil and
11 gas parlance, means where you can make a profit
12 beyond your operating costs, not taking into account
13 your capital costs.

14 CHIEF JUDGE LIPPMAN: So - - - so let me
15 translate what you're saying. So if you can drill by
16 a means other than fracking or that kind of drilling,
17 but you can't make money out of it, then you don't
18 have do it. That doesn't count.

19 MR. WEST: It doesn't - - -

20 CHIEF JUDGE LIPPMAN: That doesn't mean
21 anything.

22 MR. WEST: It doesn't do anybody any good,
23 because we don't make money for the landowners, and
24 we don't - - -

25 CHIEF JUDGE LIPPMAN: But you have the

1 rights to drill, though. It doesn't ma - - -

2 MR. WEST: We have the right to drill, but

3 - - -

4 CHIEF JUDGE LIPPMAN: It doesn't matter to
5 you, if you have the right - - - do you have to be
6 able to do it and make money?

7 MR. WEST: We - - - in order to extend the
8 lease, we have to - - - we have to have production in
9 paying quantities, Your Honor.

10 JUDGE STEIN: If I can follow up on that,
11 when - - - when these leases were - - - were entered
12 into, my understanding is that fracking wasn't even
13 on the radar at - - - at that time. There were other
14 methods of drilling that were anticipated, and - - -
15 and - - - and that's - - - and - - - and so if
16 fracking - - -

17 MR. WEST: Could I just - - -

18 JUDGE STEIN: - - - had never come about -
19 - -

20 MR. WEST: Could I just - - -

21 JUDGE STEIN: - - - let me just finish my
22 question, and then - - -

23 MR. WEST: Okay, yeah.

24 JUDGE STEIN: Okay? If fracking had never
25 come about, and these wells turned out to be dry

1 wells, would you have been able to extend this lease?

2 MR. WEST: Your Honor, if there was no
3 technology available that was - - - that was capable
4 of producing production in paying quantities, we
5 wouldn't be here. We wouldn't have a force majeure
6 event. We - - - we wouldn't - - -

7 JUDGE STEIN: That's not my question. Not
8 whether the technology developed, when - - - when the
9 leases were entered into, there - - - there was no
10 designation in the leases of what methods of drilling
11 or anything like that. It was - - - everybody took a
12 risk here.

13 MR. WEST: So - - - so you have to
14 understand - - -

15 JUDGE STEIN: Right?

16 MR. WEST: - - - oil and gas law a little
17 bit to answer that question properly. In - - - in -
18 - - under oil and gas law, when you take a lease, you
19 have the right to drill, not necessarily the
20 obligation, but the right to use whatever technology
21 becomes available during the course of that lease
22 term. So if four years into that lease term, they -
23 - - they invent a new technology that enables you to
24 tap a resource that you couldn't tap before, that is
25 available to you. Even the plaintiffs - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but you don't -
2 - - but you don't have to use the newest technology.
3 You could - - -

4 MR. WEST: In this - - - in this case - - -

5 CHIEF JUDGE LIPPMAN: - - - you could be
6 drilling with old technology.

7 MR. WEST: In this case, we do, Judge, be -
8 - -

9 CHIEF JUDGE LIPPMAN: Why? Why?

10 MR. WEST: - - - because we drilled with
11 the old technology. They were all dry holes. We had
12 geologists look at this. We had promising shows in
13 the Marcellus, which means that they saw gas in their
14 mud logs, and - - - and - - -

15 CHIEF JUDGE LIPPMAN: So this is important.
16 You're saying that - - - that you - - - you - - - you
17 sign a lease. You have the right to drill. You
18 drill, but you can't find anything. A new technology
19 comes in that you will be able to make productive and
20 - - - and - - - that's the only technology at that
21 point? Once it comes in and the others aren't
22 profitable and that one is profitable, that's the
23 only one that matters in terms whether there's a
24 force majeure event? If you can't do that kind of
25 newest technology, end of story?

1 MR. WEST: During the term of the lease,
2 yes. If - - - if the new technology - - -

3 JUDGE FAHEY: Well, wait a second. Let's
4 stay on the term of the lease, because you raise a
5 point - - - and Judge Stein also referred to it, too.
6 As I understand it, the Victory leases were from '01
7 to '06, is that correct?

8 MR. WEST: Correct.

9 JUDGE FAHEY: And then subsequent to that,
10 Governor Paterson in '08 ordered a supplemental EIS,
11 I believe.

12 MR. WEST: Correct, that's correct.

13 JUDGE FAHEY: In 2010, the moratorium was
14 put into effect. So that sequence of events says to
15 me that the force majeure event took place after the
16 expiration of the primary term of the lease.

17 MR. WEST: Your Honor, we would
18 respectfully disagree with that analysis, because
19 what happened here was - - -

20 JUDGE FAHEY: Well, let me ask you this.
21 First - - -

22 MR. WEST: - - - sort of a roll - - - the
23 moratorium came - - -

24 JUDGE FAHEY: Let me just finish. The
25 moratorium itself. The force majeure event has got

1 to be either the moratorium or Governor Paterson's
2 lease, and I - - - or Governor's Paterson's EIS. And
3 that's a - - - I think - - - a generous
4 interpretation of the concept of force majeure, but
5 let's take it as that, as '08. It still has us two
6 years beyond the primary term, and that means under
7 the - - - under the habendum clause, you really - - -
8 the supplemental clause could not have kicked into
9 effect, because you would not have been drilling
10 within the primary term.

11 MR. WEST: Your Honor, we - - - we maintain
12 that the force majeure event - - - event began with
13 the directive of the Governor in 2008 - - - July
14 23rd, 2008 - - -

15 JUDGE FAHEY: All right. That's two years
16 after the - - - after the end of the initial primary
17 term of lease.

18 MR. WEST: Well, a lot of these leases were
19 renewed, Your Honor. So you can't just assume that
20 they expired in 2006 or so.

21 JUDGE FAHEY: You see my problem, because
22 what would happen is, is you would have a primary
23 term of a lease; the force majeure event takes place
24 afterwards during a supplemental period, which means,
25 in effect, your lease would be infinite. It would

1 have no time frame, because at any point afterwards -
2 - -

3 MR. WEST: We're not - - - we're not
4 arguing that, Your Honor. All the leases that are at
5 issue here were renewed, and the - - - the 2008 time
6 period occurred during the primary - - - primary
7 term. What happened with the moratorium, to get back
8 to some of the questions, is the moratorium evolved,
9 okay. Governor Paterson ordered an update to the
10 SGEIS. We all thought we'd still be able to get
11 permits in New York State. We were told that we
12 couldn't, all right. There - - - there is, in the
13 rec - - -

14 JUDGE READ: Then you ended up - - - you
15 ended up December 18th of the last year, right, with
16 - - - with Governor Cuomo's announcement.

17 MR. WEST: Well, Governor - - - there were
18 - - - there was an announcement at a - - - at a
19 cabinet meeting that a - - -

20 JUDGE READ: A valid - - - but I - - - I
21 want to actually - - - I want to follow up on the
22 second question. Judge - - - the district court
23 judge, I believe, just assumed that there was a force
24 majeure, and then went to the second question, and
25 said that it doesn't modify the habendum clause.

1 Would you agree that if we answer the second question
2 here no, we don't have to decide the force majeure
3 issue?

4 MR. WEST: That would be correct. You have
5 to - - - you have to decide both questions in the
6 affirmative for us to win. That's - - -

7 JUDGE READ: Could you discuss the second
8 question a little then?

9 MR. WEST: I'd - - - I'd be happy to, okay.
10 So - - - so that - - - that issue comes down to a
11 very simple analysis. The force majeure clause has
12 language in it that says, "the time of delay shall
13 not be counted against the - - - the lessee, anything
14 in this lease to the contrary notwithstanding".
15 Okay, so that's the magic phrase.

16 The respondents and the lower court would
17 want to see that language in the habendum clause.
18 And we say it doesn't matter. Under New York
19 contract construction - - - lease construction - - -

20 CHIEF JUDGE LIPPMAN: What is the - - - the
21 thrust of what the habendum clause says?

22 MR. WEST: The habendum clause says that it
23 - - - it applies for five years, unless extended by
24 payment, which most of these leases were - - - and
25 thereafter by production, okay, but that's - - -

1 that's not the only - - -

2 CHIEF JUDGE LIPPMAN: And you don't need
3 any magic language along the lines you were talking
4 about before?

5 MR. WEST: As long as the magic language is
6 some place in the lease. In this clas - - - case,
7 it's in the force majeure clause, and it's in two
8 other clauses that extend the lease, all right, and -
9 - - and - - - and that's a holistic reading of the
10 contract, which is commonplace in New York State.

11 This court has uniformly, and the courts in
12 New York State have uniformly interpreted the
13 language, "anything else in this document to the
14 contrary notwithstanding", as trumping everything
15 else, that that's a magic phrase, no matter where it
16 appears.

17 And if there's any doubt in your mind as to
18 what the parties intended, all you really have to do
19 is go to the memorandum of lease, which precedes
20 every lea - - - almost every lease in the record, and
21 what that says - - - we all know what a memorandum of
22 lease is. If you don't want to record a whole lease,
23 you record a memorandum of lease as a short form to
24 put the world on notice that there's a lease out
25 there.

1 What does this one say? The term of lease
2 is for five years from the effective date - - - prong
3 one - - - and so long thereafter as oil and gas are
4 produced from said lands - - -

5 JUDGE ABDUS-SALAAM: These - - - counsel,
6 you mentioned that these - - - all of these leases
7 involved here had been extended. For how long a
8 period in - - -

9 MR. WEST: Typically they renew for the
10 same primary term.

11 JUDGE ABDUS-SALAAM: So - - -

12 MR. WEST: So it would be five years for -
13 - - and they renew them for another five years.

14 JUDGE ABDUS-SALAAM: So the lease that
15 began in 2001 was renewed in 2006?

16 MR. WEST: Correct.

17 JUDGE ABDUS-SALAAM: And the one in 2006
18 was renewed until 2 - - - 2011?

19 MR. WEST: That's correct. Yeah, that - -
20 - that issue - - - if - - - if you were correct, we
21 wouldn't be here, okay. We would never have been in
22 this case. We would have - - - we would have been
23 done. All these cases were renewed. But let's get
24 back to the memorandum of lease.

25 JUDGE RIVERA: So - - - so it appears

1 you're basically arguing that as long as this
2 moratorium is in place - - - it could be fifty years
3 - - - their property is encumbered?

4 MR. WEST: If the moratorium continues as
5 is. Now, Judge Read asked a question, what - - -
6 what - - - what's going to happen now? We don't know
7 what's going to happen now, because we have a couple
8 of sound bites from a cabinet meeting, okay. And - -
9 - and - - - but we really don't know - - -

10 CHIEF JUDGE LIPPMAN: But those sound bites
11 have been - - -

12 JUDGE READ: They were - - -

13 CHIEF JUDGE LIPPMAN: - - - interpreted in
14 a particular way.

15 JUDGE READ: There were pretty - - - there
16 were - - -

17 MR. WEST: Well, they're interpreted to say
18 that there's going to be - - -

19 JUDGE READ: - - - pretty definitive sound
20 bites.

21 MR. WEST: - - - a permanent ban on - - -

22 CHIEF JUDGE LIPPMAN: Yes.

23 MR. WEST: - - - on hydraulic fracturing in
24 New York. Judge - - -

25 CHIEF JUDGE LIPPMAN: Assuming that's the

1 case?

2 MR. WEST: Assuming that's the case - - -

3 CHIEF JUDGE LIPPMAN: So how long does this
4 go on?

5 MR. WEST: We - - - we would - - - we would
6 agree to stipulate to some limit on that, but it
7 can't go forever. I would - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
9 hear from your adversary, and then you'll have your
10 rebuttal.

11 MR. BOUMAN: May it please the court, Mr.
12 West, this is simply a question of - - -

13 CHIEF JUDGE LIPPMAN: Counsel, why isn't
14 there a force majeure event here?

15 MR. BOUMAN: There isn't a force majeure
16 event here because all that's being required of
17 Inflection is that they follow New York law.

18 Now, what happens in 1992 is the GEIS was
19 passed. And it contemplated the use of 80,000
20 gallons of water in a fracking operation. The defend
21 - - - the - - - sorry, the appellants come in and
22 want to use five million to seven million gallons of
23 water. That's fifty times the amount that was
24 studied and approved in the GEIS. That's why the
25 issue evolved.

1 The law and the regulation have been on the
2 books since 1992. And it's clear that - - -

3 JUDGE PIGOTT: Are you saying these are - -
4 - these are contracts that are impossible?

5 MR. BOUMAN: I'm sorry?

6 JUDGE PIGOTT: Are the - - - are these
7 contracts void from the beginning, then?

8 MR. BOUMAN: No, I - - - I - - - I'm not
9 saying that. I'm saying that they have to follow the
10 GEIS that has been duly approved. They can use up to
11 80,000 gallons of water, if they wish, and drill
12 horizontally, if they wish, but they cannot use high-
13 volume hydro-fracking under the current state of law.

14 JUDGE RIVERA: So you're saying when they
15 entered the leases, they understood that?

16 MR. BOUMAN: No, when they entered the
17 leases, drilling and black shale was not in the
18 contemplation of the parties at all. 2001 to 2006 -
19 - -

20 JUDGE PIGOTT: Every - - - back to my
21 question?

22 MR. BOUMAN: I'm sorry.

23 JUDGE PIGOTT: Are you saying that your
24 people signed contracts that were - - - that were not
25 within their contemplation at the time that they

1 signed them?

2 MR. BOUMAN: Well, what I'm trying to talk
3 about here is he - - - what was in the contemplation
4 of - - - of the gas companies in 2001 and 2006 was to
5 develop the Trenton Black River or formations that
6 been traditionally used.

7 JUDGE READ: So you're trying to relate
8 that to the force majeure?

9 MR. BOUMAN: I'm sorry?

10 JUDGE READ: You're trying to relate that
11 to the force majeure? The fact that there is a
12 difference in what - - - what might have been in
13 people's mind - - - or what was in people's minds in
14 1992, and the force majeure they're - - - they're
15 claiming? I gue - - - we're asked two specific
16 questions.

17 MR. BOUMAN: Right, yes.

18 JUDGE READ: So I'm just trying to relate
19 your argument to one or the other of them.

20 MR. BOUMAN: Well, I was trying to answer a
21 question from another judge, Your Honor, so I - - - I
22 don't quite know.

23 The fact of the matter is, the lease does
24 not include a provision to say, if we're not allowed
25 to use high-volume hydro-fracking, this is a force

1 majeure of that. There's nothing in there like that.
2 All it says is drilling. They've always had - - -

3 CHIEF JUDGE LIPPMAN: So they can do the
4 more conventional means of drilling?

5 MR. BOUMAN: Ab - - - absolutely.

6 JUDGE ABDUS-SALAAM: And they say that they
7 have tried that, not exactly on - - - on your
8 clients' land, but on land around that, the
9 equivalent land, I guess, and they're saying they get
10 dusters. So - - -

11 MR. BOUMAN: No ground - - - no land is
12 equivalent. And I think any oil and gas person will
13 tell you that.

14 CHIEF JUDGE LIPPMAN: Does it matter if
15 they're dusters? Does it matter if they drill and
16 they don't get anything out of it?

17 MR. BOUMAN: No, it doesn't. This is - - -
18 this is - - -

19 CHIEF JUDGE LIPPMAN: Does it have to be
20 productive, payable, whatever the term is?

21 MR. BOUMAN: Absolutely not. There's not a
22 word - - -

23 CHIEF JUDGE LIPPMAN: Why - - - why not?

24 MR. BOUMAN: There's not a word - - -

25 CHIEF JUDGE LIPPMAN: Because they just had

1 the right to drill, not to - - - not to be
2 productive, is that the answer?

3 MR. BOUMAN: There's not a word in this
4 lease about viable production.

5 CHIEF JUDGE LIPPMAN: What about your
6 adversary talking about a new way of drilling - - -

7 MR. BOUMAN: Yes.

8 CHIEF JUDGE LIPPMAN: - - - is developed
9 and then after that, they have to be able to use the
10 - - - the new way of drilling in order for this to be
11 a productive we - - - well - - -

12 MR. BOUMAN: Right

13 CHIEF JUDGE LIPPMAN: And that - - - that's
14 the - - - at that point, when you know the others
15 don't work, and the new way works, then it's only the
16 new drilling that matters.

17 MR. BOUMAN: If it - - -

18 CHIEF JUDGE LIPPMAN: Would you be able to
19 do that?

20 MR. BOUMAN: If it's in accord with New
21 York law and regulations, they can use the new
22 method, but it is not. It hasn't passed the
23 supplemental - - -

24 JUDGE PIGOTT: So you're saying these are
25 valid leases and they can continue on, because they

1 can continue to drill the way you say they can
2 continue to drill.

3 MR. BOUMAN: They could have. Now - - -
4 now they're all expired. They all expired in 2012.
5 Just to clear that up.

6 CHIEF JUDGE LIPPMAN: But they could have -
7 - - but - - - but - - - the Judge is saying, I think,
8 they could have continued drilling in any way that
9 was legal under New York law until the end of the
10 lease, and then end of story, it's expired in your
11 mind.

12 MR. BOUMAN: Absolutely.

13 CHIEF JUDGE LIPPMAN: Even though they
14 couldn't do, under New York law, let's say for the
15 sake of argument, hydro-fracking.

16 MR. BOUMAN: Right. Exactly, Judge.

17 JUDGE PIGOTT: So we got to - - -

18 JUDGE RIVERA: So what - - - what's the
19 point - - - what's the point from your clients'
20 perspective - - - from the lessor, from the landowner
21 - - - of allowing that, because the consideration and
22 the rental payments are de minimis. There's no way -
23 - -

24 MR. BOUMAN: They were - - -

25 JUDGE RIVERA: - - - the only way the

1 landlord and the lessor really has an incentive to
2 enter these things is that they're actually going to
3 hit some oil or gas and pay you some royalties. So
4 what - - - why you have - - - why - - - why would
5 your side enter an agreement where there's no value
6 to it, unless they drill, and - - - and they get some
7 production out of the drill?

8 MR. BOUMAN: All the parties were subject
9 to New York law in this lease. The lease says it is
10 subject to the law. And it's - - -

11 JUDGE ABDUS-SALAAM: So you're saying that
12 your clients took a risk that they wouldn't get paid
13 anything.

14 MR. BOUMAN: Of course. That's what this
15 kind of business is. It's speculative. The very
16 first cases that were decided by New York State said
17 this is - - - this is a speculative industry.

18 JUDGE RIVERA: Well, but what they're - - -
19 they're arguing, well, yeah, but the risk now has
20 gone the other way because they'd like to drill in a
21 particular way that would be productive and would be
22 profitable, but they can't - - -

23 MR. BOUMAN: Yes.

24 JUDGE RIVERA: - - - so they just expect
25 that the lease goes on a little longer period of

1 time; hopefully - - - hopefully the - - - it won't be
2 interpreted as a ban or the ban will be lifted. And
3 I thought your client's position or your clients'
4 position was that the property's encumbered so we're
5 not going to see any profit anytime soon. We want
6 out. And if they get to drill later, we want back
7 in, and I can get more royalties for it. You want
8 out of the bad deal.

9 MR. BOUMAN: We want out of the deal, yes.

10 JUDGE RIVERA: Well, the bad deal, now,
11 right - - -

12 MR. BOUMAN: Yes, well - - -

13 JUDGE RIVERA: - - - for both of you in
14 many ways. They just want to hold on tight in the
15 hopes they'll get a good deal.

16 JUDGE FAHEY: So are - - - are you saying -
17 - - just so I'm clear. Are you saying that the - - -
18 that the government moratorium was not a force
19 majeure event?

20 MR. BOUMAN: Absolutely not.

21 JUDGE FAHEY: All right.

22 MR. BOUMAN: All it was, was the
23 application of 6 NYCRR 617 - - -

24 JUDGE FAHEY: And that - - - that doesn't
25 directly address the terms that are in the lease in

1 terms of its definition of a force majeure event?
2 This seems to be - - - there's contractual and common
3 law and it seems to be a contractual force majeure
4 event.

5 MR. BOUMAN: And I think - - - if I may - -
6 -

7 JUDGE FAHEY: Go ahead, please, sure.

8 MR. BOUMAN: - - - that this - - - these
9 leases were not negotiated by the landowners - - -

10 JUDGE FAHEY: Well, that's - - - that's a
11 separate question - - -

12 MR. BOUMAN: Right.

13 JUDGE FAHEY: I just want to know the
14 clause of the lease. I - - - I understand about the
15 negotiations, maybe it's an adhesion contract, I
16 don't know, but leaving that aside - - -

17 MR. BOUMAN: Yes.

18 JUDGE FAHEY: - - - for our purposes today,
19 the - - - the language in the - - - in the section of
20 the contract that outlines what - - - what
21 constitutes a force majeure event seems to
22 contemplate exactly this kind of scenario. If you
23 have a valid lease, that - - - a government action
24 that takes away your right to drill is a force
25 majeure event. Unless you're saying that they have a

1 right to drill, just not the kind of drilling that
2 they want to do.

3 MR. BOUMAN: Absolutely. They have the
4 right to drill, just not the particular type of
5 stimulation method. Not - - - nobody said you can't
6 drill. All I said was you can't use that much - - -

7 CHIEF JUDGE LIPPMAN: If they can't drill
8 the other kind of way - - - the hydro-fracking - - -
9 under New York law.

10 MR. BOUMAN: Under New York law, they
11 cannot use five - - - you know, five million - - -

12 JUDGE STEIN: If it is - - -

13 MR. BOUMAN: - - - gallons of water.

14 JUDGE STEIN: If it is a force majeure - - -
15 -

16 MR. BOUMAN: Yes.

17 JUDGE STEIN: - - - how does it effect the
18 habendum clause, because the habendum clause seems to
19 explicitly say, "anything in this lease
20 notwithstanding to the contract", which - - -

21 MR. BOUMAN: That's not the habendum
22 clause, Your Honor, pardon me. That is - - -

23 JUDGE STEIN: I'm sorry, that's the force
24 majeure clause.

25 MR. BOUMAN: Yeah.

1 JUDGE STEIN: Yeah, okay.

2 MR. BOUMAN: The - - - the term clause.

3 JUDGE STEIN: So - - - so why doesn't that
4 do - - - do the trick?

5 MR. BOUMAN: Because oil and gas leases are
6 very particular types of contract. They're a
7 conveyance and that's the - - - the - - - the
8 habendum clause in this thing, and they're contracts.

9 JUDGE STEIN: So you're saying that the
10 rule in this state is or should be that it must be in
11 the habendum clause.

12 MR. BOUMAN: It must be - - -

13 JUDGE STEIN: It doesn't matter what the
14 other language in the entire lease is, but it must be
15 in the habendum clause. Why?

16 MR. BOUMAN: I'll say this. It - - - we
17 believe it should be in the habendum clause - - -

18 JUDGE STEIN: Well, should be is one thing,
19 but - - - but must it be, and if so, why?

20 MR. BOUMAN: Okay, I - - - I'll say it must
21 be, because - - -

22 CHIEF JUDGE LIPPMAN: Where do you - - -
23 where do you get that from? Where does it say that
24 it must be?

25 MR. BOUMAN: Other - - -

1 CHIEF JUDGE LIPPMAN: How do we know that?

2 MR. BOUMAN: Other jurisdictions that have
3 addressed the - - -

4 CHIEF JUDGE LIPPMAN: New York, we haven't
5 addressed it?

6 MR. BOUMAN: New York has not addressed it.

7 CHIEF JUDGE LIPPMAN: What's the
8 jurisdiction you would point to that - - -

9 MR. BOUMAN: I would point to the
10 jurisdiction of California and San - - - San Mateo -
11 - -

12 CHIEF JUDGE LIPPMAN: San Mateo, Cal - - -

13 MR. BOUMAN: Yes. And also in Texas.
14 Texas holds that if you have a clause that
15 specifically modifies the term clause and says so
16 elsewhere in the lease, without any ambiguity, then
17 that will work.

18 JUDGE PIGOTT: What case is that?

19 MR. BOUMAN: That's Gulf Oil v. Southland
20 Royalty Company. And that - - - that ca - - - that
21 case, Gulf Oil, dealt with the same exact force
22 majeure clause that we have in this case, and said it
23 was not sufficient to keep the term going. Faced
24 with an express term, they were not going to let that
25 force majeure clause continue the lease on and on and

1 on, ad infinitum. I do suggest that - - - that Gulf
2 Oil can be controlling in this case. I do suggest
3 that San Mateo can be controlling in this case.

4 JUDGE PIGOTT: Which weighs the terms.

5 MR. BOUMAN: Yes.

6 CHIEF JUDGE LIPPMAN: It's not controlling
7 - - - controlling.

8 MR. BOUMAN: I don't mean controlling. I
9 am sorry. Of course, they're not - - -

10 JUDGE READ: We have no - - - we have no
11 cases in New York at all, is that what - - -

12 MR. BOUMAN: Of course, they're not
13 controlling, not - - -

14 JUDGE READ: We have no cases in New York
15 at any level - - -

16 MR. BOUMAN: No, Your Honor.

17 JUDGE READ: - - - to deal with this in an
18 oil and gas lease?

19 MR. BOUMAN: Not dealing with the - - - the
20 interplay between the habendum clause and the force
21 majeure clause.

22 JUDGE FAHEY: Well, yeah, the Texas case
23 says "the final expression giving the force majeure
24 section priority over any contrary provision of the
25 lease does not decide what the section means and" - -

1 - "and what it is contrary to", so - - -

2 MR. BOUMAN: Exactly.

3 JUDGE FAHEY: That's from 73 in Texas, but

4 - - -

5 MR. BOUMAN: Yes.

6 JUDGE FAHEY: - - - I can see the argument
7 there - - -

8 MR. BOUMAN: Counting time against the
9 lessee and counting time against the lease term are
10 two different things.

11 JUDGE FAHEY: I see. Thank you.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. BOUMAN: Say again?

14 CHIEF JUDGE LIPPMAN: Anything else?
15 Anything else, counsel?

16 MR. BOUMAN: No, Your Honor. Thank you
17 very much for your time.

18 CHIEF JUDGE LIPPMAN: Thank you.
19 Appreciate it.

20 Counsel, rebuttal?

21 MR. WEST: Thank you, Your Honor.

22 CHIEF JUDGE LIPPMAN: What state should we
23 look to - - - to in terms of the law on - - -

24 MR. WEST: I think - - - you can look to -
25 - -

1 CHIEF JUDGE LIPPMAN: - - - oil and gas
2 leases?

3 MR. WEST: You can look to Hornbook Law.
4 You could look to Williams & Meyers, the leading
5 treatise which says that it - - -

6 CHIEF JUDGE LIPPMAN: What states do you -
7 - - do you suggest we look?

8 MR. WEST: Virtually every other state
9 except for Texas and California follows the general
10 rule - - -

11 CHIEF JUDGE LIPPMAN: I see. Okay.

12 MR. BOUMAN: - - - okay, that - - - that
13 you - - -

14 CHIEF JUDGE LIPPMAN: Okay, fair enough.

15 MR. WEST: - - - you don't have to have the
16 magic language in the - - -

17 CHIEF JUDGE LIPPMAN: Fair enough.

18 JUDGE FAHEY: That's good.

19 CHIEF JUDGE LIPPMAN: We get it. Go ahead.

20 MR. WEST: Okay, so that's - - -

21 CHIEF JUDGE LIPPMAN: Go ahead.

22 MR. WEST: That's a very simple answer. I
23 want to go back to the memorandum of lease. I - - -
24 I said the prong one was five years. Prong two was
25 "so long thereafter as there's production". Prong

1 three, "or the lease is otherwise maintained pursuant
2 to the provisions hereof". The parties
3 contemporaneously signed and acknowledged that they
4 knew that these leases could be extended by other
5 provisions.

6 The force majeure language here is very
7 simple. If drilling's delayed, the moratorium
8 delayed drilling for a technology that came into
9 being - - -

10 CHIEF JUDGE LIPPMAN: Counsel, let me ask
11 you another question. We - - - we get a sense of
12 what both of your legal arguments are. What's fair
13 here? Why - - - why should you prevail over the
14 landowner? Why - - - what's - - - what - - - from a
15 - - - from a policy perspective, why is your position
16 better?

17 MR. WEST: It's fair, Your Honor, because
18 we believe that we're entitled to a chance to prove -
19 - - with this technology, if it's allowed in New
20 York, if this moratorium is ended - - - that we can
21 produce large volumes of natural gas for the mutual
22 benefit of the lessor and the lessee.

23 CHIEF JUDGE LIPPMAN: But you agree that -
24 - - that - - - because you indicated maybe you could
25 put an outside date on it - - - that if it were

1 totally open-ended, maybe that wouldn't be fair to
2 the landowner?

3 MR. WEST: That's why the Gulf Oil case is
4 a good case, because it had a fifty-year absolute
5 limit, and every case I've seen in the country - - -

6 CHIEF JUDGE LIPPMAN: Fifty years is a long
7 time? How so?

8 MR. WEST: It's a long time, Judge. It's -
9 - - it's going to be beyond my time, but it - - -
10 it's - - - it's one of those things that every time
11 I've seen a case with an absolute limit in it, and
12 people are trying to construe the lease, that limit
13 controls, okay.

14 San Mateo is California. I would urge this
15 court not to adopt California law, but even that
16 court left open the possibility that if there had
17 been language like this, it - - - you know, nothing
18 else in this lease to the contrary withstanding - - -

19 JUDGE ABDUS-SALAAM: Can I just - - - I - -
20 -

21 CHIEF JUDGE LIPPMAN: Go ahead.

22 JUDGE ABDUS-SALAAM: Your light is on, but
23 I just wanted to ask - - -

24 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

25 JUDGE ABDUS-SALAAM: - - - a practical

1 question about something your adversary said
2 concerning - - - if this - - - I know you want to
3 hold on until this ban is lifted or, you know,
4 something comes out of the governor's - - - Governor
5 Paterson's sending it back for supplementary EIS, but
6 assuming that does happen and fracking is permitted,
7 why couldn't you go get another - - - why couldn't
8 you lease this land again?

9 MR. WEST: You - - -

10 JUDGE ABDUS-SALAAM: Is it a - - - is it a
11 - - - an economic situation where you have to pay
12 more because - - - I'm not quite clear about that.

13 MR. WEST: Exactly, Your Honor. And I'll
14 just tell a - - - this story in thirty seconds. My
15 client started with the sole purpose of drilling in
16 New York State. They invested seven million dollars
17 in trying to develop these leases. They invested
18 another twenty million dollars in other leases in
19 Broome County. One day they woke up and saw the
20 light and moved their risk capital down to
21 Pennsylvania, and have been drilling in Pennsylvania.
22 Other companies that didn't make that shift went out
23 of business.

24 What's fair here is to give them a shot at
25 drilling what is known to be a very prolific

1 resource, the Devonian shales.

2 CHIEF JUDGE LIPPMAN: Let me - - - let me
3 ask you a more - - - a political question. Is the
4 reason that you want to hold on to this so dearly
5 because the political climate has changed in terms of
6 the public dialogue has changed in terms of the
7 virtues versus the - - - you know, the - - - the
8 problems with hydro-fracking? Or is that not in - -
9 - in the real world - - -

10 MR. WEST: In the - - -

11 CHIEF JUDGE LIPPMAN: - - - is that part of
12 the issue here?

13 MR. WEST: In the real world, Your Honor,
14 our clients want to hold on to these leases under the
15 belief that truth will prevail. New York State is
16 the only state that shut its borders to high-volume
17 hydraulic fracturing. Every other state in the
18 country allows it - - - has allowed it while they
19 increase their - - -

20 CHIEF JUDGE LIPPMAN: So you think the tide
21 will turn eventually and you'll be able to drill - -
22 -

23 MR. WEST: We do.

24 CHIEF JUDGE LIPPMAN: - - - hydro-fracking.

25 MR. WEST: We do, and that - - -

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. WEST: - - - and that's the fairness
3 that we're asking.

4 CHIEF JUDGE LIPPMAN: Okay.

5 JUDGE RIVERA: Can - - - and - - - and - -
6 -

7 CHIEF JUDGE LIPPMAN: I'm sorry. Judge
8 Abdus-Salaam?

9 JUDGE RIVERA: No.

10 CHIEF JUDGE LIPPMAN: Judge Abdus - - -
11 Judge Rivera, go ahead.

12 JUDGE RIVERA: And how long does your
13 client get to keep praying and wishing?

14 MR. WEST: Well, you know, I think as long
15 as this moratorium continues, and - - - and - - - and
16 I would agree, there should be an outside limit on
17 it; I don't know what that is. I don't have the
18 answer. I think what's going to happen here is the
19 moratorium, the temporary delay, is going to be
20 changed in some way when the Governor - - -

21 CHIEF JUDGE LIPPMAN: Okay, counselor.

22 MR. WEST: Okay.

23 CHIEF JUDGE LIPPMAN: Thank you. Thank you
24 both. Appreciate it.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Beardslee v. Inflection Energy, LLC, No. 44, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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