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May 1, 2
Oct. 1

CANADIAN FINA OIL LIMITED .....APPELLANT;

AND

TEXAS GULF SULPHUR COMPANY ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, TRIAL DIVISION

Contracts—Agreement to purchase natural gas—Provisions governing method of determination of price to be paid—Price related to sale price of sulphur in which parties "have an interest"—Meaning of word "interest"—Whether pecuniary as well as proprietary interest included.

An agreement dated January 1, 1962, and amended on January 1, 1965, to which the appellant and the respondent were parties, contained provisions governing the method of determination of the price to be paid by the respondent to the appellant and two other companies for acid gas delivered by them to the respondent. Action was initially commenced by the respondent against the other three parties to the agreement for a declaration as to the proper interpretation of the clauses in question, but a settlement was effected by the respondent with the other two parties, before trial.

The parties other than the respondent agreed to deliver acid gas to the respondent's plant, retaining for themselves the other products of the gas which they produced. The respondent agreed to pay the other parties, for the acid gas which they delivered to it, a price to be determined by multiplying the number of long tons of sulphur produced by the respondent from such acid gas by a price, per long ton of sulphur, established in the manner provided in the agreement. It was the interpretation of an amended sub-clause of the payment clause of the agreement which was in dispute, and the question in issue was as to the meaning in its context, of the word "interest". The meaning of that word was in dispute in respect of the application of the clause to certain factual situations.

An appeal, by leave of the Appellate Division of the Supreme Court of Alberta, pursuant to s. 39 of the *Supreme Court Act,* R.S.C. 1952, c. 259, was brought from the judgment of the trial judge to this Court.

Held: The appeal should be dismissed.

The word "interest", as used in the amended clause of the agreement, was not limited in its meaning to a proprietary interest, but included a pecuniary interest. Where sales of sulphur were made by a company with which both the appellant and the respondent (and others) had entered into gas sales contracts, and where part of the money received by each owner contracting with the company was paid on the basis of the sulphur derived from its gas, all sales made by that company would properly be included in making the required price computation.

In the case of a plant in which one or more of the parties were joint owners with others, and therefore had an interest in the plant and a right to receive sulphur therefrom out of the common inventory, all sales from that plant should be considered in applying the price computation provisions of the agreement.

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*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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APPEAL from a judgment of Milvain J., now C.J.T.D., Supreme Court of Alberta, interpreting the language of a contract for the sale of natural gas. Appeal dismissed.

W. A. McGillivray, Q.C., and *E. D. D. Tavender*, for the appellant.

D. P. McLaws, Q.C., and *R. S. Dinkel*, for the respondent.

The judgment of the Court was delivered by:

MARTLAND J.:—This appeal, by leave of the Appellate Division of the Supreme Court of Alberta, pursuant to s. 39 of the *Supreme Court Act*, R.S.C. 1952, c. 259, is brought from the judgment of the learned trial judge in these proceedings. Such an appeal lies only in respect of a question of law. The legal issue involved in this case is as to the proper interpretation of the provisions contained in an agreement dated January 1, 1962, and amended on January 1, 1965, to which the appellant and the respondent were parties, governing the method of determination of the price to be paid by the respondent to the appellant and two other companies for acid gas delivered by them to the respondent at the "West Whitecourt plant" near Whitecourt, Alberta. The two other parties to the agreement were Pan American Petroleum Limited and Hudson's Bay Oil and Gas Company Limited.

The action was initially commenced by the respondent against the other three parties to the agreement for a declaration as to the proper interpretation of the clauses in question, but a settlement was effected by the respondent with the other two parties, before trial.

The three parties to the agreement, other than the respondent, who are referred to in the agreement as "West Whitecourt Owners", built the West Whitecourt plant to treat acid gas which they were producing. Among the products of the plant is sulphur. Under the agreement the West Whitecourt Owners conveyed to the respondent, for a stated consideration, that part of the plant which produced sulphur.

The West Whitecourt Owners agreed to deliver acid gas to the respondent's plant, retaining for themselves the other products of the gas which they produced. The respondent agreed to pay the West Whitecourt Owners, for

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the acid gas which they delivered to it, a price to be determined by multiplying the number of long tons of sulphur produced by the respondent from such acid gas by a price, per long ton of sulphur, established in the manner provided in the agreement, which was as follows:

9. PAYMENT

Subject to the provisions of Clause 10 hereof, Texas Gulf shall make payment to Pan American on behalf of the West Whitecourt Owners for all acid gas delivered hereunder, the amount of such payment to be determined by multiplying the number of Long Tons of sulphur produced at the Sulphur Plant from the said acid gas by the prices per Long Ton for such sulphur established in accordance with the following terms and provisions:

(1) At the beginning of each calendar year Texas Gulf shall estimate a reasonable F.O.B. Price which may be expected for sulphur sold from plants in the Province of Alberta during such calendar year, having regard for the F.O.B. Price at which sulphur was sold from plants in the Province of Alberta during the preceding calendar year.

(2) On the basis of the aforesaid estimated F.O.B. Price, Texas Gulf shall, within twenty (20) days following the end of each calendar month, make payment for acid gas delivered during such calendar month, in Canadian currency, in accordance with the following scale:

When the estimated F.O.B. Price is within the range of:	Amount payable for acid gas expressed as a price per Long Ton for sulphur produced therefrom shall be:
$ 0 to $ 5.00	$1.00
$ 5.01 to $ 8.00	$1.00 plus 100% of the amount by which F.O.B. Price exceeds $5.00.
$ 8.01 to $ 9.00	$4.00 plus 50% of the amount by which F.O.B. Price exceeds $8.00.
$ 9.01 to $13.50	$4.50
$13.51 or more	$4.50 plus 50% of the amount by which F.O.B. Price exceeds $13.50.

(3) At the end of each calendar year Texas Gulf shall determine the actual F.O.B. Price for the preceding calendar year which shall be the greater of:

(*a*) the weighted average F.O.B. Price at the Sulphur Plant received by Texas Gulf for sulphur sold from the Sulphur Plant during such calendar year, or

(*b*) the weighted average F.O.B. Price received for all sulphur sold from plants in the Province of Alberta during such calendar year, exclusive of sulphur sold from the Sulphur Plant, in which sulphur the parties hereto, or any of them, have an interest and which price can be verified from actual statements from the sellers of such sulphur. It is agreed, however, that for the purpose of determining the weighted

average sales price pursuant to this Clause 9(3)(*b*) the quantity of sulphur sold by Texas Gulf from plants in the Province of Alberta in which sulphur Texas Gulf has an interest, exclusive of the Sulphur Plant, shall be a maximum of Fifty (50%) percent of the total sulphur sales under consideration or Fifty Thousand (50,000) Long Tons, whichever is the greater,

and immediately following such determination shall calculate the difference, if any, in the payments which would have been made to Pan American on behalf of the West Whitecourt Owners for acid gas delivered during such preceding calendar year if this actual F.O.B. Price had been substituted for the estimated F.O.B. Price in the schedule set forth in Clause 9(2) hereof, and the parties hereto shall make settlement for any such difference within thirty (30) days of the determination thereof.

(4) Texas Gulf shall, if requested so to do by the West Whitecourt Owners, verify the price received by Texas Gulf for sulphur sold from the Sulphur Plant by Statutory Declarations made by virtue of The Canada Evidence Act.

Under the original agreement, the West Whitecourt Owners had an option to purchase 50 per cent of the sulphur produced at the West Whitecourt plant at the price set out in cl. 9(3)(*a*).

The agreement was amended by the agreement of January 1, 1965. The option to purchase, just mentioned, was eliminated, and cl. 9(3) was amended, so as to read as follows:

(3) At the end of each calendar year Texas Gulf shall determine the actual F.O.B. Price for the preceding calendar year which shall be the greatest of:

(*a*) the weighted average F.O.B. Price at the Sulphur Plant received by Texas Gulf for sulphur sold from the Sulphur Plant during such calendar year, or

(*b*) the weighted average F.O.B. Price received for sulphur sold from plants in the Province of Alberta during such calendar year, exclusive of sulphur sold from the Sulphur Plant, in which sulphur the parties hereto, or any of them, have an interest and which price can be verified from actual statements from the sellers of such sulphur. It is agreed, however, that for the purpose of determining the weighted average sales price pursuant to this Article 9(3)(*b*) the quantity of sulphur sold by Texas Gulf from plants in the Province of Alberta in which sulphur Texas Gulf has an interest, exclusive of the Sulphur Plant, shall be a maximum of fifty percent (50%) of the total sulphur sales under consideration or fifty thousand (50,000) Long Tons, whichever is the greater, or

(*c*) the weighted average F.O.B. Price received for sulphur sold during such calendar year from EXISTING PLANTS in the Province of Alberta, exclusive of sulphur sold from the

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> Sulphur Plant, in which sulphur the West Whitecourt Owners, or any of them, have an interest and which price can be verified from actual statements from the sellers of such sulphur. It is agreed that the term "EXISTING PLANTS", as used in this Article 9(3)(*c*), hereof, shall be limited to include only plants in the Province of Alberta in existence on the 1st day of January, 1965 which have actually produced sulphur prior to that date,
>
> and immediately following such determination Texas Gulf shall calculate the difference, if any, in the payments which would have been made to Pan American on behalf of the West Whitecourt Owners for acid gas delivered during such preceding calendar year if this actual F.O.B. Price had been substituted for the estimated F.O.B. Price in the schedule set forth in Article 9(2) hereof, and the parties hereto shall make settlement for any such difference within thirty (30) days of the determination thereof.

It is the interpretation of the amended cl. 9(3) which is in dispute in these proceedings, and the question in issue is as to the meaning, in its context, of the word "interest". The meaning of that word is in dispute in respect of the application of the clause to three factual situations.

The first of these relates to sulphur produced and sold by Petrogas Processing Ltd. (hereinafter referred to as "Petrogas"). This company was incorporated to construct and operate a gas processing plant, located near Calgary. It entered into contracts, identical in form, with most of the owners of natural gas in what is known as the East Calgary Field. Under the terms of the contract, the owner agreed to sell gas to Petrogas, which agreed to pay for it from the proceeds which it received from the sale of the plant products, one of which is sulphur. Each owner receives his proportion of the total sale proceeds, as computed under the terms of the agreement, less applicable processing charges, in the determination of which Petrogas is entitled to show only a nominal profit.

Each owner of gas contracting for its sale to Petrogas is entitled to become a shareholder of Petrogas, the size of the share holding being determined on a proportionate basis. In essence, Petrogas provided a convenient vehicle for the disposition of their natural gas by owners in the East Calgary Field. Both the appellant and the respondent had entered into sales contracts with Petrogas and owned shares in it.

The sales agreement provided, with respect to sulphur, that:

> The value of elemental sulphur shall be the average sales price per long ton actually received in cash in each month by Buyer (Petrogas) F.O.B. the Plant.

The value of the sulphur ascribed to each owner and sold by Petrogas is an element in determining the price for gas to be paid to such owner.

It is the contention of the respondent that, in applying the formula provided in paras. (*b*) and (*c*) of the amended cl. 9(3), the price received for all sulphur sold by Petrogas in any calendar year is to be taken into account in determining the weighted average F.O.B. price. The appellant contends that the price received by Petrogas from sulphur sold by it cannot be taken into account because neither the appellant nor the respondent has any "interest" in such sulphur. It takes the position that "interest" means a proprietary interest. The respondent submits that the word, as used in this agreement, was intended to have a broad application and would include, not only a proprietary, but also a pecuniary interest.

The appellant has cited a number of authorities, which deal with the meaning of the term, but none of these is a precedent. Rather they are illustrations of the application of the word in various factual circumstances.

Reliance is placed on *Macaura v. Northern Assurance Co. Ltd.*[1]. This case is authority for the proposition that neither a shareholder nor a creditor of a company has an insurable interest in any of its assets. It holds that no shareholder has any property right in any item of property owned by the company. This, of course, merely reaffirms the fact that the company is a legal entity, separate and apart from its shareholders.

On the other hand, in *City of London Electric Lighting Co. Ltd. v. Mayor, &c., of London*[2], the House of Lords had to consider the application of a statutory provision which prohibited a commissioner or a member of the Court of Aldermen or of the Common Council of the City from

[1] [1925] A.C. 619.

[2] [1903] A.C. 434.

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being directly or indirectly interested in any contract made by the Commissioners of Sewers. It was held that a contract with a company, in which any of the commissioners, members of the Court of Aldermen or of the Common Council were shareholders, would be within this provision and would be null and void.

The appellant cited *Smith v. Hancock*[3], which held, on the facts of that case, that the defendant was not interested in a business operated by his wife and nephew so as to be in breach of a covenant in an agreement made by the defendant with the plaintiff, that the defendant, within a specified area, would not carry on or be in anywise interested in any similar business to that described in the agreement, which the defendant had sold to the plaintiff. What the defendant had done was to introduce his wife to his bankers, assist her in obtaining a lease of a shop in her name, introduced the nephew to wholesale suppliers who had supplied the old business and to write, for his wife, who was prevented by a physical infirmity from writing, a circular inviting "old friends" to come to the shop. The defendant put no money into the business and took no share in its profits.

At p. 386, Lindley L.J. says this:

> When a person sells a business and agrees not to carry on, or be in any way interested in, any similar business, the word "interested" is used to prevent him, not only from carrying it on, but also from having any proprietary or pecuniary interest in it.

Similarly, in *Gophir Diamond Co. v. Wood*[4], it was held that a covenant not to become directly or indirectly interested in a similar business did not prevent the defendant from becoming an employee in such a business at a fixed salary. It was, however, stated that if the defendant's remuneration had in any way depended on the profits or gross returns of the business he would have been interested in it.

In my opinion, an interest may, in certain circumstances, consist of a pecuniary interest as distinct from a proprietary interest. The meaning of the word, in any specific agreement, must be ascertained in the context in which it appears.

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[3] [1894] 2 Ch. 377.

[4] [1902] 1 Ch. 950.

In considering this issue, it is desirable to refer to the whole of cl. 9 of the agreement, and not only to the portion of it which was amended by the second agreement. Under this clause, the respondent agrees to pay the West Whitecourt Owners, not for sulphur, but for "all acid gas delivered hereunder". The respondent is obligated to pay for such gas whether or not the sulphur produced from it by the respondent is sold or not. The provisions of the clause dealing with the price of sulphur relate only to the method for determination of the price to be paid for acid gas. Such price is determined by multiplying the number of long tons of sulphur produced by the respondent by a price per ton determined under the clause.

The initial payments to the West Whitecourt Owners are determined on the basis of an estimate by the respondent, at the beginning of the calendar year, of a reasonable F.O.B. price to be expected for sulphur sold from plants in the Province of Alberta having regard to the F.O.B. price for which sulphur was sold from plants in that province during the previous year (cl. 9(1)).

The final price is to be ascertained at the end of the year, as the highest of three prices as determined by three methods of computation. The first, described in para. (*a*) of cl. 9(3), is the actual selling price of sulphur produced at the West Whitecourt plant.

The second, described in para. (*b*), is based on the sale price of all sulphur sold from plants in Alberta, exclusive of the West Whitecourt plant, and is thus somewhat similar to the provisions of cl. 9(1), but it contains the restriction which limits "all sulphur sold from plants in the Province of Alberta" by the words "in which sulphur the parties hereto or any of them have an interest".

The third, described in para. (*c*), is essentially the same as para. (*b*), but the restrictive words refer to sulphur in which the West Whitecourt Owners, or any of them (and not the respondent) have an interest, and it is limited to "existing plants", as defined.

If the provisions of para. (*b*) had been intended to be limited to sales from plants in Alberta, exclusive of the Whitecourt plant, of sulphur actually owned by any of the

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parties, the wording used appears to be unnecessarily cumbersome. The paragraph, to achieve that object, could have read:

> The weighted average F.O.B. price received for all sulphur sold by any of the parties hereto from plants in the Province of Alberta, exclusive of sulphur sold from the Sulphur Plant.

But the paragraph does not say this. Its terms are broader in their scope. It is significant that it contains the provision which reads: "which price can be verified from actual statements from *the sellers of such sulphur*". (The italicizing is my own.) This obviously indicates that the paragraph is applicable to sales of sulphur made by parties other than the parties to the agreement. The parties to the agreement are described, in the very same sentence, as "the parties hereto", and, quite clearly, verification of their sales prices could be required as a term of the agreement. But verification of the sale price of sulphur sold by a third party would depend on his willingness to provide a statement.

Furthermore, when we come to para. (*c*), which refers to sulphur in which "the West Whitecourt Owners or any of them have an interest", there is the specific exclusion therefrom of "sulphur sold from the Sulphur Plant". Clearly the West Whitecourt Owners have no proprietary interest in sulphur produced from that plant and, therefore, if the word "interest", in para. (*c*), meant a proprietary interest, no such exclusion would be necessary. That sulphur is produced by the respondent from the acid gas sold and delivered to it by the West Whitecourt Owners and is the property solely of the respondent. But the West Whitecourt Owners do have a pecuniary interest in that sulphur in that its sale, by the respondent, may determine, under para. (*a*), the price which they receive for their acid gas.

In my opinion, the word "interest", as used in paras. (*b*) and (*c*), is not limited in its meaning to a proprietary interest, but includes a pecuniary interest.

My understanding of the meaning of para. (*b*) is that, in making the computation contemplated by it, one is to take into account, in each calendar year, the prices received on all sales of sulphur from those sulphur plants in Alberta from which sulphur, in which any party to the agreement has some proprietary or pecuniary interest, has been sold.

The paragraph does not stipulate that such interest must exist at the time a particular sale is actually effected. All that is required is that the plant in question be one from which sales are made of sulphur in which the party to the agreement has an interest.

I should add that the words "and which price can be verified from actual statements from the sellers of such sulphur" restrict the computation made under para. (*b*) to prices received from sales made by sellers who are prepared to give actual statements so as to verify the prices obtained.

Turning now to the sales of sulphur made by Petrogas, it is my view that all the sales made by that company would properly be included in making the computation required under para. (*b*). It is true that such sales were of sulphur owned by Petrogas and not by the appellant or the respondent, and that what was sold by them to Petrogas was gas. However, Petrogas is essentially an instrument for the processing and sale of the gas and its derivatives of those companies with whom it contracts. The sulphur extracted from the gas delivered by the appellant and by the respondent was a part of the total volume of sulphur to be marketed by Petrogas. Part of the money received by each owner contracting with Petrogas was paid on the basis of the sulphur derived from its gas. Both of the parties had a pecuniary interest in the sulphur sold from that plant.

What I have said above in relation to para. (*b*) applies equally to the computation to be made under para. (*c*), since the appellant, one of the West Whitecourt Owners, had the required interest under that paragraph.

The next factual situation is in connection with sales of sulphur from plants in which one or more of the West Whitecourt Owners are joint owners with others. In such a case, the appellant, for example, would sell acid gas to the plant and receive, in kind, its share of the products, proportionate to the volumes of gas which it delivered to the plant. One of the products would be sulphur. The gas received at the plant from the various suppliers would be intermingled. The sulphur produced from it would be placed in a common stock pile from which each would be entitled to withdraw its proportionate share.

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In substance, the appellant's contention is that it is only sales of sulphur from the stock pile made by the appellant itself, or in which it has itself participated along with others, which can be taken into account in making the computations required under paras. (*b*) and (*c*).

I do not agree with this submission. The sulphur produced in plants of the kind under consideration, in a common inventory, is sulphur in which the appellant or other West Whitecourt Owner has joint ownership, which clearly constitutes an interest. In my opinion, any sale from the joint stock pile is a sale of sulphur in which a West Whitecourt Owner has an interest, within the meaning of paras. (*b*) and (*c*), and the fact that, for purposes of delivery, the sulphur sold must be removed from the stock pile, does not prevent the application of those paragraphs. Their application extends to all sales from a plant of any sulphur in which the appellant or other West Whitecourt Owner has an interest and the "interest" is not to be determined solely at the time of segregation and delivery to the buyer. What these paragraphs contemplate is a broad base for the ascertainment of price not limited only to those sales effected by the West Whitecourt Owners themselves.

The third factual situation is in respect of sales of sulphur sold from the Okotoks plant. This is a plant in which the respondent has an interest. It supplies gas to this plant and is entitled to sulphur produced therefrom in proportion to the gas which it supplies. This situation is the same as the one just considered, save only that in this case it is the respondent, and not a West Whitecourt Owner, which has an interest in the plant, and a right to receive sulphur therefrom out of the common inventory. For the same reasons as those already given, it is my view that all sales from that plant should be considered in applying para. (*b*).

I am, therefore, of the opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

Solicitors for the respondent: McLaws & Company, Calgary.