Privy Council Appeal No. 48 *of* 1926.

The Crown - - - - - - - - - *Appellant*

v.

Neil McNeil and another - - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF WESTERN AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JANUARY, 1927.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT FINLAY.]

This appeal is brought on a petition of right, in the Supreme Court of Western Australia under the Crown Suits Act of Western Australia, to recover a balance alleged to be due from the Crown. The judgment appealed from was delivered by Mr. Justice Northmore on the 21st September, 1925. He awarded to the respondents £6,572 15*s.* 2*d.*, the amount certified by the Master as due on the balance of account, and further, interest at 6 per cent. from the dates on which the sums constituting the debt became payable respectively. There is no dispute as to the principal sum, the only question being as to the claim for interest; but in order to render the case intelligible, it is necessary to state shortly what were the relations between the parties, and how the controversy arose.

The respondents were the owners of the Ravensthorpe smelting works in the Phillips River Gold Mining district of Western Australia, and they were also mining leaseholders carrying on business as "The West Australian Gold and Copper Mines." In December, 1913, the West Australian Government took over the smelting works from the respondents on a lease for seven

years, with a view to operating them in a manner which would be in the interests of producers of auriferous copper in the district. For this purpose the Government entered into arrangements with the mining owners by which the Government was to purchase, smelt and realise all ore sent to the works by ore producers in the district. The price was to represent the assay value of the ore, less charges for assaying, smelting and realising the products of smelting. The terms agreed were embodied in Regulations made by the Governor in Council and published in the *West Australian Gazette* of 27th February, 1914, and these Regulations were from time to time altered and amended. The ore so purchased by the Government was delivered to them from time to time at the works, and as it accumulated in sufficient quantities was subjected to smelting. Each period of smelting was termed a "campaign." There were in all nine of these "campaigns" completed during the time with which this appeal is concerned, the first beginning in January, 1916, and the ninth ending in December, 1918. The ore was smelted in the course of these "campaigns," and the resulting metal, after being refined, was transmitted for sale in the market. Under the agreement between the parties embodied in the Regulations as from time to time amended, all these operations, including the sale of the ultimate product, were carried out by the Government, who were to account to the owners for the price at which they had bought after all deductions had been made. Controversy arose between the mine owners and the Government as to the meaning and application of these Regulations, but after a very great deal of dispute and prolonged litigation it was found that the Government were indebted to the owners in the principal sum of £6,572 15*s*. 2*d*.

The only question that remained was the claim for interest. There is no contract for the payment of interest on any sums due to the mine owners, and there is no provision in the Crown Suits Act with regard to such interest. The question of liability for interest was argued at the end of the proceedings in the Court below and the Supreme Court of Western Australia allowed the claim. The following are the reasons which were given for the decision of the Court on this point, which was delivered by Mr. Justice Northmore on the 21st September, 1925 :—

> "The original judgment in this case was given on the 12th August, 1921, and under that judgment, as subsequently varied by the judgment of the High Court, accounts have been taken between the parties, and the Master has certified the result of the taking of such accounts to be that a sum of £6,572 15*s*. 2*d*. is due by the respondent to the petitioners.
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> "The petitioners now move for judgment for the amount of £6,572 15*s*. 2*d*., together with the costs of taking the accounts, and interest upon the sums certified by the Master to be due in respect of the several campaigns. The only contest before me was in respect of the claim for interest.
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> "As the result of the inquiries before the Master, it now appears that the Petitioners have been deprived of the use of several sums of money which should have reached their hands on various dates between the 18th

April, 1918, and the 16th October, 1921, as the result of the 6th, 7th, 8th, 9th and 10th campaigns, and, apart from authority, it would seem right that they should be entitled to interest on those moneys from such several dates. On behalf of the respondent, however, it was contended that interest could not be allowed prior to the date of the certificate, because, it was said, the claim was simply one for accounts, and that there had been no fraud on the part of the officers of the Crown, who honestly believed that they were entitled to charge the actual total costs of the various campaigns, and in making out the accounts against the petitioners they had not made charges in excess of the actual total costs.

"If the matter rested there, if there were no other feature in the case, I should have felt bound to uphold the respondent's contention. But that argument does not fairly put the position. If the respondent's officers had made out the accounts in such a way as to show that they claimed to deduct the full smelting costs as against the charge of 30*s*. a ton fixed by the Regulations, the petitioners would have been in a position to at once challenge the accounts. However, they did not take that course. On the contrary, they deliberately concealed that fact from the petitioners, because they showed the smelting charge at 30*s*. a ton and the realisation charges at a figure much in excess of the actual realisation costs, and in that way they misled the petitioners. In these circumstances, I think that this is a case where interest should be allowed. It was argued by the respondent's counsel that, whatever might be the case as between subject and subject, as against the Crown interest could not be allowed. I do not agree with that contention. This is an action brought under the Crown Suits Act, and section 27 of that Act provides that in such actions the Court shall give and pronounce such and the like judgment, order, or decree on any such petition as such Court would give and pronounce in any action between subject and subject.

"Interest will therefore be allowed at the rate of £6 per cent., and will run on the amount due in respect of each campaign from a period three months after the date upon which the accounts for such campaign were closed. I have fixed the starting point as being three months after the date of the accounts in accordance with the request of the petitioners' counsel, although in looking at the report of the case upon which he relied for making such request I notice that there was a reason for allowing a period of three months in that case which does not exist here."

In the opinion of their Lordships, interest was properly allowed in this case. The relation between the Crown and the owners with regard to these ores entrusted to the Crown for treatment and sale was not merely that of buyer and seller, but also fiduciary in its nature. The owners delivered their ores to the West Australian Government for treatment and sale, and on the terms that the balance of the sums realised by the sales of the products should be applied to discharge the sums due to the owners of the mines as sellers.

There was, in fact, great delay in making payment of these sums to the owners on the agreed terms, and it is in respect of such delay that the claim for interest arose.

The amended Regulations issued on the 30th June, 1915, contained the following provisions, which are set out in the respondents' case, page 3, paragraph 9 :—

9. In June, 1915, it became clear to the Government officials concerned that the charges authorized by the regulations were insufficient, and on

30th June, 1915, amended regulations were issued which, providing for increased charges for certain operations, also provided, *inter alia* :—

"11. A charge will be made to cover the costs of receiving, sampling and smelting the ore to matte of 30*s*. per ton of ore (net weight) and for the further expenses of realising the values therein there shall be an additional charge per ton of ore (net weight) of 3*s*. 6*d*. per unit of copper in the agreed assay value for copper, less the schedule deduction aforesaid, and 6 per cent. of the agreed assay value in gold and silver, less schedule deductions.

"15. Forthwith after agreement of assays advances in part payment towards purchase of the ores will be made if desired by the sellers after making the foregoing deductions and charges up to 90 per cent. of the net value of the ore calculated at such prices for the metals contained in it as may be fixed from time to time by the Minister by notice in the Government *Gazette* and which until further notice will be :-

Copper—£56 10*s*. per ton of standard copper.
Gold—80*s*. per ounce of fine gold.
Silver—2*s*. per ounce of fine silver.

"16. The marketable products of smelting of any ore or metal-bearing material presented to the Smelting Works for purchase will be sold by the Minister at his discretion as opportunity offers, and any balances remaining from the sale of such products, after payment of all expenses incurred by the Government on account of the purchase, receiving and treatment of such ore or material and the shipment and selling of the products therefrom, inclusive of interest at the rate of 6 per cent. per annum, calculated from day to day from the time of payment of such expenses up to the date of the final payment of the balances to the sellers, will be paid in final completion of the purchase of such ore or material to the sellers thereof in proportion to the percentages which the values of the separate lots form of the total value of all the lots smelted from which the aforesaid products have been derived, calculating such values on the prices assumed as above for the purpose of making advances."

It was strongly urged on behalf of the appellants that no claim is maintainable under the West Australian Crown Suits Act except for some of the causes enumerated in Section 33, and that the claim for interest did not fall within them. Under that section the claim must for this purpose be founded upon and arise out of some one of the causes of action enumerated in that section. The first of these is—

"Breach of any contract entered into by or under the lawful authority of the Governor on behalf of the Crown or the Executive Government of the Colony, whether such authority is expressed or implied."

There clearly was a contract between the parties to the present litigation, namely, the Crown and the owners of the mine, and that contract was one under which the Crown became the purchaser of the ore from the owner of the mine. It was urged, on behalf of the Crown, that in the absence of express stipulation, there could be no liability for interest in respect of delay in the payment of the purchase money. But in the present case the provisions of the contract as to the payment of the purchase money were of a very special kind. It was to be paid out of the

proceeds of the realization of the ores by the Crown, to whose staff the ores were delivered by the mine owners for treatment and realisation according to the terms of the contract contained in the Regulations. The Government received and dealt with these ores as fiduciaries, and held the balance in each case, after all charges had been defrayed, for the mine owners, the present respondents. If a person who has received money in a fiduciary capacity unduly delays making payment to his beneficiary, he is accountable in equity for interest upon the amount of the principal. It cannot be doubted that on the facts of this case interest would have been payable as between subject and subject. It was, however, insisted, on behalf of the Crown, that such a liability is not covered by the Crown Suits Act inasmuch as it arises on equitable principles, and not out of breach of contract. But in truth this liability for interest was one of the terms of the contract of sale between the mine owners and the Crown, as that contract provided for the smelting and realisation of the metal from the ore being effected by the Crown, and for the application of the proceeds as specified in the Regulations. As regards the ultimate balance, it was held by the Crown in a fiduciary capacity and liability for interest is one of the incidents of such a fiduciary capacity. The action is brought for breach of contract in respect of the terms of the contract of agency undertaken by the Crown. It appears to their Lordships that the claim is founded on and arises out of the breach of a contract within the meaning of Section 33 of the Crown Suits Act.

It is not necessary to enter into the question of misrepresentation, which is referred to in the judgment of the Court below, inasmuch as it is sufficient for the decision of this case that the Crown received this money under a contract for agency on certain terms which have not been observed. There was very considerable delay in handing over the proceeds. It would appear that this delay was due to various claims put forward by the agents of the Crown in respect of the amounts to be allowed, but there was, in the opinion of the Court below, with which their Lordships agree, no justification for the delay which took place in accounting for the proceeds.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE CROWN

v.

NEIL McNEIL AND ANOTHER.

DELIVERED BY VISCOUNT FINLAY.

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