Privy Council Appeal No. 7 of 1959

Ponoka-Calmar Oils Ltd. and another – – – – *Appellants*

v.

Earl F. Wakefield Co., and others – – – – – *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH OCTOBER, 1959

Present at the Hearing:

VISCOUNT SIMONDS
LORD REID
LORD RADCLIFFE
LORD TUCKER
LORD DENNING

[*Delivered by* VISCOUNT SIMONDS]

This appeal from a judgment of the Supreme Court of Canada raises questions of some difficulty upon the true construction of the Mechanics' Lien Act and in particular upon its application, where the lien alleged to arise under it attaches not only to certain land including the oil and gas therein but also to the oil and gas when severed, and where it is sought to enforce it against a fund representing the proceeds of sale of such oil and gas which have been realised by a receiver appointed by the Court under the Act. Upon these questions there has been a difference of judicial opinion in the Courts of Canada.

The facts can be shortly stated. They were agreed at the trial of the action, out of which this appeal arises, before the Court of First Instance in Alberta. What inferences can be drawn from such facts will be considered later.

At all material times the third respondent, Harry Szpilak, was the registered owner of an estate in fee simple in certain lands in Alberta, 80 acres in extent, subject to a reservation in favour of the Canadian Pacific Railway Company of all coal. On the 31st May, 1948, he granted to five named individuals (including one Duitman and one Morrisroe) a lease of all petroleum natural gas, natural gasoline and related hydrocarbons to be found within, upon, or under the said land. By the lease the lessees were obliged to commence a well for petroleum and natural gas within two years from the date of the lease and thereafter continuously to carry on the work until either petroleum oil or gas should be struck in a quantity of at least 30 barrels per day or the lessees should be reasonably convinced that no such production would be reached. The lessees were entitled to assign the lease.

On the 10th September, 1949, the first respondents, Earl Wakefield Company, on the instructions of one Harding and one McMullen began to drill an oil well on the said lands. It had by the 23rd September reached a depth of 2,570 feet. The drilling was commenced on the authority of a permit issued before drilling to the second respondents, Oil City Petroleums (Leduc) Limited, which was in fact not incorporated until the 19th September, the only shareholders being Harding and

McMullen, of whom the former was Treasurer, and the latter Secretary, of the company.

On the 19th September, 1949, an agreement was made between the first respondents (described as " contractor ") and the second respondents (described as " owner ") whereby the first respondents undertook to drill a well for the production of oil and gas on the said lands. Drilling was to commence on or before the 15th September and the first respondents were to be remunerated by the payment of $50,000 for the work therein mentioned and of certain other sums. It was further provided that the first respondents were to receive $10,000 when the well was spudded and other periodic payments and that the second respondents should deposit with the Prudential Trust Company a sum of $40,000 upon which the first respondents could draw as the work progressed.

On the 21st September the lessees from the third respondent assigned to the first appellants, Ponoka-Calmar Oils Ltd., all their right title and interest in and to the oil and gas rights in the said lands and the latter assumed all the obligations of the lessees to the third respondent under the lease.

On the 23rd September the first respondents, having by then drilled the well to the depth of 2,570 feet, told the second respondents they would drill no further until they were paid for the work which they had done in accordance with the agreement of the 19th September.

On the next day an agreement was made between the two appellants (described as " the owners ") of the first part the second respondents (described as " the operators ") of the second part the Prudential Trust Company Ltd. of the third part and Harding and McMullen of the fourth part. Thereby the appellants assigned to the Trust Company all their rights in the said lands and other lands and in the production of natural gas and hydrocarbons therefrom and it was thereby provided that all the gross proceeds of wells drilled in the said and other lands under the said agreement were to be divided by the Trust Company, subject as therein mentioned, in certain defined proportions between the first and second appellants and Harding and McMullen and the second respondents. The agreement, which recited (inter alia) that the appellants desired to have the second respondents drill or have drilled wells for petroleum or natural gas on the said lands and that Harding and McMullen had assisted in arranging for the drilling of the said wells, provided (inter alia) that on or before the 20th September, 1949, the second respondents would commence to drill or cause to be commenced to be drilled one well on the said lands and would thereafter continuously and diligently carry on or cause to be carried on the work of drilling and casing such well together with penalties in default of their doing so.

On the 26th September the first respondents received from the second respondents a cheque for $3,000 which was dishonoured. They have received no other payment for work done and services rendered under the agreement of the 19th September.

On the 14th October the first appellants served notice on the second respondents of their default under the agreement of the 24th September and that, if such default was not remedied within 30 days, the said agreement should thereupon cease and determine.

On the 22nd October the first respondents, having applied for and received a permit from the Petroleum and Gas Conservation Board of the Province of Alberta, plugged and abandoned the said well.

Between the 23rd September and the 14th October the first respondents did not drill the well though they were ready, willing, and able to do so and would have done so had they received the payment under the agreement of the 19th September.

During the month of January, 1950, the well drilled by the first respondents was deepened and was subsequently completed and has produced a considerable quantity of oil. The work and services done and rendered by the first respondents were competent and skilful and for the benefit of the appellants and other respondents. The agreed value

of the work done by the first respondents and the material supplied by them (not including compensation for the period from the 23rd September to the 16th October) was $30,000. The agreed value of day work was $14,075 and of material purchased by the first respondents for account of the second respondents was $1,670.62. There was no agreement between the first respondents and the appellants or any of the other respondents that the first respondents should not be entitled to a mechanics' lien under the provisions of the Act. On the 12th October the first respondents filed a mechanics' lien under the Act against the said lands for the sum of $28,849.33 and on the 18th October a further similar lien for the sum of $36,896.29.

On the 5th December, 1949, the first respondents filed their statement of claim under the Act, all the other parties to this appeal being defendants, and thereby claimed a declaration that the said liens were good, valid and subsisting liens, judgment against the second respondents for $65,745.62 and the appointment of a receiver pursuant to section 36 of the Act.

On the 22nd June, 1950, an order in the action was made by Mr. Justice Shepherd. It was made upon the application of the first appellants in the presence of the first respondents and with their assent. It recited that it appeared that a receiver should be appointed to preserve the property in the oil well therein described forming the subject matter of that action and to collect the receipts from the said well and to otherwise manage and operate the said well until the settlement of the action and it was thereby ordered that the Prudential Trust Company should be appointed receiver to collect, get in and receive all moneys presently receivable or which might become receivable from the sale of oil or other productions from the said well and the receiver was thereby authorised to pay out from any moneys which might be received from such sale the costs of production and of operating the well. Other directions were thereby given including a direction that the receiver (who was there called "the said Trustee") should pay out from his receipts to the respondent Szpilak the gross royalty of 12½ per cent. reserved to him under the lease and it was ordered that except for the payment of the said operating expenses and royalty the receiver should pay all other moneys received thereunder into a special trust account to the credit of the action subject to further order. The said receiver duly entered upon its duties and collected the moneys receivable from the sale of oil and other products and, subject to the payments that he was directed to make thereout, paid the said moneys into a special fund to await further order. It is the destination of this fund which is the subject of the present dispute and before further examining that question it is necessary to refer in some detail to some provisions of the Mechanics' Lien Act.

For the purpose of determining the first question that appears to arise, viz. whether the first respondents validly filed a lien or liens against the said lands, only a few sections of the Act need be considered. Briefly the question is whether the work done by the first respondents in respect of which the lien is claimed was done on behalf of any "owner contractor or subcontractor" or of "any person having any estate interest or right in the oil or gas in place or in the oil or gas when severed" within the meaning of the Act or with the privity or consent of any such owner. Section 2 defines a "contractor" as a person contracting with or employed by an owner or his agent to do work or perform services upon or in respect of, or to place or furnish materials to be used for, any improvement. "Improvement" includes a gas oil or other well. "Owner" is defined as extending to "every person . . . having any estate or interest in land at whose request express or implied and (i) upon whose credit or (ii) upon whose behalf or (iii) with whose privity and consent or (iv) for whose direct benefit any contract work is done and all persons claiming under him . . . whose rights are acquired after the commencement of the work". This definition is extended by section 43 to include "every person having any estate interest or right in the oil or gas in place or in the oil or gas when severed notwithstanding that such person has not requested the contract work to be done, is only indirectly benefited

thereby and has had no dealing or contractual relationship with the contractor or person claiming the lien " with the proviso that where the oil or gas is held in fee simple the holder of an interest in the first royalty in the oil or gas up to 20 per cent. thereof shall not by reason of that section be deemed to be an owner. Section 6 provides that unless he signs an express agreement to the contrary any person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making of any improvement for any owner shall by virtue thereof have a lien for so much of the price of the work service or materials as remains due to him in the improvement and the land occupied or enjoyed therewith or upon or in respect of which the work or service is performed or upon which the materials are to be used. Section 7 provides that the lien shall arise at the date of the commencement of the work or at the date of the first delivery of material. Section 19 provides for the method of registration. Section 44 provides that the lien provided under section 6 shall not only attach to the land, including the oil and gas therein, but also to the oil and gas when severed, and section 45 that all interests in the oil or gas under any lease mortgage or agreement for sale relating to the oil or gas in excess of the first royalty up to 20 per cent. shall be subject to the lien in all respects. Other sections of the Act will be referred to in connection with the other questions that arise.

Upon this first question there has been a difference of judicial opinion. The learned Chief Justice of the Trial Division of the Supreme Court of Alberta held that the first respondents had a valid lien for $30,000 and ordered that that sum should be paid out of the funds held by the receiver. He did not give a reasoned judgment. In the Appellate Division of the Supreme Court it was held by Ford, C.J.A., and Macdonald and Porter, JJ.A., that from beginning to end of the drilling the first respondents had not done any work for the owner as defined by the Act, while McBride and Johnson, JJ.A., were content to assume the contrary but for other reasons disallowed the first respondent's claim. Upon appeal to the Supreme Court of Canada the learned Judges of that Court were unanimous in determining that the first appellants were to be regarded as owners within the meaning of the Act.

In reaching this conclusion Mr. Justice Locke (with whom the Chief Justice and Mr. Justice Fauteux concurred) and to some extent Mr. Justice Rand (with whom also the Chief Justice and Mr. Justice Abbott concurred) relied on facts to some of which attention has been called, in particular that the drilling agreement of the 19th September required the drilling to commence on the 10th September, that the agreement of the 24th September specified the date for commencement as four days earlier, that Harding and McMullen were intimately connected with the appellants, and other circumstances to which reference is made in their judgment. These facts led Mr. Justice Locke to infer that " Harding and McMullen had been authorised, either by the individual lessees from Harry Szpilak (the third respondent) or on behalf of the Ponoka-Calmar Company (the first appellant) to request the appellant (the first respondent) to do the work and further that the drilling done by the appellant from September 10th onwards was done with the privity and consent of the said Lessees and of the said company ". This conclusion was challenged by the present appellants on the ground that such an inference of fact was not to be found in the agreed statement of facts and could not properly be drawn. If it was a fact, the first respondents should, it was said, have required the appellants to agree to its inclusion in the statement: they had not done so and it was not to be assumed that agreement would have been reached.

Their Lordships are not satisfied that the inferences drawn by Mr. Justice Locke could not fairly be drawn but they do not think it necessary to determine this question. For in the judgment of Mr. Justice Rand there is what appears to them an alternative and decisive way of dealing with the question. That learned Judge after citing section 43 of the Act proceeded " The drilling work prior to the date of the contract (i.e. the 19th September) having been expressly contemplated in the agreement of September 24th, these two companies (i.e. the present appellants) vis-a-vis

Oil City (the second respondent) have ratified and bound themselves to the latter's recognition and inclusion of the work done previously to the 15th. Section 43 in its exceptional terms was undoubtedly passed to meet just such situations as are shown here : i.e. conditions brought about by the urgency to exploit the resource in which formal agreements could not keep pace with action and only by relation back were the rights of the parties intended to be determined." In his opinion therefore the appellants clearly were "owners" within section 2 and section 6 as extended by section 43. Their Lordships agree with this statement, which no elaboration can improve. This question must therefore be decided in favour of the first respondents.

It remains to determine whether upon the assumption that valid liens were created in favour of the first respondents they were enforceable in the manner and to the extent directed by McLaurin, C.J. The consideration of this question requires the statement of other sections of the Act.

Section 19 and the following sections prescribe the manner in which, and the time within which, liens must be registered. Section 24 provides for the expiry and discharge of a lien and must in view of the opinion of McBride and Johnson, J.J.A., in the Appellate Division of the Supreme Court of Alberta and of the contention before the Board be stated in some detail. By subsection (1) it is enacted that every lien which is not registered shall absolutely cease to exist on the expiration of the time thereinbefore limited for the registration thereof. Subsection (2) provides for the cessation of a lien upon notice. Subsection (6) is more relevant. It provides that every registered lien, whether a certificate of *lis pendens* has been filed or not, shall absolutely cease to exist on the expiration of 6 years from the date of registration of the lien unless before the expiration of that period and not more than two months before its expiration the lienholder, his assignee, agent or any person claiming through or under him files in the office of the Registrar of Land Titles a statement verified by affidavit setting out the interest of the lienholder and the amount still owing to him for principal and interest, which statement might be in Form 7 in the Schedule or to the like effect with such variations as the circumstances might require.

Section 26 is significant. It provides (1) that upon application by originating notice a judge having jurisdiction may allow security for, or payment into Court of, the amount of the claim and such costs as he may think fit and may thereupon order that the registration of the lien be vacated, and (2) that any money paid into Court shall take the place of the property discharged and be subject to the claim of all persons for liens to the same extent as if the money was realised by a sale of the property in an action to enforce the lien.

Sections 30 to 37 deal elaborately with the enforcement of a claim for a lien. Proceedings to enforce a lien may be commenced either (as in the present case) by a statement of claim or by originating notice and in either case by the filing of *lis pendens* in the prescribed form. Service of the claim or notice is to be made upon all persons who by the records of the Land Titles Office appear to have any interest in the land in question and such other person as the Judge may direct. All lienholders served with the statement of claim or notice are to be deemed parties to the proceedings and any lienholder failing to appear at the hearing after proof of notice duly served on him thereby loses his lien. Section 35 provides that upon the hearing of the application the Judge shall decide all questions which arise therein or which are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of all persons concerned. He may (inter alia) order that the land charged with the lien be sold and, when a sale is held, must direct to whom the money in Court shall be paid, and where a claimant fails to establish a valid lien may make a personal order against any party to the proceedings for such sum as may appear to be due to him and which he might recover in an action against such party.

By section 36 the Judge is empowered at any time prior to the sale of the property upon the application of any lienholder to appoint a receiver to take charge of the property and rent it on such terms and conditions as he thinks fit and after making such deductions as thereby prescribed to apply the balance of the rents as directed by the Judge. By section 47 (where the improvement consisted of an oil or gas well) the Judge might in appointing a receiver under section 36 authorise him to take charge of the well and operate it and sell the production therefrom or, in the alternative, to take the oil and gas when produced and saved and sell the same and receive and pay into Court the proceeds of the gas and oil when sold.

Finally, it was by section 37 (1) provided that all moneys realised by proceedings under the Act including as therein mentioned should be applied and distributed in the following order, that is to say, in paying (*a*) the costs of all lienholders of and incidental to the proceedings and of registering and proving the liens (*b*) six weeks' wages (if so much be owing) of all labourers employed by the owner, contractor or sub-contractor (*c*) the several amounts owing to other lienholders other than the contractor (*d*) the amount owing to the contractor: subsection (2) provided for the methods of distribution between the lienholders *inter se* and subsection (3) for the payment of the balance to the owners or other persons legally entitled thereto.

Their Lordships can now deal with the contention which found favour with two of the learned judges of the Appellate Division of the Supreme Court of Alberta, viz. that the two liens which had been registered on the 12th and 19th October, 1949, absolutely ceased to exist on the 13th and 20th October, 1955, by virtue of section 24 (6) of the Act, and that the lienholders had no longer any rights by virtue of their liens against the fund representing the proceeds of sale of the oil. Upon this question their Lordships are so fully in agreement with the judgment given by Mr. Justice Rand in the Supreme Court of Canada that they can state their own opinion shortly.

The object of a mechanics' lien is to give a security to those who have by work or services effected an improvement upon land by way of a charge upon that land. Its registration is for the purpose of protecting the title to an estate or interest in land which is created by the lien. It is thus part of the law affecting title to land, as the prescribed form of claim for registration clearly indicates. The extension of the lien by section 44 from the land "including the oil and gas therein" to the oil and gas when severed, creates a new situation. It is not necessary to consider what are the rights of the parties so long as the oil and gas, though severed, remain on the land. That is not the position here. The relevant question is what are their rights when the oil and gas, formerly subject to the lien, pass into the hands of a Receiver appointed by the Court and are sold by him and the proceeds paid into a fund to await the further order of the Court. In the first place it is clear that the original lien can no longer subsist: it is equally clear in the second place that there is no longer anything, so far as the oil and gas thus sold are concerned, in respect of which a new lien can be registered or an old lien renewed. But from this it does not follow that the lienholders have no rights against the fund representing the proceeds of sale. It may not be correct to say that a new charge against the fund is substituted for the old lien—though the language of section 26 (2) goes far to justify it. But this is a matter of words. The scheme of the Act is that, where land subject to a lien is sold in an action to enforce a claim the lienholder is not to be prejudiced by the fact of sale and, subject always to prior claims, which may now include the costs and expenses arising out of the action, has the same rights as he would have had against the land itself including the oil and gas whether severed or not.

It may be pointed out that, if it were otherwise, the action of the lienholder in obtaining the appointment of a Receiver with a view to the preservation of the property subject to the lien would or might result in the loss of the rights which the lien was intended to preserve. In the

present case it appears that the application for a Receiver was made not by the lienholder but by the owner. But it was made with the consent of the former, and it is not to be supposed that his rights were thereby prejudiced. The appointment is contemplated by the Act as being made, and was in fact made, in an action by the lienholder to enforce his claim and is part of the statutory machinery for doing so.

It further appears to their Lordships that any doubt that might otherwise exist is set at rest by the provisions of section 37 of the Act, which provides for the application of moneys " realised by proceedings under this Act ". It is clear that the moneys paid into Court or into a special fund by the Receiver are moneys " realised by proceedings under this Act ". If so they must be applied and distributed in the prescribed order to the persons therein named. But it was urged that the lienholders therein mentioned meant only those persons who had subsisting liens on the land at the date of distribution. This contention cannot be accepted. For the land subject to the lien had been sold and under section 26 (2) the lienholder was relegated to the claim to a lien " to the same extent as if the money was realised by a sale of the property in an action to enforce the claim ". It follows that the lienholders mentioned in section 37 are those persons who had at the time of sale a lien on the property sold and brought their action to enforce it. The only consistent interpretation of the Act is to treat the proceeds of sale of oil and gas realised by the Receiver in the same way as the proceeds of sale of the land itself. This may be described as creating a charge on the fund : but equally it is the method which a Court administering a fund under its control must employ in order to preserve and give effect to the rights of the parties and it is that principle that is embodied in section 37.

For these reasons their Lordships are of opinion that the judgment of the Supreme Court of Canada was correct. They will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

(39915) Wt. 8078--37 100 10/59 D.L.

In the Privy Council

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DELIVERED BY
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Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1959