Privy Council Appeal No. 61 *of* 1916.

The Tilbury Town Gas Company (Limited) - *Appellants,*

v

The Maple City Oil and Gas Company (Limited), and Others - - - - *Respondents,*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND NOVEMBER, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.

[*Delivered by* LORD SHAW.]

This is an appeal by the Tilbury Town Gas Company from a judgment of the Appellate Division of the Supreme Court of Ontario, dated the 31st December, 1915. That judgment allowed the appeal of the defendant company from the judgment of Lennox, J., in favour of the plaintiff company, dated the 10th February, 1915.

The business of the plaintiff company is that of distributing and selling natural gas. This gas is found in considerable quantities in what is known as the Tilbury Field in the County of Kent, Ontario. For the purposes of its business of distribution and sale the plaintiff company obtained a supply of gas from the Maple City Oil and Gas Company. The Maple Company conducted boring operations, gathered the gas, and delivered the same into the pipeage system of the plaintiffs, all under an agreement of, *inter alia*, purchase and sale. The agreement is dated the 22nd July, 1912.

The question in the case depends for its solution upon the proper construction to be given to certain clauses of that document. These clauses are as follows:—

"The Tilbury Company agrees with the Maple City Company to receive, accept, and take from the Maple City Company, and the Maple City Company agrees to bore or operate for, supply, and deliver as and when required to the Tilbury Company natural gas to the full extent of their requirements at all times which can be obtained in merchantable quantities from the said lands now held or which may hereafter be held as aforesaid by the Maple City Company, and which gas may be required for supply or marketing or sale by the Tilbury Company, or used by the Tilbury Company within the limits of the town of Tilbury, or within the township of Tilbury East, in the County of Kent, or elsewhere under any franchise or agreement under which the Tilbury Company may from time to time have the right or power to deliver, distribute or market or use natural gas, and may desire so to do."

By the second clause of the agreement the Tilbury Company agrees with the Maple City Company "to pay to the Maple City Company for such natural gas supplied and delivered as aforesaid into pipe-lines or piping of the Tilbury Company" a price at the rate of 7 cents per 1,000 cubic feet of gas.

By the third clause of the agreement it was provided as follows:—

"And the Tilbury Company agrees with the Maple City Company that it will not, while the present franchise or agreement with the town of Tilbury for the supply therein of natural gas by the Tilbury Company shall remain in existence and in force, take or procure natural gas from any other company or person than the Maple City Company for the supply of natural gas in the town of Tilbury, so long as and provided that the Maple City Company shall continuously supply from the lands hereinbefore described to the Tilbury Company sufficient natural gas with at all times sufficient pressure and regularity of delivery required for the purposes from time to time of the Tilbury Company and the persons or corporations taking or buying such gas from the Tilbury Company; and the Maple City Company agrees with the Tilbury Company that it will produce, supply, and deliver to the Tilbury Company hereunder sufficient natural gas, with sufficient pressure and regularity of delivery from time to time required for the purposes aforesaid, continuously (provided that the same can be obtained in merchantable quantities in or upon said lands), and will not supply or deliver gas or allow gas to be taken from the lands as aforesaid now or hereafter held or leased by the Maple City Company or agree so to do, except subject to the rights of the Tilbury Company hereunder and after the Tilbury Company shall be supplied as aforesaid, with all the gas required by it, or to which it may be entitled for supply or marketing or sale or use by the Tilbury Company, as aforesaid."

It was further provided by clause 5 of the agreement that, in the event of the Maple City Company "failing to produce, supply, and deliver natural gas as aforesaid to the Tilbury Company when the same might be obtained and delivered in merchantable quantities from the lands," then the Tilbury Company might, in its option, itself bore or operate for the gas and deliver the same into its own pipeage, the Tilbury Company being entitled to be indemnified for the costs incidental to these operations.

In the course of the development of this gas-field other

companies have appeared, and various contracts have been made. The respondent company, namely, the Glenwood Natural Gas Company (Limited), has been formed, and also another company called the Southern Ontario Gas Company. Both of these companies came into existence in December 1912. The Southern Ontario Company was incorporated for the purpose of supplying the cities of London and St. Thomas, places at a considerable distance from the Tilbury field. The Glenwood Company was formed for the purpose of conducting the operations of mining and production in order to supply the Southern Ontario Company's demands.

About the same time the Glenwood Company, by the purchase of stock, obtained a controlling interest in the Maple City Company, and in the beginning of the following year it purchased the fee of two of the three farms which the Maple City Company held under leasehold and used as the ground of their mining operations. The purchase by the Glenwood Company was made subject to the interests of the Maple City Company under these leases. It is alleged that the Glenwood Company used all the rights thus amassed by it by endeavouring to undermine the rights of the Tilbury Company so as to prevent them from obtaining delivery of a sufficient supply of natural gas from the Maple City Company. It is admitted that the Glenwood Company's pecuniary interests might be in this direction, because the natural gas thus diverted might be sold by it to the Southern Ontario Company at 8 cents, and not 7 cents, per 1,000 cubic feet.

It is in these circumstances that the action was brought, and the claim set forth in the writ is against the defendants "for an injunction restraining them from connecting up the wells of the defendant, the Maple City Oil and Gas Company (Limited), with the pipe line of the Southern Ontario Gas Company (Limited)." Certain declarations are also asked for, but these declarations are simply an affirmance of the rights, such as they are, of the parties under the agreement founded on. The question before the Board, as was admitted, is whether an injunction of the kind claimed should, in the circumstances, be granted.

While the agreement and arrangements above sketched have been made between and among the respondent companies, it is admitted that the plaintiffs, the Tilbury Company, can claim no power of interference with these, except in so far as they form a violation of the rights to gas supply from the Maple City Company under the agreement founded on. It is accordingly of vital importance to note what the admitted facts with regard to that supply are. It appears from the proceedings, and it was admitted with candour at their Lordships' Bar, that up till now there has been a full and regular and continuous supply of gas to the Tilbury Company. It was further admitted that that supply had, up to date, largely exceeded in quantity their requirements from day to

day, or month to month, and that there was accordingly a large available surplus. With regard to the immediate future, it was further admitted that the rate of yield and the effect of mining operations conducted in different portions of the field was a matter of considerable speculation, and it was not in fact established by the evidence that the immediate future of the required supply under the contract was imperilled.

In this state of the facts their Lordships are of opinion that an injunction is not warranted by law.

It was argued that, under the terms of the agreement, the Tilbury Company is entitled to a supply of all the gas which these fields produce, except such amount thereof as the Tilbury Company may expressly dispense with. This is the view taken by the learned Judge who tried the case. As he puts it: "The agreement requires the Maple City Company to so act as to secure as far as possible a permanent or quasi-permanent source of supply of gas for the Tilbury Company." And with regard to the surplus, his view is that, if the Maple City Company "in working out the agreement should find itself liable to sustain a loss by reason of a temporary surplus of gas, which the Tilbury Company, after notice and the lapse of a reasonable time is unable or unwilling to take, it may be that in such a case the Maple City could for the time being dispose of this surplus elsewhere."

Their Lordships find themselves quite unable to accept this view of the agreement founded on. Under clause 1 of that agreement the obligations of the Maple City Company are to bore or operate for supply and delivery of natural gas to the Tilbury Company, to the full extent of their requirements at all times. This obligation extends not only to the lands now held, but to those "which may hereafter be held" by the Maple City Company: and with regard to the Tilbury Company the requirements for the supply or marketing or sale extends to all franchises or agreements which that company may acquire or have from time to time. The true point of the case is:—what is the meaning of the phrase "to the full extent of their [that is, the Tilbury Company] requirements at all times"? In their Lordships' view, this applies to the needs of their actual business from time to time. Those needs might decline; or, in view of the possible extensions of the Tilbury Company by the acquirement of new franchises, they might be enlarged. It would be practically impossible for that company to say what, if its business develops, would be its needs in the future. This is true; but when the agreement refers to the requirements from time to time, this in their Lordships' opinion applies to the needs actually arising or in immediate prospect in the course of the going business; and the word "requirements" should not be construed as signifying the presentation of a request or demand. Such a request or demand might be far in excess of the business needs and might

create at the will of the Tilbury Company a monopoly by way of reserve against an unknown future.

This view is confirmed by the language of section 3 of the contract under which the Maple City Company agrees to produce, supply, and deliver, to the Tilbury Company "sufficient natural gas with sufficient pressure and regularity of delivery from time to time required for the purposes aforesaid continuously." But it is also clear that no monopoly was meant to be created, and that the parties fully contemplated the case of production in excess of the Tilbury Company's requirements from time to time. For the clause proceeds to bind the Maple City Company not to allow gas to be taken from the lands except subject to the rights of the Tilbury Company, and after the Tilbury Company shall be supplied.

It thus appears quite plain that the development of the field was contemplated, and that the position of the Tilbury Company was, that this development might take place, and supplies be made to other customers, so long as priority was given to the requirements of the Tilbury Company. In short, the agreement does not provide for a monopoly of the entire production of the field, but it does provide for priority of supply therefrom. Nor, in the view taken by the Board, does the agreement sanction the idea of a monopoly subject to a power of dispensation by the appellants at their option, without which dispensation the field could not be developed or other supplies made.

In the opinion of their Lordships, the agreement not having created any monopoly as argued, and it not having been established that the true right of the Tilbury Company (namely, to a priority in the full satisfaction of its requirements) having been invaded or immediately threatened, no case has arisen which would warrant a court of law in granting the injunction claimed.

In the opinion of the Board, the correct view of the case has been adopted by the learned Judges of the Appellate Division of the Supreme Court. Their Lordships also agree with the observations made by the learned Hodgins, J., that, the requirements of the Tilbury Company "do not consistently with the concluding part of clause 3, as it seems to me, compel that company to store up all its assets in order to be able at some indefinite future time to meet any possible demand which may be made upon it by the respondents." Their Lordships also agree with the learned Judge in his view that the plaintiffs are only entitled to "what they actually require and demand from time to time, and not to the creation and preservation of a reserve fund of untapped or unexhausted gas which, in the meantime costs them nothing, although it might cost the Maple City Company a very considerable expenditure, and the enforced retention would deprive them of the right given by the contract of selling 'subject to the right of the Tilbury Company.' That expression would be

meaningless if its import was that what they could sell would be nothing at all because of possible demands in the future."

Their Lordships will humbly advise His Majesty that the appeal be refused with costs.

In the Privy Council.

THE TILBURY TOWN GAS COMPANY (LIMITED)

v.

THE MAPLE CITY OIL AND GAS COMPANY (LIMITED) AND OTHERS.

DELIVERED BY LORD SHAW.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1916.