COMMONWEALTH OF PENNSYLVANIA

THE ESTATE OF CLARENCE MOORE and PENNLYCO, LTD., a Maryland Corporation	:	BEFORE THE BOARD OF CLAIMS
VS.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES	:	DOCKET NO. 1010

FINDINGS OF FACT

1. The Plaintiffs are the Estate of Clarence Moore and Pennlyco, Ltd., a Maryland Corporation. (Second Amended Complaint)

2. The Defendant is the Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, a Commonwealth agency. (Second Amended Complaint)

3. The Moore Estate and Pennlyco, Ltd. own the oil and gas which might underlie 25,621 acres of surface property owned by the Department of Conservation and Natural Resources in Lycoming County. (R-246-7)

4. The 25,621 acres is divided into two areas one consisting of 18,780 acres, colored yellow on the maps offered at trial, hereafter referred to as the yellow tract, and the other consisting of 6,841 acres, colored blue on the maps offered at trial, and hereinafter referred to as the blue tract. (R 182, Plaintiff Ex. 52; Note: page 182 due to a typo reads 6,821; it should read: 6,841)

5. Both the yellow and blue surface areas were conveyed to the Commonwealth by Central Pennsylvania Lumber Company in accordance with a sales agreement of 1932 followed by a deed dated March 28, 1933. Central Pennsylvania Lumber only owned the oil and gas under the yellow tract; it did not own the oil and gas under the blue tract. (R 140, Plaintiff Ex. 1 and 2)

6. Through a succession of transfers of ownership, the title to the oil and gas under the yellow and blue tracts became vested in the Plaintiffs; the title to the oil and gas under the yellow and blue tracts came to the Plaintiffs through separate titles. (R 246-7)

7. The sales agreement and deed referred to in ¶ 5 contained a reservation clause which reserved to the grantor all the oil and gas with the rights of ingress, egress and regress upon the land for fifty (50) years. (Plaintiff Ex. 1 and 2)

8. The Commonwealth Court in an opinion rendered on November 17, 1989 interpreted the reservation clause to mean that Moore owned the gas and oil underlying the yellow tract but at the end of the fifty (50) years, March 28, 1983, surface access terminated. (R 139, 511)

9. The Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, hereafter DCNR, had mistakenly claimed ownership of the gas and oil under the yellow tract until the Commonwealth Court decision of l989; DCNR also mistakenly claimed ownership of the oil and gas under the blue tract, but following a title search conducted in 1984 stipulated that it did not own the oil and gas under the blue area. (R 183, 553, Plaintiff Ex. 15)

10. DCNR issued a notice to bidders for an oil and gas lease sale on December 27, 1983 which included the yellow and blue tracts. The notice stated that Commonwealth is considered to be the owner of the oil and gas rights but makes no warranty as to ownership. (R 155, 300, 302, 306, Com. Ex. 7)

11. Moore protested the sale and filed an action to quiet title in 1984 for the yellow and blue tracts. DCNR stipulated shortly thereafter, following a title search, that Moore owned the oil and gas under the blue tract and the blue area was removed from the litigation. The quiet title action was brought before the Board of Property which ruled that the DCNR owned the oil and gas under the yellow tract as of March 28, 1983. However, on appeal, the Commonwealth Court reversed as set forth in ¶ 8. (R 139, 156, 158, 183, 202, 247, 315)

12. In 1984, at that time still mistakenly maintaining its claim of ownership of the oil and gas under the yellow tract although not warranting such ownership, DCNR leased the yellow tract to C.E. Beck who in turn assigned the lease to Pennzoil. (R 303-312, 318)

13. In 1984, DCNR returned the bid guarantee checks for the blue tract after admitting and stipulating that the Commonwealth did not own the oil and gas under the blue area. (R 183, 303, 309)

14. The Commonwealth collected $291,000 under the lease for the yellow tract area which was dated February 27, 1984 but signed in November of 1984. (R 303, 305, 312, 318, 502)

15. In the early 1980's the price of gas was up because of the OPEC oil embargo and favorable tax laws which encouraged tax shelters. There was a frenzy by major oil companies. (R 48, 104, 533)

16. The boom gas market crashed by 1986. (R 97)

17. John Page was in real estate development business during the early 1980's and formed a Pennsylvania partnership which he claims made the offer to Moore for the oil and gas rights. (R 100 and 101)

18. John Page claims that Moore was offered $2 million plus the standard one eighth royalty for a lease of the oil and gas rights under the entire 25,621 acres (the yellow and blue tracts) by IDC Drilling Co., a Pennsylvania partnership, in the early 1980's. (R 105, 106, 116, 119, 120, 138, 541)

19. Although Mr. Page claims that IDC made the offer of $2 million plus the standard one eighth royalty to Mr. Moore, and that Mr. Moore accepted, there was nothing reduced to writing and Mr. Page testified that at the time of the offer "he needed some verification as to the ownership of the minerals." (R 106, 113, 114)

20. Page testified there were two problems with the ownership of the oil and gas:

1. Mobil Oil Corporation ("Mobil") was joint owner with Mr. Moore of the oil and gas rights at the time;

2. DCNR claimed ownership of the oil and gas. (R 107, 125, 126, 133, 236.)

21. The Mobil problem was eliminated when Moore sued Mobil in 1983 for failure to cooperate in realizing benefit from the property and Mobil settled by quitclaiming its interest to Moore in late 1983. (R 107, 238-9, Com. Ex. 5)

22. Mr. Page testified that the effect of DCNR's claim of ownership of the oil and gas was to "kill the deal deader than a doornail..." (R 107-8, 145)

23. Mr. Page did not testify as to the exact date of the offer and acceptance and on cross-examination indicated that he could not remember the year of the offer and acceptance or the year when IDC lost interest due to the DCNR's claim of ownership of the oil and gas; he did say these things occurred in the early 1980's. (R 123-135, 200-202)

24. Following the stipulation by DCNR that Moore owned the oil and gas under the blue area, there still was some confusion by DCNR as to access to the blue tract as the attorney for DCNR still mistakenly denied in 1984 that Moore had access to the blue area. (See Plaintiff Ex. 14, p. 8; R 184, 434, 525, 526, 527, 553, 554)

25. In 1985, Moore filed the case here at issue with the Board of Claims but it was continued pending the other litigation. In 1992, Moore filed a defacto taking action in

Lycoming County against the Commonwealth (in that case, the County Court found a taking but the Commonwealth Court vacated the County Court finding and the Pennsylvania and U.S. Supreme Courts refused to hear the case further.) (R 139, 203, 204)

26. The continued confusion by the DCNR attorney subsequent to the stipulation for the ownership of the oil and gas under the blue area, resulted in no damage to Claimants as Plaintiffs leased to Pennzoil the oil and gas under blue tract in 1984. (R 212-213, 219-221, Com. Ex 1)

27. In 1989 and 1991 DCNR offered Plaintiffs access to the yellow area for a share of the oil and gas and the royalty interest and if Plaintiffs would give up the instant claim before the Board of Claims. (R 150, 542-3, 546, 550; Plaintiff Ex. 13, 40)

28. Plaintiffs are asking for (1) the loss of the $2 million dollars offered plus interest; (2) the royalty expectancy which Plaintiffs value at $1 million plus interest; and (30) the lease money of $291,000 collected by the Commonwealth plus interest. (R 563-4; Second Amended Complaint)

29. Mr. Moore died in 1997 and was replaced by his estate in this litigation. (R 26)

30. Prior to his death, Mr.Moore conveyed 50% interest in the mineral estate to Kenneth F. Yates who subsequently conveyed that interest to Pennlyco. (R 140, ¶ 2 of Second Amended Complaint)

31. Ownership of the yellow and blue tracts are as follows: yellow tract: oil and gas is owned by Plaintiffs; surface is owned by Commonwealth; access prior to March 28, 1983 was controlled by Plaintiffs; access subsequent to March 28, 1983 is controlled by Commonwealth; blue tract: oil and gas is owned by Plaintiffs; surface is owned by Commonwealth; access is controlled by Plaintiffs. (Board Finding from record)

32. The testimony of John Page can be given very little, if any, weight as there are no writings and there is no detail as to time. (Board Finding from record)

33. There is no express contract obligation which was breached by the Commonwealth. (Board Finding from entire record)

34. The Commonwealth could not have entered into a lease of the yellow tract without losing the oil and gas rights owned by Plaintiffs (Board Findings from record)

35. A quasi contract was created when the Commonwealth leased the oil and gas rights belonging to Moore and retained the $291,000.00 paid under the lease. (Board Findings from record)

36. The Commonwealth was unjustly enriched by retaining the $291,000.00 in lease rental payments (Board Findings from record)

37. The $291,000.00 in lease rental must be paid to the Plaintiffs. (Board Finding from record)

38. The Plaintiffs are entitled to interest at the statutory rate from November 17, 1989 (Board Finding from record)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of this action. (72 P.S. §4651-1 through 10)

2. The Board of Claims has jurisdiction over the parties to this action. (72 P.S. §4651-1 through 10)

3. There is no express contract obligation which was breached by the Commonwealth.

4. A quasi contract was created when the Commonwealth leased the oil and gas rights owned by Moore and retained the $291,000.00 paid under the lease.

5. The Commonwealth was unjustly enriched by retaining the $291,000.00 in lease rental payments.

6. The Plaintiffs are entitled to the $291,000.00 lease rental payments held by the Commonwealth.

7. The Plaintiffs are entitled to interest upon the $291,000.00 at the statutory rate from November 17, 1989.

8. The Board Findings of Fact are supported by substantial, relevant evidence such as a reasonable mind might accept as adequate to support its Conclusions of Law.

OPINION

This matter is one in a series of cases brought against the Commonwealth of Pennsylvania by Clarence Moore and Pennlyco Ltd. These cases concern property in Lycoming

County which was conveyed by the Central Pennsylvania Lumber Company to the Commonwealth by deed dated March 28, 1933. The deed conveyed 25,621 acres of ground and reserved unto Central Pennsylvania Lumber Company all the oil, coal and gas, with the right of ingress, egress and regress for a period of fifty (50) years. The 25,621 acres is divided into two tracts which were identified and referred to at hearing as the yellow tract, consisting of 18,780 acres, and the blue tract, consisting of 6,841 acres. At the time of the deed conveyance, March 28, 1933, Central Pennsylvania Lumber Company did not own the oil and gas under the blue tract.

The Commonwealth claimed ownership of the oil and gas rights after March 23, 1983 contending that the reservation clause terminated the Plaintiffs rights upon the expiration of fifty (50) years from March 23, 1933. Moore filed suit in 1984 before the Board of Property which agreed with the Commonwealth position but was reversed by the Commonwealth Court. The Commonwealth Court held that the reservation clause applied to surface acres only and accordingly held that the oil and gas was owned by Moore but the surface was owned completely by the Commonwealth after March 23, 1983. This decision applied to the yellow tract only; during litigation the Commonwealth had completed a title search which revealed that the oil and gas under the blue tract was not owned by Central Pennsylvania Lumber and accordingly withdrew any claim for the oil and gas as to the blue tract.

On December 27, 1983 the Commonwealth issued notice for bids of the oil and gas within the yellow and blue tracts. The Commonwealth, however, made no representation as to ownership and bidders were advised to conduct their own title search. Leases were executed in

November of 1984 but were dated as of February 27, 1984. After Moore's filing of suit before the Board of Property, the Commonwealth completed its title search, as aforesaid, and finding it did not have title to the oil and gas under the blue tract, canceled and withdrew the leases upon the blue tract. However, the leases upon the yellow tract were not canceled and the Commonwealth received $291,000.00 in lease payment which it has retained even after the Commonwealth Court decision in 1989 which held that the Plaintiffs owned the oil and gas but access thereto had terminated thereby vesting complete surface title in the Commonwealth.

Accordingly, by way of stipulations and litigation the ownership of the yellow tract is as follows; oil and gas is owned by Plaintiffs, surface is owned by the Commonwealth, access prior to March 28, 1983 was controlled by Plaintiffs and subsequent to March 28, 1983 by the Commonwealth; as to the blue tract: oil and gas is owned by Plaintiffs, surface is owned by the Commonwealth and access is controlled by Plaintiff. Since the 1989 Commonwealth Court ruling, the Commonwealth has made no further claim to ownership of the oil and gas.

Moore originally brought the present action to this Board in 1985. His original Complaint, filed July 1, 1985, alleged that the Commonwealth breached a contract with Moore. The alleged breaches were the Commonwealth's preventing Moore from entering upon the surface and its entering into leases with Pennzoil in 1984. He first amended the original Complaint on July 16, 1985 demanding the money obtained from Pennzoil and claimed damages of $1 million.

The action before this Board was continued for the Board of Property proceedings and then again continued when Moore brought an action in Lycoming County in 1993 alleging a de

facto taking of his property by the Commonwealth. Although Lycoming County found a taking, the Commonwealth Court vacated the County Court's determination. Moore v. DER, 660 A.2d 677 (1995) (Pa. Cmwlth. Ct.) ("Moore II").[1] The Pennsylvania Supreme Court refused to grant allocatur, and the United States Supreme Court refused to grant certiorari in October of 1996.

By the time the parties got back to this Board, the original Plaintiff, Clarence Moore, died and was replaced as Plaintiff by his estate. A Second Amended Complaint was filed with the estate as Plaintiff which sought damages in excess of $2.5 million dollars.

The Plaintiffs characterize Count 1 of the present claim as an unjust enrichment claim. Moore claims that he should have the rentals that the Commonwealth collected from Pennzoil during the years 1984 to 1989.

Count II, alleges a breach of contract by the Commonwealth with resulting damages in excess of $2 million dollars. Moore's allegation is that he could have leased his property to International Drilling Company and, also, sold the prospective royalty.

1

There is no question that the Board has jurisdiction over only those claims which

[1] Moore I is the result of an action originally brought before the Board of Property in May, 1984. The Board of Property interpreted the 1933 deed to say that there was a reversion of all the sub-surface interests, including access, to the Commonwealth in March, 1983. The Commonwealth Court made the determination that the 1933 deed granted the surface to the Commonwealth and reserved the oil, gas and coal for the grantor, which is Moore and Pennylco's predecessor, but also reserved access to the oil, gas and coal for the grantor only until March 28,1998.

sound in assumpsit, i.e., claims based on express contract, contracts implied in law, and contracts implied in law, or quasi-contracts. 72 P.S. §4651-4, Department of Environmental Resources v. Winn, 142 Pa. Cmwlth. 375, 597 A.2d 281 (1991), app. den., 529 Pa. 654, 602 A.2d 863 (1992); Miller v. Department of Environmental Resources, 133 Pa. Cmwlth. 327, 578 A.2d 550, app. den. 526 Pa. 643, 584 A.2d 324, (1990). In order to maintain a claim for damages before the Board, a plaintiff must first establish the existence of a contract, either express or implied, on which the claim may be based.

In their Second Amended Complaint, the Plaintiffs assert that the Commonwealth breached a duty owned to it under a contract dated April 12, 1932 between Central Pennsylvania Lumber Company and the Commonwealth. This document is a sales agreement for the conveyance of land that was subsequently effected by way of deed to the Commonwealth on March 28, 1933. The Plaintiffs allege that the contract contains an agreement by the Commonwealth that Central Pennsylvania Lumber Company, and its successors, would retain ownership of the mineral estate. However, the sales agreement cannot be used as the basis of a claim for breach because it has merged into the deed which succeeded it. The rule in Pennsylvania is well-established and unambiguous: an agreement of sale merges into the deed, and neither party may recover damages based on the prior agreement. E.g., Dintenfuss v. Greenberg, 318 Pa. 20, 177 A.2d 788 (1935), Pennsylvania Electric Co. v. Waltman, 448 Pa. Super. 174, 670 A.2d 1165 (1995).

The Plaintiffs also contend that the Commonwealth's "agreement" was "memorialized and perpetuated" by the 1933 deed to the Commonwealth. A deed is a writing under seal. Ladner Conveyancing in Pennsylvania Section 9.0.1. The language relied upon by the Plaintiffs appears as a conventional exceptions and reservations clause in the premises section of the

deed which states as follows:

> "Also excepting and reserving unto the Grantor, its successors and assigns all the oil, coal and gas now owned by it, the Central Pennsylvania Lumber Company, in, under and upon the aforementioned and described four parcels of ground, with rights of ingress, egress and regress upon and over said tracts of land for and during the term of fifty (50) years from the date of conveyance, together with the use of any part of the surface in the operation, development, protection and transportation of any oil, coal and gas according to such rules and regulations as may be from time to time adopted by the Secretary of the Department of Forests and Waters, but such rules shall at all times be reasonable and in harmony with the usual methods of operating and producing oil, coal and gas."

This exception merely retained title to the gas and oil by the grantor, with a limited time for access and nothing more.

It is well settled with this Board and under Pennsylvania law, that each party to a contract has an implied duty to act in good faith and deal fairly with the other party to the contract during the performance and enforcement of the contract. Bushkill-Lower Lehigh Joint Sewer Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources. Docket No. 475; PLE Vol, 8 Contract Section §356; Commonwealth of Pennsylvania, Department of Property & Supplies v. Berger 11 Pa. Commw. 332, 312 A.2d 100 (1973); Commonwealth of Pennsylvania v. W.P. Dickerson & Son, Inc. 42 Pa. Commw. 359, 400 A. 2d 930 (1979). However, there must be a duty to perform by one party to the other that the other party has interfered with before these principles can apply. In this case the duty to perform was for the Plaintiffs predecessors to convey a general warranty deed and the Commonwealth to pay the agreed consideration. There were no performance conditions beyond that point. The Plaintiffs cannot use these principles to create a contract obligation; that obligation must exist to which these principles then apply. The

Plaintiffs cannot pick themselves up by their own bootstraps. There is no contract performance warranty running from Plaintiffs to the Commonwealth which the Commonwealth prevented Plaintiffs from performing.

This Board should not rewrite an agreement to conflict with the straightforward and everyday meaning of words in the agreement. Lindstrom v. Pennswood Village, 417 Pa. Super 495, 612 A.2d 1048 (1992)

The Plaintiff is claiming that the reserve clause in the deed and agreement of sale reserved the oil and gas under the yellow area to Plaintiff's predecessor and that Commonwealth breached a contractual duty set forth in those documents, by claiming ownership of the oil and gas under the yellow and blue areas. However, the Board finds no promise by the Commonwealth in the deed or agreement of sale to import performance in any particular way. There is no wording by which the Commonwealth agreed to conduct itself in any particular manner concerning the mineral rights. The Commonwealth interpreted the reserve clause as turning over the oil and gas rights to the Commonwealth after fifty (50) years. Following the removal of the blue area from the litigation, the Board of Property agreed with this interpretation; the Commonwealth Court did not. That the Commonwealth, as it turns out, was incorrect in its interpretation of the reserve clause does not constitute an act that breaches a contract and, as set forth above, the Board finds no agreement or promise in the deed or agreement of sale to be breached.

Additionally, in attempting to set a value on the damages caused by the alleged breach of contract, Plaintiffs argue that there was an offer and acceptance of $2 million plus the standard one eighth royalty for the oil and gas between Mr. Moore and IDC Drilling Company in the early 1980s. However, as set forth above, we find no contract and no breach. Moreover, this

Board found that the offer and acceptance were never finalized. As John Page said at p. 106 of the hearing testimony, he "needed some verification as to the ownership of the minerals." The offer and acceptance were never reduced to writing and none of Plaintiffs' witnesses could identify a date, or even a year for certain, when such offer and acceptance were made. This type of evidence, in the opinion of this Board is entitled to very little weight, if any, even if this Board had found a breach of contract. Therefore, even if the Plaintiffs had successfully proven a breach of contract, there would have been no damage awarded by this Board on that count.

While this Board has found no breach of any contract by the Commonwealth's claim of ownership of the oil and gas, we do feel that the Commonwealth in effect sold Mr. Moore's oil and gas for $291,000.00 and that such sum should now go to Moore's successors, the claimants in this case. The Board realizes that, according to the Commonwealth Court opinion, Mr. Moore, through the reserve clause, lost access to the yellow area in 1983 and thus may not have had a "complete package" of ownership of the oil and gas in 1984. Nevertheless, the Commonwealth would not have obtained the $291,000 if it had not mistakenly claimed ownership of the oil and gas.

Pursuant to Section 405 of the Fiscal Code, 72 P.S. Section 405, this Board exercises both law and equity jurisdiction which extends to quasi contract claims the sine qua non being unjust enrichment. Miller v Department of Environmental Resources, 133 Commwlth Ct. 327, 578 A.2d 550 (1990) A quasi contract imposes a duty, despite the absence of either an express or implied agreement, when one party receives an unjust enrichment at the expense of another party. It is the unjust enrichment that brings about the implied-in-law contract without proof of a contractual relationship. Department of Environmental Resources v. Winn, 142 Commwlth Ct. 375, 597 A.2d 285 (1991)

Although the Board does not find a breach of contract based upon the agreement of sale and deed and the Commonwealth's act of claiming ownership of the oil and gas in the early 1980's this Board does find unjust enrichment.

In 1984, while still mistakenly claiming ownership of the oil and gas, the Commonwealth leased the yellow tract to C.E. Beck who in turn leased it to Pennzoil. Although the Commonwealth did not warrant ownership of the oil and gas, it did advertise that it was leasing the oil and gas and received $291,000.00 for the lease. As admitted by the Commonwealth's witness Mr. Walker, nobody takes a lease for oil and gas just to walk on the surface. It is clear that the $291,000.00 was paid for the right to obtain gas. Mr. Moore protested the lease and shortly thereafter filed a quiet title action which ultimately resulted in the Commonwealth Court decision of November 17, 1989 holding that Moore continued to own the oil and gas but that surface access had expired in March of 1983.

Unjust enrichment is established where Plaintiffs show the Defendant has wrongfully secured or passively received a benefit that it would be unconscionable for it to retain. Gee v. Eberly, 279 Pa. Super 101, 420 A.2d 1050 (1980). The elements of unjust enrichment are: (1) a benefit conferred upon defendant; (2) awareness of the benefit; and (3) acceptance or retention of the benefit would be inequitable with the most important factor being whether defendant's enrichment has been unjust. Schenck v. K.E. David Ltd. 446 Pa. Super 94, 666 A.2d 327, (1995) appeal denied 544 Pa. 660, 676 A.2d 1200 (1995) When unjust enrichment occurs a contract implied-in-law requires the defendant to pay to the plaintiff the benefit conferred. Styer v. Hugo 422 Pa. Super 262, 619 A.2d 347 (1993) aff'd 535 Pa. 610, 637 A. 2d 276 (1994) In the opinion of this Board, the elements of unjust enrichment have been met and this is a classic case compensable under

the fiscal code.

Accordingly, in the opinion of this Board, the Commonwealth, should have paid over the $291,000.00 it received from the lease of the yellow tract to Moore as of November 17, 1989 when the Commonwealth Court held that Moore owned the oil and gas rights. Therefore, judgment will be entered for Plaintiffs in the amount of $291,000.00 with interest at the statutory rate from November 17, 1989.

ORDER

AND NOW, this day of , 1999, judgment is hereby entered in favor of the Plaintiffs. The Estate of Clarence Moore and Pennlyco, Ltd., a Maryland Corporation, and against the Commonwealth of Pennsylvania, Department of Conservation and Natural Resources in the amount of Two Hundred Ninety-One Thousand Dollars ($291,000.00) with interest at the statutory rate from November 17, 1989.

It is further **ORDERED** and **DECREED** that Defendant's Motion for Summary Judgment, filed on July 17, 1997 is hereby dismissed as being moot.

Upon receipt of said award, Plaintiff shall forthwith file a Praecipe with the Board requesting that the matter be marked closed, discontinued and ended with prejudice.

Each party to bear its own costs and attorney fees.

BOARD OF CLAIMS

_____
David C. Clipper
Chief Administrative Judge

_____
Louis G. O'Brien, P.E.
Engineer Member

March 31, 1999

_____
James W. Harris
Citizen Member