Most Negative Treatment: Distinguished
Most Recent Distinguished: Penney v. Vipond Inc. | 2011 ABQB 785, 2011 CarswellAlta 2203, [2012] A.W.L.D. 1189, [2012] A.W.L.D. 1230, 2012 C.L.L.C. 210-055, 209 A.C.W.S. (3d) 835 | (Alta. Q.B., Dec 12, 2011)

2010 ABCA 126
Alberta Court of Appeal

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.

2010 CarswellAlta 746, 2010 ABCA 126, [2010] A.W.L.D. 2082, [2010] A.W.L.D. 2083, [2010] A.J. No. 432, 25 Alta. L.R. (5th) 221, 477 A.R. 112, 483 W.A.C. 112

Dow Chemical Canada Inc. (Respondent) and Shell Chemicals Canada Ltd. and Shell Chemicals Americas Inc. (Appellants)

Jack Watson, Frans Slatter, Colleen Kenny JJ.A.

Heard: April 8, 2010
Judgment: April 22, 2010
Docket: Calgary Appeal 1001-0006-AC

Proceedings: reversing *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2009), 2009 ABQB 706, 2009 CarswellAlta 2049 (Alta. Q.B.); affirming *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2009), 467 A.R. 144, 2009 CarswellAlta 242, 2009 ABQB 108 (Alta. Master)

Counsel: E.P. Groody, D.H. de Vlieger for Respondent
C.D. Simard, Z. Abbas for Appellant

Subject: Corporate and Commercial; Civil Practice and Procedure; Contracts; Property; Natural Resources

Related Abridgment Classifications

Civil practice and procedure

XVIII Summary judgment
XVIII.5 Requirement to show no triable issue

Commercial law

V Sale of goods
V.9 Buyer's remedies
V.9.d Contractual limitations on remedies
V.9.d.ii Miscellaneous

Headnote

Commercial law --- Sale of goods — Buyer's remedies — Contractual limitations on remedies — Miscellaneous issues

Plaintiff signed agreement to purchase styrene from defendant, with price to be determined by formula that included price reported by trade publication — Publication changed explanatory description of its reported price, and plaintiff claimed information on which formula was based had ceased to exist in form contemplated by contract, triggering dispute resolution — Defendant took position that information required to determine price remained available — Plaintiff brought action for breach of contract — Defendant's application for summary dismissal of

action was granted — Plaintiff successfully appealed — Defendant appealed — Appeal allowed — Chambers judge concluded that defendant did not satisfy test for summary dismissal — However, plaintiff did not identify any admissible evidence that could be produced at trial, and that would result in finding of fact that would affect outcome — On proper interpretation, re-negotiation and dispute resolution provisions were not triggered.

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Plaintiff signed agreement to purchase styrene from defendant, with price to be determined by formula that included price reported by trade publication — Publication changed explanatory description of its reported price, and plaintiff claimed information on which formula was based had ceased to exist in form contemplated by contract, triggering dispute resolution — Defendant took position that information required to determine price remained available — Plaintiff brought action for breach of contract — Defendant's application for summary dismissal of action was granted — Plaintiff successfully appealed — Defendant appealed — Appeal allowed — Chambers judge concluded that defendant did not satisfy test for summary dismissal — However, plaintiff did not identify any admissible evidence that could be produced at trial, and that would result in finding of fact that would affect outcome — On proper interpretation, re-negotiation and dispute resolution provisions were not triggered.

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Tottrup v. Clearwater (Municipal District) No. 99 (2006), 68 Alta. L.R. (4th) 237, 391 W.A.C. 88, 401 A.R. 88, 2006 ABCA 380, 2006 CarswellAlta 1627 (Alta. C.A.) — followed

APPEAL by defendant from judgment reported at *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2009), 2009 ABQB 706, 2009 CarswellAlta 2049 (Alta. Q.B.).

***Per Curiam*:**

1 This appeal arises out of a long-term contract under which the appellant agreed to supply styrene monomer to the respondent at a price set by a formula in the contract. The respondent argues that the formula is no longer workable (under the terms of the contract) and seeks the negotiation or arbitration of a new price. The appellant argues that the formula still works and is applicable, and applied for summary dismissal of the claim. A Master in Chambers granted summary dismissal, but that decision was reversed on appeal: *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2009 ABQB 706 (Alta. Q.B.), rev'g 2009 ABQB 108, 467 A.R. 144 (Alta. Master). This appeal followed.

Facts

2 The contract in question has a term of 10 years commencing on January 1, 1999. It contains a formula for setting and adjusting the quantity of styrene to be delivered in each year, and a further formula for setting the price. The Product Price for the styrene to be bought and sold is set in Article 5.2 by this formula:

> **5.2 Product Price**
>
> The "Product Price" (expressed in cpp [cents per pound]) shall be determined for each Billing Month using the following formula:
>
> Product Price= (.8 × Benzene) Price + (.3 × Ethylene)Price + Fee Over Feedstocks + Supplemental Fee

3 The various components of the formula are also defined. Article 5.4 sets the Ethylene Price:

> **5.4 Ethelyne Price**
>
> The "Ethylene Price" means the Ethylene Net Transaction Contract price (expressed in cpp) for ethylene (or the midpoint if a range is given), as reported in the last issue of the M & M Report for the month immediately preceding the Billing Month, in the table entitled "North America Product Price for [DATE]" under the column "Cents/Pound", where,
>
> "M & M Report" means the bimonthly publication entitled "DMAI Monomers Market Report" published by Chemical Market Associates, Inc.

4 The Benzene Price is set by Article 5.3:

> **5.3 Benzene Price**
>
> The "Benzene Price" means an amount (expressed in cpp) determined using the following formula:
>
> Benzene Price = U.S. Gulf Contract Benzene Price - Rebate (if any) 7.3650

The U.S. Gulf Contract Benzene Price is set by reference to a weekly newsletter published by Dewitt & Company Inc. The Rebate is related to the Typical Large Buyer Rebate, defined as follows:

> "Typical Large Buyer Rebate" means an amount determined as follows:

(a) The parties shall agree by the end of September of each Contract Year on the typical rebate (expressed in cents per gallon) off the U.S. Gulf Contract Benzene Price being provided to large buyers of benzene in North America (the "Typical Large Buyer Rebate") in such Contract Year and such amount shall be used to calculate the Benzene Price for the succeeding Contract Year.

(b) If the parties have not agreed on the Typical Large Buyer Rebate by September 30 of a Contract Year, then the parties shall each immediately appoint a senior officer or a senior officer of an Affiliate to resolve the matter at issue. If such senior officers are unable to resolve the matter at issue within 30 days of their appointment, then the parties shall immediately refer the matter at issue to Dewitt & Company Inc. (or if Dewitt & Company Inc. no longer exists, to another qualified consultant agreeable to both parties) whose determination of the Typical Large Buyer Rebate for the Contract Year shall be final and binding on both parties.

5 Many of the definitions in the contract rely on data published by third parties. The contract contains a clause that anticipates that some of that data might cease to be available:

5.8 Information

(a) If the information required to determine the AECO Price, the Ethylene Price, the Ethylene Spot Price, U.S. Gulf Contract Benzene Price, the RCAF-U Adjustment, or any other amount required by this agreement ceases to be available in the form, manner or time frame contemplated in this Agreement, and SCCL and DCCI are unable to agree upon an alternative method of determining or obtaining that amount, then the parties shall each appoint a senior officer or a senior officer of an Affiliate to resolve the matter at issue. If such senior officers are unable to resolve the matter at issue within 45 days of their appointment, then the parties shall immediately refer the dispute to binding arbitration pursuant to the *Arbitration Act* (Alberta).

(b) If any information contemplated by this Article 5 cannot be obtained in a timely manner, SCCL will provide DCCI with its best estimate of such information and will provide corrected information as soon as it becomes available. If required, corrected invoices will be prepared by SCCL and submitted to DCCI in a timely manner, as necessary, to reflect actual information.

The essential issue in this appeal is whether Article 5.8 can be interpreted summarily, or whether a trial is required.

6 Whether any genuine issue for trial bars summary disposition depends to some extent on whether additional evidence could be called at any trial that was held. There are several Articles in the agreement that address the extent to which the parties can look outside the four corners of the agreement to find its meaning:

1.5 Undefined Terms

In this Agreement, terms, phrases or expressions which are not specifically defined and which have an accepted meaning in the custom and usage of the business of rail transportation or the production, transportation or sale of SM, ethylene, natural gas or benzene in North America, shall have that meaning.

. . . . .

22.3 Entire Agreement

This Agreement constitutes the entire agreement between the parties relating to the subject matter of this Agreement.

22.4 Representations and Warranties

There are no representations, warranties, conditions or collateral agreements, express or implied, statutory or otherwise, between the parties relating to the subject matter of this Agreement, other than as contained in this

> Agreement. SCCL makes no representations or warranties (whether statutory or otherwise) as to merchantability or fitness of the SM for a particular purpose.

To a considerable extent these clauses merely reflect the common law.

7 The respondent alleges that about one-half way through the term of the contract Chemical Market Associates, Inc. changed the way that it calculates the Ethylene Net Transaction Contract price. The respondent argues that when the contract was signed, there were 10 large buyers that dominated the market. It argues that evidence would show that through amalgamations and consolidation the market has changed, such that there are no longer 10 large customers. It also argues that the price originally published in the M & M Report was a discounted price, but that Chemical Market Associates, Inc. no longer uses a discounted price. It argues that this change in methodology triggered Article 5.8 because the Ethylene Net Transaction Contract price is no longer available in the "form, manner or time frame" contemplated in the agreement, and that the parties are required to negotiate or arbitrate a new price. The appellant argues that there has been no change in the methodology used to calculate the Ethylene Net Transaction Contract price, but that in any event the "form, manner or time frame" of publication of that price has not changed. The appellant denies that any renegotiation of the price is called for.

8 The Master agreed with the appellant that a change in Chemical Market Associates, Inc.'s approach to setting the price did not trigger Articles 5.4 or 5.8 when read in the context of the entire agreement. He did not find that what was before him, notably disputed extrinsic evidence about the understandings of the parties at any time, would prevail over the clear wording of the contract. Effectively, his view was that "contemplated by the agreement" did not mean "contemplated by parties individually", especially in retrospect. He therefore found no trial of facts was required in order to dismiss the respondent's claim that Article 5.8 was triggered.

9 The chambers judge reversed and set aside the summary judgment. In his view, the Master did not give correct effect to all the terms of the agreement, and, in particular, too narrowly construed the word "manner". The chambers judge opined that the term "manner" had a more substantive meaning, which had to be determined at trial. What the trial would decide is what the parties "understood" the "manner" of calculation of the Ethylene Net Transaction Contract price to involve. The chambers judge also opined that there was a triable issue as to whether the "form" of the Chemical Market Associates, Inc. information had also been altered enough to trigger Article 5.8 of the agreement.

Standard of Review

10 The standard of review for questions of law is correctness. The findings of fact of the trial judge, and inferences drawn from the facts, will only be reversed on appeal if they disclose palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.). The standard of review for findings of fact and of inferences drawn from the facts is the same, even when the chambers judge heard no oral evidence: *Housen v. Nikolaisen* at paras. 19, 24-5; *Andrews v. Coxe*, 2003 ABCA 52, 320 A.R. 258 (Alta. C.A.) at para. 16.

11 The interpretation of a contract may invoke several standards of review. Some findings of fact may be required. In some cases the trial judge may have to determine which documents, promises, and consideration constitute the contract. There is a limited ability to introduce evidence regarding the circumstances surrounding the formation of the contract. Findings of fact on such issues will only be disturbed on appeal if they disclose palpable and overriding error: *Double N Earthmovers Ltd. v. Edmonton (City)*, 2005 ABCA 104, 363 A.R. 201 (Alta. C.A.) at para. 16, aff'd, [2007] 1 S.C.R. 116, 2007 SCC 3 (S.C.C.); *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) at para. 10. A trial judge's determination of the factual matrix surrounding the contract in light of the evidence as a whole (including if appropriate extrinsic evidence) is a matter of fact, although the determination may be influenced by legal concepts: *Diegel v. Diegel*, 2008 ABCA 389, 100 Alta. L.R. (4th) 1 (Alta. C.A.) at para. 20; *Jiro Enterprises* at para.10; *Double N Earthmovers* at para. 16.

12 Once the exact terms and nature of the contract, and the surrounding facts, have been established, the interpretation of the words of the contract is a matter of law. The interpretation and application of contract principles to a settled set of facts is a question of law reviewed for correctness: *Diegel v. Diegel* at para. 20; *Alberta Importers & Distributors (1993) Inc. v. Phoenix Marble Ltd.*, 2008 ABCA 177, 88 Alta. L.R. (4th) 225, 432 A.R. 173 (Alta. C.A.) at para. 9; *Fenrich v. Wawanesa Mutual Insurance Co.*, 2005 ABCA 199, 46 Alta. L.R. (4th) 207, 371 A.R. 53 (Alta. C.A.) at para. 6; *McDonald Crawford v. Morrow*, 2004 ABCA 150, 348 A.R. 118 (Alta. C.A.) at paras. 5 and 43.

The Test for Summary Judgment

13 The test for summary judgment was summarized in *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380, 68 Alta. L.R. (4th) 237, 401 A.R. 88 (Alta. C.A.):

> 9 Rule 15(3) states that summary judgment cannot be granted if "there is a genuine issue for trial". The case law provides that before a litigant can be deprived of his or her day in court, it must be shown that there is no genuine issue of material fact requiring a trial: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 247 N.R. 97, at para. 27.
>
> 10 Applications for summary judgment or summary dismissal can take many forms. In some cases the application is simply based on the factual merits of the case. In other words, the applicant argues that it can prove its case on the facts without a trial. In this type of summary judgment application, the approach is as stated in *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298, 339 A.R. 165, 27 Alta. L.R. (4th) 62:
>
> > [18] First, the plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. Each and every fact necessary to support the claim must be proven: *Bank of Montreal v. Kalin* (1992), 131 A.R. 397 (C.A.).
> >
> > [19] After the plaintiff has proved its case on a balance of probabilities, the evidentiary burden shifts to the defendant but the ultimate burden remains, as always, with the plaintiff. The defendant can avoid a summary judgment in favour of the plaintiff by proving that there is a genuine issue for trial. If the defendant meets this evidentiary burden, the plaintiff fails to meet its ultimate burden. It must be beyond doubt that no genuine issue for trial exists.
>
> An analogous approach is used where the defendant applies for summary dismissal. It is in the context of this type of summary judgment application that the cases sometimes say it must be "plain and obvious", or "clear" or "beyond real doubt" that the action should be summarily disposed of: see *Murphy Oil Company Ltd. v. Predator Corporation Ltd.*, 2006 ABCA 69, 55 Alta. L.R. (4th) 1, 384 A.R. 251, [2006] 5 W.W.R. 385 at paras. 24-8; *German v. Major* (1985), 39 Alta. L.R. (2d) 270 at 276, 20 D.L.R. (4th) 703, 62 A.R. 2 (C.A.); *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229, 30 C.P.C. (2d) 197 (C.A.). The Supreme Court has stated that it must be shown that there is a "real chance of success" to avoid summary dismissal of the action: *Gordon Capital Corp.*, *supra*, at para. 27, discussed in *Murphy Oil*, *supra*, at paras. 26-8. If the record raises genuine factual or credibility issues, for example if there is conflicting evidence, then summary judgment generally cannot be granted: *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 111 O.A.C. 201, 164 D.L.R. (4th) 257, at paras. 13-20 (C.A.).
>
> 11 There are, however, other types of summary judgment applications. In some cases the facts are clear and undisputed. The ultimate outcome of the case may depend on the interpretation of some statute or document, or on some other issue of law that arises from undisputed facts. In such cases the test for summary judgment is not whether the issue of law is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometimes necessary to have a full trial to provide a proper foundation for the decision. In other cases it is possible to decide the

> question of law summarily: see for example *Olson v. Bieganek* (1997), 56 Alta. L.R. (3d) 322, 211 A.R. 313, 44 M.P.L.R. (2d) 104; *Medicine Hat (City) v. Wilson*, 2000 ABCA 247, 191 D.L.R. (4th) 684, [2001] 2 W.W.R. 601, 87 Alta. L.R. (3d) 25, 271 A.R. 96; *Bumper Development Corp. Ltd. v. Home Insurance Co.* (1989), 101 A.R. 264, 43 C.C.L.I. 195 (M.); *Dial Mortgage Corp. v. R.J.C. Investments Ltd.*, [1981] A.J. No. 172 (M.).

The parties disagree on whether there are controverted facts on this record which have to be resolved at a trial, or whether the litigation is capable of being resolved summarily.

14 The important role of summary judgment in our system of civil procedure was emphasized in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, [2008] 1 S.C.R. 372, 2008 SCC 14 (S.C.C.) at para. 10:

> This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

Neither party disagreed with this statement of principle.

Evidence on the Meaning of the Contract

15 Trials are held to make findings of fact: *Tottrup* at para. 12. In order to establish that there is a "genuine issue for trial" the party resisting summary judgment should be able to articulate what facts are in dispute that could be resolved at a trial. Those could be the background facts of the case, or facts that are needed to provide context to the issues of law: *Tottrup* at para. 11. Are there any unproven facts needed to resolve this case, and if so what admissible evidence would be available?

16 The respondent acknowledges that the parties to the contract are not entitled to provide evidence on what they think the contract means. Neither contracting party is entitled to call evidence that "I think it means X": *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.) at p. 166; *Gainers Inc. v. Pocklington Holdings Inc.*, 2000 ABCA 151, 81 Alta. L.R. (3d) 17, 255 A.R. 373 (Alta. C.A.) at para. 20; *Marthaller v. Lansdowne Equity Venture Ltd.* (1997), [1998] 1 W.W.R. 428, 52 Alta. L.R. (3d) 329, 200 A.R. 226 (Alta. C.A.).

17 It is also clear that the parties cannot call expert evidence on the meaning of the contract: *Lunenburg Industrial Foundry & Engineering Ltd. v. Commercial Union Assurance Co. of Canada* (2004), 2005 NSSC 62, 231 N.S.R. (2d) 378, 21 C.C.L.I. (4th) 140, 10 C.P.C. (6th) 376 (N.S. S.C.) at paras. 24-5; *Michael Santarsieri Inc. v. Unicity Mall Ltd.*, 2000 MBQB 202, 152 Man. R. (2d) 215 (Man. Q.B.); *LHS Holdings Ltd. v. Laporte PLC*, [2001] EWCA Civ 278 (Eng. C.A.) at paras. 20, 36. For example, neither party could retain a professor of law or English to prepare an expert report on the meaning of the terms of the contract: *Gorgichuk Estate v. American Home Assurance Co.* (1985), 5 C.P.C. (2d) 166 (Ont. H.C.).

18 It follows that no third party can provide an opinion on what the contract means. That is the case even if the third party is a knowledgeable member of the same industry; his or her opinion on what the contract means is not admissible: *Harris v. Nugent* (1996), 46 Alta. L.R. (3d) 264, 193 A.R. 113 (Alta. C.A.). It is also clear that the opinions of third parties about the commercial context *after* the contract was signed are inadmissible. If any evidence about the contract was admissible, it would have to be evidence about the situation prior to and at the date of signing of the contract, in this case 1999: *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59, 85 O.R. (3d) 616 (Ont. C.A.) at para. 53; *McDonald Crawford v. Morrow*, 2004 ABCA 150, 28 Alta. L.R. (4th) 62, 348 A.R. 118 (Alta. C.A.) at para. 72.

19 There is a narrow exception for technical terms of art, which can be proven by extrinsic evidence: *Canadian National Railway v. Volker Stevin Contracting Ltd.* (1991), 120 A.R. 39, 1 Alta. L.R. (3d) 167, 48 C.L.R. 134 (Alta. C.A.). This

exception is contemplated and narrowed by Article 1.5 of the agreement. Any technical terms specifically defined in the agreement cannot be given another meaning, even if the industry would use those words in a different sense. But there is no evidence that the key terms "information", "manner" or "contemplated" have any special meaning in the styrene business.

20 Where a contract is ambiguous, there is a limited ability to call evidence on the circumstances surrounding the formation of the contract and the commercial context in which it was made. But where the contact is clear, the parties' intention is to be derived primarily from the words they have used in the contract: *Eli Lilly & Co.* at paras. 52-6, explaining *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.); *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70, 73 B.C.L.R. (3d) 102 (B.C. C.A.) at paras. 17-8. This is especially so when the contract contains a "whole agreement" clause. Evidence of context cannot in any case be allowed to overwhelm the words of the contract, or to contradict those words: *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 25 B.C.L.R. (3d) 285 (B.C. C.A.) at para. 19.

21 The parties, to different degrees, reach beyond the wording of the contract to propose the meanings of Articles 5.4 and 5.8. For example, the appellant does so by referring to a contemporaneous agreement between the parties that it calls the "Sarnia agreement", contending that the respondent's argument does not just interpret but actually amends the present agreement in order to bring its practical application closer to the terms of the Sarnia agreement as to ethylene pricing. The respondent does so more comprehensively, by suggesting that the language of Articles 5.4 and 5.8 is technical and industry-sensitive, and that it can only be properly understood by reference to a body of evidence about industry realities at the time the contract was entered into and since that time.

22 The respondent outlines the type of evidence it would propose to introduce if the summary judgment application were dismissed and the matter went to trial. The proposed evidence would be inadmissible. There are no ambiguities in the wording of the contract that would warrant extrinsic evidence about the context in which it was entered into.

23 For example, the respondent proposes to tender evidence to demonstrate that the industry would expect that if the methodology in the M & M Report changed, the price marker would change. This is an attempt to provide direct evidence on what the parties intended Article 5.8 to mean, in the guise of "context". What the industry would have intended to contract for is an attempt to have the court draw an inference of subjective intent from external evidence. It goes one step further, because it suggests that the expectations of the industry as a whole could override the intentions of these two parties as expressed in the wording of this particular contract.

24 In its factum the respondent argues:

> 90. Contrary to the appellant's assertions, Dow does not seek to adduce evidence of subjective intent. Nor does Dow rely on extrinsic evidence to vary or contradict the agreement. To the contrary, Dow seeks to ascribe meaning to the words of the agreement.

Unless the agreement contains technical terms of art (as contemplated by Article 1.5) the respondent is not entitled to call evidence to explain the "meaning of words".

25 Since the proposed evidence would be inadmissible, it is of no consequence that some of the evidence provided on the summary judgment application conflicted. There is also no need to determine whether some of the deponents' evidence was undermined on cross-examination.

26 The factual context in which the parties negotiated and signed this agreement is clear from the undisputed portions of this record and the agreement itself. The appellant and the respondent are both very large and sophisticated petrochemical companies. The appellant wanted a long term market for its styrene, and the respondent wanted a long term supply of styrene. The parties realized that many things could change over the ten-year term of the agreement, particularly the market price for styrene. Rather than engage in repeated negotiations about price, the parties decided to use external objective market prices. They put the setting of those prices in the hands of expert third parties, like Chemical

Market Associates, Inc. and Dewitt & Company Inc. No other evidence of context is necessary or admissible to interpret the words used by the parties in their agreement. No resort may be had to the subjective intentions or expectations of the parties beyond the words used.

27 This case turns primarily on the grammatical and ordinary interpretation of the words of the agreement on its face, giving meaning to all the relevant language in the context of the agreement as a whole. The respondent has not been able to postulate any admissible evidence that it might introduce to explain the meaning of the contract, which is necessary to justify a trial. Reading the agreement as worded enables the court to provide a complete answer to the dispute. This contract does not use specialized industry terminology requiring explanation by extrinsic evidence. It follows that the dispute is capable of summary disposition.

Interpretation of the Contract

28 On its proper interpretation, Article 5.8 has not been triggered. Chemical Market Associates, Inc. continues to publish the Ethylene Net Transaction Contract price in the same form, manner and time frame. Whether Chemical Market Associates, Inc. has adjusted the assumptions it uses does not change the fact that "the information" continues to be available. On the proper interpretation of the contract, the intention of the parties was that the price would be set by a neutral, knowledgeable third party, and the selected neutral third party has continued to publish the benchmark price required.

29 Article 5.8 is, on its face, a generic provision. It applies specifically to four "Prices", and one "Adjustment", and then goes on to encompass "any other amount required by this Agreement". It is worded generally to accommodate the wide scope of its application. It refers to all of the complex defined components in the Agreement that are utilized in the formula that generates the contract price for styrene. Several of those defined components refer to external markers or benchmarks established and published by third parties that are used to set the price for styrene. Article 5.8 provides an alternative dispute resolution mechanism to use if any of the third party information becomes unavailable during the 10 year term of the Agreement. Article 5.8 should be interpreted accordingly.

30 The respondent argues that "manner" relates to the underlying methodology or assumption used by the third party in calculating the formula component. The appellant argues that it relates merely to the method and format of presentation of the information. The appellant's position is supported by the other parts of the Article. As noted, the opening phrase refers to "the information", which is more properly a reference to the availability of the information, rather than the assumptions underlying its calculation. The Article goes on to describe the potential dispute as "an alternative method of determining or obtaining such amount". This too should properly be read as a reference to finding an alternative source of publication of the original amount, not of recalculating the formula or its components.

31 The parties were clearly aware that prices and amounts would change during the time period of the contract, so adjustment of prices and amounts was provided for by reference in the relevant Article to information available to the parties. Accordingly, Article 5.8 refers back to various other Articles which provide for a means to determine needed information on an ongoing basis. The distinct reference set out in Article 5.4 to determine the Ethylene Price defines the form, manner and time frame for the information required in order to determine that Ethylene Price. In other words, the "manner" of acquiring the information needed to determine the Ethylene Price is set out in Article 5.4. The "manner" is a reference to the M & M Report. The "manner" of making the information available is not the same thing as the "methodology" used to set the price. The methodology to be used was put in the hands of an independent third party, Chemical Market Associates, Inc.

32 Article 5.8 provides that "if any of the information required to determine" any of the amounts referred to in the Agreement is "no longer available in the form, manner or time frame contemplated in this Agreement", then the dispute resolution mechanism will be triggered. The reference to "any of the information" is properly read as a generic reference to the third party sources that generate the components of the various definitions. In the case of ethylene, it refers to the M & M Report.

33 The chambers judge concluded that the appellant's interpretation of Article 5.8(a) gave no meaning to the phrase "any of the information required". That phrase is a compendious and generic reference to all of the separate sources of data found in the benchmarks underlying the various definitions that are combined together to create the formula price. The opening phrase of Article 5.8(a) is grammatically necessary to encompass the components of the four Prices, the Adjustment, and the "other amounts" then referred to. The very general nature of the term "information" can be seen by its use in Article 5.8(b). The appellant's interpretation of the phrase "form, manner or time frame" is entirely consistent with the opening words "information required" being concerned with the necessary third party data being available and published in the same format. That phrase is not designed to address the assumptions underlying the objective third party data.

34 The respondent argues that the phrase "contemplated in this Agreement" was a reference to the subjective intent or contemplation of the two parties, and thereby allows the introduction of evidence of subjective intent about the meaning of the contract. When read with the "whole agreement" clauses (Articles 22.3 and 22.4), "contemplated" means as defined and specified in the words used in the agreement. "Contemplated" is not intended to substitute a subjective exercise of determining the intentions of the parties for the objective price markers in the agreement. That would undermine the whole philosophy of the agreement, which was to provide a formula that would operate with some certainty throughout the entire 10 year term of the agreement. In any event, the word "contemplated" relates only to the "form, manner and time frame" of the information, not to its substantive content.

35 The appellant also pointed to the definition of Benzene Price by way of comparison. While the definition of Ethylene Price is based on purely objective criteria, the definition of Benzene Price contains a subjective element. The Typical Large Buyer Rebate is to be set by agreement of the parties or, failing that, arbitration. The appellant argues that where the parties recognized that sophisticated buyers might negotiate away from the published prices, and the parties wished to use that subjectively negotiated price, they expressly so provided. The Ethylene Price, on the other hand, is to be purely set by the posted price, without regard to any exceptions or discounts. Thus the appellants argue that the plain wording of the contract does not support the argument that the parties were entitled to look behind the published Ethylene Price, depending on the assumptions on which it was allegedly set.

36 The parties had been dealing in chemicals for some time prior to the contract which is now in dispute. On January 9, 1996 the respondent wrote to Chemical Market Associates, Inc. as follows:

> RE: Confidential Gulf Coast Ethylene Price
>
> As a follow-up to our discussions on December 1, 1995 we would like you to begin to provide to us monthly data which is representative of what the ten largest U.S. Gulf Coast ethylene buyers are paying, including discounts.
>
> The parameters should include:
>
> 1. The monthly weighted average contract price should be on a delivered basis excluding Superfund, and including contractual discounts applicable for domestic consumption.
>
> 2. Joint venture, base load, or take or pay pricing should not be considered a straight contract purchase.
>
> 3. Distressed purchases, "fire sales", wide spec purchases or derivative export allowances should not be included in these calculations.
>
> 4. We would also like a separate spot price including the spot to contract sales ratio.
>
> 5. The data should be received by Dow within the month following the month in question.
>
> 6. The first report should be for December 1995.

> We plan to use this data to administer third party ethylene supply contracts and expect to require this data for an extended period. The data will be kept confidential to people who need to know.

The respondent agreed to pay a fee for this information. The letter of January 9, 1996 became Schedule "A" to a previous contract between the parties, which itself became Schedule "I" to the contract now in dispute. Since the letter is incorporated into the contract, it can be used to provide context for the interpretation of its provisions.

37 The Schedule I agreement is referred to in the definition of Ethylene Cost Amount in Article 5.5(b):

> "Ethylene Cost Amount" means an amount, agreed between SCCL and DCCI, equal to the Alberta market value for ethylene at the time, if any, the parties are exchanging ethylene in accordance with an ethylene exchange agreement. An example of the Alberta market value for ethylene is the "Price" (expressed in cpp), as described and determined in the Letter Agreement dated January 14, 1998 between SCCL and DCCI, a copy of which is attached hereto as Schedule I.

In the letter of January 9, 1996 the respondent specifically dealt with issues like the "ten largest buyers", "contractual discounts", "distressed purchases" and other assumptions that might underlie the Chemical Market Associates, Inc. published prices. No similar provisions are to be found in the contract now in dispute, which supports the interpretation of the appellant. If it had been intended that changes to the assumptions underlying the formula were to trigger the right to renegotiate the price of Ethylene, one would expect to find similar provisions in the contract.

38 The contract is lengthy and detailed. It contains a "whole agreement" clause. It anticipates and provides for a great many contingencies. For example, it allows for a price adjustment if legislation requires capital expenditures at the Styrene Facility in excess of $5 million. It has a detailed force majeure clause that contemplates a number of changes beyond the control of the parties. It ties the quality of the delivered product to recognized industry specifications, and has a mechanism that allows those specifications to evolve. It contemplates that a named carrier would transport the styrene, but provided a mechanism for changing to another carrier. It is significant that there is no provision dealing with changes in the assumptions underlying the third-party information that is relied on in the formula.

39 There is nothing in the word "manner" which includes the reasoning method used by Chemical Market Associates, Inc. (independently of the parties) to report on what it considers to be the relevant Ethylene Net Transaction Contract price. In effect, by Article 5.4 the parties expressed confidence that Chemical Market Associates, Inc. would objectively provide a fair, arms length marker Ethylene Net Transaction Contract price, howsoever Chemical Market Associates, Inc. reasoned its way to developing that price. It may be that the respondent assumed from the start that Chemical Market Associates, Inc. would always include discounting, but the agreement did not require a discounted version of the Ethylene Net Transaction Contract price. An objective observer of the agreement and of Articles 5.4 and 5.8 would not find that the M & M Report of the Ethylene Net Transaction Contract price has become unavailable. The M & M Report continues in actuality to make available an Ethylene Net Transaction Contract price in the form, manner and time frame contemplated by the agreement

Conclusion

40 In conclusion, there is no reason why the present dispute cannot be decided summarily. The respondent has not identified any admissible evidence that could be produced at trial, and that would result in a finding of fact that would affect the outcome of this case. On its proper interpretation the re-negotiation and dispute resolution provisions of Article 5.8 have not been triggered.

41 The appeal is allowed, and the action is summarily dismissed.

Appeal allowed.

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