

Doc# 736

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 200/93

CIVIL APPEAL NO. M3 OF 1995

BEFORE: THE RT. HON. MR. JUSTICE ZACCA P.C., O.J. PRESIDENT  
THE HON. MR. JUSTICE J. KERR J.A.  
THE HON. MR. JUSTICE GERALD COLLETT J.A.

BETWEEN: THOMAS W. QUINTIN  
SANDRA J. WESTPHAL APPELLANTS

AND: PHILLIPS PETROLEUM COMPANY RESPONDENT

Mr. R. Alberga Q.C. and Mr. Ritchie for the Appellants  
Mr.A. Turner for the Respondent

JUDGMENT

August 6, 7, 8 & 9 and December 11, 1996

COLLETT, J.A.

This is an appeal against the judgment of the Grand Court given in Cause 200 of 1993 on 19th May, 1995 whereby the Appellants/Defendants Thomas W. Quintin and Sandra J. Westphal, were ordered the Respondent/Plaintiff, Phillips Petroleum Company ("Phillips") the sum of U.S.\$721,526. together with interest thereon at 7 1/2% per annum from that date and the costs of the action to be taxed or agreed. The Appellants were held to be liable under the terms of written

guarantees, dated 28th January 1991, which each of them had signed in favour of the Respondent.

The Respondent is a worldwide concern engaged (inter alia) in the business of refining and supplying petroleum products to wholesale dealers for onward resale to roadside filling station proprietors and eventual resale to consumers at the pump. Like most such concerns, its strategy is geared to the eventual sale of such products under its own brand name and market logo at stations providing quality service conforming to its own minimum set standards of performance and prominently displaying its identity as such for the edification and, hopefully, the attraction of the motoring public.

To this end Phillip's policy was in 1991 to enter into a standard form of contract with wholesalers in the U.S.A. called a Branded Marketer Sales Contract ("BMSC"). It required Phillips to sell up to a set limit of quantities of gasolines and distillates monthly to the wholesaler concerned and the wholesaler to buy at least 60% of those combined limits yearly during the currency of the contract. It also imposed fixed quality standards upon the wholesaler in respect of payment, storage of product and also the eventual onward sale of the products through the retailer amongst other matters.

Max Oil Company (Inc.) ("Max Oil") was a wholesale distributor of petroleum products trading in the State of Colorado, U.S.A., between 1990 and 1993 and at all material times it was controlled by the two appellants who are husband and wife and are resident in the Cayman

Islands. Although it was at one point in dispute in this litigation it was already common ground at the conclusion of the trial in the Grand Court, that Max Oil had entered into a BMSC with Phillips dated 21/1/91 for a term expressed to commence on 1st January, 1991 and to end on 31st December, 1993. In accordance with its standard business policy, Phillips required the discharge of each wholesaler's obligation resulting from performance of a BMSC to be guaranteed not only by corporate guarantors where appropriate but also by the personal guarantees of the individual principals of the corporate wholesalers with which it elected to contract. In pursuance of this requirement each of the two Appellants entered into and signed Phillips' standard form of guarantee in each case on 28th January, 1991.

These guarantees read as follows (so far is relevant):-

"In consideration of Phillips Petroleum Company and/or one or more of its subsidiaries entering into certain agreements and/or leases with, and extending credit to Max Oil, Incorporated of Denver, State of Colorado (herein after referred to as "The Principal Debtor") and in order to induce the Creditor to do so, the undersigned jointly and severally hereby guarantee the prompt payment at maturity of all indebtedness hereafter or heretofore so incurred by the Principal Debtor to Creditor under the terms of any and all such agreements, leases and extensions of credit.

This guarantee is accepted by Creditor and such agreements and leases are entered into and such credit extended subject to the following conditions:

Any such indebtedness becoming due and payable to Creditor in reliance upon the guaranty of

the undersigned, may at any time be settled and adjusted between Creditor and Principal Debtor by note or notes of said Principal Debtor, either endorsed or unendorsed, and with or without further security, and the time of payment of any such indebtedness or notes or other security given therefore may be extended from time to time by Creditor to the Principal Debtor without notice the undersigned, and such extensions and any of same may be for any period (whether or not longer than the original period for payment), all of which may be done without, in any way, affecting the obligations hereby created. The undersigned hereby expressly waives notice of the acceptance of this guaranty by Creditor, waives notice of all obligations and indebtedness created and credit extended hereunder, waives notice of the taking of notes or other security for such indebtedness as may be incurred by the Principal Debtor to Creditor and waives notice of default by the Principal Debtor.

This instrument is intended to be and shall be construed to be a continuing guaranty without further notice to the undersigned and shall not be revoked by the death of any of the undersigned but shall remain in full force and effect until the undersigned or a legal representative of the undersigned or his estate shall have given notice in writing to enter into no further agreements, leases or other obligations, nor extend further credit on the security of this guaranty and until such written notice shall be received by Creditor. Each of the undersigned agrees to make such arrangements as may be necessary to assure that Creditor will be notified as soon as practically possible in the event of the undersigned's death."

It is common ground that each of these guarantees remained in force and effect until 31/12/92 and that Max Oil on countless occasions up till that date drew petroleum products from Phillips' terminals in the State of Colorado and duly paid for these consignments through the credit transfer mechanism set up with Phillip's bankers pursuant to the

requirements of the BMSC of 21/1/91.

In October, 1992, however, Phillips was notified of an intention to restructure the Appelants wholesale petroleum business in Colorado State by the setting up of a new company "SJW" to take over the functions of Max Oil. Negotiations for that purpose were conducted by Lamont Hull as agent for Max Oil and SJW and by Roger Hansen for Phillips. They eventually led to the conclusion of a mutual cancellation agreement ("MCA") in standard form dated 1/12/92 between Phillips and Max Oil, the stated purpose of which was to terminate the BMSC of 21/1/91 with effect from 1/1/93; also a replacement BMSC also dated 1/12/92 to enable SJW to take over and continue the former business of Max Oil with Phillips as from the same effective date.

Notwithstanding the conclusion of these agreements the legal effect of which was in contention at the trial of this action, Phillips continued during the early part of 1993 to supply further petroleum products to Max Oil and Max Oil to pay for the same by means of the mechanisms already in place and SJW did not, at least on its own account, draw any product from Phillips terminals or make any payment to Phillips. This state of affairs continued until 6th April 1993 on which date Max Oil abruptly ceased to trade as a result of the seizure of its books and the freezing of its assets by the Internal Revenue Service of the U.S.A. acting under a Federal Court warrant. At that date Max Oil owed considerable sums to Phillips for petroleum products drawn from the terminals during 1993 but as yet unpaid for.

No payment for the unpaid products has ever been made by Max Oil, a circumstance which prompted Phillips to advance its claim by action in the Grand Court against both Appellants jointly and severally for the amount outstanding under the terms of the guarantees already quoted. The amount involved was computed and assessed at the trial at a figure of \$721,526, U.S. currency, after giving credit for an amount of \$70,000 recovered by Phillips in a subsequent liquidation of SJW. Liability was contested in the action by the Appellants/Defendants upon a number of grounds, but effectively at the conclusion of the trial a number of these issues raised upon the pleadings by successive amendments on each side were abandoned and only four "live" issues were left for determination by the Judge. These issues can be essentially formulated as follows:-

1. Can parol evidence be admitted under Colorado Law to show that the MCA of 1/12/92 (which purported to cancel the BMSC of 22/1/91 between Phillips and Max Oil) and the BMSC of 1/12/92 between Phillips and SJW were subject to an oral condition precedent suspending their operation?
2. If admissible, does the evidence called establish that the two agreements did not come into effect at all?
3. If parol evidence is not admissible or the evidence does not establish that there was such a condition precedent, what is the effect in Colorado Law of the MCA and the BMSC both of 1/12/92?
4. On the same assumption as 3, what is the effect, if any, of the MCA of 1/12/92 upon the guarantees of 28/1/91?

The learned trial judge having heard full argument and considered the evidence concluded that, on Issue No. 1 parol evidence could be admitted to prove the oral condition precedent alleged by the Plaintiff/Respondent. On issue No. 2 he was satisfied by that evidence that neither the BMSC of 1/12/92 nor the MCA of even date ever came

into operation. On Issue No. 3 he held that, absent the oral condition precedent, the MCA would have been effective to cancel the BMSC of 21/1/91 and any other prior agreements between Phillips and Max Oil; a finding which is not challenged in this Court. Finally, on Issue No. 4 he found that, even if the MCA had been effective as between Phillips and Max Oil, it had no effect upon the guarantees dated 28/1/91: these would nevertheless have continued in full force until Max Oil ceased to trade. Against the three adverse findings the Appellants now appeal to this Court.

The first issue which we therefore need to determine is whether or not the trial judge was correct to admit and consider parol evidence seeking to establish that the BMSC of 1/12/92 and more particularly the MCA of even date did not come into effect upon the specified date of 1/1/1993 but instead were suspended by a prior oral agreement of the parties until such time as SJW should obtain its Federal Government licence to sell petroleum products free of tax. That issue falls to be determined by the law of Colorado State, which is, of course, a matter of fact in our Courts to be proved by expert testimony.

Evidence of the relevant rule as to admissibility of parol evidence in the law of Colorado was given at the trial by Mr. Garry Appel for the Appellants and by Professor Edward Dauer for the Respondents. Each of these witnesses was duly qualified to give that evidence and much of their testimony on that issue coincided or at least was not at variance.

In particular both experts agreed that both the MBSC and the MCA of 1/12/92 were documents apparently complete and unconditional on their face and that each was according to its own express terms intended to take effect on 1/1/93. They agreed also that the general rule of Colorado Law is that parol evidence may not be introduced to contradict or to vary or add to the terms of what they call "a fully integrated writing", i.e. an apparently complete and unconditional written contract. This rule is subject to an exception, where parol evidence may be introduced to show that the parties, prior to the execution of the written contract, had agreed that it should not come into effect as such until some extraneous condition had first been fulfilled.

According to Mr. Appel, where the written contract contains an integration clause, i.e. a statement that it contains the entire agreement of the parties and terminates and supersedes all previous communications, a Colorado court would not admit parol evidence under this exception. Prof. Dauer disagreed that an integration clause would have that effect but in cross-examination he conceded that if a "flat contradiction" could be found between the written contract and the oral pre-condition then such a court might refuse to admit parol evidence of the latter.

It is to be noted that whereas the BMSC of 1/12/92 contains at its para. 23(c) a classic integration clause, the MCA does not. It does, however, contain what Mr. Appel aptly described as much stronger language, namely the statement that "all rights, obligations, claims and duties arising out of the existence or performance of any of the

contracts described herein or any and all other written and oral agreements between the parties relating to the same subject matter"... are ... "terminated, cancelled, liquidated, held for naught and released as of the date designated", i.e. 1/1/93. One would not expect to find a standard integration clause in a contract of that nature and purpose.

The experts also disagreed as to whether in the case of the two contracts under consideration any flat contradictions actually existed. This in reality is a matter for construction of these documents and that is not strictly a question of Colorado law at all to be proved through evidence but rather it is one for the application by the trial judge of the Colorado rules of construction proved by that evidence to the facts of the instant case before him. That distinction is well recognised in *Dicey and Morris, the Conflict of Laws 12th Ed., Vol. 1* at pages 234/235 and by the authorities there cited: it is for the trial judge ultimately to determine the meaning of the documents. The point needs emphasis in the light of the judge's findings as to the respective credibility of the two expert witnesses, because although he correctly directed himself as to the function of the Court in the matter of construction it is not clear whether in fact he exercised any independent judgement as to the existence or otherwise of flat contradictions in this case.

In assessing the evidence of the two experts on this issue it is also noteworthy no decision of the Colorado superior courts themselves were relied upon by either as establishing their respective views directly.

Both disclaimed the existence of any binding authority in point from the decisions of those courts. In its absence Mr. Appel opined that Colorado courts would follow a 1990 decision of the New York Federal District Court, and in '**Bank Leumi Trust Company of New York v David Wulkan**', whereas Prof. Dauer considered that they would prefer to follow '**Kryl v Mecholson et al**', a 1951 decision of the State Supreme Court of Wisconsin.

The trial judge again correctly directed himself that it was open to him in a case where the experts on each side disagreed as to the meaning of a rule of foreign law to look at the foreign sources relied upon himself so as to reach a conclusion upon the validity of the respective views expressed. However, he went on to say that in this case that course had been unnecessary, presumably because of his earlier findings as to the respective witnesses credibility. Nevertheless, a review of these two cases is instructive as it demonstrates how the judiciary of two other states of the U.S.A. have approached this very issue on facts not altogether dissimilar to the present, approaches which might carry much weight as persuasive authority in the courts of Colorado should a case such as this one fall to be tried there.

In Bank Leumi, the defendant "irrevocably and unconditionally" guaranteed certain debts to the bank by a written contract which stated that "no modifications or amendments to the guarantee shall be deemed to be made unless the same shall be in writing". He sought to adduce evidence that prior to its execution he had orally agreed with the bank

that the guarantee was conditional upon his first obtaining authorisation from the Israeli Government which had not been forthcoming. It was held that he could not be permitted to do so, as parol evidence is not admissible in New York law to prove a condition precedent to a written document if the condition varies or contradicts the express term of the writing itself.

In *Kryl v Mecholson*, the written contract was for the performance of two concerts on a given date, which the defendant contended was subject to a prior oral agreement between the parties that the contract should not become binding at all if the local branch of the musicians union objected to it, which they did. It was held that the prior condition precedent might be proved by parol evidence on the basis that such evidence was not offered to vary the terms of the contract but as proof that it should not take effect as such until the consent has been obtained. Such parol evidence was said to be admissible "provided the written conditions are not repugnant to the conditions sought to be established by parol". The court also distinguished another decision of the Wisconsin Courts, "*Edward T. Kelly Co. v Von Zakobiel*", refusing admission of parol evidence where the written contract in question had provided that "this contract is irrevocable and no conditions affecting it not embodied herein exist." That language is also strong and its parallels with the language employed in the MCA of 1/12/92 are instructive when considers the basis of the decision in *Kryl v Mecholson*.

Basing himself upon the *Kryl v Mecholson* case and upon a passage from

"Fransworth on Contracts" a local textbook, Prof. Dauer expressed the view that to ban parol evidence more is required in the way of a contradiction between the written agreement and an alleged oral pre-condition than the implicit contradiction inherent in the mere fact that it seeks to make a seemingly on unconditional agreement conditional. The learned trial judge seems to have accepted this proposition, which enshrines a certain logic, and to have applied it to the facts of the present case but without examining the question whether a more explicit contradiction can be found in the language of the present agreements.

There is no doubt that the judge formed a definite view as to the respective credibility of the two expert witnesses and expressed a decided preference for the evidence of Prof. Dauer over that of Mr. Appel. He gave three reasons for doing so, the first of these being that Mr. Appel's firm had represented the Appellants in legal matters connected with this case and that he himself had had some involvement, which through suspicion upon "the dispassion" of his opinion.

Secondly, the judge preferred Prof. Dauer's report which he described as detailed and fully reasoned to Mr. Appel's which had failed to address some issues. The third reason was demeanor in the witness box on the part of the two gentlemen concerned.

The first reason must be acknowledged as containing some possible basis for approaching Mr. Appel's opinions with caution but having regard to the large area of common ground existing between the evidence of the two experts it is hardly a weighty one in itself for rejecting his

testimony altogether as it seems the learned judge did and as counsel for the Respondent has urged us to do also. The second reason involves something of a misconception, in that the Grand Court Rules require only that the substance of an expert witness' testimony shall be disclosed in his report. The witness is not required to prepare a treatise and the existence of differences between expert's opinions in evidence is not to be resolved by a comparison of the amplitude of material or detail embodied in their various reports. The third reason is, of course, one which is strictly a matter for the trial judge and one which an appeal court which has not seen or heard the witnesses is not in a good position to challenge. We must therefore accept that Prof. Dauer was the more impressive witness on the day. It does not necessarily follow that his opinions on the relevant rules of Colorado law are invariably correct nor does it preclude or absolve this court from making critical analysis of those views or indeed those contrary views expressed by Mr. Appel.

I am content to accept the judge's assessment of the due weight to be attached to the opinions of Prof. Dauer and Mr. Appel insofar as they relate to propositions of Colorado law on which they did not agree. This court must however arrive at its own conclusions regarding the existence or otherwise of a flat contradiction between the written terms of the BMSC and MCA of 1/12/92 on the one hand and the terms of the alleged oral condition precedent sought to be established by parol evidence on the other. That appears to be the core of the first issue in this appeal and it is essentially a matter of construction for the courts in which the views of the expert witnesses are not by any means

decisive. The trial judge adopting Prof. Dauer's views wholesale saw no conflict or contradiction between the two. I cannot agree. The conflict appears irreconcilable and the contradiction direct and far in excess of any implicit contradiction of the kind mentioned in Fransworth's work.

In the case of BMSC of 1/12/92 there is para. 23(c) to be considered (the standard integration clause) -

"This contract contains the entire agreement between the parties and terminates and supersedes all previous communications representations and contracts (included any prior Branded Marketer Sales Contract) between the parties with respect to the subject matter hereto... No change in or addition to that contract shall be effective unless in writing and signed by both parties."

How is language of this kind to be reconciled with a prior alleged agreement of the parties (Phillips and SJW) not reduced to writing, that notwithstanding its terms the BMSC shall not be effective until such time as SJW procures its Federal licence? It cannot be. The contradiction is explicit, not implicit and, if the general rule of Colorado law is to preserve any meaning or be given any effect, it must be made applicable to this case.

Even clearer to my mind is the case of the MCA, the contract which is relied upon on as terminating the business relationship existing for the previous two years between Phillips and Max Oil together with Appellants' two guarantees. As has already been noted the express

purpose of this document is to terminate and cancel as of 1/1/93 the BMSC dated 22/1/91 together with all rights, obligations, claims and duties arising out of it or out of any and all other written and oral agreements between the parties relating to the same subject matter (i.e. the sale of petroleum products by Phillips to Max).

Not only must there be a direct contradiction between an agreement to terminate their business relationship constituted by BMSC of 22/1/91 as of 1/1/93 and a prior alleged oral agreement to continue that relationship until such time as a third party, stranger to the contact, receives a Federal licence. The alleged oral agreement also seeks to vary the MCA by providing in effect that it shall operate (if at all) at some uncertain future date instead of 1/1/93 being the date when such a licence may be issued by the Federal Authorities to SJW. The contradiction is inescapable and so also, applying united evidence of Prof. Dauer and Mr. Appel on the point, is the rule of Colorado law that parol evidence to establish the existence of the inconsistent oral agreement or understanding is excluded.

I would therefore hold that on the first issue in the appeal the contentions of the Appellants must prevail with the effect that the BMSC of 22/1/91 ceased to have any legal force between Phillips and Max Oil on 1/1/93, in accordance with the terms of the MCA of 1/12/92.

Strictly speaking my conclusion as to this first issue absolves from the necessity of examining the second, namely, was the trial judge correct in his assessment of the parol evidence which I have held to

have being erroneously admitted. However, in deference to his findings on the second issue and also because it has implications also for the third in respect to the scope and extent of the guarantees, it is desirable to review that evidence and the findings of facts which were based upon it.

Essentially the evidence in question comprises the testimony of Mr. Roger Hansen given at the trial and that of Mr. Lamont Hull given by way of deposition earlier. Mr. Hansen acting for Phillips and Mr. Hull acting for Max Oil and also for SJW were the protagonists who negotiated the MCA and the BMSC of 1/12/92. There is also a quantity of contemporaneous documentation which sheds some light upon their testimony. The learned trial judge who heard and saw Mr. Hansen give evidence accepted him as an honest and reliable witness and, having reviewed his testimony in detail I can see no good reason to disagree. It was also corroborated in all essential respects by the deposition of Mr. Hull and supported by much of the available contemporaneous documentation.

The exercise intended to withdraw Max Oil from the business of purchasing and reselling Phillips Petroleum products and to substitute SJW was first proposed by Hull to Hansen in mid-October, 1992 and was acceptable to the latter. An initial date of 1/11/92 was suggested for the transfer but it was soon apparent that the volume of paper work which such a switch entailed could not be completed in time and a new target date 1/12/92 was then agreed instead. Not only was a new BMSC with new personal and corporate guarantees required as well as

MCA to effect the desired switch, but the switch also involved preparation of new documentation to regulate the access of SJW to the Phillips supply terminals together with an elaborate system of plastic cards to regulate the drawing of each consignment and arrangements for simultaneous electronic billing and satisfaction of the purchase price for each through the offices of Vectra Bank out of the bank account of the new corporate marketer instead of the old.

It is, moreover clear from the evidence of these two witnesses that the principal stumbling block in the way of any instant substitution of SJW for Max Oil was the desirability of ensuring that SJW was in possession of both Federal and State Government licences to deal with in tax free gasoline and diesel oil. This was recognised by both men from the outset. Although in strict law there was no requirement for SJW to hold such licences before commencing business there were compelling commercial reasons why it should do so. A significant number of consumers were farmers or others entitled to purchase gasoline or diesel oil tax free at the pump and a supplier who was entitled to supply those products to them on that basis would hold an obvious competitive edge.

I am satisfied that there was throughout the preparation period for the switchover a continuing understanding between Messrs. Hull and Hansen that its implementation date should be delayed until the new licences were in place. By early December 1992 the state licences had been obtained but the Federal licence was still outstanding. This must be why, when the BMSC and the MCA of 1/2/92 were signed, the

implementation date was altered in both drafts to read 1/1/93 and initialled. It seems clear that in both men's minds the expectation was that the missing licence would be forthcoming during the month of December, 1992.

In fact the Federal licence was not forthcoming at all. Nevertheless no further action was, it seems, taken by either Mr. Hansen or Hull or by their principals to further amend the two contracts before they should come into force. There is no evidence of so much as any further enquiry by Mr. Hansen of Mr. Hull before the New Year dawned as to whether the Federal licence had yet been obtained. Moreover the evidence of both suggests that neither had alerted their respective principals to the highly unusual situation which had arisen, in that the contract documentation to effect the switch had been signed and delivered but an essential needed to fulfill their mutual understanding was not yet in place.

1st January, 1993 came and went without any kind of amendment to the contract documentation. Max Oil continued to draw product from Phillips terminals and to pay for it through the bank transfer system still in place. This situation continued until 3rd February 1993 when following a meeting between Messrs. Hansen and Hull which took place on 28/1/93 and was arranged in connection with other business it appears to have been agreed between them to revert to the situation that had legally existed prior to the end of 1992. Mr. Hull handed the originals of the new contract documents back to Mr. Hansen and the latter on that date sent them back to his own Company's contract

section with a most significant covering note. In relation to the BMSC and the MCA of 1/2/92 Mr. Hansen stated -

"Please void both and let's assume the exercise never happened. Reinstate the original Max Oil Co. and all the appropriate forecasts".

Although it is clear from their evidence that neither Mr. Hansen nor Mr. Hull possess any expertise regarding the Colorado law of contract, I find myself unable to agree with the trial judge when he expressed the view that Mr. Hansen was not thereby indicating that the two contracts had ever come into force. He may not be a contract lawyer but he is an experienced businessman. It is unnecessary to void an agreement which has never possessed any validity nor is it necessary to reinstate something which has all along retained it. I can only reconcile Mr. Hansen's words as well as his contemporaneous actions on that occasion by postulating on his part a belated realisation that steps and omissions had by oversight been taken by himself and Mr. Hull which had significantly altered the legal relationship between Phillips and Max Oil and which in the circumstances now prevailing required action on their part to restore the status quo ante. Unfortunately for them, as the nursery rhyme puts it, "all the King's horses and all the King's men couldn't put Humpty Dumpty together again".

The legal effect of the actions which Messrs. Hansen and Hull took on 28/1/93 and 3/2/93 seems on the face of it to have been a reinstatement of the terms of the BMSC of 22/1/91 retrospective to 1/1/93 by a fresh oral contract between Phillips and Max Oil although,

since we were not addressed in argument by either party on the point, I make no concluded finding to that effect. But even if that is the legal consequence of what occurred, it cannot effect the validity of otherwise of the Appellants guarantees because neither Appellant was a party to or even aware of what had taken place upon in those dates. Res itner alios acta.

It remains to consider one further piece of evidence in this connection. That is the 'Acknowledgment' dated 28th April 1993. Much reliance was placed upon this document by counsel for the Appellants but I agree with the learned trial judge that it was prepared without Mr. Hansen's knowledge or approval and that its status is only that of a draft which does not establish the truth of the recitals which it purports to record. It does not advance the matter any further.

What then can be the legal effect of the understanding between Messrs. Hansen and Hull that all should stay on hold until the Federal licence should be forthcoming upon the written contracts of 1/12/92, one of which states that it contains the entire contract between one set of parties and terminates all previous communications, representations and contracts between them and the other which states that all rights and obligations between the other sets of parties are terminated and cancelled as of 1/1/93. It can only be that the oral understanding is subsumed in these written contracts or, to put it another way, the terms of the written contracts being inconsistent with those prior understandings have overtaken them and deprived them in the future of

any legal validity which they might previously have enjoyed prior to 1/1/93.

In my judgment, therefore, even had the evidence just reviewed been properly admitted at the trial, the trial judge should still have reached the conclusion that the BMSC and the MCA of 1/12/92 were not affected and that both nevertheless came into legal force and effect on 1/1/93.

We come now to the third and final issue which is in contention on this Appeal, that is, did the cancellation of the BMSC of 22/1/91 effected by the MCA of 1/12/92 as of 1/1/93 and the consequent discharge of Max Oil from its obligations thereunder to Phillips also discharge the guarantees of 28/1/91 by the appellants to Phillips or did those guarantees survive the cancellation of the BMSC and continue to secure any future indebtedness of Max to Phillips thereafter? This once again is a question governed by the law of Colorado state.

According to that law is expounded by both Mr. Appel and Prof. Dauer, there is a general rule that discharge of the underlying contract between a creditor and his principal debtor also discharges the obligation of a guarantor. There is however an exception where the guarantee is a continuing, i.e. one which by its terms governs indebtedness arising under a series of transactions which may continue indefinitely. The discharge of the principal debtor from his indebtedness under any one or more of those transactions does not automatically discharge the guarantor because his obligation extends

to secure his indebtedness under other and future transactions also. The guarantees in the question here specifically state that they are continuing guarantees. This coupled with the fact that there is no explicit reference therein to the BMSC of 21/1/91 seems to constitute the basis for the opinion advanced in evidence by Prof. Dauer that the exception rather than the general rule just referred to is applicable to these guarantees.

Mr. Appel in his evidence disagreed. His contention was that the court must first examine the wording of the guarantees to ascertain what was intended by the parties to be their scope. Was it their intention to cover all present and future indebtedness arising between the creditor and principal debtor or only a restricted class of such indebtedness? The correctness of this view strikes me as obvious since the scope of guarantees is governed by their wording and infinitely various. The mere employment of a label "continuous guarantee" is no sure pointer to the parties exact intention in this regard.

The terms of the two guarantees in question have already been noted. They are expressed as being made in consideration of Phillips "entering into certain agreements and/or leases with and extended credit to Max Oil" and purport to guarantee the prompt payment at maturity of "all indebtedness hereafter or heretofore so incurred by the said principal debtor to the creditor under the terms of any and all such agreements, leases and extensions of credit." As a matter of syntax it seems clear to me that the obligations of the guarantors

must be restricted by the adverb "so" and the adjective "such" to indebtedness arising under the agreements, leases or extensions of credit mentioned in the consideration clause. It cannot cover indebtedness at large. Furthermore, employment of the word "certain" to qualify these "agreements and/or leases" strongly implies that they constitute one or more agreements or leases actually in contemplation by the parties at the time of the execution of these guarantees.

These then are not guarantees of the nature of those in issue in the Colorado Supreme Court case of '**Gandi v. Park National Bank**' 515P. 2d 20 (Colo. 1980) and in the Colorado Court of Appeals case of '**Ranson Distributing Co. v. Lazy B. Ltd.**' 532P, 2d 364 (Colo. App. 1975, NSOP) which were discussed in evidence by the experts and where there was no limitation expressed as to the scope of the relevant indebtedness to be guaranteed. To lump such guarantees together with those in the present case together as continuous guarantees, therefore, seems to me to be unhelpful and merely to beg the question, what indebtedness are they intended to cover?

The essential question to be asked and answered here is, were guarantees of 28/1/91 limited to indebtedness arising out of or in connection with the BMSC of 22/1/91 or are they to be construed as extending to any and all indebtedness arising out of or in connection with the supplier of petroleum products by Phillips to Max Oil including indebtedness so arising under future written or oral agreements? This is a question for which examination of the terms of the guarantees alone cannot provide an answer. It cannot do so because

the parties have not chosen to specify in the documents themselves what are the "certain agreements and/or leases" in contemplation between them. They have left out that essential information which is necessary for a determination of the precise scope of these guarantees. Hence there is and must be seen to an ambiguity. The trial judge holding otherwise considered that it would strain the language used to find any such ambiguity but I am constrained to regard it as impossible to find that there is not an ambiguity. The answers are just not there within the confines of the documents.

The further suggestion was advanced and was indeed accepted by the trial judge that a conclusion to the effect that the guarantees are limited to indebtedness arising in connection with the BMSC of 22/1/91 is in conflict with the later language of the documents referring to 'further agreements, leases or other obligations and to 'further credit'. I am satisfied that this is not the case, however, since those references occur only in the context of the nature of the notice required to be given by the guarantors in order to terminate their obligations. In this case we are not concerned with the giving of any such notices as termination, if it did occur on 1/1/93, would have done so by operation of law and not as the result of the service of any such notice.

How then is the resulting ambiguity to be resolved? Both expert witnesses were in agreement that in case of ambiguity the law of Colorado would require the court to seek extrinsic evidence in order to resolve it. Such evidence is in fact to hand in the record of

appeal.

First, there is the course of dealing. Max Oil is only one in a succession of corporate vehicles through which the Appellants have done business with the Respondents over the years. Its immediate predecessor was Pit Stops of America Inc. SJW was its designated successor. Each one in turn has entered into a BMSC with Phillips or its subsidiary and this has been the constant basis of the trade between them. Only one such BMSC has been in force at a time. Fresh guarantees have been procured each time a change has taken place and when the Pit Stops contract was terminated it appears that the former guarantees were terminated also, not by the serving of a notice of termination but by operation of law.

It also appears from the evidence that Max Oil traded with Phillips exclusively under the BMSC of 21/1/91 during its period of currency. Counsel for the Respondent identified four other contracts between these parties which were current during that period and which are in evidence; The New Construction Incentive Program of 11/1/91, the New Construction Incentive Program of 14/2/92, the Trademark Agreement of 3/1/91 and the Terminal access Agreement of 15/10/90. Reference to the terms of each of these separate contracts discloses that all of them are ancillary to and dependent upon the status of Max Oil as a customer under a BMSC and that there is no room for any of them to exist independently of that status. The relevant BMSC was at all times that of 21/1/91.

The evidence points inexorably towards a conclusion that the "certain agreements and /or leases" specified in the guarantees of 28/1/91 are intended by the parties thereto to refer to the BMSC as the foundation of the business relationship between Phillips and Max Oil. Only one phrase employed in the guarantees appears at first sight to escape this conclusion: that is the wording "and extending credit to Max oil". This phrase is apt to refer to future extensions of credit and counsel for the Respondent relied upon it as demonstrating an intention to cover future extensions of credit irrespective of whether the BMSC remained in force or not.

The answer to this apparent inconsistency lies in the evidence of Mr. Jerry Johnson, a financial manager with Phillips, who explained in some detail the procedure for a branded marketer customer of that company to draw petroleum product from one of its supply terminals and the mechanism in place for securing payment of the price. Although the relevant BMSC specifies amounts of product which the supplier has agreed to sell and the marketer to buy, the controls in place at the terminal do not specifically limit any marketer to any particular quantity of product to be drawn at any particular time. Mr. Johnson explained that as a result it would be possible for such a marketer to draw product in excess of the internal credit limit fixed by Phillips for that particular marketer of which he might not himself be aware and even to empty the terminal. Thus an extension of credit, beyond that which was already in place, could be involved in that particular transaction and this was one reason for the insistence by Phillips upon obtaining guarantees for every BMSC into which it entered in

terms similar to those in issue in this case. The further conclusion therefore seems warranted by the evidence that the future extensions of credit mentioned in these guarantees are firmly linked to the currency of the relevant BMSC and are not intended to be at large.

The extrinsic evidence available in this case thus leads me to conclude that the two guarantees of 28/1/91, continuous though they may be in one sense as covering multiple sales of products through the Phillips terminals to Max Oil, are nevertheless linked and intended to be linked inextricably with the currency of the BMSC of 21/1/91. When that came to an end on 1/1/93 as a result of the coming into effect of the MCA of 1/12/92 and the principal debtor, Max Oil, was thereby discharged, it follows that the obligations of the guarantors were likewise discharged by operation of the general rule of Colorado law. Any subsequent revival of that BMSC by a new oral agreement reached through Messrs. Hull and Hansen on 28/1/93 or 3/2/93 could not revive those guarantees. The Appellants are not therefore liable to make good the default by Max Oil in failing to pay for any product delivered to it by Phillips subsequent to 1/1/93.

Accordingly, I would allow the appeal and set aside the judgement of the Grand Court, substituting a judgment in favour of the Appellants/Defendants with costs here and below.

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Judge of Appeal

I agree. -----  
President

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I agree. -----  
Judge of Appeal