

C.J. n

Open Court

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
CAUSE NO:200/93

26-04-95

PHILLIPS PETROLEUM COMPANY

v

THOMAS W. QUINTIN                      1st defendant

and

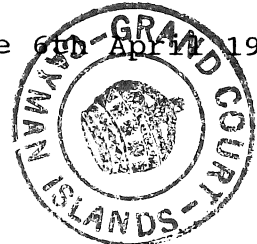
SANDRA J. WESTPHAL                      2nd defendant

JUDGMENT

Mr. Alan Turner for plaintiff  
Mr. Ramon Alberga Q.C. with Mr. Graham Ritchie for both defendants

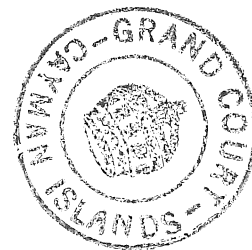
Schofield J.

Phillips Petroleum Company (hereinafter called "Phillips") is a company based in the United States of America which carries on business in various locations throughout the world. Phillips 66 was a wholly owned subsidiary of Phillips which was merged with Phillips on the 31st December, 1991. Phillips sold petroleum products to a company called Max Oil Company Inc.(hereinafter called "Max Oil") a company incorporated in Nebraska U.S.A., and carrying on business in the States of Colorado, Wyoming, and Nebraska. On the 6th April 1993



the United States District Court for the District of Colorado issued a seizure warrant and, pursuant thereto, the United States Revenue Services seized various records, correspondence, invoices, receipts, contracts and other documents of Max Oil and seized and froze the bank accounts of Max Oil. From that date Max Oil ceased its trading operations and it did so owing Phillips a substantial sum of money in respect of petroleum products which had been supplied to it. The amount was quantified by Phillips during the course of the hearing as US\$791,526, which amount, save for a sum of US\$70,000 received from the trustee in bankruptcy in other court proceedings in Colorado, remains unpaid. The first defendant ("Quintin") and the second defendant ("Westphal") are husband and wife who reside in these Islands and who were directors of Max Oil. Quintin and Westphal both executed guaranties in writing dated the 28th January 1991 in consideration of Phillips entering into certain agreements with and extending credit to Max Oil and thereby they agreed to guarantee the prompt payment to Phillips of all indebtedness of Max Oil under the terms of such agreements and extensions of credit. It is as well here to recite the first four paragraphs of the guaranty which are relevant to the determination of this suit. The guaranties executed by both parties are in exactly the same terms.

In consideration of Phillips Petroleum Company and/or one or more of its subsidiaries (hereinafter collectively referred to as "Creditor") entering into certain agreements and/or leases with, and extending credit to Max Oil, Incorporated of Denver, State of Colorado, (hereinafter referred to as "Principal Debtor") and in



order to induce 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 said principal; Debtor to Creditor under the terms of any and all such agreements, leases and extensions of credit.

This guaranty 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 on the guaranty of the undersigned, may at any time be settled and adjusted between Creditor and the 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 therefor may be extended from time to time by Creditor to the Principal Debtor without notice to 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 the 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.

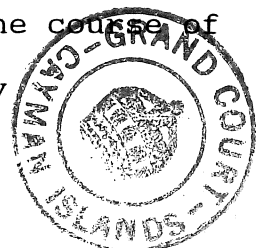
This instrument is intended to be and shall be construed to be a



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."

It is upon those guaranties that Quintin and Westphal are sued for the outstanding indebtedness of Max Oil to Phillips.

There is, in the writ, an alternative claim against Westphal alone on a similarly worded guaranty which she executed on 20th November 1992 in respect of payments for petroleum products which were to be supplied by Phillips to a company called SJW Oil Co. Inc. ("SJW"). SJW was formed by Westphal in the latter part of 1992 and it was intended that SJW should take over the business of Max Oil. Initially SJW was beneficially owned by Westphal, but in March 1993 it was purchased by two individuals, one of whom was Ronald Arellano. Arellano worked for Pit Stops of America ("Pit Stops") in which both defendants had an interest. Max Oil took over the wholesale distribution business of Pit Stops in January 1991. The writ also includes an alternative claim under guaranties executed by Quintin and Westphal in respect of Pit Stops' indebtedness to Phillips but it appears that Phillips have now abandoned any claim under those guaranties, it having become apparent during the course of proceedings that Pit Stops could not be held liable for any



indebtedness to Phillips.

In late 1992 negotiations took place between Phillips and SJW to transfer the Max Oil business to SJW. All the documentation was put into place and signed to be effective 1st January 1993. The date in the documentation was originally 1st December, 1992, but it was altered to 1st January, 1993. It is Phillips' contention that there was a condition precedent to those agreements taking effect that SJW should obtain a Federal tax exemption licence, which licence was never obtained. Phillips maintain that any petroleum products supplied from 1st January to 6th April 1993 were to Max Oil and not SJW. The defendants maintain that the supply was to SJW pursuant to the terms of the written agreements. The alternative claim by Phillips is that even if the supply by Phillips was to SJW, Westphal is liable under her guaranty executed 20th November, 1992.

Determination of the action rests upon interpretation of the guaranties the relevant parts of which are set out above.

These contracts are governed by the law of the State of Colorado, U.S.A., and I heard the evidence of experts from both parties to assist me in my determination. I should add here that guaranties similar to those above and dated 15th January 1991, and purportedly executed by Quintin and Westphal, originally formed the basis of Phillips' claim. However, the signatures upon them were denied by both defendants and their validity was in dispute. In the event any issue in relation to those purported guaranties fell away during the course of the trial and Phillips does not seek to rely on them



When Max Oil took over the wholesale distribution business from Pit Stops it entered into a contract with Phillips 66 called a Branded Marketer Sales Contract in which was set out, in considerable detail, the terms under which Phillips 66 would sell and Max Oil would purchase petroleum products. The contract was dated the 22nd January 1991. It was purported to be signed by Quintin, but here again Quintin disputes that the contract bears his signature. Nevertheless the defendants conceded, through their counsel, that the Branded Marketer Sales Contract of the 22nd January 1991 governed the relationship between Max Oil and Phillips. On the same day Pit Stops and Phillips entered into a Mutual Cancellation Agreement releasing each other from a Branded Marketer Sales Contract entered into between them on the 16th November 1990.

Pursuant to the Branded Marketer Sales Contract of the 22nd January, 1991, Max Oil obtained petroleum products from Phillips' terminal under an elaborate system of control, involving cards issued to the purchaser, each vehicle and each driver of each vehicle, and of credit whereby invoices were raised and sent direct to Max Oil's bank, payment being made through an electronic funds transfer system.

In October 1992 Phillips was told that there was to be some internal restructuring of Max Oil and that SJW would be taking over its business. The communication link between the companies was between Roger Hansen who is a marketing representative for Phillips, based in Denver, Colorado, and Lamont Hull who was employed by Max Oil. Although Hull appears not to have been an employee or officer of SJW,



from the evidence he acted on its behalf in regard to the transfer of business from Max Oil to SJW. The evidence is that Hull indicated that he wanted the transfer to be effected by 1st November 1992 but Hansen considered this impractical. Certain permits and licences are necessary from both the State and Federal authorities before fuel can be bought by a distributor tax-free. Although it was not essential for SJW to obtain these permits and licences prior to the transfer of business from Max Oil, there were certain clear advantages to both Phillips and SJW for them to be in place. Both Hansen, who testified before me, and Hull who gave his evidence by deposition taken in Denver, Colorado, and who was subsequently cross-examined by telephone link, stated that it was their intention that any agreement between Phillips and SJW for the sale and purchase of petroleum products would be put "on hold" until the necessary permits and licences had been obtained.

Certain licences were obtained by SJW from State authorities, but the essential licence issued by the Federal authorities was never obtained. Nevertheless a Branded Marketer Sales Contract was prepared and signed on behalf of Phillips and SJW. A Mutual Cancellation Agreement was also prepared and signed on behalf of Phillips and Max Oil to terminate the Branded Marketer Sales between them dated 22nd January 1991. Initially the operative dates of these agreements was set out as the 1st December 1992, but that was amended to read 1st January 1993. It is the defendants' case that these agreements took effect from the 1st January 1993, and that a necessary legal consequence of that was that the guaranties dated 22nd January 1991, executed by them, were cancelled. It is Phillips' case that



these agreements never became operative because SJW did not fulfil the condition precedent of obtaining the relevant permits and licences. Phillips also maintains that even if the agreements became effective on 1st January 1993 the guaranties executed by the defendants did not fall away with them.

I am grateful to Mr. Alberga for formulating the issues in this trial. I am content to adopt his general formula save for this reservation, and the amendments to his drafted issues which flow therefrom. There is no evidence on record which could support a finding that Phillips supplied any petroleum products to SJW, either directly or through Max Oil as SJW's agent, pursuant to the Branded Marketer Sales Contract dated the 1st December, 1992. Consequently Westphal cannot be held liable under her guaranty executed on the 20th November, 1992. The only live issues relate to the defendants' liability under their guaranties executed 28th January, 1991, and on my finding above it is irrelevant whether the Branded Marketer Sales Contract between Phillips and SJW dated 1st December, 1992, ever came into effect, because nothing happened, at least to affect the outcome of this suit, under it. In those circumstances the remaining issues are these:

(1) Can parol evidence be admitted to show that the Mutual Cancellation Agreement dated 1st December 1992, between Phillips and Max Oil, was subject to an oral condition precedent?

(2) If such parol evidence is admissible, does the evidence



on record satisfy the Court that the agreement did not come into effect?

(3) If such parol evidence is not admissible or I find that I am not satisfied on the evidence that the agreement did not come into effect, what is the effect, as a matter of Colorado Law, of the Mutual Cancellation Agreement dated 1st December 1992, on the Branded Marketer Sales Contract dated 22nd January 1991 and on any other agreements between Phillips and Max Oil?

(4) If such parol evidence is not admissible, or I find that I am not satisfied on the evidence that the agreement did not come into effect, what is the effect of the Mutual Cancellation Agreement dated 1st December 1992 on the guaranties dated 28th January 1991?

(5) If Phillips did supply petroleum products to Max Oil after 1st January 1993 are the two defendants liable under the guaranties of 28th January, 1991.

Before I turn to those issues in detail I shall make some general comments on the expert testimony I heard. The guaranties are to be construed according to the law of Colorado and to assist me in that regard I heard the evidence, tendered on behalf of Phillips, of Edward A. Dauer, Dean Emeritus and Professor of Law at the University of Denver, Colorado. Professor Dauer also acts in a consultant capacity to the Denver law firm of Popham, Haik, Schnobrich and Kaufman. Evidence was tendered on behalf of the defendants from Gary Richard



Appel an experienced attorney-at-law with the substantial law firm of Doherty, Rumble and Butler which has offices in Denver, Colorado, St. Paul and Minneapolis, Minnesota, and Washington DC. Mr. Appel is the senior partner in the Denver office.

There is no question that both these gentlemen are qualified to give expert evidence on the law of Colorado. Their evidence did not agree on various aspects of that law. I must say at once that my general assessment of Messrs. Dauer and Appel leads me to prefer the evidence of the former. I say this for three reasons. First, Mr. Appel's firm represented both defendants when depositions in this trial were taken in Colorado and Mr. Appel himself assisted, albeit to a limited extent, in the preparation of the defence case. Having regard to that, and having observed Mr. Appel in the witness box, I am not satisfied that his opinions carry the same dispassion as those of Professor Dauer. Second, Professor Dauer's report was detailed and fully reasoned, with authorities to support his reasoning. Mr. Appel's report was not as detailed or carefully prepared and he had to admit that he omitted to cover various important matters for consideration in such written report. Third, Professor Dauer was far more convincing in the witness box.

I was addressed by counsel on how a Court in these Islands should approach a question of foreign law when faced with a difference of opinion between experts on that law. There is ample authority for the proposition that if the evidence of several expert witnesses conflicts as to the effect of foreign sources, the Court is entitled to look at



those sources in order to decide between the conflicting testimony (see for example Re Duke of Wellington [1947] Ch.506). Where documents are to be construed, as opposed to statutes, the function of the expert is to prove the foreign rules of construction and the Court itself, in the light of those rules, determines the meaning of the documents.

(see Rouger Guillet et Cie v Rouger Guillet & Co. Ltd. [1949] 1 All E.R. 244) . Fortunately in this case I have been able to answer the issues without the need to review the foreign sources for myself, but of course I have had to construe the documents in the light of the evidence of Messrs. Dauer and Appel on the Colorado rules of construction.

Turning now to the issues, I have to decide first of all between the opinions of Professor Dauer and Mr. Appel on whether parol evidence can be admitted to show that the Mutual Cancellation Agreement dated 1st December 1992 was subject to an oral condition precedent. Professor Dauer testified that whilst parol evidence cannot generally be introduced to add to, vary or alter the terms of a written agreement, such evidence may be admitted in order to establish that a particular written agreement should not become effective until a condition is satisfied. His view, clearly and unequivocally expressed in his written report and in his evidence, was that under Colorado law the express terms of the agreement in question, that it came into effect on the 1st January 1993, could be subject to an oral agreement that it should not come into effect until a condition precedent was satisfied. Professor Dauer cited authority for that proposition. The Mutual Cancellation Agreement states that the Branded Marketer Sales Contract



of January 22, 1991, between Phillips and Max Oil is "cancelled and terminated effective the 1st January 1993". Professor Dauer saw no conflict or contradiction between that statement in the contract as to its effective date and the general proposition that it may be subject to an oral agreement that a condition has to be met before the contract become effective. Nor do I, and I cannot accept Mr. Appel's reservations in that regard.

There was discussion with the expert witnesses on the effect upon a condition precedent of what is known in the United States as an "integration" or "merger" clause in the contracts. Paragraph 23c of the Branded Marketer Sales Contract reads:

"This contract contains the entire agreement between the parties and terminates and supersedes all previous communications representations and contracts (including any prior Branded Marketer Sales Contract) between the parties with respect to the subject matter hereto. This contract does not extinguish any accrued rights under prior contracts. No change in or addition to this contract shall be effective unless in writing and signed by both parties."

Both experts agree that this paragraph is an integration or merger clause. The effect of such a clause, according to Mr. Appel, is to render an oral condition precedent ineffective as being directly contradictory of the express terms of the contract. However Professor Dauer opined that the Mutual Cancellation Agreement does not



contain such a clause and Mr. Appel agreed with that proposition when it was put to him by Mr. Turner in cross-examination. As it is the latter contract which determines the continued existence of the guaranties sought to be relied on by Phillips, I do not consider that the existence of an integration or merger clause in the Branded Marketer Sales Contract affects the issue of whether the guaranties dated 28th January, 1991 were still in existence after the 1st January 1993.

I conclude that parol evidence may be admitted to show that the Mutual Cancellation Agreement dated 1st December, 1992, was subject to an oral condition precedent.

The second issue relates to whether the evidence supports a conclusion that there was such an oral condition precedent in relation to the Mutual Cancellation Agreement. Evidence was heard from Mr. Hansen, who is employed by Phillips, that the substitution of SJW for Max Oil was put "on hold" pending the receipt by SJW of the tax exemption permits or licences and that the essential Federal permit or licence, was never obtained. This evidence is borne out by the deposition of Mr. Hull who acted for Max Oil and SJW and who was not shown to be other than a disinterested witness. Mr. Hansen impressed me as an honest and reliable witness whose testimony was not shaken under intensive cross-examination. Although the defendants point to a dearth of written proof that the implementation of the contracts were "on hold" there is on record an internal memorandum from Hansen to two



of his colleagues dated 4th December 1992, in which he states:

"By copy of this note I will advise Jim and Jack that although all the prep. work can be done now, please hold off on the implementation until after the first of the year and until they hear from me or the marketer advising the exact start date."

Mr. Hansen adequately and convincingly explained why all the documentation was put in place prior to the anticipated implementation of the transfer of business from Max Oil to SJW. Although in a memorandum of the 3rd February, 1993, in returning the Mutual Cancellation Agreement and the Branded Marketer Sales Contract, dated 1st January 1993, to his own Contract Section, Mr. Hansen asked a Ms. Walton of that section to "... void both and let's assume the exercise never happened. Reinstate the original Max Oil Co. and all the appropriate forecasts." I am satisfied from his evidence that he was not there indicating that the two contracts had ever come into affect. The whole tone of the memorandum serves to underscore his evidence rather than detract from it.

Nor does the acknowledgment dated 28th April, 1993, which was expressed to be made between, inter alia, Phillips 66, SJW, and Ronald Arellano and which seems to have been prepared in Phillips' offices, lead me to doubt the evidence of Hansen and Hull. The acknowledgment contains assertions which are contrary to Hansen's evidence and my findings above. However I am satisfied that the document was not signed by Hansen and that he would not have accepted its terms. I am also satisfied from the evidence of Mr. Jordan, Phillips' attorney, that the



document was a draft and it is safe to conclude that it was prepared without proper reference to those with full knowledge of the negotiations between Max Oil and SJW on the one hand and Phillips on the other. The evidence convinces me that the Branded Marketer Sales Contract between SJW and Phillips and the Mutual Cancellation Agreement between Max Oil and Phillips, both dated 1st December, 1992, were never intended to take effect until the necessary Federal permit or licence was obtained. Phillips supplied Max Oil, and not SJW, with petroleum products from 1st January to 6th April 1993. The Mutual Cancellation Agreement did not as a matter of fact or law become effective.

Subject to proof of Max Oil's debt to Phillips those decisions determine the defendants' liability to Phillips, but in case there is a successful appeal against them, I shall continue to make my findings on the other issues set out above. If I am wrong in my findings, what is the effect of the Mutual Cancellation Agreement dated 1st December 1992 on the Branded Market Sales Contract dated 22nd January 1991 and any other agreements between Phillips and Max Oil? This issue presents the Court with little difficulty because both experts agree, and I accept, that if the Mutual Cancellation Agreement was effective then it terminated the Branded Marketer Sales Contract between the same parties and any other subsequent agreement made between them up to 1st January 1993.

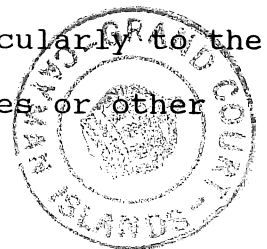
However the fourth issue requires slightly more consideration because the experts differed in their opinion upon it. If I am wrong in my determination of either of the first two issues what is the effect of



the Mutual Cancellation Agreement dated the 1st December 1992 on the guaranties of 28th January 1991? Both experts agree that under Colorado law a creditor's voluntary discharge of a debtor from an underlying contract generally discharges the guarantor as well. However, Professor Dauer states that this general rule does not apply to a continuing guaranty and both experts agree that the guaranties of 22nd January 1991 are continuing guaranties. Mr. Appel states that this opinion of Professor Dauer is an oversimplification and the real issue is: what is the nature of the guaranty? If the guaranty relates to the debtor's obligations under a particular agreement or lease, then if that agreement or lease is terminated between the parties, such termination also terminates the guaranty and releases the guarantor.

If I look at the guaranties from either of these standpoints I reach the same conclusion.

I agree with Professor Dauer that the guaranty is not restricted to cover transactions under the Branded Marketer Sales Contract and would cover further deliveries of petroleum products to Max Oil even if the Mutual Cancellation Agreement was effective from 1st January 1993. True it is that the guaranties are expressed as being in consideration of Phillips "entering into certain agreements and/or leases with, and extending credit to Max Oil," but to construe that as limiting the guaranties to covering agreements and leases in existence at the time the guaranties were executed and to extensions of credit thereunder would do violence to later clauses in the guaranty, particularly to the fourth paragraph which refers to "further agreements, leases or other

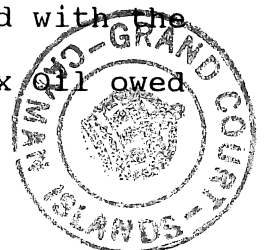


obligations" and "further credit" .<sup>17</sup>

In my judgment the guaranties covered extensions of credit in relation to the supply of petroleum products to Max Oil outside the Branded Marketer Sales Contract of 22nd January 1991. That would include extensions of credit to Max Oil in relation to petroleum products supplied to it even after a Mutual Cancellation Agreement such as that signed on 1st December, 1992, came into effect. Mr. Appel invited the Court to find that the guaranties are ambiguous and to look for extrinsic evidence in their construction, but it is my view that the Court would have to strain to hold these guaranties to be ambiguous, and that is something which the Court must not do. It is significant that such an ambiguity was not pleaded in the defence and was not mentioned in Mr. Appel's written report.

On the final issue, I am satisfied that Phillips has proved that it supplied Max Oil, and not SJW, with petroleum products from 1st January 1993 to 6th April 1993. So much is evident from the testimony of Mr. Hansen and the deposition of Lamont Hull. There has been no evidence to the contrary and particularly no evidence to support a conclusion that Phillips supplied SJW with petroleum products.

Phillips called Jerry Lloyd Johnson its Financial Services Manager for the Petroleum Marketing Division to prove the extent of Max Oil's indebtedness to Phillips as at the close of Max Oil's business. He was cross-examined extensively in that regard and I am satisfied with the figures he presented to Court. As at 6th April, 1993, Max Oil owed

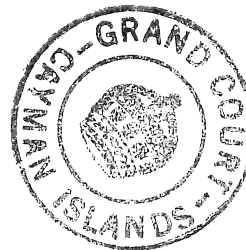


Phillips US\$791,526. From that is to be deducted the sum of US\$70,000 which Phillips' obtained under a settlement agreement in the bankruptcy proceedings in Colorado against SJW and another related company. During the hearing the defence suggested that alleged inconsistencies between Phillips' pleadings in those bankruptcy proceedings and the pleadings in this suit could affect the outcome of this trial. However, as Mr. Alberga did not make that suggestion an issue, nor did he mention it in his final submissions, I understand him to be accepting Prof. Dauer's opinion that such alleged inconsistencies are irrelevant to the outcome of this matter.

Under the term of the guaranties dated 22nd January 1991 Quintin and Westphal are jointly and severally liable for the sum of US\$721,526. plus an amount of interest which I shall determine after further argument from counsel.

They are also liable for the costs of this action.

Dated this 26th day of April, 1995.



D. Schofield

Judge