IN THE SUPREME COURT OF BELIZE, A.D. 2005

CLAIM NO. 195 OF 2005

ESSO STANDARD OIL S.A. LIMITED Claimant

BETWEEN AND

ELADIO ALAMILLA Defendant

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Aldo Salazar for the claimant.
Mr. Dean Barrow S.C. for the defendant.

—

JUDGMENT

I must first congratulate the attorneys for both sides in this case for their responsive use of the provisions of the R.S.C. Supreme Court (Civil Procedure) Rules 2005, relating in particular to a memorandum of issues and witnesses' statements. They have thereby telescoped proceedings that might have been prolonged without any benefit to clarity of the issues in contention.

From their agreed memorandum of issues the following issues have arisen for determination:

1. Was there an oral agreement between the parties for a discount to persist throughout the duration of the written agreement?

2. Did the Claimant breach the Agreement by revising its schedule of prices to the Defendant?

3. If the Claimant did breach the agreement by eliminating the discount, was the Defendant entitled to discontinue his purchases of fuel from the Claimant.

4. Was the Defendant justified in discontinuing his loan payments to the Claimant?

5. Did the Claimant refuse to make timely deliveries of products to the Defendant? If so did this constitute a breach of the agreement?

6. Has the Defendant breached the agreement by not purchasing fuels and lubricants from the Claimant and further by failing to deliver title to the property?

2. This case itself, shortly put, arose out of a written contract dated 21st December 1998 between the claimant, Esso Standard Oil S.A. (Esso for short) and Mr. Eladio Alamilla, the defendant. The background to the relationship was the supply and purchase of petrol and lubricants by Esso to Mr. Alamilla. Mr. Alamilla operated a service station the "Come 'N' Go" Station, just on the outskirts of Orange Walk Town at the junction of Chan Pine Ridge and the Northern Highway in Orange Walk District. The relationship had started sometime in 1992. At the time Mr. Alamilla would receive a

discount of 15 cents for every gallon of fuel supplied to him by Esso. Things continued like this until 1998 when Esso approached Mr. Alamilla to have his service station carry the brand name of "Esso" which would give to all and sundry that it was an Esso Station. Mr. Alamilla however needed to execute extensive repairs and renovations to his service station.

3. In order to effect the improvements necessary, Esso agreed to expend the total sum of $347,000.00 by way of capital expenditure on the service station and to lend Mr. Alamilla the sum of $250,000.00, all for the purpose of effecting the necessary improvements so as to operate the Come 'N' Go Station as a quality Esso Service Station.

4. Esso and Mr. Alamilla executed a written agreement dated 21st December 1998 which was put in evidence as **Exhibit GA 1**. It is a detailed agreement and it is not necessary to set out all its provisions. Its purpose was stated to be that Mr. Alamilla agreed to utilize the loan ($250,000) *"to renovate (his) service station in accordance with Esso's existing minimum marketing retail standards and to use the said service station solely and exclusively as an Esso Branded Service Station for the marketing of Esso branded motor fuels and lubricants for a period of not less than fourteen years after the completion of the renovation works."* The loan was stated to be interest free for fourteen years, but subject to an interest rate of 16% per annum in the case of default and from the date of default. It was expressly stated in Clause 1.7 that Mr. Alamilla would repay the loan by monthly installmental payments of at least $1,448.10.

4. By clause 3.1 of the agreement Mr. Alamilla represented and warranted that he had a lease of the service station and that he would in four weeks have a good and valid title to it and by clause 2.1 he undertook to immediately execute and register, upon being requested by Esso to do so, a mortgage on the service station in favour of Esso as a security for the loan. Furthermore by clause 4.1(c) it was expressly stated as an event (among others listed) of default, if Mr. Alamilla ceases or threatens to cease to carry on business or substantially the business as an Esso Service Station

5. I have mentioned the written agreement between the parties at some length because, I think, it is central to their relationship and vital to a resolution of the issues between them in these proceedings.

6. The defendant's case however is that there was as well an oral agreement between them and that by this oral agreement he was given an assurance on behalf of Esso that the 15 cents discount on the price of fuel per gallon he had enjoyed since 1992 would continue for the duration of the written agreement. In fact Mr. Alamilla averred that, but for this discount, which he regarded as an inducement, he would not have entered into the agreement.

   Therefore, it was contended on behalf of Mr. Alamilla, Esso breached its agreement with him when it later revised its schedule of prices for fuel and excluded the 15 cents discount per gallon.

7. I now turn to a consideration of the issues between the parties in the light of the evidence and the applicable law.

1. <u>The oral agreement and its alleged breach: Issues 1 and 2</u>

The only evidence of this came from Mr. Alamilla himself and Mr. Jose Gabriel May. In paragraph 7 of his witness statement, Mr. Alamilla said that at the time the written agreement for the branding of his service station as an Esso Gas Station was being negotiated with Esso, he specifically sought and received an assurance on the price at which he would be supplied fuels. He went on in paragraph 8 to say that he was assured by Esso's representative Mr. May with whom he negotiated the branding arrangement, that the discount would remain in effect for so long as the loan and branding agreement continued. Mr. Alamilla was adamant that he received assurances that the discount would continue. In cross-examination by Mr. Aldo Salazar for Esso, he stated that if he had not been assured that the 15 cents discount was permanent at least for the duration of the written agreement, he would never have entered into the branding arrangement.

8. Mr. May who was Esso's sales representative at the material time negotiated over a period of some six months the arrangement for branding the gas station with Mr. Alamilla. It is clear from his witness statement that he gave Mr. Alamilla the assurance relating to the 15 cents discount as he believed this had to be factored intro the calculations so as to persuade him to accept the loan and branding agreement. See in particular, paragraphs 6, 7, 8, 10, 11, 12, 13, 14, 15 and 16 of Mr. May's witness statement.

9. Mr. Dean Barrow S.C. for Mr. Alamilla therefore not unnaturally put much store on this 15 cents discount, which he said was at the core of his defence and counter-claim against Esso. He submitted that it was a collateral contract whose breach by Esso entitled Mr.

Alamilla a complete defence and a counterclaim. He submitted further that the separate oral agreement was the consideration for Mr. Alamilla to enter into the written agreement.

For Esso, on the other hand, apart form denying that there was an oral agreement, it sought, by the line of questioning by Mr. Salazar its learned attorney, to deny that Mr. May had any authority to have granted the 15 cents discount to Mr. Alamilla. Mr. Rufino Lin for Esso in his witness statement stated that as at 1st January 1998, Esso's pricing policy was that discounts could only be given by the company's country manager (a Mr. Rivera) or himself as the country coordinator, and that Mr. May had no delegated authority to approve any discount. Mr. Lin also denied that Esso guaranteed a 14 year discount to Mr. Alamilla. He stated that all the terms and conditions governing the relationship between Esso and Mr. Alamilla were included in the written agreement between them. He further stated that Esso did not give and could not have given a discount for such a long period of time since discounts were discretionary and usually reviewed within six months to a year to ensure their viability.

10. Mr. Guillermo Alamina, the lead country manager for Esso also put in a witness statement for Esso and was cross-examined at some length by Mr. Barrow S.C. for Mr. Alamilla. Mr. Alamina assumed his position in September 2002. He explained how the price of fuel was set and how discounts to customers worked. He stated in paragraph 9 of his witness statement that in December 2000 Esso took the decision to abolish certain discounts to customers. And that on 1st January 2003 the discount to Mr. Alamilla was terminated. He gave four reasons why this was done.

Determination

11. I am satisfied that on the evidence, Mr. Alamilla did indeed enjoy the 15 cents discount per gallon on fuel he purchased from Esso since 1992; and that in fact he had enjoyed this facility in 1998 during the negotiation and conclusion of the written agreement in December of that year; and that he continued to enjoy it up until January 2003 when it was terminated.

I am, however, not persuaded that it was the availability or the assurance of the continuation of this discount that motivated Mr. Alamilla to enter into the formal and written contract with Esso in December 1998. The discount and the possibility of its continuation might have influenced him and perhaps disposed him into entering into the formal arrangement. But I do not think that it was such as to be reasonably regarded as a term, or stipulation or condition of his written formal agreement with Esso. The substance of the written contract between Mr. Alamilla and Esso was such that the discount and the possibility of its continuance (for some 14 years), could not, I find have been operational so as to make it a term of the contract. The discount was decidedly not a term, implied or express, of the written contract.

12. I find that the substance of the contract was for Mr. Alamilla's service station to be branded as an Esso Service Station and for him to continue to buy his fuel and lubricant supplies exclusively from Esso for the duration of the contract (14 years). In return Esso would spend by way of capital expenditure of some $347,000.00 for effecting improvements to the service station and loan to Mr. Alamilla the sum of $250,000.00 interest-free for 14 years, with Mr. Alamilla undertaking to repay the loan by monthly installment of

$1,448.10. This, I am persuaded by the evidence, was the substance of their agreement.

13. I find it difficult to accept the evidence of Mr. May as well as Mr. Alamilla himself regarding the discount as a part of the contract. There is in the first place the parole evidence rule which is to the effect that:

> *"If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given … so as to add or subtract from, or in any manner to vary or qualify the written contract"* – **Goss v Lord Nugent (1883) 5 B & Ad 58 64**, cited in **Chitty on Contracts Vol. 1 – General Principles, 27 Ed.** para. 12-081 at p. 600 and cases there cited. This rule is however, subject to exceptions, none of which in my view however, is applicable to this case.

14. Although no objection was taken to exclude the alleged oral agreement regarding the discount, and in fact evidence was led in support of it, I find however that the contract of December 1998 between Mr. Alamilla and Esso was whole, entire and complete. The alleged oral agreement, I find, cannot be used to vary, subtract or add to it. I am satisfied that a look at the evidence in this case, from start to finish, the bargain that was struck between Mr. Alamilla and Esso was that contained in their written contract.

15. In the second place, even if I were to give full credence to Mr. May's testimony regarding the oral assurance relating to the discount, it does not in my view, rise beyond mere representation and did not amount to a term of the contract between Mr. Alamilla

and Esso. As the learned authors of **Chitty** **ibid** at para. 203, p. 560 state the position, which I respectfully adopt:

> *"During the course of negotiations leading to the conclusion of a valid and binding contract, a number of statements may be made, some of which may, and others may not, be intended to have contractual force. Some statements may be considered to be mere representations, intended to induce the other party to enter into the contract, but not imposing liability for breach of contract. Others may be considered to be terms of the contract, for the breach of which an action for damages will lie."*

Although the learned authors of **Chitty** recognize that the question of deciding in any particular case whether a statement is a mere representation or a term of the contract, may be a difficult one for a court to decide, they state that one pointer is whether the statement was subsequently omitted when the parties embody their agreement in a more formal contract in writing.

Here in this case, even if Mr. May could be said to be the proper agent of Esso and that he assured Mr. Alamilla of the discount and its continuance, there is no hint or reference to it in the contract that was reduced into writing. Surely, if it was intended that the discount was a term of their contract and the assurance regarding it was given by Mr. May, it is difficult to appreciate how Mr. Alamilla could have acquiesced to its omission from the written contract between him and Esso. The omission of this issue of the discount in a contract that was said to have been negotiated over some six months, I find, is telling.

16. I am unable as well to find that the discount or assurances relating to it said to be given by Mr. May constituted a collateral contract, albeit oral, between Mr. Alamilla and Esso. On the evidence, Mr. Alamilla had enjoyed the discount since 1992, independently and aside from any formal contract between him and Esso. It is not easy to appreciate how in 1998 when the formal written contract was entered into, the position regarding the discount could be transformed into a collateral contract. If this was intended, the parties would have formally embodied it into their written contract.

17. I must confess that I gained no assistance from the case of **Esso Petroleum Co. Ltd. v Mardon (1976) QB 801**, which Mr. Barrow S.C. relied upon as "almost eerily on point" with the facts of the instant case before me. **Mardon** was a claim for negligent or careless misrepresentation regarding the throughput of a petrol station made by the company in negotiations with Mr. Mardon regarding a tenancy for the petrol station, which turned out to be unreliable. In the present case, the main issue is whether there was a collateral contract regarding price discount aside from or additional to the written contract between Mr. Alamilla and Esso.

18. I also do not think that the case of **City and Westminster Properties (1934) Ltd. v Mudd (1959) Ch. 129**, mentioned in **Chitty ibid** at para. 12-078, pp 604-605, to be germane to the facts of the instant case before me. In that case, the draft of a new lease presented to a tenant contained a covenant that he would use the premises for business purposes only and not as sleeping quarters. The tenant objected to this covenant, and the landlords gave him an oral assurance that, if he signed the lease, they would not enforce it against him. The tenant signed the lease, but the

landlords later sought to forfeit the lease for breach of this covenant. But the court (Harman J) held that the oral assurance constituted a separate collateral contract from which the landlords would not be permitted to resile.

Here, it is not disputed that the discount had been in existence well before (some six years starting in 1992) the formal contract between Mr. Alamilla and Esso. And it continued well after the agreement. But the issue is: did it form part of an oral agreement or a collateral term of the formal agreement between the parties? The suddenness with which the discount was withdrawn, and without any prior notice to Mr. Alamilla, may be disconcerting and not the best corporate exercise in good customer relations. But this did not make it a term of the 1998 written agreement or a collateral contract of its own. I am therefore unable to find that the oral assurance by Mr. May constituted a collateral term of the formal agreement concluded between the parties in December 1998. I am equally unable to find that the assurance on the discount was a collateral contract.

19. For the reasons that I have stated, I find that there was no collateral contract regarding the discount, nor did Mr. May's representation on the discount amount to a term of the contract.

20. Accordingly, I find that there was no oral agreement between the parties for a discount to persist throughout the duration of the written agreement and Esso did not therefore, breach the Agreement by revising its schedule prices to Mr. Alamilla.

21. In view of my findings on issues 1) and 2), that is to say, Esso did not breach the agreement with Mr. Alamilla, it follows that the answers to issues 3) and 4) must be in the negative. By this I mean, I can find no justification that would entitle Mr. Alamilla to discontinue his purchases of fuel from Esso. His failure to continue to purchase fuel and lubricants from Esso, is, I find, a clear breach of **clause 1.2** of the agreement. Also I find in terms of the agreement, no justification for Mr. Alamilla to discontinue his repayment of his loan to Esso. I find as well that his discontinuance of his loan repayment is a clear breach of **clause 1.7** of the agreement.

22. I now turn to *issue 5: Did the claimant (Esso) refuse to make timely deliveries of products to Mr. Alamilla? If so, did this constitute a breach of the agreement?*

There is evidence from both sides that in the course of their relationship problems were encountered in the delivery of products to Mr. Alamilla. From the evidence, these problems were either attributable to the computerization of Esso's operations or the financial problems Mr. Alamilla was encountering which resulted in Esso putting him on a pre-payment plan before supplies could be sent off to him.

23. For example, in paragraphs 24 and 25 of the witness statement of Mr. Guillermo Alamina, the following is to be found:

> *"24. Despite our disagreement with Mr. Alamilla we have never refused to sell fuels or lubricants to him.*

> *25. The only problems processing sales to the Defendant were created by the introduction of our new accounting system. There were some "growing pains" associated with the system and this caused some delays soon after implementation. The major difficult caused was the fact that the system would place a customer's account on hold if there was any balance (either a debit or credit) showing."*

24. And Mr. Alamilla himself states in paragraphs 13 and 14 of his witness statement:

> *"13. The Claimant placed Come 'N' Go on prepayment for supplies, after difficult financial circumstances caused some of our cheques to be returned.*
>
> *14. Even after the prepayment was instituted, I found that there were times when our fuel trucks were not allowed to load by the Claimant. Eventually, placing a 'hold' on our trucks for one reason or another (such as supposedly to allow time for the Claimant to check with the bank to ensure that our deposit slips were genuine) seemed to become routine."*

25. There is also evidence that Mr. Alamilla was experiencing financial difficulties even before the cessation of the discount – see Exhibit EA 1, letter dated July 20, 2001 from Mr. Alamilla to Esso explaining why some of his cheques were not honoured.

26. I am therefore satisfied that Esso did not, from the evidence, refuse to make timely deliveries of products to Mr. Alamilla and certainly not a refusal that would constitute a breach of contract.

Issue 6: The Defendant breaches of the agreement

27. I am satisfied that from the evidence, Mr. Alamilla breached his agreement with Esso in several particulars.

First, Mr. Alamilla failed, contrary to clause 2.1 of the agreement, to immediately execute and register, upon being requested by Esso, a mortgage on the property comprising the service station, in favour of Esso.

Secondly, Mr. Alamilla failed, contrary to his obligation to buy fuel and lubricants only from Esso during the currency of the agreement: this was expressly provided for in **clause 1.2** of their agreement. Mr. Alamilla freely admitted this in paragraphs 21 and 22 of his witness statement.

Thirdly, Mr. Alamilla breached the agreement when, contrary to its clause 1.7 on the loan repayment, he stopped his monthly loan repayments to Esso. And Mr. Guillermo Alamina states in paragraph 13 of his witness statement that since the start of January 2005, Mr. Alamilla had refused to pay any monies towards his loan account and that the balance of the loan then stood at $175,682.18. Mr. Alamilla for his part, again, freely admits that this is so, as he says in paragraph 25 of his witness statement:

> *"25. I accept that I have not been repaying the loan installment to the Claimant (That is Esso) since around March 2005. But*

the amount I owe at the date of these proceedings is far exceeded by the amount the claimant owes me for the .15¢ per gallon discount that I was by oral agreement entitled to."

Fourthly, Mr. Alamilla breached the agreement when contrary to **clause 2.1**, he failed to execute a first mortgage on the service station in favour of Esso and instead mortgaged it to Scotia Bank. He readily admitted, under cross-examination by Mr. Salazar, to having mortgaged the property to Scotia Bank for the sum of $397,000.00. This action, I think, clearly offends **clause 3.5** of the agreement as well.

28. It is for all these reasons that I find and conclude that Mr. Alamilla was and is in serious breach of his agreement with Esso.

29. However, Esso is not to be compensated for the lost of a bargain, the amount of $1,013,770.21 which Mr. Alamina mentioned in his witness statement as representing the loss of profit to Esso by the refusal of Mr. Alamilla to buy fuel from it, I find, is somewhat speculative (see in particular paragraphs 18, 19, 20, 21, 22 and 23 of his witness statement). It is however, not in doubt that Esso suffered loss for the breach of contract by Mr. Alamilla, in particular the security which they were intended to enjoy by way of a first mortgage over the Service Station may well now be in jeopardy. Ideally, it would be preferable to award damages to Esso so as to put it in the position as if the contract had been performed. But this is not possible in all the circumstances of this case. I can therefore award what I think is reasonable damages for Mr. Alamilla's breaches of contract in addition to the other reliefs Esso is entitled to.

Conclusion

Therefore, I enter judgment for the Claimant Esso in these proceedings and dismiss Mr. Alamilla's counterclaim.

Accordingly, I therefore order that:

i) the payment of the loan balance by Mr. Alamilla together with interest thereon at 16% from the date of the service of the Claim Form on him until payment;

ii) Mr. Alamilla is restrained and is hereby restrained either by himself or by his servants or agents or howsoever from removing Esso Standard Oil S.A. Ltd. fuel pumps and installing fuel pumps from other fuel supplies or competitors of Esso at the Come 'N' Go Service Station at the junction of Chan Pine Ridge and the Northern Highway on the outskirts of Orange walk Town;

iii) Mr. Alamilla is hereby restrained whether by himself, his servants or agents or howsoever from purchasing fuel, lubricants or any other service station products from any other supplier or competitors of Esso Standard Oil, for sale at the aforesaid Come 'N' Go Service Station for a period of six years from the date of this judgment;

iv) Damages to Esso for Mr. Alamilla's breach of contract in the sum of $50,000.00.

I also awarded the cost of these proceedings to Esso in the sum of $20,000.00.

A. O. CONTEH
Chief Justice

DATED: 22nd December 2006.