No: 1354/82
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: HUSKY OIL MARKETING LTD. PLAINTIFF AND: REMPEL AUTO SERVICE LTD. and JACQUELINE REMPEL and MARK REMPEL, also known as MARK EARL REMPEL DEFENDENTS	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE SPENCER

Counsel for the Plaintiff: David Mulroney, Esq.

Counsel for the Defendants Rempel Auto Service Ltd. and Mark Rempel: R. Byl, Esq.

The Defendant Jacqueline Rempel appeared in person.

Place and Dates of Trial: Prince George, B.C.
May 3rd and 4th, 1984.

The plaintiff already has judgment for debt against the defendant company in the amount of $10,613.42, together with pre-judgment interest to the 15th July, 1983 and has leave to prove a balance owing on the account between it

and the defendant company in excess of that sum. In addition, it already has a judgment against the two personal defendants, finding them liable as guarantors for whatever amount is found to be owing by the corporate defendant. The hearing before me was to determine the validity of certain counterclaims brought by the corporate defendant against the plaintiff. I shall deal with the items of that counterclaim one by one.

Advertising Costs.

The corporate defendant claims that the plaintiff agreed to bear one-half of its advertising costs throughout the period in which it leased and operated a service station at Fort St. John. The plaintiff produced a contract, Exhibit 15, by which it limited its share of the costs to $600.00 but it is not Mr. Rempel's signature on the contract for the defendant company. Someone else has written in his name. However, I am satisfied by Mr. Caron's evidence that the plaintiff would not have, and did not undertake one-half of the advertising costs whatever they might be in the future. I accept his evidence that he had to obtain his head office's approval and that Exhibit 15 represents the extent of that approval and of the agreement. The plaintiff has already paid for the sign which is priced out on Exhibit 15 and I find a balance owing of advertising costs in favour of the defendant company of $343.00.

The Value of the Defendant Company's Chattels Taken Over by the Plaintiff.

This item was pressed at trial by the defendants but the evidence makes it clear that credit has already been given by the plaintiff on its statement of claim for the value of all the articles it took over in the sum of $7,679.90. The defendant company is entitled to no further award in relation to those items.

Gasoline Lost Through Faulty Metering in the Gas Pumps.

Shortly after the defendant company commenced operating the service station under lease from the plaintiff, it found that the amount of gas being recorded as sold to customers through the pumps was less than the amount of gas it was buying from the plaintiff. I accept Mr. Rempel's evidence that he continued to complain to Mr. Caron, who kept promising new pumps. I also accept Mr. Rempel's evidence that the pumps were repaired frequently but kept breaking down. I think Mr. Matthews, the repairman, has a less accurate memory than Mr. Rempel and his employees as to the extent of the problem. Mr. Rempel estimates that 24,000 litres with a wholesale cost of approximately $10,000.00 was lost because the gearing in the pumps was so worn that it frequently slipped and failed to record gasoline flowing past it into customers' cars. No other explanation has been given for the discrepancy between gas delivered by the plaintiff wholesale and gas pumped into the defendant's customers' cars. I do not think the defendants were under any obligation to mitigate the loss by refusing to pump gas to customers' cars. They were in business as a service station, leasing service station premises from the plaintiff for that purpose. Mr. Rempel continually complained to Mr. Caron so the plaintiff had ample notice but failed to replace the pumps for ten months. More than one pump must have been affected because eventually four were replaced. I reject the argument that the plaintiff is protected from responsibility under s. 26 of the lease, Exhibit 12. That exempts the plaintiff from liability for loss from leakage. There was no leak here. The gasoline went where it was intended to go, into customers' cars. The problem was not one of leakage but one of worn out metering equipment which failed to record deliveries accurately. I

find the plaintiff liable to reimburse the corporate defendant for the wholesale value of the lost gas and I refer the matter to the District Registrar to take an accounting of the quantity and value of gas lost. That should be done by quantifying the gasoline in the servicestation tanks when the corporate defendant entered the lease, adding the amount of gas delivered by the plaintiff during the lease, and then deducting the amount of gas recorded as delivered by the pumps during the lease and the amount of gasoline left in the tanks at the end of the lease. The result will be the net loss of gasoline through the mechanical failure of the pump meters and it should be valued at the wholesale prices of gasoline delivered by the plaintiff from time to time during the course of the lease. The defendant claims only the wholesale price.

Forcible Termination of the Lease

On November 4th, 1982, the plaintiffs' agents demanded that the corporate defendant vacate the premises on approximately twenty-three hours' notice, alleging a failure by that defendant to meet credit terms. It was entitled to do that under paragraph 4 of the lease. I find that Exhibit 13, an agreement scheduling payments in favour of the plaintiff, was executed by the corporate defendant and signed by Mr. Rempel for the company. The amount actually owing to the plaintiff as of November 4th, 1982, will not be determined until the Registrar has taken the accounts. However, in my opinion there can be no claim under this heading in any event because the corporate defendant executed Exhibit 7, a mutual release of obligations arising under the lease. The defendant was under great pressure to execute that document but does not plead that it is unconscionable, nor that it was executed under duress. The defendant company is

therefore bound by it in spite of the plaintiff's pressure upon it. The document was executed by Mr. Rempel for the defendant company and the absence of its seal does not invalidate it. The defendant company is therefore not entitled to damages for forcible termination, nor for the costs incurred in moving to another location.

Back Charges of 1¢ per Litre.

Mr. Rempel testified that in August, 1982 the plaintiff endeavoured to impose an additional charge of 1¢ per litre for all gasoline delivered from April 4th, 1982 onwards. He says that sum amounts to approximately $30,000.00. The plaintiff's counsel conceded the back charge during the trial and conceded it was wrong and should be reversed. I refer that matter to the District Registrar to take the accounts of how much gasoline was delivered by the plaintiff to the defendant and made subject to the back charge. The Registrar should determine whether the back charge has already been reversed in the accounts between the plaintiff and the corporate defendant and, if it has not, an appropriate credit is to be given to the corporate defendant on the accounting between it and the plaintiff.

Damage to the Corporate Defendant's Business Reputation through the circulation of a General Assignment of Book Accounts.

In August, 1982 the plaintiff discovered that the corporate defendant had not paid for certain loads of gasoline delivered into its tanks and owed approximately $85,000.00. Mr. Caron immediately began to try and secure the plaintiff's position. At some time a general assignment of book accounts was created in the corporate defendant's name. Several different copies and one original such document were tendered as exhibits. I accept Mr. Rempel's evidence

and the evidence of the expert handwriting examiner, Mr. Brown, that the purported signature of Mr. Rempel on the photostatic copies, which are Exhibits 4, 5, 18 and 21, were not written by Mr. Rempel but by someone trying to imitate his signature. All those documents are photostats of an original assignment which has become registered in the office of the Registrar of Companies in Victoria pursuant to s. 5 of the Book Accounts Assignment Act, R.S.B.C. 1979, C. 32. It appears that someone, I cannot determine who, has perpetrated a fraud by procuring the registration of a forged document.

Mr. Rempel denied that he ever signed any general assignment of book accounts on behalf of the corporate defendant. Mr. Caron gave confusing evidence about the original of Exhibit 4. He assumes he saw Mr. Rempel sign it but has no specific recollection. He testified that it was his practice sometimes to leave such documents undated and then to add a date later on, so that the document would appear to be registered within the twenty-one days required by the Act. The plaintiff's counsel assures me that his client is now aware of the potentially fraudulent nature of that practice and that it is no longer followed. The fact that it was followed, however, must throw doubt upon Mr. Caron's evidence. Having given due allowance for that doubt, however, I accept his evidence that the original assignment which is now Exhibit 16 was in fact signed by Mr. Rempel. My comparison of its signature with other documents in evidence signed by Mr. Rempel suggests that it is his writing. The fact that the plaintiff took from Mr. Rempel a list of his receivables, Exhibit 6, falls in logically with the plaintiff's evidence that in fact it had an executed assignment. In my opinion, the fact that the assignment may have been dated after the event does not affect its

validity as between the assignor and the assignee. The date of execution may be added subsequently to a document without invalidating it, see Waterman v. Waterman (1921), 61 D.L.R. 105. I do not think the addition of the date to this assignment and the alteration of the year from 1980 to 1982 was a material alteration. The evidence shows that the correct year was 1982 and that that the assignment must have been signed between August 26th and November 4th of that year. Since it was an assignment of present and future debt, the addition of the date after it was signed would not have any legal effect upon a person served with notice of the assignment. Debts then existing and future debts would both be affected in the hands of the person served. In fact, various debtors of the defendant company were served with a photocopy of the forged document registered in Victoria. The defendant says its business reputation was thereby adversely affected. I do not think that position can be maintained because there was, in any event, a valid assignment of book accounts, Exhibit 16. The corporate defendant's claim under this heading is dismissed. At trial some time was spent challenging the execution of a debenture also, Exhibit 14, but it is not relied upon by the plaintiff and nothing turns upon it.

The Result

In the result I find the plaintiff liable to the corporate defendant for advertising costs in the sum of $343.00; for gasoline lost through the faulty pumps, the amount and sum to be determined by the Registrar, and for the back charge of 1¢ per litre between some dates in April and August, 1982, the amount to be determined by the Registrar. In addition the Registrar is directed to take the plaintiff's account of what, if any, sum is owing to it by the defendant company

over and above the principal sum of $10,613.42 for which the plaintiff already has judgment. The Registrar should also find what amount is owing for interest on any sum he finds owing to the plaintiff pursuant to the interest terms set out in Exhibit 13. The Registrar is directed to certify to the Court the result of that accounting. The parties will have leave to speak further to the matter when the Registrar's certificate is available and have liberty to apply for further directions with respect to the accounting if that proves necessary. The extent of the guarantors' liability must also remain to be determined in the light of whatever sum is eventually found owing by the corporate defendant to the plaintiff. The balance of the defendant's counterclaim is dismissed.

Costs

The hearing before me was concerned only with the counterclaim. The defendant has succeeded in establishing a substantial amount of the counterclaim and will therefore have its costs of the counterclaim and of the preparation for and trial of the counterclaim before me, including disbursements for its witnesses. Those costs, however, may not yet be taxed. They are to be taxed when the value of the counterclaim is known and the costs eventually will be set off against any costs found in favour of the plaintiff in the action as a whole. The defendant Mrs. Rempel is not entitled to costs since she represented herself, but she will be entitled to her disbursement for attending during the trial, that disbursement also to be set off against any costs taxed by the plaintiff.

VANCOUVER, B.C.
May 9th, 1984.

J. Spencer J.