ANTIGUA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 of 1986

BETWEEN:

S. ROY MENDES - Defendant/Appellant

and

TEXACO WEST INDIES LIMITED - Plaintiff/Respondent

Before: The Hon. Mr. Justice Bishop - Chief Justice (Acting)
The Hon. Mr. Justice Moe
The Hon. Mr Justice Williams (Acting)

Appearances: Mr. F. Clarke for the Defendant/Appellant
Mr. S. Christian for the Plaintiff/Respondent

1987: Nov. 2
1988: Feb. 22.

JUDGMENT

BISHOP, Chief Justice (Acting)

This is an appeal against the decision of the learned trial Judge, in which he ordered that Texaco West Indies Limited recover from S. Roy Mendes the sum of $498,324.75 or any part thereof remaining unpaid by S.R. Mendes (Antigua) Limited (in Receivership) and costs to be agreed or taxed.

In October, 1983 Texaco West Indies Limited (also called Texaco) filed a Writ of Summons endorsed with a Statement of Claim showing that it claimed from S.R. Mendes (Antigua) Limited (in Receivership), hereinafter also called the Company, $539,133.82 owed by the latter and/or against S. Roy Mendes as guarantor of the indebtedness of the Company, the said sum or any balance thereof remaining unpaid by the Company.

The claim was based upon a guarantee dated 6th September, 1978; and whereas on the one hand Texaco alleged that S. Roy Mendes guaranteed payment of all sums owing to Texaco by the Company (see paragraph 5 of the Statement of Claim), on the other hand the defendant pleaded, on the 17th April, 1984, that he gave the guarantee but its terms were not accurately stated or sufficiently set out. He asserted that he would "refer to the said guarantee.....for its full term and effect" (see paragraph 1 of the Defence). This assertion must be borne in mind.

S. Roy Mendes also alleged in his defence that he gave the guarantee, relying on the representation by Texaco that the credit facilities granted to the Company would be limited to $272,000.00, that that amount would not be exceeded at any time, and that thereby his liability under the guarantee

/would.....

would only amount to the said sum of $272,000.00. It was further pleaded that this representation was made orally by Texaco to S.R. Mendes at the Company's premises around August, 1978 and "was confirmed by letter from Texaco dated 26th September, 1978". This defendant asserted that without his knowledge or consent Texaco granted credit facilities to an amount of $647,002.19 to the Company, and in all the circumstances, he was discharged from all liability under the guarantee.

I think that the case as conducted in the Court below, departed from the tenor and facts of the pleadings, in some respects; but I shall confine myself to the appeal as argued before us.

Each of the five grounds of appeal concerned the guarantee. It is appropriate then to set out the following part of that document;

> "Gentlemen,
>
> For value received, and to induce you, your divisions and subsidiaries to undertake or continue to sell goods and/or lease property to STEPHEN R MENDES (ANTIGUA) LIMITED, hereinafter called the debtor, the undersigned, jointly and severally, hereby unconditionally and absolutely guarantee payment when due of any and all present or future indebtedness owed to you, your divisions and subsidiaries by the debtor and hereby agree to pay such indebtedness punctually if default in payment thereof is made by the debtor.
>
> .....
>
> Without in any way limiting the generality of the foregoing, the undersigned acknowledges that this guarantee encompasses debtor's purchases of goods on account (including credit card purchases) and service, handling and delinquency charges incurred thereon, debtor's rental obligations for leased real and personal property, money borrowed by debtor (whether secured or not) and interest thereon, and debtor's obligations to account for goods consigned to or in the care or custody of debtor.
>
> This guarantee is unlimited as to amount and time, but may be revoked by the undersigned effective five (5) days after receipt by you of notice to that effect, signed by the undersigned and delivered to you ar the above address, marked for the attention of the Credit Manager, but such revocation shall not affect liability on any indebtedness then existing....."

This document dated 6th September, 1978 showed clearly on its face, that it was the guarantee of S. Roy Mendes Esq., to TEXACO WEST INDIES LIMITED, that it was witnessed by Christopher J. Blackstone and signed by the guarantor on the said 6th September, 1978.

There can be no doubt at all that the parties to this contract were Texaco and S. Roy Mendes.

In his decision delivered on the 7th May, 1986 Matthew J. stated:

/"The second.....

> "The second defendant contends that he was mis-represented as to the terms of the guarantee. Here is a retired businessman aged 65 and Senator of this country. He has been in the family business since he was 16 until he was retired in 1981. He was Managing Director and in charge of the Board for some time up to 1978 when Mr. Blackstone was made Managing Director, but he remained Chairman of the Board of Directors until his retirement and even after that. He appears to be well versed in business matters and gave an impressive opinion as to the reasons for the failure of the business. The Managing Director of Texaco came to him in Antigua and spoke about the guarantee..... He was reluctant at first to give it..... . He realised the agency depended on his giving the guarantee and he signed a document containing 17 lines ..... in fairly simple language and reads in part -"This guarantee is unlimited as to amount and time". There are no sums of money whatsoever in the document. Yet the second defendant says when he signed he understood it to be a guarantee limiting him to pay in the event of the Company's default, an amount not exceeding $272,000.00. I completely reject the second defendant's evidence here. He knew very well what he was doing and that is why he was reluctant....."

The learned Judge expressed the opinion that S. Roy Mendes had every interest in signing that guarantee, as guarantor, as he did not wish his company to lose an agency that was viable and that the Company held for 30 to 40 years.

In arguing the appeal learned Counsel pointed out - quite correctly in my view - that the duty of this Court was to interpret the guarantee of 6th September, 1978. Then Counsel submitted that in discharging that duty (1) it was necessary to consider the whole transaction between Texaco and the Company and (2) merely to look at the document alone and say that one is giving a guarantee that is unlimited as to amount and time must, (in Counsel's words) "be ambiguous in the sense that it would be unreasonable to expect anyone to give a guarantee couched in that term". Learned Counsel reviewed the evidence and the exhibits which he regarded as helpful in interpreting the guarantee. There was the testimony of Trevor Edgehill, an employee in the Credit and Collections Department of Texaco Eastern Caribbean Limited, a company providing management services for Texaco, and the testimony of Stephen Roy Mendes, the guarantor. In addition to the guarantee there were two letters dated 18th September and 26th September, 1978 exhibited.

Counsel submitted that it was clear from all the circumstances that the letters should be read together with the guarantee and that when the discussions held by Ralph Carter, Managing Director of Texaco and Roy Mendes were borne in mind with those documents, the only proper conclusion for this

/Court.....

Court was that the guarantee was limited in amount to $272,000.00. Counsel contended that this was supported by the dealings between Texaco and the Company from 1978 onwards; or to put it in other words, by the subsequent dealings after the signing of the guarantee, which, in his view, served to emphasise that the parties intended that the credit facilities ought to be kept within a specified limit and not be extended without any limit; consequently the guarantee was limited.

In support of his submissions and arguments Counsel for the appellant cited two cases: HOLMES v MITCHELL (1859) 26 Digest 58 and AMALGAMATED INVESTMENT & PROPERTY CO. LIMITED v TEXAS COMMERCE (1981) 3 All E.R. 577. With due respect, I did not find either of these cases to be particularly helpful with the duty of construing the guarantee of 6th September, 1978.

Learned Counsel for the respondent contended that there was no justification for looking to extrinsic evidence to interpret the document since there was no ambiguity that demanded clarification. Further, Counsel submitted, the guarantee was a normal business document which could not be described as unreasonable because it was unlimited in amount and time.

Counsel referred to the document and pointed out that it showed beyond doubt, not only that it was "unlimited as to amount and time" but that the guarantor agreed "to guarantee payment, when due, of any and all present or future indebtedness" to Texaco.

So far as the letters (of 18th September, 1978 and 26th September, 1978) were concerned, Counsel submitted that, as the learned Judge found, these letters dealt with a change in the accounting procedure, in order to assist and benefit Stephen R. Mendes (Antigua) Limited. The appellant was not a party to this correspondence which was entered into after he signed the guarantee.

At the trial the Judge permitted Roy Mendes to give evidence of the content of a discussion which he, Christopher J. Blackstone and Ralph Carter of Texaco, held in Antigua in 1978. The discussion concerned credit arrangements for the operation of Texaco's business in Antigua. There was alteration to the initial terms of payment set out in the Distribution Agreement signed on the 23rd of July, 1976 on behalf of Stephen R. Mendes (Antigua) Limited and on behalf of Texaco West Indies Limited. In my view the content of the discussion was irrelevant to the interpretation of the guarantee as will be shown later.

Under the Distribution Agreement Texaco undertook to sell and deliver or to cause to be sold and delivered to Stephen R. Mendes (Antigua) Limited (the Distributor) and the latter undertook to buy, receive and pay for the entire quantity of petroleum products mentioned in the Agreement and required by the

/said Distributor.....

said Distributor for re-sale or for its own consumption, and such other petroleum products that Texaco might introduce from time to time. Under the paragraph of the Agreement which dealt with the terms of payment, it was stipulated that at the end of each month the Distributor should submit promptly to Texaco a sales statement showing the quantities of each product purchased. The statement was required to be in accordance with Texaco's accounting procedures and to show the amount due to Texaco. Thereafter Texaco should verify that statement and if agreed, the sum shown should be paid by the Distributor to Texaco within a stated period. Where the Distributor failed to pay within that period, interest at 1% per month or part thereof should be charged.

It is undisputed that Stephen R. Mendes (Antigua) Limited fell into difficulty running Texaco's business in Antigua; and as a result, in 1978 new arrangements for payment were discussed and finalised. This led to the letters of 18th September, 1978 and 26th September, 1978. The former, from the General Manager of the Company to Texaco (for the attention of Ralph Carter), referred to discussion held on 12th September, 1978 and summarised the conclusions to show, that Texaco had approved a credit limit for the Company of E.C. $272,000.00, and that Roy Mendes' personal guarantee of this indebtedness had been tabled. Clearly that was the guarantee signed on the 6th September, 1978. The letter also explained, under the head "Implementation", what would be the position at the end of each accounting period when the Company completed their monthly account; they would adjust the balance upward or downward in the manner stated, so that the monthly current account would always show a balance of $272,000.00. The second letter, from R.H. Carter, Managing Director of Texaco, to the Company, was typed prior to the receipt of the letter dated 18th September, 1978, and it referred to the meeting in Trinidad of 12th September, 1978. Then it advised that from 20th September, 1978 credit facilities were granted by Texaco to the Company up to a limit of U.S. $100,000.00 (which was then equivalent to E.C. $272,000.00). It stressed that that figure represented the total exposure and was not to be exceeded at any time. It also set out how compliance with the limited credit facility could be achieved.

It is significant, in my opinion, that apart from referring to the fact that the personal guarantee of Roy Mendes was tabled at the discussions there was no specific mention of its limit or of any other term in it. It was not revoked as it could have been. It was left in such terms as were accepted and set out on the 6th September, 1978.

It is crystal clear, in my opinion, that the letters were concerned with credit facilities and accounting procedures for the Company to follow in the future, in its business with Texaco. They bore no relation to the PERSONAL guarantee which was a matter between Roy Mendes and Texaco.

/As Counsel.....

As Counsel for the appellant said, the duty of this Court is to interpret the guarantee dated 6th September, 1978.

The contract of guarantee is, in general, not dissimilar from any other contract; thus it is governed by similar rules of interpretation. The parties thereto must be taken to have contemplated and considered what they intend and to have expressed their intention in the contract. They have therein said what they meant and meant what they said. "Where.....a clear meaning appears without any evidence at all, the Court will not break in upon the rule which prohibits the variation of a written document by extrinsic evidence" (Volume 18 Halsbury's Laws of England (3rd edition) page 441, paragraph 814).

In 1970, in the case JAMES MILLER & PARTNERS LTD. v WHITWORTH STREET ESTATES (MANCHESTER) LTD. (1970) 1 All E.R. 796, a contract had to be construed and Lord Reid said this:-

> ".....I must say that I had thought it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract means one thing the day it was signed but by reason of subsequent events meant something different a month or a year later."

In my view these words are appropriate to the instant case. If it was correct to call in aid in the construction of the guarantee anything which the parties to that guarantee said or did after 6th September, 1978, then that guarantee would have one meaning on the 6th September and a different meaning on the 18th September; but, of course, the more important point is, that the parties concerned with the guarantee were not the parties connected with the credit facilities and the alteration in the accounting procedure.

In L. SCHULER A.G. v. WICKMAN MACHINE TOOL SALES LTD. (1973) 2 All E.R. 39 Lord Reid observed that the Court of Appeal were influenced by a consideration of actings subsequent to the making of the contract. This (he said) was inconsistent with the decision of the House of Lords in the James Miller & Partners Ltd. case. he saw no reason to change his view in that case.

The above quoted passage from Lord Reid's opinion was also cited, in part, by Sir John Pennycuick in BUSHWALL PROPERTIES LTD. v VORTEX PROPERTIES LTD. (1976) 2 All E.R. 283, at p. 293 letter g. In AMALGAMATED INVESTMENT & PROPERTY CO. LTD. (in liquidation) v.TEXAS COMMERCE INTERNATIONAL BANK LTD. (1981) 3 All E.R. 577, Lord Denning M.R., in his judgment, dealt with subsequent conduct and quoted the passage (to which I have referred above) before saying this:-

/"I can.....

> "I can understand the logic of it when the construction is clear; but not when it is unclear."

I have already quoted from the guarantee and I share the view of the learned trial Judge to the effect that it is short and in fairly simple terms which ought not to have presented any difficulty to a man of the pre-eminence of the appellant. So that on the 6th September, 1978 he must have understood what he was signing. Indeed even after the receipt of the letter of 26th September, 1978 there was no change in the terms and no revocation of the guarantee. In my opinion there was no ambiguity or other form of difficulty in the guarantee. It was clear, and "S. Roy Mendes Esq.," was bound by its terms. There was no room for any extrinsic evidence as to what he meant or understood when he signed the guarantee. It was not a limited guarantee; it was, as it said, "unlimited as to amount and time" and the guarantor unconditionally and absolutely guaranteed payment, when due, of any and all present or future indebtedness owed to Texaco by the Company. Further, the guarantor agreed to pay such indebtedness punctually if default was made by the Company.

Counsel for the appellant pointed out that if it was found that the guarantee was unlimited then the fifth ground of appeal could not arise. I have so found.

I have been unable to find any merit in the other grounds and I would therefore dismiss the appeal with costs.

E.H.A. BISHOP,
Chief Justice (Acting)

G.C.R. MOE,
Justice of Appeal

L.G. WILLIAMS,
Justice of Appeal (Acting)