U Corp. v. Shell Co., 15 ROP 137 (2008)

U CORPORATION,
Appellant,

v.

SHELL COMPANY (PACIFIC ISLANDS), LTD.,
Appellee.

CIVIL APPEAL NO. 07-044
Civil Action No. 00-37

Supreme Court, Appellate Division
Republic of Palau

Decided: September 16, 2008[1]
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Counsel for Appellant: Carlos Hiros Salii

Counsel for Appellee: William L. Ridpath, G. Patrick Civille

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEX R. MUNSON, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable LARRY MILLER, Associate Justice, presiding.
NGIRAKLSONG, Chief Justice:

On cross-motions for summary judgment, the Trial Division granted judgment to Shell Company, and U Corporation appeals. The suit began when plaintiffs, individual Shell dealers, filed a complaint (later adopted by intervenor U Corporation) alleging that Shell Company was acting outside the scope of its business permit issued by the Foreign Investment Board, and that Shell Company was engaging in Unfair Business Practices as defined by 11 PNC § 102 *et seq* in the implementation of its Shell Card program. We affirm the judgment.

BACKGROUND*

On November 29, 1989, Shell applied for a Foreign Investment Business Permit for "[m]arketing and distribution at the wholesale level of petroleum and petroleum related products to commercial, industrial, and government entities." The permit was approved on January 4, 1990, and renewed in 2005 for another fifteen-year term. It authorized Shell "[t]o import, market, and distribute, locally at the wholesale level, petroleum and petroleum related products to commercial, industrial, and governmental entities and to conduct all business activities related

[1] Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

* Editor's Note: The headings in this opinion have been changed from those used in the slip opinion for the sake of consistency within the reporter.

thereto." In 1995, Shell introduced the Shell Card program and executed agreements with various individual Shell dealers around Palau implementing the program. Pursuant to the agreements, Shell would repurchase from the individual dealer fuel provided to Shell Card customers immediately before the fuel passed to the Shell Card customer's tank. Shell would purchase the fuel from the dealer at the price the dealer purchased the fuel from Shell plus a set markup of 20 cents per gallon. Shell would then sell the gas to the Shell Card customer at an agreed upon price below the retail price the individual dealers charged to the general public.

The original complaint, filed by three individual Shell dealers, sought a declaratory judgment, penalties, sanctions, and damages under both the Unfair Business Practices Act, codified at 11 PNC § § 101-106 and the Foreign Investment Act, codified at 28 PNC §§ 101-121. Specifically, the complaint alleged that Shell violated its business permit by "marketing and distributing petroleum and related products as a retailer." Compl. ¶ 8. The Complaint also alleged that Shell was "using its superior economic power to fix the price of petroleum and related products to certain purchasers of petroleum and related products . . . by unilaterally ⊥139 fixing retail prices at a substantially lower rate thereby discriminating in price between different purchasers of petroleum . . . so as to create a monopoly over major or selected purchasers of Shell Oil petroleum." Compl. ¶ 12-13. U Corporation, a corporation selling Mobil petroleum, filed a complaint in intervention adopting the same claims shortly after the original complaint.

The Trial Division ruled on cross motions for summary judgment on July 22, 2003. The court first rejected Shell's argument that plaintiffs had no standing to bring a claim under the Foreign Investment Act. The court then denied plaintiffs' motion insofar as it was premised on an absolute restriction on Shell from making sales to end users. The court held that because the permit authorized Shell "'[t]o import, market, and distribute . . . to commercial, industrial, and governmental entities' . . . any reading of 'wholesale' or of the permit as a whole to entirely forbid defendant from making sales to end-users" was untenable. 2003 Order at 7. The court did not grant defendant's motion on this claim, however, holding that "the permit imposes some limitation on defendant's ability to sell directly to consumers." According to the court, defendant's affidavit from Frank Kyota, the Palau Area Manager for Shell Company, stating that "the Shell Card program was instituted 'to promote fuel sales among existing and potential commercial, industrial, and governmental purchasers of large fuel quantities'" was too conclusory to support summary judgment.

As to the Unfair Business Practices claims under § 102(d) and (e), the trial court granted summary judgment to defendant on the § 102(e) claim but allowed the § 102(d) claim to stand. The court saw the § 102(d) claim as alleging two vertical price-fixing[2] violations by Shell. First, by fixing the price at which plaintiffs resold gas to retail customers, and second, by fixing the price at which gas is sold through the Shell Card program. Because of conflicting affidavits regarding the first claim, the court denied summary judgment to both parties. On the second claim, the court stated that the two bilateral contracts involved in Shell Card transactions (first between the Dealer and Shell reselling the gas at purchase price plus $.20; then between Shell

[2] A manufacturer engages in vertical price fixing "by entering into agreements with his or her customers obligating them to observe fixed resale prices when reselling the manufacturer's products." 54 Am. Jur. 2d *Monopolies and Restraints of Trade* § 77 (1996).

and the Shell Cardholder, selling the gas at a price lower than the pump price offered to the public) did not constitute price-fixing. But the court allowed the claim to survive summary judgment, inviting plaintiffs to argue or find case authority which might lead the court to "consider the sales as occurring directly between plaintiffs and the Shell Card customers . . . as an effort to fix the price for such sales." 2003 Order at 12.

On August 13, 2007, the original plaintiffs stipulated to dismiss all claims with prejudice, leaving only intervenor U Corporation to pursue the lawsuit. U Corporation and Shell filed additional cross motions for summary judgment and the Trial Division issued a second order resolving the motions on September 19, 2007. Shell argued that U Corporation had no standing to pursue price-fixing claims under the Unfair Business Practices Act based on U.S. antitrust law. While not explicitly adopting the nuanced U.S. antitrust standing doctrine, the ⊥140 court granted summary judgment for Shell on the price-fixing claims. The court held that the purpose of § 102 was to promote competition, and that a narrowing principle similar to that found in U.S. jurisprudence was necessary to fulfill that purpose. Because U Corporation's only claimed injury stemming from the Shell Card program was a loss of business resulting from increased competition from Shell due to the program, no antitrust claim could lie. The court also granted summary judgment to Shell on the Foreign Investment Act claims. The court first held that defendant did not violate § 105(a), which limits the "wholesale or retail sale of goods" exclusively to Palauan citizens. The court noted that § 105(a) applies "only prospectively, and that non-citizens currently holding business permits . . . shall be permitted to continue such business activities." Second, the court held that the activities defendant undertook were within the bounds of its business permit. The court repeated its earlier analysis that the language contemplating wholesale distribution to "commercial, industrial, and government entities" permitted Shell to sell petroleum directly to Shell Card customers and bolstered its conclusion with a new affidavit from Frank Kyota averring that "only customers with business licenses are accepted into the Shell Card program." 2007 Order at 9 n.16. The court granted summary judgment to defendant on both claims and this appeal followed.

On appeal, plaintiff-intervenor (Appellant) U Corporation challenges the lower court rulings in three points. First, defendant's business permit does not allow it to make direct sales to end-users; second, the Trial Division's ruling ignored the Foreign Investment Board's legal opinion that defendant was not allowed to sell petroleum directly to end-users; and third, dismissal of the price-fixing claims was error when Shell was setting the retail price of gas for its Shell Card customers. Defendant raises both standing arguments raised below and otherwise seeks to affirm the trial division's decision.

STANDARD OF REVIEW

This court reviews the Trial Division's grant of summary judgment *de novo,* viewing the evidence and inferences in the light most favorable to the losing party below. *See Mesubed v. ROP,* 10 ROP 62,64 (2003); *Airai State v. ROP,* 10 ROP 29, 30 (2002); ROP R. Civ. P. 56(c). If the Trial Division correctly found that there was no issue of material fact and defendant was entitled to j judgment as a matter of law, this Court will affirm the judgment.

DISCUSSION

A. Foreign Investment Act Claims

1. Standing

Shell renews its argument that U Corporation lacks standing to enforce a violation of Shell's business permit. The law under which Shell received its permit, 28 PNC § 141 *et seq.*, did not provide for private enforcement of the terms and conditions of foreign business permits. *See Gibbons v. Government of Palau*, 1 ROP Intrm. 634, 642 (1989). The current Foreign Investment Act does so provide. 28 PNC § 120; *see Tulmau v. R.P. Calma & Co*, 3 ROP Intrm. 205 (1992). Shell argues that because 28 PNC § 105 dictates that the current Foreign Investment Act applies only prospectively, the private enforcement provision cannot apply to Shell's permit granted under the old law.

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28 PNC § 105(a) provides: "[T]he provisions of this chapter shall apply only prospectively, and that non-citizens currently holding business permits issued under 28 PNCA Chapter 1 or investment approval certificates for [wholesale or retail sales of goods] . . . shall be permitted to *continue such business activities* only for the current term of their present business permits . . . ." (emphasis added). In rejecting this argument below, the Trial Division correctly held that "absent the *continued* effectiveness of its previously-issued foreign business permit, [Shell] may not carry on a business enterprise . . . without first acquiring a foreign investment approval certificate." 2003 Order at 4 (emphasis added). Essentially, the Trial Division held that the prospectivity provision in § 105 allows businesses to continue the activities listed in the prior permits. Because the complaint alleged that Shell was undertaking activities outside of the scope of its permit, § 105 is no barrier to private enforcement of the permit, even one granted under the old law.

There is a more obvious reason why Shell's argument here must fail. When the permit was renewed in 2005, it was necessarily renewed "in accordance with the provisions of this chapter that do not conflict with any terms regarding extension or renewal included in [the] permit." 28 PNC § 105. Section 120, which allows private enforcement, does not conflict with any extension or renewal terms in Shell's permit, and a condition of the 2005 extension was compliance with the new Foreign Investment Act. Thus, U Corporation has standing to enforce the terms and conditions of Shell's permit.

2. Scope of the Permit

U Corporation's two main arguments on appeal are that Shell violated the terms of its permit when it sold petroleum directly to customers through the Shell Card program, and that the trial court erred when it failed to consider a letter from the Foreign Investment Board's legal counsel stating as much.[3]

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[3] To the extent Appellant raises the stand-alone argument that Shell violated 28 PNC § 105(a), which reserves "wholesale or retail sale of goods" to Palauan citizens and businesses, simply by selling petroleum, that argument is rejected. As the Trial Division noted and as this opinion noted above, § 105 explicitly provides that "non-citizens currently holding business permits . . . shall be permitted to continue such business activities." We agree with the Trial

The crux of the matter is interpreting Shell's business permit. The permit provides that Shell may "import, market, and distribute, locally at the wholesale level, petroleum . . . to commercial, industrial, and governmental entities and to conduct all business activities related thereto." Through its Shell Card program, Shell sells petroleum directly to cardholders. If this qualifies as distributing, "locally, at the wholesale level," to "commercial, industrial, and government entities" then Shell is not violating its permit. The trial division relied on the affidavit of Frank Kyota, dated May 29, 2007, in which he stated "[t]he Shell Card program is a worldwide program marketed exclusively to Shell's commercial, industrial, and governmental customers. Shell Cards are not available to retail customers. In Palau, each non-governmental Shell Card customer is required to show proof of a business license to qualify for a Shell Card." U Corporation does not dispute this. Thus, Shell ⊥142 sells petroleum directly only to commercial, industrial, and government entities. Appellant argues that the plain meaning of "wholesale" cannot contemplate any sale to end-users, but only sales to those who will resell as a retailer. We should not define "wholesale" so narrowly. Black's Law Dictionary defines "wholesale" as "[t]he sale of goods and commodities usu. to a retailer for resale, and not to the ultimate consumer." Black's Law Dictionary 1628 (8th ed. 2004) (emphasis added). Webster's Third International Dictionary adopts virtually the same definition and includes as a secondary definition "a large scale or indiscriminate transaction or maneuver." Webster's Third International Dictionary, Unabridged 2611 (1981). Contrary to Appellant's assertion, Shell's permit to distribute petroleum at the wholesale level contemplates direct sales to "commercial, industrial, and government entities" for use in the ordinary course of business. The Shell Card program is available only to those with a local business license, and the purpose and effect of the program is to provide a discount for largescale purchasers. In this respect, Shell's distribution of petroleum to Shell Card customers should be considered wholesale and is within the scope of its business permit.

3. Foreign Investment Board Letter

The letter from the Foreign Investment Board does not alter our conclusion. On February 9, 2000, legal counsel for the Board wrote a letter to Frank Kyota asking him to "cease engaging in the practice of setting the retail price products (sic) purchased with fleet issued credit cards." The letter stated that this was in violation of Shell's business permit. The Board took no further action with regard to Shell's business practices and renewed Shell's permit in 2005, knowing full well what Shell was doing. U Corporation argues on appeal that the authority to interpret Shell's business permit lies with the Foreign Investment Board, and that the 2000 letter is evidence that Shell exceeded the scope of its business permit. This argument is rejected. First, it is the province of the courts to interpret legal documents such as Shell's business permit. Although the Board may define the business activities in which Shell mayparticipate, when a dispute arises as to the meaning ofthe language used by the Board, the court will resolve the dispute as we have done here. Second, because the Foreign Investment Board took no further action on the letter

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Division that "the legality of Shell's sale of petroleum . . . depends entirely on the interpretation of its business permit." 2007 Order at 8.

and renewed the permit in 2005, there is no reason to believe that the Board was of the same opinion regarding Shell's business practices as its former legal counsel. U Corporation's argument fails and we uphold summary judgment on the Foreign Investment Act claims.

B. Price-Fixing Claims

We read Appellant's brief on appeal as waiving his price-fixing claims raised below. Appellant mentions the Unfair Business Practices Act only in point three of its appeal, and therein states "[t]his lawsuit was filed only after it became a matter of public knowledge that Shell Company's use of its fleet card in Palau was in violation of its FBP No. 103-90 . . . . The reality of the claim was not price-fixing but retail price setting by Shell Company through fleet card. Intervenor's claim is that Shell Company is engaged in retail sales of fuel as a co-retailer with each Shell Oil dealers including former plaintiffs through its fleet card." Brief at 11. For good reason, Appellant is not making a stand-alone price-fixing claim on appeal. As Justice Miller recognized, the allegations in this case belie a ⊥143 fundamental misunderstanding of antitrust law and do not come close to alleging an antitrust violation.[4] The only claim Appellant makes is "retail price setting" in violation of § 105(a), which reserves exclusively to Palauans "retail sales of goods." As mentioned above in footnote 3, we reject this claim.

Even if we were to consider Appellant as making a price-fixing claim through the Unfair Business Practices Act, we would dismiss for lack of antitrust standing. Price-fixing antitrust law in Palau stems from the following two statutory provisions: "It is illegal for one or more persons to create or use an existing combination of capital, skill or acts the effect of which is: . . . to fix at any standard or figure whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use, or consumption." 11 PNC § 102(d). "Any person who is injured in his business, personal property, or real property by reason of another's violation of sections 102 or 103 of this chapter may sue therefor in the Trial Division of the Supreme Court, and may recover three times the damages sustained by him together with a reasonable attorney's fee and the costs of suit . . . ." 11 PNC § 106(b).

The remedy provided in § 106(b) for allegations of unfair business practices is based on section 4 of the Clayton Act, 15 U.S.C. § 15(a). U.S. courts interpret this provision as limiting those who can recover for a violation of §§ 102 or 103 to those who suffer specific antitrust injury. In other words, even if a plaintiff can prove a violation of § 102(d), "antitrust injury does not arise . . . until a private party is adversely affected by an *anticompetitive* aspect of the

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[4] The only type of "price-fixing" that could be alleged here is "vertical price-fixing," where a manufacturer (Shell) mandates the price at which the distributer (the individual Shell dealers in Palau) must resell the manufacturer's goods - if Shell did not allow the individual dealers to set their own retail prices. *See 54* Am. Jur. 2d *Monopolies and Restraints of Trade* § 77 (1996). That is why Justice Miller, in his 2003 Order, invited plaintiffs to find a reason why the court should consider Shell Card transactions as occurring between the individual Shell dealer and the cardholder. If the transaction were so considered, Shell, the manufacturer, would be dictating to the Shell dealer the price at which he must sell gas. It is undisputed that this is not the case here.

defendant's conduct." *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 339, 110 S. Ct. 1884, 1893 (1990) (emphasis added). As the trial court noted, Shell's conduct here, allowing dealers to set retail prices to the general public, but implementing a program to attract high-volume customers by discounting the price, is not anticompetitive. "A firm complaining about the harm it suffers from nonpredatory price competition 'is really claiming that it is unable to raise prices.' . . . This is not *antitrust* injury; indeed, 'cutting prices in order to increase business often is the very essence of competition.'" *Atlantic Richfield Co.*, 495 U.S. at 337-38, 110 S. Ct. at 1891 (emphasis in original, citations and brackets omitted). "Low prices benefit consumers regardless ofhow those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." *Id*. at 1892. There are no allegations of predatory price-fixing here, and U Corporation lacks standing to assert a price-fixing claim.

CONCLUSION

For the foregoing reasons, we affirm the trial court's grant of summary judgment to defendant Shell Company.