*Shell Co. v. Palau Pub. Utils. Corp*., 16 ROP 149 (2009)
**SHELL COMPANY (PACIFIC ISLANDS LTD.),**
**Appellant,**

**v.**

**PALAU PUBLIC UTILITIES CORP.,**
**Appellee.**

CIVIL APPEAL NO. 07-048
Civil Action No. 06-066

Supreme Court, Appellate Division
Republic of Palau

Decided: April 17, 2009

Counsel for Appellant: G. Patrick Civille, pro hac vice, William L. Ridpath

Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable Justice Larry W. Miller, presiding.

PER CURIAM:

This is an appeal of a September 26, 2007 decision issued by the Trial Division in favor of Palau Public Utilities Corporation (hereinafter "PPUC" or "Appellee"), on a claim for recovery of overpayments made under a commercial fuel supply agreement, signed February 2005, with Shell Company (Pacific Islands), Ltd. (hereinafter "Shell" or "Appellant").

Shell appeals the Trial Division's interpretation of the Agreement, specifically the interpretation of when fuel is considered "delivered" or "consumed" and what circumstances allow for fuel price changes under the Agreement.

## BACKGROUND

### A. The Agreement

The Agreement between Shell and PPUC was signed in early February, 2005, with an effective date of February 1, 2005, and an initial term of 5 years.

*1. Delivery*

Section 3 of the Agreement states that delivery of the fuel is to be made "(a) at the place

or places of delivery specified in... Schedule A; or (b) at such other places as Shell and the Customer may agree." Schedule A lists the places of delivery as Aimeliik Power Plant, Malakal Power Plant, and a vessel chartered by PPUC for delivery to the Peleliu, Anguar, and Kayangel Power Plants. At the Aimeliik Power p.150 Plant, there are several storage tanks; Shell leased Tanks 5 and 6 to store fuel for its other customers. Tanks 3, 4, and 7 were dedicated to the use of the Aimeliik power plant.[1] There is also a Tank 9 at Aimeliik Power Plant, which is smaller and known as the "day tank."

Schedule A does not describe where at the Aimeliik Power Plant delivery is made. Elsewhere in the agreement, there is conflicting language as to where delivery takes place and when the fuel moves from Shell's to PPUC's possession. Section 13 of the Agreement describes delivery, for the purposes of transfer of title and risk, as taking place "[w]hen the fuel passes from the storage tanks through the intake flange to the Customer's day tank." In contrast, Section 14 of the Agreement, Delivery, gives Shell liability "for the delivery and transfer of fuel from the supply ship to the Aimeliik Power Plant storage tanks," implying that the fuel is "delivered" when it reaches the storage tanks. Agreement, § 14. Also, the Agreement states that "[v]olume delivered to the Aimeliik power plant will be based on the product movements in the storage tanks (currently 3,4, and 7) dedicated for the power plant" and the integrity of those tanks is PPUC's responsibility. *Id.* at §§ 9, Schedule E.

*2. Pricing*

The supply agreement states that, as for pricing, "[a] 'first in first out' system will be used. Price will be fixed until a new cargo is received. Price for delivered cargo will be fixed until such cargo is wholly consumed." Supply Agreement, Schedule B.

Shell interpreted the above language to mean that when a shipment of fuel arrived at the Aimeliik Power Plant, the fuel remaining in the storage tanks would be repriced to meet the new delivery rate. Because Shell interpreted "delivery" to take place when the fuel was transferred from the storage tanks to the day tank, only fuel in the day tank had a fixed price.[2]

PPUC contests the application of new delivery prices to the fuel that was remaining in the tanks. Because PPUC's interpretation of "delivery" includes all fuel in Tanks 3,4, and 7 as delivered by Shell, PPUC interprets the pricing language to fix the price of all fuel in the storage tanks until it is used. PPUC rejects the notion that the arrival of the fuel barge has any impact on prices of fuel already in Palau.
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[1]Actually, Tanks 3, and 4 were never used exclusively for Aimeliik Power Plant during the relevant period. Prior to the effective date of the Agreement and the date the Agreement was signed, the parties recognized that Tank 5 needed repair. As a result, the parties agreed that Shell would use Tanks 3 and 4 to store fuel for other customers and PPUC would waive the lease payments for Tank 5 to cover the repairs. Tr. at 156-159 (Test. Of Frank Kyota); *see also* PPUC's Resp. to Def.'s Mot. for Summ. J. (dated May 2, 2007) at 3.

[2]The fuel prices were "the arithmetic average of Mean of Platt's Singapore (MOPS) posting for 0.5% Sulfur Gas Oil on the month of loading of the cargo." Agreement at Schedule B. So, repricing might raise or lower prices, according to the market. However, during the period under scrutiny, fuel prices consistently increased.

**B. Procedural Background**

The decision of September 26, 2007, was the fourth decision by the Trial Division in this case. On May 12, 2006, the Trial Division denied PPUC's motion for a preliminary injunction. The preliminary injunction addressed Shell's threat to withdraw PPUC's line of credit, but was rooted in the contractual dispute currently at issue. In that decision, the Trial Division determined preliminarily that PPUC's position was most aligned with the words of the contract and the likely intent of the parties.[3]

Subsequently, the Trial Division ruled on cross-motions for summary judgment, granting summary judgment for PPUC as to the proper interpretation of the commercial fuel supply agreement. Oct. 16, 2006 Dec. The trial court accepted PPUC's argument that fuel in storage tanks 3 and 4 was "delivered" to PPUC and PPUC was entitled to the entire delivery amount of fuel for the price at the time of delivery. May 17, 2007 Dec. at 5. Pursuant to this determination, it was improper for Shell to reprice fuel in the storage tanks, so the Trial Division ruled that Shell had to repay PPUC for overpayments. May 17, 2007 Dec. On September 26, 2007, the Trial Division entered judgment in PPUC's favor in the amount of $365,369.43.

## DISCUSSION

**A. Standard of Review**

Review of summary judgment is *de novo* and "includes both a review of the determination that there is no genuine issue of material fact and that the substantive law was correctly applied." *Mesubed v. ROP*, 10 ROP Intrm. 62, 64 (2003). The parties agree that there are no genuine issues of material fact in this case. Accordingly, the only issue currently before the Court is whether the legal issue of contractual interpretation was correctly decided. *See Estate of Rechucher v. Seid*, 14 ROP 85, 88 (2007). "Conclusions of law, including the court's interpretation of a contract, are reviewed *de novo*." *Id.* Accordingly, the Trial Division's interpretation of the Supply Agreement does not receive any deference from this Court.

**B. Delivery**

The contradictions and conflicting language in the Agreement make it difficult to say with any certainty which interpretation of "delivery" was agreed upon by the parties. As seen above, there is language which supports either interpretation. "Ambiguity exists when (language) is capable of being understood by reasonably well-informed persons in two or more different senses." *WCTC v. Phillip*, 13 ROP 28, 30 (2005) (Ngiraklsong, C.J. concurring) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* §45.02 at 11-12 (6th ed. 2000)). When contractual language is ambiguous, a reviewing court must look beyond the words

[3]The trial court noted that neither party's interpretation of delivery is entirely satisfactory, because of the inconsistencies in the contract, but found that PPUC's made the most sense with regard to the language the parties agreed to. May 12, 2006 Dec. at 11.

to properly interpret a contract. *Estate of Rechucher*, 14 ROP at 93; *see also Ngiratkel Etpison Co, Ltd. v. Rdialul*, 2 ROP Intrm. 211, 222 (1990); 17A Am. Jur. 2d p.152 *Contracts* § 345 (2004) ("If an ambiguity exists the court will gather, if possible, the intention of the parties from the contract as a whole"). In analyzing the parties' competing interpretations, this Court must look at the Agreement as a unified whole, in the context in which it was written.

*1. Agreement in its Entirety*

The most detailed description of delivery locations in the Agreement is found in Section 13 and supports Shell's interpretation. That language states that "deliveries of fuel, title and risk of loss shall pass to Customer at various delivery locations as follows: … (ii) Aimeliik: When the fuel passes from the storage tanks through the intake flange to the customer's day tank." Although Section 14 of the Agreement makes Shell liable for the delivery and transfer of fuel from the supply ship to the storage tanks, rather than the specific day tank, that language is more general than that in Section 13 and not necessarily inconsistent.[4] The Restatement of Contracts states that, in interpreting an agreement, "specific terms and exact terms are given greater weight than general language." Restatement (second) of Contracts § 203(C) (1981).

PPUC's interpretation cannot co-exist with the language in Section 13; if fuel is delivered when it reaches the storage tanks, then delivery cannot take place "when the fuel passes from the storage tanks... to the customer's day tank." "An interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferable to an interpretation which leaves a part unreasonable, unlawful or of no effect." *Id.* at § 203(a). In contrast, if Shell's interpretation succeeds, the general language in Sections 14 and 15, which gives PPUC some responsibility over the storage tanks, is not rendered meaningless or unreasonable. Indeed, Section 15, which requires PPUC to "ensure the integrity and security of the tanks that will be used for storing consigned stocks for the Aimeliik Power Plant," supports the argument that fuel in the storage tanks does not belong to PPUC. The word "consign" means

> 1. To transfer to another's custody or charge, 2. To give (goods) to a carrier for delivery to a designated recipient, 3. To give (merchandise or the like) to another to sell, usu. with the understanding that the seller will pay the owner for the goods from the proceeds.

Black's Law Dictionary 327 (8th ed 2004). The use of the word "consign" to describe the fuel in the storage tanks indicates that the fuel is in PPUC's custody but is not PPUC's property. It is not unreasonable that PPUC would have responsibility over the tanks' physical integrity, even if it did not own the fuel inside; the tanks are PPUC property and are located on PPUC land.

It is more difficult to reconcile Shell's interpretation of "delivery" with the use of the word in Section 14, "Shell shall be liable for the p.153 delivery and transfer of fuel from the supply ship to the Aimeliik Power Plant storage tanks." However, that section can be understood to assign Shell liability for the actual transfer of the fuel, up until it reaches the storage tanks, although title to the fuel (and risk of loss) does not pass until the fuel reaches the storage tanks.

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[4]This is also true for Schedule A of the Agreement, which describes an agreed-on place of delivery as "Aimeliik Power Plant." This general description could refer to either the storage tanks or the day tank.

Considering, as noted above, that the storage tanks and the day tank are owned and maintained by PPUC, it is reasonable that PPUC should bear the liability (besides risk of loss) for fuel transfer between those two tanks.

One final element of the Agreement that supports Shell's interpretation of "delivery" is the pricing provision of Schedule B: "price will be fixed until a new cargo is received. Price for delivered cargo will be fixed until such cargo is wholly consumed." The first sentence of that provision is meaningless under PPUC's interpretation, in which fuel offloaded from the supply ships to the storage tanks has been "delivered." If, as PPUC asserts, fuel in the storage tanks cannot be repriced until it is consumed, then the receipt of new cargo cannot have any impact on the prices. Because PPUC's interpretation of delivery makes the first sentence above without effect, Shell's interpretation must be preferred. Restatement (second) of Contracts § 203(a) (1981).

For the foregoing reasons, although the contractual language contains ambiguity; it is more easily read to support Shell's interpretation of "delivery."

*2. Economic Reasonableness and Common Sense*

"The presumption in commercial contracts is that the parties were trying to accomplish something rational. Common sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons." *Fishman v. La Salle National Bank*, 247 F.3d 300, 302 (1st Cir. 2001) (quoted by *Dispatch Automation, Inc. v. Richards*, 280 F.3d 1116, 1119 (7th Cir. 2002)).

Holding the competing interpretations of the Agreement up to principles of reasonableness and economic sense, it is more likely that the negotiating parties never considered PPUC to have had ownership of or entitlement to the fuel in the storage tanks. Under the Agreement, PPUC does not pay Shell for any fuel off-loaded into the storage tanks until it is transferred to the day tank. *See* May 12, 2006 Dec. at 3, n.3; Tr. at 122-123. (Test. of F. Kyota). Since the fuel quantities delivered to those tanks may not be used by PPUC for months, PPUC's interpretation of the agreement, accepted by the trial court, allows PPUC to possess fuel for months without payment or interest owed to Shell. Additionally, price-fixing on this scale would result in large financial losses for Shell, unless the fuel market declines.[5] Considering trends in fuel prices, it would have been commercially unreasonable for Shell to sign such p.154 an agreement.

*3. Extrinsic Circumstances*

The parties' failure to alter the contract to reflect Shell's use of Tanks 3 and 4 also undermines PPUC's interpretation. The Agreement describes Tanks 3, 4 and 7 as "dedicated" to the Aimeliik Power Plant, as opposed to Tanks 5 and 6, leased by Shell for storage of its fuel for other PPUC locations or other customers. Agreement at § 9, p. 5. This division of storage tanks

[5]As discussed above, PPUC's interpretation entitles PPUC to purchase the amount of an entire shipment, at the price at the time of shipment, even though much of the shipment will be used by other Shell customers. Shell is then required to sell fuel received in later shipments, typically purchased at a higher cost, to PPUC at the previous price until PPUC has consumed the entire original shipment amount.

is assumed throughout the Agreement and is integral to the delivery, volume, and pricing provisions. However, in reality, no tanks were ever reserved for the exclusive use of the Aimeliik Power Plant. *See supra* n. 1.

The parties agreed prior to signing the contract that Shell would have use of Tanks 3 and 4 for its own storage needs, while Tank 5 was under repair, but did not bother to update the contract to reflect that those tanks would no longer be dedicated to the Aimeliik Power Plant. Shell's use of Tanks 3 and 4 to store fuel for its other customers resulted in deliveries of greater amount and frequency than that contemplated by the Agreement.

Under either party's interpretation, there is a discrepancy between the text of the Agreement and practice. However, under PPUC's interpretation of the Agreement, in which fuel in the storage tanks has been "delivered" to PPUC, the financial impact of that discrepancy is much larger. Since the parties felt that the change in tank usage was so insignificant that there was no need to update the Agreement to reflect the practice, it is reasonable to infer that they did not consider the fuel in Tanks 3 and 4 to be "delivered" to PPUC. If the parties had thought that Tanks 3 and 4 were the focal point of delivery and pricing (as under PPUC's interpretation), then they would have incorporated their extrinsic agreement into the contract. If, instead, Tanks 3 and 4 were used to store consigned fuel as a back-up supply for Shell, but were not relevant to delivery or re-pricing (as under Shell's interpretation), then it would be much less important to incorporate Shell's use of Tanks 3 and 4 into the written Agreement.

Analyzing the parties' suggested interpretation of the Agreement in the context of the entire agreement, the parties' circumstances at the time of signing and general economic realities, this Court finds that Shell's interpretation of "delivery" best supports the intent of the parties to ensure the regular sale of fuel from Shell to PPUC, in an economically reasonable way. PPUC's interpretation of the contract, adopted by the trial court, does not give effect to this intention. Interpretation of a contract must be guided by the principal intent of the parties. Restatement (Second) of Contracts § 202, cmt c. (1974). Accordingly, Shell's interpretation will be enforced by this Court.

**C. Pricing**

The language of Schedule B, Pricing, must be read in accordance with Shell's interpretation of delivery. The relevant language is: "[a] 'first in, first out' (FIFO) system will be used. Price will be fixed until a new cargo is received. Price for delivered cargo will be fixed until such cargo is wholly consumed." Agreement, Schedule B. Considering that only p.155 fuel in the day tank is "delivered," this provision prevents repricing of fuel in PPUC's day tank and allows Shell to re-price fuel in the storage tanks when a new shipment is off-loaded.

As a result, the Trial Division's determination that Shell violated the contract by repricing the fuel in the storage tanks as new shipments came in must be reversed.

**CONCLUSION**

This Court **REVERSES** the Trial Division's interpretation of the Agreement and **VACATES** its judgment in favor of PPUC. This case is **REMANDED** to the Trial Division, for the purpose of calculating and entering judgment in accordance with this Opinion.