ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/006

BETWEEN:

ANTIGUA POWER COMPANY LIMITED

Appellant

and

[1] THE ATTORNEY GENERAL
[2] THE HON. BALDWIN SPENCER (As Minister of APUA and Energy)
[3] ANTIGUA PUBLIC UTILITIES AUTHORITY
[4] THE COMMISSIONER OF POLICE

Respondents

Before:

The Hon. Mde. Janice M. Pereira (formerly George-Creque) Justice of Appeal
The Hon. Mr. Michael Gordon, QC Justice of Appeal [Ag.]
The Hon. Mr. Davidson Kelvin Baptiste Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC led by Mr. Geoffrey Robertson, QC for the Appellant
Mr. Kendrickson Kentish led by Mr. Douglas Mendes, SC for the 1st and 2nd Respondents
Dr. David Dorsett led by Sir Gerald Watt, QC for the 3rd Respondent

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2009: December 8;
2011: October 19.

Civil appeal – Contract – Agreement between the appellant and third respondent concerning the acquisition of generator sets to increase the electricity generating capacity in Antigua and Barbuda – Whether both Phases I and II of the agreement were formally approved by Cabinet – What is a Cabinet decision – Legitimate expectation – Estoppel – Whether the second respondent acted unlawfully in preventing the appellant from landing and installing the three engines at the power plant at Crabbs Peninsula

Around the time of April/May 2006, negotiations were being held between the appellant, Antigua Power Company Limited ("Antigua Power"), the Government of Antigua and Barbuda and the third respondent, the Antigua Public Utilities Authority ("APUA"),

concerning the acquisition of generator sets to increase the electricity generating capacity in Antigua and Barbuda. Apart from the fact that there was generally a need for this to be done, it was viewed as particularly urgent since the country would soon be hosting the 2007 Cricket World Cup. The generator sets ("gensets") were to be acquired from a company called Wartsila Caribbean Inc. and it was envisaged that the entire venture, termed the Joint Venture Agreement, would be completed in two phases – Phase I and Phase II. It was further agreed that Antigua Power would finance the purchase, importation and installation of the gensets. Phase I involved the purchase and installation of one 17 MW genset, which was to be installed and commissioned by December 2006. The purchase and installation of the remaining gensets, which were part of Phase II of the venture, was to take place subsequently.

Resulting from the negotiations between Antigua Power and APUA, the appellant wrote a letter dated 9th May 2006 to the Minister of Works, Transportation, the Environment and APUA, which sought to set out what had been agreed between the parties. This letter, significantly, spoke to Phase I as being separate to Phase II. At the end of the section which outlined what Phase I involved, the following words were written: "The understanding arrived at herein shall be subject to the approval of the cabinet of Antigua and Barbuda." Exactly the same words appeared at the end of the section which outlined what Phase II involved. On 9th May 2006, there was a meeting of the Cabinet of Antigua and Barbuda ("Cabinet") which authorized the purchase of the 17 MW genset for Phase I of the venture. Cabinet held another meeting on 15th May 2006. The minutes of that meeting, read in part: "Following the presentation by Management of [APUA] and [Antigua Power], Cabinet decided that, further to its decision of 9th May 2006, to approve the following:- (i) the Joint Venture Agreement between APCL/APUA in respect of producers of electricity…". Antigua Power contended that based on the minutes of that Cabinet meeting, as well as the subsequent actions of the respondents, approval was essentially received for the entire venture, that is, Phase I as well as Phase II. The respondents however, insist that only Phase I was ever formally approved. Antigua Power subsequently attempted to land and install the three Phase II engines at a power plant situated at Crabbs Peninsula in Antigua, where the respondents had given them permission to house the 17 MW Phase I engine. The respondents refused to allow them to do this, and directed the fourth respondent, The Commissioner of Police, to prevent them from accessing the power plant there.

Antigua Power commenced proceedings in the court below seeking a determination on several issues, including whether Phase II of the Joint Venture Agreement had been properly approved by Cabinet and whether the respondents had acted unlawfully in preventing them from accessing the power plant at Crabbs Peninsula. Judgment was entered in favour of the respondents. In particular, the learned trial judge found that no formal decision of Cabinet had been reached at the meeting held on 15th May 2006 and that only Phase I of the venture had been properly approved by Cabinet. Antigua Power appealed.

Held: dismissing the appeal and awarding costs to the first, second, third and fourth respondents at two-thirds of the costs awarded by the court below, that:

1. The learned trial judge rightly concluded that the perceived "assurances" and "verbal approval" that the appellant contends had been given by Cabinet, did not amount to a formal Cabinet Decision. Further, there is no clear Conclusion expressed in the same medium as the Cabinet Conclusion of 9th May 2006, to persuade the Court to find that Cabinet approved the purchases anticipated by Phase II of the Joint Venture Agreement. Accordingly, the trial judge was correct in holding that no Cabinet approval was given for Phase II of the Joint Venture Agreement.

2. In determining whether the appellant could be said to have had a legitimate expectation, one needs to ask whether the action of the appellant can be said to have resulted from the representation given by the public authority. The Court is of the view that the appellant felt sufficiently confident that it would be able to have both Phases I and II of the Joint Venture agreement approved, and thus entered into the Letter Agreement with Wartsila Caribbean Inc. on that basis, at its own risk. Any detriment which the appellant suffered derived not from a representation, but rather from a deliberate risk taking which predated any alleged representation. Therefore, legitimate expectation does not arise in the circumstances; the learned trial judge came to the correct conclusion on this issue, albeit with different reasoning.

   Regina (Bibi) v Newham London Borough Council [2002] 1 W.L.R. 237 cited.

3. The party pleading estoppel must show that he acted to his detriment as a result of a clear and unequivocal representation of fact made to him. However, it is clear that the appellant company acted in anticipation, rather than in reaction to any representation. It cannot then successfully pass on its risk to the other contracting party. Furthermore, an estoppel by representation does not normally stand alone in the sense of giving rise to a cause of action. An estoppel is used to prevent a party from insisting on his strict legal rights, when it would be unjust to allow him to do so. In essence, it operates as a shield and not as a sword.

   Amalgamated Investment & Property Co. Ltd. (In Liquidation) v Texas Commerce International Bank Ltd. [1982] Q.B. 84 applied.

4. As of the date of the landing of the three engines on 3rd December 2007, there was no Joint Venture Agreement in place nor was the Court able to find any written agreement in relation to the use of the power plant at Crabbs to house the first engine. The fact that the first engine – the 17 MW genset – remained in the ownership of the appellant and was placed at the power plant at Crabbs Peninsula by the leave of the Crown, made the appellant nothing more than a mere licensee of the power plant.

JUDGMENT

[1] GORDON J.A. [AG.]: According to the affidavit of Calid Hassad, General Manager of the appellant, sometime in April/May 2006 the Government of Antigua and Barbuda and the appellant commenced negotiations concerning the perceived need for additional generating capacity of electricity for the State of Antigua and Barbuda, specifically, Antigua. It was the evidence of Mr. Hassad that the essence of the negotiation was that the appellant would finance the purchase, importation and installation of one 17 Mega Watt ("MW") generating set ("genset") and a further 34 MW generating set or sets subsequently. It is common ground between the parties that the purchase and installation of the 17 MW genset was seen as very urgent as it was agreed that the same should be in commission prior to the holding of the Cricket World Cup in Antigua. To this end, it was agreed that the 17 MW genset should be installed and commissioned by December 2006. The remaining gensets were to be purchased and installed at a later date.

[2] It is worthwhile reproducing two paragraphs of Mr. Hassad's affidavit[1] at this time. At paragraphs 16 and 17 he says:

> "16. That amongst other things it provided for a Joint Venture for a 50.9 megawatt project utilizing a phased approach to ensure effective preparation and implementation of the joint venture. Phase I contemplated the installation, commissioning and maintenance of the above 17 mw Gen Set with associated auxiliaries and substation facility by the 31st January 2007, to be 100% financed by the Claimant ..."
>
> "17. Phase II contemplated the installation, commissioning and maintenance of 33.9 megawatts [of generating capacity] comprising of 11.3 megawatts generators with associated auxiliaries and substation facilities to meet growing consumer demands by December 2007. Also included was a substation facility on the southern side of the island financed solely by the Claimant in an amount not exceeding U.S $1 million. The entire project was to be financed by the Claimant. In both instances, the signed proposal provided that it will be subject to the approval of Cabinet."

[1] Affidavit in Support of Application – Core Bundle No. 1, Vol. 2, Tab 2.

[3] At paragraph 18 of the judgment, the learned trial judge says:

> "With respect to the negotiations with Wartsila, Calid Hassad initially testified that the resulting agreement with Wartsila was conducted in accordance with the Joint Venture Proposal signed on 11th May 2006. This he later modified by saying that it was based on mutual discussions that were held. And in terms of the content of the actual proposal, Hassad did testify that in view of the two phases, this amounted to two separate transactions; and was unsure if the Joint Venture envisaged a Joint Venture with respect to the purchase of the 17 MW engine. The witness later agreed that the Cabinet Decision of 9th May 2006 did not authorise the 50.9 MW plant."

[4] Mr. Hassad further testified:[2]

> "My understanding was that we were to proceed to buy 17 megawatt engine and the associated auxiliaries so that we could produce power from the 17 megawatt engine. That is what I say the auxiliaries [are]."

[5] Mr. Francis Hadeed also swore an affidavit on behalf of the appellant. In his affidavit, he states that he is the Chairman of the Board of Directors of the appellant. He agreed that during the month of April 2006 the appellant and the third respondent (hereafter "APUA") were in negotiation for the provision of the gensets referred to above.

[6] Resulting from the negotiations between the appellant and APUA, the appellant wrote a letter dated 9th May 2006 addressed to Hon. Wilmoth Daniel, Minister of Works, Transportation, the Environment and APUA.[3] That letter sought to set out what had been agreed between the parties. The letter, importantly, spoke to Phase 1 and, separately to Phase 2. Phase 1 was the provision, installation and commissioning of a 17 MW Wartsila genset with associated auxiliaries and sub-station facility. Phase 2 was the provision, installation and commissioning of a further 33.9 megawatts comprising three 11.3 megawatts generators with associated auxiliaries and sub-station facility. At the end of the section of the letter dealing with Phase 1 the following words appear:

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[2] According to the trial judge; see para. 21 of his judgment.
[3] See Core Bundle No. 2, Vol. 3, Tab 8.

> "The understanding arrived at herein shall be subject to the approval of the cabinet of Antigua and Barbuda."

Immediately following those words, there appears a heading "Phase 2". After that latter heading, the letter continues to set out the terms purportedly agreed between the parties. The penultimate paragraph of the letter reads:

> "The understanding arrived at herein shall be subject to the approval of the Cabinet of Antigua and Barbuda."

The letter was signed by Mr. Calid Hassad and by Mr. Francis Hadeed on behalf of the appellant and was in a form seeking the agreement by the Hon. Minister (to whom it was addressed) and representatives of APUA to be signified by their signatures to the letter.

[7] The 9th May 2006 letter was responded to by APUA by letter dated 11th May 2006 signed by the Hon. Minister, Mr. Leon Symister, Mr. Esworth Martin and Mr. Lyndon Francis on behalf of APUA. On the day after, 12th May Mr. Francis Hadeed and Mr. Calid Hassad together signed a copy of the May 11th letter agreeing and accepting its terms.

[8] Like the May 9th letter from the appellant, the May 11th letter spoke separately to Phase 1 and Phase 2 (describing each in exactly the same terms as the May 9th letter), and at the end of each section dealing with Phase 1 and Phase 2 were the words:

> "The understanding arrived at herein shall be subject to the approval of the Cabinet of Antigua and Barbuda."

[9] On 9th May 2006 there was a Cabinet meeting of the Cabinet of Antigua and Barbuda (hereafter referred to as "the Cabinet"). Resulting from that meeting a Minute was generated, signed by the Cabinet Secretary. The Minute[4] was addressed to The Hon. Wilmoth Daniel and reads in part:[5]

> "Cabinet, at its meeting held on Tuesday 9th May, 2006, agreed to authorize the Honourable Minister of Works, Transportation and the

[4] Dated 12th May 2006.
[5] See Core Bundle No. 2, Vol. 3, Tab 10.

> Environment together with the Management of Antigua Public Utilities Authority (APUA) and Antigua Power Company Ltd. (APCL) to proceed immediately to make all necessary arrangements for the purchase of one (1) 17 Mw Generator from Wartsila."

[10] These proceedings were brought by the appellant by way of Fixed Date Claim[6] pursuant to leave granted by the High Court by Order dated 7th December 2007. Pursuant to the Fixed Date Claim, the appellant[7] sought, inter alia, an Order that the it is entitled to the benefit of a joint venture contract with the Government of Antigua and Barbuda and Antigua Public Utilities Authority, entered into during the month of May 2006 to supply the third respondent (APUA) with electrical generating capacity power plant capable of outputting 50.9 megawatts.

[11] As grounds for the seeking of the Order, the appellant cited:[8]

> "1. The Joint venture Agreement/Proposal dated May 11th 2006 coupled with the parties thereto subsequent conduct, promises and representations give rise to a contract entitling the Claimant to wholly fund, develop and commission a power generating facility capable of producing 50.9 megawatts of power on lands provided by the Government of Antigua and Barbuda at Crabbs Penninsula [sic] in the Parish of St. George in Antigua and Barbuda on or before 28th February 2008.
>
> "2. The said Joint Venture agreement/proposal of itself and together with the parties thereto subsequent conduct, promises and representations give rise to a legitimate expectation of a substantive benefit namely the establishment of a joint venture corporate entity whose principal shareholders will be the Claimant with 55% of the shares and the Third Defendant with 45% of the shares."

[12] From what has been stated so far in this judgment it is easy to agree with the learned trial judge when he said at paragraph 136 of his judgment:

> "In this instance, the Court is of the view that the question as to whether or not a binding agreement exists and whether or not Cabinet approved Phase ll of the Proposal are substantially questions of fact that are critical to the whole application for judicial review."

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[6] Dated 21st December 2007 (see Core Bundle No. 1, Vol. 2, Tab 7).
[7] As claimant.
[8] See Core Bundle No. 1, Vol. 2, Tab 7, p. 4.

[13] Ground 7 of the Grounds of Appeal filed by the appellant reads:[9]

> "(7) The learned Judge was wrong to define the issues in the terms set out in paragraph 129 of his judgment, namely:
>
> (a) Whether the Joint Venture Proposal created obligations between APCL, APUA and any other person of authority.
>
> (b) Whether the Cabinet gave its approval to Phase ll of the Joint Venture Proposal"

[14] With great respect to learned Queen's Counsel for the appellant, this question was precisely what the court was required to answer before it could proceed further.

[15] As the learned trial judge remarked, it is common ground that Phase l of the contract was approved by Cabinet. With regard to Phase ll, the questions that arise are: did Phase ll require its own independent Cabinet approval; if so, did it get it; if not, then what was the effect of the failure to obtain Cabinet approval for Phase ll.

[16] A good starting point is Chitty on Contracts[10] where the learned authors write:[11]

> "Promissory and contingent conditions. A condition in the sense mentioned above may conveniently be termed a "promissory" condition, being a promise or assurance for the non-performance of which a right of action accrues to the innocent party. This sense must be carefully distinguished from that of a "contingent" condition, *i.e.* a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens. In this latter case, the non-fulfilment of the condition gives no right of action for breach; it simply suspends the obligations of one or both parties. In *Trans Trust S.P.R.L.* v. *Daubing Trading Co. Ltd.,*[12] Denning L.J. considered a condition in a contract for the sale of goods whereby the buyer was to open a confirmed credit in favour of the seller, and said: "What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit 'is rather like a stipulation 'subject to contract.' If no credit is provided, there is no contract between the parties. In other cases, a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of the contract, but to the

[9] See Appellants Notice of Appeal, p. 10.
[10] 26th Ed. Vol 1.
[11] At para. 795.
[12] [1952] 2 Q.B. 297, 304.

obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit." The first of these instances provided by Denning L.J. is that of a contingent, and the second of a promissory, condition."

[17] As stated above, it is common ground that Cabinet duly approved Phase I of the project.[13] The next document relevant to this point is a "Circulation Note" over the signature of Hon. Wilmoth Daniel dated 15th May 2006. As I apprehend it, a Circulation Note is a term for a memorandum setting forth issues for the consideration of Cabinet, and in this case stating the decision sought. The Circulation note read in part as follows:

> "CONSIDERATION
> A new Company shall be created for the Joint Venture. APCL will hold 55% shares and APUA 45% in the new 50.9 megawatt turnkey project.
>
> The project will be in two (2) phases. Phase I - 17 MW Wartsila Gen-Set by Jan 31, 2007. While phase II will be the remaining 33.9 MW.
>
> APCL and APUA shall each have representation on the Board of Directors. APUA's representation will be based on the proportion as represented by its shares.
>
> All day to day management and plant operational activities of the turnkey project will be the responsibility of APCL in consultation with APUA.
>
> APUA will appoint a Project Engineer and a Site Engineer in consultation with APCL during the project execution phase of the 17M. turnkey project. The employment costs of the same to be for the account of APUA.
>
> This Joint Venture shall enter into a PPA agreement along a Build, Own, Operate and Transfer (BOOT) concept for the new 50.9 Megawatt project that shall commence January 2007 and terminate January 2029.
>
> RECOMMENDATION
> The Ministry of Works (APUA) recommends the Joint Venture of Antigua Power Co Ltd and APUA at 55% and 45% respectively. The other details are outlined in the Phase I and II of the attached.
>
> DECISION SOUGHT
> The Hon. Members of Cabinet are asked to approve:

[13] See para. 9 above.

(1) The Joint Venture Agreement APCL/APUA in respect of producers of electricity.

(2) Shareholding of 55% / 45%APCL and APUA respectively."

[18] Cabinet would appear to have considered the Circulation Note at its meeting of 15th May 2006. The Cabinet Minutes of that meeting of 15th May, after noting that Cabinet suspended its meeting to allow representatives of APUA and of the appellant to give explanations on the Circulation Note, reads in part:

> "Following the presentation by Management of Antigua Public Utilities Authority (APUA) and Antigua Power Company Ltd., Cabinet decided that, further to its decision of 9th May, 2006 to approve the following:-
>
> (i) the Joint Venture Agreement between APCL/APUA in respect of producers of electricity;
>
> (ii) shareholding of 55%/45% to APCL and APUA respectively."

[19] A substantial part of the argument of the appellant revolves around what is a Cabinet decision and what was the Cabinet decision in regard to the overall project to provide 50.9 megawatts of generating capacity.

[20] The learned trial judge considered the legal nature of a Cabinet decision from paragraphs 212 to 223 of his judgment. As I read the grounds of appeal, the appellant does not challenge the jurisprudence therein contained. Lest I be mistaken in that latter regard, let me just repeat briefly what I glean from the trial judge and add my agreement thereto.

[21] Cabinet is established by section 70 of the Antigua and Barbuda Constitution Order 1981 ("the Constitution") and is vested with the power to have general direction and control of the Government and is collectively responsible to Parliament. Section 77 of the Constitution is of importance in this discussion and it reads:

> "77.–(1) There shall be a Secretary to the Cabinet whose office shall be a public office.
>
> (2) The Secretary to the Cabinet, who shall have charge of the Cabinet office, shall be responsible in accordance with such instructions as may be given him by the Prime Minister, for arranging the business for, and

keeping the minutes of, the Cabinet and for conveying the decisions of the Cabinet to the appropriate person or authority and shall have such other functions as the Prime Minister may direct." (Emphasis added).

[22] The trial judge quoted from the book by Lloyd Barnett, The Constitutional Law of Jamaica at page 77 to the following effect:[14]

> "Attendance at Cabinet meetings is normally limited to Ministers. Parliamentary Secretaries do not attend as a normal practice. Senior Civil Servants are occasionally summoned to the meetings to explain technical matters. On rare occasions even private persons are allowed 'to present a case' to the Cabinet, but the conclusions of the meeting are only formulated after their departure. As we have seen, Civil Servants attend the special annual discussions on the draft Estimates of Expenditure.
>
> The minutes of the meeting are drafted by the Secretary to the Cabinet who attends the meeting but takes no part in the deliberations. The minutes are subject to the approval of the Prime Minister. Copies are sent to all the Ministers. These minutes are in fact succinct statements of the problems and proposals considered and the conclusions of the meetings. The Secretary indicates on copies of the minutes which Ministry should carry out the decisions of the Cabinet as well as the Ministries to which the decisions have been sent for information. Usually the Ministry responsible for the execution of the decision is that from which the Submission emanated. The extracts of the minutes containing the relevant decision is known as a 'Cabinet Decision'."

[23] The trial judge concludes, on this point:[15]

> "Finally, the omnibus point must be that whenever Cabinet invites persons to give information or to demonstrate matter [sic] it suspends its sitting. Therefore, the obvious point is that once Cabinet suspends its sitting is [sic] it is not sitting *qua* Cabinet. This is reflected expressly in minutes contained in the evidence before this Court and by implication from Mr. Simon's testimony quoted above. Consequently, the perceived 'assurances' and 'verbal approval' did not even get into Cabinet far less to rise to the level of a Cabinet Decision. And even if Cabinet did give a verbal agreement while its meeting was suspended, the logic of the Constitution is that on resumption of Cabinet, there would be a compelling requirement for a formal decision to be taken on the matter which is then conveyed as appropriate."

[14] See para. 218 of the trial judge's judgment.
[15] At para. 223 of his judgment.

[24] I agree with the learned trial judge's conclusion. I would simply add that in the face of the clear language of the Cabinet Conclusion of 9th May 2006[16] I would look for an equally clear conclusion expressed in the same medium in order to be persuaded that Cabinet approved the purchases anticipated by Phase ll. That being absent, and it being possible for the appellant to point only to the approval of the Joint Venture Agreement[17] as between the appellant and APUA and the respective shareholding, I have no hesitation in agreeing with the learned trial judge that no Cabinet approval was given for Phase ll.

Legitimate expectation

[25] The appellant argues as a ground of appeal that the learned judge was wrong to hold that there was no clear, unambiguous and unqualified representation made by the Government or APUA upon which the appellant relied so as to give rise to a legitimate expectation that the appellant was entitled to the benefit of the contract as between itself and APUA, both as to Phase I and Phase ll.

[26] The appellant urged that the trial judge ought to have accepted the evidence of the following matters relied on by the appellant to justify their claim for legitimate expectation:[18]

(a) The construction of the 50.9 MW plant by the appellant in conjunction with APUA;

(b) The provision of Austin Joseph as the Project Engineer for the 50.9 MW project;

(c) The approval by APUA of APCL site meeting minutes and Wartsila project reports;

(d) The approval by APUA personnel of the construction of the 50.9 MW plant;

(e) The inspection of the Wartsila engines by APUA engineers in Trieste, Italy;

[16] See para. 9 above.
[17] See para. 18 above.
[18] See Appellant's Notice of Appeal, para. 35.

(f) The endorsement of the construction of the 50.9 MW plant by Government;

(g) The provision by the Government of the land for the construction of the 50.9 MW plant;

(h) The representation by the Government's Finance Minister in the 2007 Budget Statement that Government proposed to increase electricity output by an additional 50.9 MW.

[27] The learned trial judge dealt with each of these items in the following passage of his judgment:[19]

> "Some of the events identified by the claimant as evidence (some as "proof") of the approval of the 50. MW project include the following:
>
> 1. 'Technical assistance provided by APUA to the building of the power plant': This reliance overlooks the fact that the 17 MW generator was approved for Phase I and the period prior to World Cup Cricket 2007 was 'a very desperate period'. Put simply, any assistance with respect to Phase I would have been lawful.
> 2. 'The weekly site meetings': This follows from the foregoing.
> 3. 'The testing of engines being witnessed by representatives of APUA in Trieste, Italy': This was not without complications which the APUA General Manager sought to clarify in his letter dated 21st September 2006 to Mr. Calid Hassad.
> 4. 'The holding of disciplinary proceedings in relation to Lyndon Francis, Electricity Manager, APUA': These were merely held with no decision or action as yet.
> 5. 'Inspection of the site of the power plant, the General Manager and the Electricity Manager': It is not clear on the evidence as to when such a visit was made.
> 6. 'Attendance at a start up party for the pre-commissioning of Phase II works on 1/2/08 representatives of APUA': This borders on the frivolous.
> 7. 'The question of the acquisition of land for APUA': This is a matter fraught with legal difficulties which Mr. Robinson expressly or impliedly accepts in his submission.
> 8. 'The Government's position that it would undertake Joint Venture projects to increase electricity output by up to an additional 50.9 megawatts': This is not a specific relation to the claimant, as to begin with the plural ('projects') is used. In cross-examination, Mr. Simon testified that the Minister of Finance in making the

[19] At para. 239.

statement in his budget speech 'may have been referring to Government's intention to ensure that there is an increase in electricity output to 50.9 megawatts.'

9. 'The Government's further position on the 50.9 megawatts being in the national interest': This is another vague concept which is [sic] not necessarily encompass the claimant's contention.
10. 'The appointment of Mr. Austin Joseph as Project Manager for Phase I and II': In this connection it was noted that under the agreement engineers were required to be appointed with respect to each phase of the project."

[28] There is one piece of evidence which I find fundamental in coming to a conclusion on the legitimate expectation point. However, before coming to the evidence, I would recall the criteria for a finding that there was a legitimate expectation. In Regina (Bibi) v Newham London Borough Council[20] Lord Justice Schiemann stated:[21]

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

At paragraph 21 he stated:

> "Sometimes, … the answer to this first question is dispositive of the case. …if the public body has done nothing and said nothing which can legitimately have generated the expectation that is advanced to the court, the case ends there."

[29] I would add to the dictum of Schiemann LJ a further question, and it is this, can the action of the appellant be said to have resulted from the representation by the public authority. In this case the piece of evidence which I find fundamental in determining whether the appellant had a legitimate expectation is the Letter Agreement between the appellant and Wartsila Caribbean Inc. I quote hereunder from that letter:[22]

> "Reference is made to the various discussions between Antigua Power Company Ltd (hereinafter "APCL"), and Wartsila Caribbean, Inc.

[20] [2002] 1 W.L.R. 237.
[21] At para. 19.
[22] See Core Bundle No. 2, Vol. 3, Tab 5.

(hereinafter "Wartsila") concerning the supply delivery and erection of a diesel power plant of nominal capacity of approximately 40 MWe consisting of 1 x 18 V46 and 2 x 12 V46 Wartsila diesel generator sets and related auxiliary equipment (hereinafter the "Project["]).

"This Letter Agreement reflects APCL's commitment in exclusively negotiating and entering into an Engineering, Procurement, and Construction contract (hereinafter the "EPC") with Wartsila for the construction and delivery of the said Wartsila diesel power plant for the Project. Hereinafter APCL and Wartsila are jointly referred to as the "Parties' and individually as a "Party".

SECTION 1 – BINDING LETTER OF INTENT

"Upon execution of this Letter Agreement by APCL and Wartsila, the following provisions will constitute the legally binding and enforceable agreement with respect to the matters set forth herein. The terms of this Letter Agreement shall be binding upon the Parties and their respective successors and assigns.

SECTION 2 – COOPERATION, NEGOTIATION IN GOOD FAITH

… .

"On or before 12th May 2006, APCL shall make an initial non-refundable payment of US$1 million followed by a down payment of USD 3.0 million to be made on or prior to 30th May 2006. These payments are to commence engineering and initial site works (land clearing and geotechnical survey) and to secure delivery of the engines and generators for the EPC according to the following schedule:

- One 18V46 engine will be immediately assigned to the APCL Project in order to support a commercial operation date of January 2007
- Production slot for one 18V46 alternator will be secured from generator manufacturer ABB to have ex factory delivery of September 2007; and
- Production slots for 2 x 12V46 engines and alternators will be secured to have ex factory delivery in July/August of 2007 to support a commercial operation date of December 2007 under the EPC." (Emphasis mine).

[30] Crucially, the date of this letter agreement is 3rd May 2006 and the same was agreed to and accepted by Mr. Francis Hadeed on the same date. In other words,

this agreement predated the Cabinet Conclusion of 9th May 2006 and the Minute to the Hon. Minister of Works Transportation and the Environment.

[31] Mr. Francis Hadeed, Chairman of the Board of Directors of the appellant deals with that situation in his affidavit dated 18th April 2008[23] in this way:

> "That throughout the preliminary discussions leading up to the conclusion of the Agreement of 11th May 2006 it was clearly understood by the parties that the project would be solely funded by the Claimant. Further, in order to secure the First Phase 18 V 46 engine from Wartsila in terms of production slot, it would be necessary to [sic] the Claimant to enter into binding arrangements with Wartsila and pay the said Wartsila a non-refundable payment of U.S $1 million. … None of this start-up money was forthcoming from the Third Respondent. The Claimant assumed the risk and on 3rd May 2006 signed a Letter Agreement…"

[32] At paragraphs 4 and 5 of the same affidavit Mr. Hadeed has this to say:

> "The letter of the Third Respondent dated 30th April 2006 exhibited with the Affidavit of Calid Hassad [General Manager of the appellant] merely reflected the negotiations as they stood as of that date. Nothing was agreed upon with respect to its contents.
>
> "…[T]he aforesaid negotiations continued right through until the submission by the Third Respondent of 11th May 2006 of its Joint Venture Electricity Supply Proposal – APUA/APCL, which after amendment in writing was agreed to and signed by the parties."

[33] It seems a clear inference to me that the appellant felt sufficiently confident, and the basis of that confidence is not relevant, that he could, to use a common phrase, swing the deal, and he committed to it, as he said, at his risk. Any detriment which the appellant suffered derived not from a representation, but rather from a deliberate risk taking which predated any alleged representation. I conclude therefore, albeit with different reasoning, that the learned trial judge came to the correct conclusion on the subject of legitimate expectation and I therefore uphold that conclusion.

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[23] At para. 8 (see Core Bundle No. 1, Vol. 2, Tab 17).

Estoppel

[34] This would be an appropriate place to deal with the grounds of appeal on the subject of estoppel[24] as in many respects the factual analysis parallels the analysis for legitimate expectation.

[35] Halsbury's Laws of England describes estoppel in the following terms:[25] Estoppel in pais or estoppel by representation operates:

> "where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice…"

[36] Clearly, the party pleading estoppel must show that he acted to his detriment as a result of the representation. However, as described above, it is clear that the appellant acted in anticipation, rather than in reaction to any representation. He cannot then successfully pass on his risk to the other contracting party. Furthermore, an estoppel by representation does not normally stand alone in the sense of giving rise to a cause of action. An estoppel, is used to prevent a party from insisting on his strict legal rights, when it would be unjust to allow him to do so. In essence it operates as a shield and not as a sword.[26] This ground of appeal also fails.

Unlawful Conduct

[37] In ground 7 of the appellant's grounds as set forth in the Fixed Date Claim, the appellant states that the decision of the second respondent to prevent the landing and installation of the three 18 V 46 engines at the power plant at Crabbs Peninsula was unlawful and contrary to law; further, the second respondent's

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[24] Grounds 52-54 of the Appellant's Notice of Appeal.
[25] Halsbury's Laws of England, 4th Ed. Reissue, Vol. 16, para. 955.
[26] Amalgamated Investment & Property Co. Ltd. (In Liquidation) v Texas Commerce International Bank Ltd. [1982] Q.B. 84.

directive to the Commissioner of Police to prevent the appellant from accessing "its" power plant at Crabbs Peninsula was contrary to law and an abuse of power.

[38] The learned trial judge dealt with this matter quite shortly at paragraph 314 of his judgment and I quote:

> "Based on the non-approval of Phase ll and the second defendant's letter to Calid Hassad indicating clearly that there was no approval for the engines to be housed at the APUA Power Plant at Crabbs, [the] Court agrees with learned senior counsel for the first, second and fourth defendants that the attempt to place the engines within the compound constituted trespass."

[39] It is to be recalled that as of the date of the landing of the three engines on 3rd December 2007, there was no joint venture agreement in place nor was there any written agreement (which I could find) in relation to the use of the Power Plant to house that first engine. It is unquestionably true that the first engine remained in the ownership of the appellant and that the engine was placed at the Crabbs Power Plant by the leave of the Crown, but I agree with learned senior counsel for the first second and fourth respondents that this circumstance made the owner of the engine a mere licensee of the Power Plant.

[40] In all of the circumstances as stated above, I would dismiss this appeal with costs to the first, second, third and fourth respondents at two thirds of the costs awarded by the court below.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Janice M. Pereira (formerly George-Creque)
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal