EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(Civil)

CLAIM NO. BVIHCV2015/158

Between:

BRITISH VIRGIN ISLANDS ELECTRICITY CORPORATION

Applicant/Claimant

and

DELTA PETROLEUM (CARIBBEAN) LTD

Respondent/Defendant

Appearances:
Mr. Terrence Neale and Ms. Elizabeth Ryan for the Claimant
Ms. Willa Travenier and Ms. Nadine Whyte for the Defendant

2015: July 14th

JUDGMENT

[1] **ELLIS, J.:** This is an Application brought by the Claimant in which it seeks interim injunctive relief compelling the Defendant to continue to deliver fuel to it in accordance with the terms of the Refined Petroleum Supply Agreement dated 30th August 2014 (the Agreement) pending the determination of the Claimant's claim for specific performance of the Agreement and damages. The Claimant also seeks its costs of the Application.

[2] The grounds on which the Application is brought are set out in the Notice of Application filed on 11th June 2015 which provides the factual background to the dispute.

[3] On August 30, 2014, the Claimant and the Defendant entered into an Agreement for the sale and purchase of No. 2 diesel fuel and unleaded gasoline. The Claimant agreed to purchase diesel fuel exclusively from the Defendant for 4 years from September 1, 2014 to August 31, 2018 (the "Supply Period") and the Defendant agreed to supply and deliver diesel fuel and unleaded gasoline to the Claimant during the Supply Period. The Defendant is the sole supplier of fuel to the Claimant.

[4] At the time of the signing of the Agreement, the Defendant was receiving its supplies of fuel from Hovensa storage facilities in St. Croix, USVI ("Hovensa"). Clause 10 of the Agreement contains provisions that relieve the Parties from their failure to fulfil their respective obligations under the Agreement if the failure is caused by any of the six events listed in sub-clause 1. The event that is relevant to the dispute between the Claimant and the Defendant is paragraph (d) which excuses performance if there is –

> "Any curtailment, failure or cessation of supplies of crude oil or refined petroleum products from any of the Seller or its suppliers' sources of supply or Seller's leased storage facilities on St. Croix, USVI, which are in fact sources of supply or storage for the purposes of this present Agreement."

[5] So that if there was a delay, interference or curtailment of the Defendant's supplies within the meaning of sub-clause 10(1), it could apply under the further provisions of Clause 10 for performance relief. On December 1, 2014 Hovensa gave notice to the Defendant that it would be closing the Hovensa facilities and terminating supplies of fuel to the Defendant effective March 1, 2015. Subsequently, the Defendant applied for performance relief as follows:

a) **Weather** – By letter dated January 27, 2015 on account of adverse weather conditions.

b) **In relation to the Hovensa closure** –

   (i) Letter dated January 27, 2015 on account of delays encountered at Hovensa related to the closing of the facilities.

(ii) Letter dated February 2, 2015 because of the closing of the Hovensa facilities and the transition to the new loading facility in Antigua.

c) **In relation to the Antigua loading facility –**

(i) Letter dated March 12, 2015 on account of delays in loading in Antigua.

(ii) Letter dated April 30, 2015 on account of *"berthing in Antigua as was cited in previous Performance Relief correspondence".*

[6] The Claimant contends that from March 12, 2015 and April 30, 2015 the requests for performance relief had nothing to do with the Hovensa closure, but rather difficulties it encountered with its supplier in Antigua. Despite these requests for performance relief, the Defendant continued to deliver fuel in accordance with the Agreement.

[7] By letter dated February 19, 2015 the Defendant claimed that the cost of supplying fuel from Antigua was more expensive than the cost of supplying fuel from the Hovensa facility to the point of making the Agreement unprofitable and asked for a renegotiation of the Agreement price.

[8] By letters dated March 4, 2015 and May 28, 2015, the Claimant rejected the Defendant's request for an increase in the price for fuel, but indicated that it was prepared to discuss other proposals that could help to mitigate the effects of an increase in the cost of supplies.

[9] Nonetheless, the Defendant continued to insist that it was entitled to performance relief on the basis of an increase in the price of fuel and that it was entitled to renegotiate the price for the fuel. The Claimant's position is that the Defendant does not have the right to renegotiate and increase the price of the fuel supplied under the Agreement.

[10] On May 26, 2015 the Claimant received a letter from the Defendant dated May 18, 2015 stating that a supply of fuel could be loaded for delivery to the Claimant at a price above the contracted price. The Claimant responded on May 30, 2015 by rejecting the offer of fuel unless it was delivered at the contracted price. The shipment of fuel was later delivered on May 31, 2015 and invoiced at the agreed price.

[11] On June 1, 2015 the Claimant received another request for performance relief on the ground that as a result of the closure of the Hovensa facilities, the Defendant was no longer able to supply the Claimant with fuel at the agreed price.

[12] On June 4, 2015 the Claimant advised the Defendant that it was treating the letter on June 1, 2015 as a further breach of the Agreement and advised the Defendant by its letter of June 4, 2015 that it intended to bring a claim against the Defendant for specific performance of the Agreement.

[13] By its letter dated June 5, 2015, the Defendant advised the Claimant that it was willing to supply fuel in the interim while the Claimant attempts to locate an alternative source of supply via the tender process. The Defendant further advised that the interim supply would not be at the contracted price because such supply would be outside the terms of the Agreement.

[14] On June 8, 2015, the Defendant again requested performance relief on the basis of the Hovensa closure and on June 9, 2015, the Claimant received notification of a shipment of fuel from the Defendant arriving in Tortola on May 12, 2015. By letter dated June 9, 2015, the Claimant indicated its willingness to accept the shipment if it was supplied at the contracted price.

[15] The Claimant contends that the requests for performance relief by the Defendant on June 1, and June 8, 2015 on the basis of the closure of Hovensa and the increased in price were not valid requests pursuant to clause 10 of the Agreement since the Defendant, having been advised of the Hovensa closure, took steps to find and did in fact find another source of supply. In addition, it contends that there is no provision in the Agreement for getting performance relief on account of an increase in the price of supplying the fuel.

[16] As a result, the Claimant has commenced legal proceedings against the Defendant seeking a declaration that the Defendant has breached the Agreement, an order for specific performance of the Agreement and damages.

COURT'S ANALYSIS AND CONCLUSIONS

[17] The guidelines for the grant of an interim injunction (or interlocutory injunction) are set out in the now classic case of **American Cyanamid v. Ethicon Ltd**[1]. That judgment prescribes that a court must consider the following factors:

(a) Is there a serious issue to be tried? If there is a serious question to be tried and the claim is neither frivolous nor vexatious, the court should then go on to consider the balance of convenience generally.

(b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the applicant; and if so, whether the Defendant is in a position to pay those damages.

(c) If on the other hand, damages would not provide an adequate remedy for the applicant, the court should then consider whether, if the injunction were to be granted, the Defendant would be adequately compensated by the applicant's cross-undertaking in damages.

(d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered. If the balance of convenience does not clearly favour either party, then the preservation of the status quo will be decisive.

[18] Only as a last resort is it proper to consider the relative strength of the cases of both parties and only when it appears from the facts set out in the affidavit evidence as to which there is no credible dispute (or where the case largely involves construction of legal documents or points of law) that the strength of one party's case is disproportionate to that of the other.[2]

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[1] [1975] AC 296

[2] This is so even if all the court can form is a provisional view. NCB v. Olint [2009] J.C.P.C. 16, applied in Smellie et al v National Commercial Bank Jamaica Ltd [2013] JMCC Comm. 1

[19] However, in the case at bar, the Claimant is seeking interlocutory injunctive relief which is mandatory in nature. Courts have notoriously been far more reluctant to grant such relief and this is reflected in recent case law. The appropriate approach which a court must adopt in such scenario is usefully set out in the judgment of **Seecomm Network Service Claimant v Colt Telecommunications.**[3] At paragraph 13 of the judgment Treacy J states:

> "The principles applicable to the approach to this type of application are not in dispute. Both parties have referred me to **Zockoll Group Limited v Mercury Communications Limited**, **(1998) F.S.R** p 354 and, in particular, page 366. At that point Phillips LJ, as he then was, summarised the principles to be applied by the Court in considering an application to grant a mandatory interlocutory injunction. I quote from the report:
>
> 'First, this being an interlocutory matter the over-riding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong in the sense described by Hoffman J.
>
> "Secondly, in considering whether to grant a mandatory injunction the Court must keep in mind that an order which requires a party to take a positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have wrongly made than an order which merely prohibits action, thereby preserving the status quo.
>
> "Thirdly, it is legitimate where a mandatory injunction is sought to consider whether the Court does feel a high degree of assurance that the Plaintiff will be able to establish this right of trial. That is because the greater the degree of assurance the Plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.
>
> "But, finally, even where the Court is unable to feel any high degree of assurance that the Plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice, if this injunction is refused, sufficiently outweigh the risk of injustice if it is granted.' I have these principles in mind."

[20] Having read the evidence filed in the matter and having heard the submissions of Counsel, the Court is satisfied that the claim raises serious issues. It involves not only principles of contractual construction and interpretation, but it also requires that a court construe the

[3] [2002] EWHC 2638

subsequent arrangements and discourse between the parties in order to determine liability. Complex factual and legal issues arise which will require a critical analysis of the evidence which is to be presented at trial and an assessment of the relevant witnesses.

[21] This Court cannot decide the substantive claim on the basis of the affidavit evidence filed in support of this Application. However, in the Court's judgment, there is a strong case made out on the materials provided on the purported breach.

[22] Having found that there are serious issues to be tried in this case, the substantive relief sought by the Claimant provides a further complication. In the event that it is successful at trial, the Claimant herein seeks a substantive remedy which would compel the specific performance by the Defendant of an agreement which has a number of years left in the term.

[23] Specific performance is an equitable remedy which will compel a party to fulfil its obligations under an agreement in accordance with the terms and conditions stipulated in the agreement. It is an exceptional remedy which courts are reluctant to grant when damages would provide an adequate remedy and it is now well established that under an ordinary agreement for the sale of non-specific goods, damages would usually be a sufficient remedy.

[24] Therein lies the foundation of the serious hurdle which the Claimant faces – that is the well-known doctrine that a court will refuse specific performance of an agreement to sell and purchase chattels not specific or ascertained. The hurdle arises because courts will invariably refuse the issue of an injunction if it will inevitably result in the enforcement *in specie* of a contract which is not specifically enforceable. **Whitwood Chemical Co Hardman [1891] 2 Ch. 416 and 427**.

[25] Counsel for the Claimant submitted that based on the guidelines which have been judicially prescribed; the Claimant would be entitled to specific performance. She pointed out that case law has established that specific performance will not be granted where:

i. The agreement is liable to be set aside or has been set aside;

ii. An award of damages would be an adequate remedy;

iii. Continued supervision of the court is necessary in order to ensure the fulfillment of the agreement;

iv. The agreement involves personal service;

v. An order would cause severe hardship to the Defendant;

vi. The claimant is in breach of Agreement and does not have clean hands;

vii. The claimant delays in bringing the claim; and

viii. The court does not have sufficient confidence that the claimant will in turn perform his part of the Agreement or that damages would not be an adequate remedy to the Defendant for any default on the claimant's part.

[26] After examining all of the criteria, Counsel for the Claimant submitted that in the case at bar, specific performance is an available remedy which would be granted by a court. This contention was of course trenchantly opposed by the Defendant on two main bases. First, Counsel submitted that specific performance would not be granted because damages would be an adequate remedy in the event that the Claimant was successful at trial. Secondly, Counsel for the Defendant argued that the Claimant's conduct was such that a court would not exercise its discretion to order specific performance.

[27] In regard to the latter objection, Counsel submitted that following the Defendant's claim for performance relief, it was made clear that the Defendant could not continue to supply fuel at the agreed price unless some consideration was given to the increased costs of doing so. The Defendant contends that during the negotiations, the Claimant led it to believe that it would be willing to consider some form of consideration to offset the increased costs either by an increase in price or other incentive. Counsel for the Defendant contends that for no apparent reason, the Defendant later changed its position. He submitted that the Claimant had deliberately misled the Defendant into thinking that its request was being seriously considered. The result is that the Defendant has continued to provide fuel for the past 6 months at a loss while the Claimant well knew that it had no intention of giving the incentive or consideration to increase costs. Counsel for the Defendant submitted that this

unjust and unconscionable behaviour would not be deserving of the court's equitable jurisdiction to grant specific performance.

[28] Surprisingly, these matters were not specifically addressed by the Claimant who submitted that there was no allegation advanced that the Claimant did not have clean hands. Instead, Counsel suggested that it is the Defendant's conduct which ought to be scrutinised. She argued that the Defendant has clearly breached the Agreement in that, it gave the Claimant only one month notice of the closure of Hovensa and thereafter failed to follow the contractual procedures for obtaining performance relief.

[29] In so far as this second objection is concerned, the Court cannot make a definitive ruling on the matters raised at this stage of the proceedings when the interim arrangements and discourse between the Parties have not been fully ventilated. The Court cannot at this stage be satisfied that the Defendant's allegations could inevitably disgorge the claim for specific performance.

[30] Returning to the factors identified by Counsel for the Claimant for the grant of specific performance, these are not disputed. Indeed case law makes it clear that any case concerning specific performance will inevitably require a consideration of these issues which may be subsumed under three main categories:

1. Whether damages would be an adequate remedy
2. Judicial discretion
3. Nature of the Agreement

[31] It is the first category which formed the focus of the debate between the Parties. Critically - whether damages would be an adequate remedy - is relevant not only in determining whether specific performance would be an appropriate remedy but it is also an important consideration when a court considers an application for interlocutory injunctive relief. This issue therefore inextricably links these two remedies.

[32] The Court is cognisant that if it were to grant the mandatory relief sought by the Claimant at this stage it would have the effect of compelling the Defendant to service the Agreement for a significant part of its residual term prior to the substantive hearing and determination of the claim. The general position is that a court will "*invariably refuse to issue an injunction if it will inevitably result in the enforcement in specie of an agreement not otherwise specifically enforceable*."[4] An injunction will therefore not generally be granted where specific performance cannot be directed; since the jurisdiction to order specific performance will not generally be granted where damages provide adequate relief, it was therefore crucial that that the Parties thoroughly address this critical factor.[5]

[33] In doing so, Counsel for Defendant relied heavily on the case of **Sky Petroleum Ltd. v VIP Petroleum.[6]** In that case, the plaintiff company in March 1970 agreed to buy all its petrol from the Defendant Company for at least ten years. In November 1973, the Defendant purported to determine the agreement. The Claimant sought an interlocutory injunction to prevent such determination. Goulding J in that case accepted that a court may order specific performance of an agreement to sell chattels which are neither specific nor ascertained if there is evidence that damages would not be an adequate remedy. The learned Judge granted the injunction on the basis that there was evidence that the claimant had little prospect of obtaining an alternative supply of petrol, and for that reason, he concluded that damages would not be adequate compensation.

[34] At page 956, the learned Judge set out his ratio:

> "Now I come to the most serious hurdle in the way of the plaintiffs which is the well known doctrine that the court refuses specific performance of an Agreement to sell and purchase chattels not specific or ascertained. That is a well-established and salutary rule, and I am entirely unconvinced by Mr. Christie, for the plaintiffs, when he tells me that an injunction in the form sought by him would not be specific enforcement at all. The matter is one of substance and not of form, and it is, in my judgment, quite plain that I am, for the time

4 Cheshire Fifoot and Furmston's law of Agreement 11th Edition at page 615
5 Supplementary written submissions were provided by Counsel for the Parties following the hearing
6 [1974] 1 All ER 954

being, specifically enforcing the Agreement if I grant an injunction. However, the ratio behind the rule is, as I believe, that under the ordinary Agreement for the sale of non-specific goods, damages are a sufficient remedy. That, to my mind, is lacking in the circumstances of the present case. The evidence suggests, and indeed it is common knowledge that the petroleum market is in an unusual state in which a would-be buyer cannot go out into the market and Agreement with another seller, possibly at some sacrifice as to price. Here, the Defendants appear for practical purposes to be the plaintiffs' sole means of keeping their business going, and I am prepared so far to depart from the general rule as to try to preserve the position under the Agreement until a later date. I therefore propose to grant an injunction."

[35] Counsel for the Defendant argued that the Claimant's position in the case at bar is very different from claimant in **Sky Petroleum.** In that case, the Court was constrained by the fact that there was no alternative supplier which would mean a possible closure of the Claimant's business thus making damages an inadequate remedy. By way of contrast, Counsel pointed to paragraphs 27 – 28 of the First Affidavit of Leroy Abraham filed in support of the Application. He submitted and it is common ground that the Claimant has entered into standby arrangements for the supply of fuel with an alternative supplier in the event that the Defendant ceases to supply fuel. He further submitted that the Claimant has the option of issuing a new tender for the supply of fuel in which could solicit bids not only from the Defendant but from other suppliers.

[36] As the Defendant puts it, the only real issue for the Claimant is the question of price i.e. the cost of the fuel from the alternative supplier. On the other hand, Counsel submitted that it is the Defendant who may actually suffer the greater loss including the possible closure of its BVI operations if the interim injunction is granted since it would mean that it would be compelled to continue to supply fuel to the Claimant at an uneconomic price over an extended period of time. Unlike the Defendant, the prejudice to the Claimant could be easily remedied by a small surcharge added to its bills to consumers, with a subsequent rebate in the event that the Claimant is successful at trial.

[37] Although Counsel of the Claimant also relied on the dicta in **Sky Petroleum**[7], she argued damages would not be an adequate remedy in the circumstances of this case. She submitted that damages will not be considered an adequate remedy where (a) it is difficult to quantify them; (b) the claimant's loss is difficult to prove; (c) certain items of loss (injury to reputation) are or may not be legally recoverable; (d) the defendant is not good for the money and (e) the claimant has suffered no loss.

[38] At paragraphs 21 – 35 of her written submissions, Counsel for the Claimant submitted that notwithstanding that the Agreement expressly provides for liquidated damages in the event of default, damages would not fully compensate a claimant for the potential losses. In support of this contention Counsel relied on the judgment in **Bath North East Somerset District Council v Mowlem Plc**.[8] In that case, there was a dispute as to whether defects were contractor's responsibility and there was delay in completing the works as a result. The employer engaged alternative contractors to carry out remedial works but the contractor denied them access. The employer sought an injunction requiring the contractor to allow them onto the site. As in the case at bar, the argument in the Bath case centred on whether damages would be an adequate remedy.

[39] The English Court of Appeal decided that in the context of the injunction application, damages would not be an adequate remedy. Mance LJ held that the Court was entitled to take into account the effect on the commercial reputation of the employer of the events which had occurred. In short, the Court held that the contractor was not entitled to breach its Agreement and that a contractual limitation on liability (namely, a liquidated damages clause) did not constitute an agreed price in respect of the contractor's breach.

[40] Counsel for the Claimant noted that the Claimant is a public statutory Claimant and the sole provider of electricity for the Territory. Consequently, this dispute involves a conflict between public and private interests. Counsel submitted that refusing relief would mean that the entire electricity consuming population would bear the inconvenience of increased

[7] Counsel also relied on Thames Valley Power limited v Total Gas &Powers Limited [2005] EWHC 2208
[8] [2015] 1 WLR 785 at paragraphs 15, 16 and 21 and see AB v CD [2014] EWCA 229

costs until the matter is ultimately determined. She argued that it is no simple exercise to pass on an increase in the price of fuel supplied by the Defendant's customers and in the event that it is successful at trial, to then issue a rebate. The difficulties are explained at paragraphs 8 - 12 of the Second Affidavit of Leroy Abrahams and paragraphs 32(c) and (d) of the Supplementary Submissions.

[41] Moreover, at paragraph 32 of the written submissions, Counsel listed a number of other reasons why damages would not be an adequate remedy. She submitted that the basis of the Agreement was that the Claimant would be assured of a reliable source of supply from a reputable supplier at an agreed price for a fixed term in order that it might be able to provide the public at large with a reliable and constant supply of electricity at a reasonable price. Counsel argued that any alternative supply would be subject to availability. If there is little or no availability, the Claimant would be forced to carry out significant load shedding or the Territory could be faced with blackouts. Damages would not therefore be an adequate remedy if the Claimant had to rely on the *ad hoc* nature of an alternate supply.

[42] Further, while the Claimant concedes that it can undertake a tender process to secure a more stable and permanent arrangement, the Claimant's case is that this is a complex and protracted process which would not address the immediate loss of energy security caused by Defendant's intended breach.

[43] She also argued that the losses which may be suffered by individuals or commercial entities will vary making the exercise of calculating damages extremely difficult. Counsel submitted that the economy and the general public would suffer incalculable losses and would as a consequence lose confidence in the Claimant. Counsel even went on to speculate that consequent blackouts may also lead to a possible upsurge in criminal activity.

[44] Counsel argued that like the Court in **Bath and North East Somerset District Council,**[9] it is appropriate that this Court take into account the loss of reputation and goodwill as well as the unquantifiable and uncompensatable damage to the economy and the general public.

[45] Counsel also submitted that it would be difficult to quantify the damages because the Court would be faced with the almost impossible task of predicting the state of the gas market in the next three years in order to calculate the price that the Claimant would have to pay to its new suppliers. Further, the court would also have a difficult task of predicting the changes in the several indices that make up formulae Platt index in order to calculate what the Defendant would have to pay the Claimant if it had carried on supplying fuel.

[46] This Court cannot ignore the incontrovertible fact that the Claimant in the case at bar is a utility company with a statutory mandate to generate, transmit, supply, distribute and sell electricity in the Territory. While this Court is satisfied that the present case does not involve a public law challenge, it does concern the exercise of a commercial enterprise, which is intended to benefit the Territory as a whole. In deciding whether damages would be an appropriate and adequate remedy, this Court must therefore take into consideration the potential impact on the general public. Notwithstanding its market dominance, it is also appropriate that this Court take into account the potential loss of reputation likely to result from affected supply or from the alternative increase in costs.

[47] Further, while it is clear that alternative fuel supply arrangements have been contemplated by the Claimant, the evidence before the Court is that these arrangements are less than satisfactory. The Court cannot be satisfied in the circumstances of this case that there is in fact a suitable alternative source of supply. In the premises, the Court cannot at this time conclude that damages would be an adequate remedy which would preclude specific performance.

[9] Paragraphs 21 and 22 of the judgment

[48] The Court is also not satisfied that if the Claimant were to succeed at the trial in establishing its right to a permanent injunction, it would be adequately compensated by an award of damages for the loss it would have sustained as a result of the Defendant's continuing to do what is sought to be enjoined between the time of the Application and the date of the trial.[10]

[49] It follows then that the Court must go on to consider the contrary hypothesis - that is - if the Defendant were to succeed at the trial in establishing its right to do that which is sought to be enjoined, would it be adequately compensated under the Claimant's undertaking as to damages for the loss which it would have sustained between the time of the Application and the time of the trial. In considering this balance, a court will normally refuse relief if the hardship caused to a defendant by compliance with the order outweighs the consequential advantages to the claimant.

[50] At paragraph 32 of the Affidavit of Bevis Sylvester, he makes it clear that the Defendant was willing to incur the loss of supplying fuel to the Claimant on an interim basis up until 15th July 2015 in order to allow the Claimant to put the necessary steps in place to secure a new supplier through a fresh tender process. However at paragraph 30 of the Affidavit, he states the position as follows:

> " …as such the continued loss of profit from the Agreement may result in the closure of the Defendant Petroleum's BVI operations since the revenue from its other operations may not be able to sustain the loss it is required to absorb while the proceedings are pending."

[51] These matters are dismissed by the Claimant as little more than bare unsubstantiated assertions. Counsel for the Claimant argued that the Defendant has failed to discharge its burden of proving that the continued supply from Antigua at the present rates would be unprofitable or uneconomic, neither has the Defendant provided cogent proof that it could lead to a closure of its BVI operations.

[10] See page 408 B-C of American Cyanamid

[52] Clearly, if damages in a measure recoverable under the Claimant's undertaking would be an adequate remedy and the Claimant would be in a financial position to pay them,[11] there would be no reason upon this ground to refuse an interlocutory injunction. And the courts have made it clear in **Sky Petroleum and Thames Valley Power Limited v Total Gas and Power Limited [2005] EWHC 2208** that the fact that the Defendant could be compelled to perform an agreement which is disadvantageous to it, would not *without more* militate against the relief sought.

[53] The potential impact which interim mandatory relief or indeed specific performance would have on the Defendant is a critical factor which must be taken into account and the simple fact is that the Defendant has not done enough to satisfy the Court that there is a serious danger that the Defendant will be forced out of business.

[54] If the Court is wrong on this issue and damages would not be an adequate remedy for either party, then the Court must consider then go on to consider the balance of convenience. Ultimately, the Court at this stage must consider which course is likely to involve the least risk of injustice if it turns out to be wrong. In the Court's judgment, the public interest should be taken into account when determining the balance of convenience and in circumstances where the Defendant has been unable to convincingly persuade the Court that the risk of injustice if this injunction is granted sufficiently outweighs the risk of injustice if it is not granted; balance tips in favour of the grant of the injunction.

[55] In arriving at its decision, the Court has considered that by its very nature, this relief will compel the Defendant to provide a service which it contends is not economically profitable. However, the Court finds that there is no basis upon which it can entertain the Defendant's bare assertion that its business will come to an end in the BVI. The Court has also weighed the fact that the Defendant has the capacity to and has in fact continued to supply fuel to the Claimant since the closure of the Hovensa Refinery facility and in accordance with its clear contractual obligation.

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[11] This is not disputed as between the Parties
"Cap 277 of the Laws of the Virgin Islands

[56] Notwithstanding the conclusions drawn here, in the Court's judgment, this case is an urgent one which will require a prompt disposal. The case should therefore be managed on a fast-track basis and with this in mind, the Court will order that it be set down for case management so that appropriate directions may be issued which would abridge the prescribed timetables in the CPR.

[57] **In the premises, the Court's order is as follows:**

1. **Pending the hearing and determination of the claim or further order of this Court, the Defendant is to continue to deliver fuel to the Applicant the Agreement dated 30th August 2014.**

2. **The costs of this Application are reserved to be dealt with by the Judge who tries the substantive action.**

3. **The matter is set down for a case management conference before the judge of the high court on 24th July 2015.**

……..
Justice Vicki Ann Ellis
High Court Judge