EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2016/0003

BETWEEN:

DELTA PETROLEUM (CARIBBEAN) LIMITED

Appellant

and

BRITISH VIRGIN ISLANDS ELECTRICITY CORPORATION

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal

Appearances:

Mr. Terrance Neale with him Ms. Elizabeth Ryan for the Appellant
Mr. Paul Dennis, QC with him Ms. Willa Tavernier and Ms. Nadine Whyte for the Respondent

---

2016: July 20;
2017: May 8.

Civil appeal – Contract – Whether appellant breached contract – Whether principle of waiver by election arose on facts of case – Whether enforcement of clause became enforcement of penalty – Whether judge erred in awarding liquidated damages

The appellant, Delta Petroleum (Caribbean) Limited, a company incorporated in the BVI engaged in the business of selling petroleum and petroleum products, entered into a contract with the respondent, British Virgin Islands Electricity Corporation, a statutory corporation which is the sole provider of electricity in the BVI. The contract terms dictated that the appellant would sell to the respondent diesel fuel and premium gasoline (hereafter referred to as "the agreed products") for use principally in the generation of electricity for the BVI. Clause 3(7) of the contract provided that the appellant shall pay to the respondent damages per day for each day that the storage level falls below the stipulated storage fuel levels.

By letter dated 1st December 2014, the appellant was notified by its supplier in St. Croix that the Hovensa storage facility (from which it accessed its fuel supply), will be closed on 1st March 2015. On 12th December 2014, the appellant informed the respondent of the possible closure of Hovensa. The appellant continued to supply the agreed products to the respondent using an alternative facility in Antigua. On 27th January 2015, the appellant provided the respondent with formal notice of closure of Hovensa. Subsequently, the appellant tried to negotiate a price increase with the respondent to make up for the added costs of shipment from Antigua instead of St. Croix. On 28th May 2015, the respondent informed the appellant that they were not prepared to pay an increased price for the agreed products and on 1st June 2015, the appellant sought to invoke clause 10(2) of the agreement to terminate the contract on the basis of the closure of the Hovensa storage facility.

A dispute arose between the parties, resulting in the respondent instituting proceedings against the appellant seeking a declaration that the appellant had breached the contract and an order for specific performance of the contract by the appellant. The respondent also claimed damages and costs against the appellant. The appellant filed a defence and counterclaim to the respondent's suit, alleging that it was the respondent which had breached the contract, and seeking a dismissal of the respondent's claim, a declaration that the respondent had breached the contract, and damages and costs against the respondent.

On the appellant's claim, the learned judge found in favor of the respondent. She held inter alia that the appellant breached the contract; she granted specific performance and ordered that the sum of $794,000.00 be paid by the appellant to the respondent as liquidated damages and that costs be paid to the respondent on a prescribed costs basis on the sum awarded as liquidated damages. On the counterclaim, the learned judge found that there had been no breach by the respondent of the contract for failing to accept the performance relief of the appellant and dismissed the entire counterclaim.

The appellant appealed on a number of grounds including that the learned judge erred in (1) holding that the principle of waiver by election was applicable on the facts of the case; (2) misconstruing clauses 10(2) and 10(4) of the contract; (3) awarding liquidated damages on the basis of clause 3(7) of the contract; and (4) finding that the appellant did not seek performance relief between 27th April and 3rd May 2015.

Held: dismissing the appeal in part and awarding 90% of the costs on this appeal calculated on the basis of two-thirds of the costs in the court below, that:

1. Waiver by election arises when a state of affairs comes into existence in which one party to a contract becomes entitled, either under the terms of the contract or by general law, to exercise a right and that party has to decide whether or not to do so; the party making the election has to choose between two alternative and inconsistent courses of action or remedies. Once he has made his election to pursue one course he is bound by it and cannot thereafter pursue the alternative course. For the doctrine to apply, the party electing must have knowledge of the

facts giving rise to the choice and must have made a clear and unequivocal representation to the other party that he has made his election between the two alternative courses of action; an election is binding once a clear representation is made, and it does not depend on reliance on it by the other party. There was ample evidence on the basis of which the trial judge could have found that the circumstances giving rise to the application of the principle of waiver were present on the facts of this case and that the principle did therefore apply. There being no question of misdirection of herself by the trial judge, and there being no indication that the judgment of the trial judge on the issue was plainly unsound, there is no basis for interference by the appellate court with the factual finding of the trial judge.

Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India, The Kanchenjunga [1990] 1 Lloyd's Rep 391 applied; **Watt v Thomas** [1947] AC 484 applied.

2. The closure of the Hovensa facility gave the appellant the right to terminate the contract, but not the obligation to do so. The appellant also had the right, notwithstanding the closure, to seek an alternative source of supply and to continue to sell the agreed products to the respondent under the contract. The appellant clearly chose to exercise the right to seek an alternative source of supply and to continue to supply the respondent with the agreed products from its new source. The appellant also clearly and unequivocally communicated this to the respondent by its words and actions in referring consistently to its 'new loading facility' in Antigua and by actually supplying the respondent after the end of January 2015 from the 'new loading port' in Antigua. The appellant had therefore made its election well before 1st June 2015 and it was not therefore open to it on that date to resile from its election and terminate the contract on the basis of the Hovensa closure.

3. An amount will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. The amounts involved in the sale and purchase of the fuel and gasoline would alone belie any notion of extravagance, but add the fact that the fuel being sold and purchased is the exclusive source of electrical power generation of the BVI and the immense business and reputational loss which the respondent can suffer by the failure of its exclusive source of supply, makes the amounts stipulated for to be anything but extravagant and unconscionable. Further, it is beyond doubt that the consequences of the breach in issue were such as to make precise pre-estimation almost an impossibility and this is just the kind of situation when it is probable that pre-estimated damages was the true bargain between the parties.

Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited [1915] AC 79 applied; **Cavendish Square Holding BV v Talal El Makdessi** [2015] UKSC 67 applied.

4. The trial judge, having made a finding that the appellant did apply for performance relief under the contract for the period between 27th April and 3rd May 2015, erred in holding that the appellant was liable to pay liquidated damages to the respondent on account of fuel shortages during that period. The trial judge misdirected herself and, accordingly, there is a basis for interference by the appellate court with the finding of the trial judge.

Watt v Thomas [1947] AC 484 applied.

JUDGMENT

[1] **MICHEL JA**: This is an appeal against the judgment of Byer J delivered in the High Court of the Territory of the Virgin Islands on 13th January 2016 on a claim instituted by the respondent against the appellant and a counterclaim by the appellant against the respondent.

Background

[2] A brief background of the parties and of the dispute which brought them before the lower court in the first instance and then before this Court is necessary to an understanding of this appeal.

[3] The appellant, Delta Petroleum (Caribbean) Limited, is a company incorporated in the Territory of the Virgin Islands (hereafter "the BVI") engaged in the business of selling petroleum and petroleum products, whilst the respondent, British Virgin Islands Electricity Corporation, is a statutory corporation which is the sole provider of electricity in the BVI.

[4] On 30th August 2014, the parties entered into a contract under the terms of which the appellant would sell to the respondent diesel fuel and premium gasoline (hereafter variously referred to as "the agreed products", "petroleum and petroleum products" or "fuel and gasoline") for use principally in the generation of electricity for the BVI.

[5] A dispute arose between the parties, resulting in the respondent instituting proceedings against the appellant seeking a declaration that the appellant had breached the contract and an order for specific performance of the contract by the appellant. The respondent also claimed damages and costs against the appellant. The appellant filed a defence and counterclaim to the respondent's suit, alleging that it was the respondent which had breached the contract, and seeking a dismissal of the respondent's claim, a declaration that the respondent had breached the contract, and damages and costs against the respondent.

[6] After a full day's trial on 2nd November 2015, the learned judge delivered judgment on 13th January 2016 in which she made the following orders:

On the claim by the claimant, which is the respondent in this appeal -

> "1. It is declared that the Defendant breached the contract entered into by the parties dated the 30th August 2014.
>
> 2. That specific performance is ordered as against the Defendants and the Contract of the 30th August 2014 is to continue in full force and effect for the duration of its tenure.
>
> 3. That the sum of $794,000.00 be paid by the Defendants to the Claimants as liquidated damages under clause 3 (7) of the Contract for the periods that they have been found liable under the Contract pursuant to the figures provided in the schedule to the Statement of Claim filed on the 10th July 2015.
>
> 4. Costs on the interlocutory injunction application determined in favour of the Claimant to be assessed if not agreed with (sic) 21 days of this order.
>
> 5. Cost to the Claimant be prescribed costs on the basis of an unvalued claim pursuant to part 65.5 CPR 2000.
>
> 6. Costs to the Claimant on a prescribed costs basis on the sum awarded as liquidated damages being the sum of $794,000.00."

On the counterclaim by the defendant, which is the appellant in this appeal –

> "1. That there has been no breach by the Claimant of the Contract for failing to accept the Performance Relief of the Defendants dated 1

June 2015 and as such the entirety of the counterclaim stands dismissed."

Grounds of Appeal

[7] The appellant appealed the judgment on the following grounds:

"(a) The learned Judge erred at paragraph 79 of her judgment when she held that by supplying fuel after receiving notice of the closure of the Hovensa storage facilities, the Appellant made an election and therefore the equitable doctrine of election applied. Election is a doctrine of equity which is only applicable when a party is faced with a choice between alternatives which equity forces the party to make. In the present matter the Appellant had no choice and could not choose to not supply the Respondent as it was contractually bound to do so. Accordingly the terms of the Contract did not require the Appellant to choose between supply and termination. While the Appellant had the right to cease supply by terminating the contract this however was an independent contractual right which it in fact exercised on 1st June 2015. The Appellant's decision to secure supplies out of Antigua when the facilities at Hovensa ceased in order to meet its supply obligations to the Respondent under the contract at the prices agreed was a matter for the judgment of the Appellant alone and the right to terminate the contract while the Appellant supplied fuel to the Respondent out of Antigua was in no way affected or diminished by such a decision. The issue was regulated by the law of contract, not by equity. The rights and obligations of both Appellant and Respondent were therefore totally dependent on the terms (expressed or implied) in the Contract.

(b) The learned Judge erred in taking into consideration non contractual matters i.e. matters which were outside the express and implied terms of the Contract in making a determination of the rights and obligations of the parties. Clause 10 of the Contract allowed termination by the Appellant during the life of the Contract in the event of a closure of the Hovensa storage facilities. Unless there was a termination by the Appellant when the Hovensa facilities ceased its contractual obligation to supply fuel continued. Once however the Appellant exercised its right to cease supply this obligation came to an end. The finding by the learned Judge that the contractual right to terminate was lost when the Appellant continued to supply fuel by securing supplies from a source other than Hovensa was therefore wrong in law as the Appellant's alternative source of supply did not and could not affect its contractual obligation to provide fuel to the Respondent at the agreed price and this was so whether or not the alternative source resulted in a loss to the Appellant. The obligation to supply at the agreed price continued until the right to terminate was exercised by the Appellant on 1st June 2015. Accordingly the Judge ought to have held that there was no term in the Contract to limit or restrict the

right of the appellant to terminate when the Hovensa storage facilities closed. The right to terminate being concurrent with the obligation to supply during the life of the contract the Appellant was entitled to exercise such right in June 2015 thereby bringing to an end its contractual obligation to supply fuel to the Respondent.

(c) The learned Judge failed to take into consideration the fact that the provision in the Contract allowing for relief or termination of the Contract upon the closure of the Hovensa facilities were inserted for the benefit of the Appellant and a (sic) such the Respondent was not entitled to claim any benefit from those provisions. The provisions of clause 10(2) of the Contract were self-executing and the liberty to withhold, reduce or suspend deliveries arose with the cessation of the Hovensa facilities and did not depend upon any action or decision of the Respondent whether on application or otherwise.

(d) The learned Judge although correctly stating the principle as it relates to reliance of waiver by election, namely, that there must be a "clear and unequivocal representation by the waivor having made his choice" [para 75 of Judgment] failed to properly apply the principle to the facts of the present case and appeared to be of the erroneous view that the ambiguity which must be relied on to establish that there had in fact not been a waiver did not depend on the state of mind of the party seeking to rely on same [paras 80, 81 and 84 of Judgment].

(e) The learned Judge's finding that "Despite counsel for the Defendant's valiant effort to elicit an admission from Mr Abraham that the acts of the Defendant were ambiguous, this court is of the view he was largely unsuccessful" and "Under rigorous cross examination, the Claimant's General Manager maintained that the correspondence between the parties was clear that they had chosen to continue supplying product from Antigua" was against the weight of the evidence [see for example pgs 107-108, 109-110, 121-122 of transcript where Mr Abraham clearly conceded that the transition to Antigua was ambiguous since both parties were thinking different things-paras 80 and 81 of Judgment].

(f) The learned Judge's finding that the failure of the Appellant to lead evidence on the date that they received the Notice of Closure from Hovensa dated December 1, 2014 "was a telling omission on the part of the Defendants…which would have been essential to the reliance that they sought to place on this fact" was inconsistent with the evidence [para 59 of Judgment] since not only was there no dispute that the Respondent had been made aware of the possibility of the closure of Hovensa as early as December 12, 2015 [pg 78 of transcript] but also Mr Leroy Abraham, the General Manager of the Respondent conceded that the Respondent would have acted no differently had it received the Notice of the closure of

the Hovensa storage facilities earlier than January 28, 2015 [pgs 83-84 of transcript].

(g) The Learned Judge's finding that the only relevant discussion between the parties with respect to the determination whether there had been a waiver by election was those discussions which related to a price increase and discussions on additional incentives to offset the increase costs of supplying fuel from Antigua was not relevant despite the fact that the effect of the latter was the same as a price increase [paras 136-140 of Judgment] was not only erroneous but showed a fundamental misunderstanding of the principle of waiver by election.

(h) The Learned Judge misconstrued Clause 17 of the Contract in holding that same was not relevant to the issue of waiver by election and notwithstanding the fact that the said clause had been specifically inserted into the Contract by the parties in anticipation of such an eventuality [paras 86-88 of Judgment]. There was no question of private law estoppel to prevent the Appellant from exercising its right to terminate as the Contract once the Hovensa storage facilities closed and the learned Judge was so obliged to hold. Further there was no question of waiver at common law by representation or conduct since clause 17 of the Contract provided a contractual bar to any argument of waiver by the Appellant of its rights under the Contract.

(i) The learned Judge's finding that "a business decision not to terminate the contract, knowing they were entitled to terminate" but instead to engage in discussions/negotiations with the other party with a view to maintaining the contract should for some reason be construed against the party and called into question its bona fides in the matter was erroneous and against the spirit of the Contact [para 82 of Judgment]. The Judge ought to have held that the unsuccessful negotiations to alter the terms of the Contract pricing or otherwise when it became known that the Hovensa facilities were to cease had no impact whatsoever upon the contractual rights and obligations which arose when the Contract was executed for four years supply of fuel at agreed prices. Similarly the learned Judge's finding that the Appellant only realised that the supply out of Antigua was "uneconomical and unprofitable" after they began supplying fuel from Antigua and this was the reason why they sought to terminate the Contract on June 1, 2015 [para 85 of Judgment] was erroneous and against the weight of the evidence since this position was communicated and accepted by the Respondent as early as December 12, 2015 [see letters dated December 12, 2014, January 28, 2014, February 19, 2015 from the Appellant as well as the March 4, 2015 letter from the Respondent and pgs 37-42 of transcript.]

(j) The learned Judge erred in awarding liquidated damages to the Respondent in the sum of $794,000 on the basis of Clause 3 (7) of the Contract. Firstly because the liquidated damages provision did not apply because of the cessation of the Hovensa facilities which was an event contemplated under clauses 10 (1) (d) and 10 (2) of the Contract and secondly because as a matter of general law, a liquidated damages clause cannot be enforced unless it represents a genuine pre-estimate of damage and there was no damage or loss to the Respondent and in fact any loss actually suffered was by the Appellant who continued to supply fuel at agreed prices despite its higher costs after the Hovensa facilities closure. The enforcement of the clause became the enforcement of a penalty which equity does not sanction.

(k) The learned Judge's finding that the Appellant did not seek performance relief during the period of 27th April 2015 – May 3rd 2015 [para 162 of Judgment] was erroneous and against the weight of the evidence and contradictory to her previous findings on the matter [see for example para 156 of Judgment and paras 61 of Abraham witness statement] that the Appellant did in fact seek performance relief but that the Respondent did not respond to these requests. This obvious error resulted in additional damages of $409,000 being awarded to the Respondent.

(l) The Learned Judge's (sic) having held that it was necessary under the Contract for the Respondent to inform the Appellant that fuel levels were not at the stipulated levels [para 151 of Judgment] wrongly awarded damages in respect of the May 11, 2015 claim by the Respondent that the fuel levels has fallen below the stipulated level when absolutely no evidence was presented by the Respondent that any notification had been provided to the Appellant of this fact or that it intended to make a claim for liquidated damages under the Contract [para 61 of Abraham Affidavit].

(m) The Learned Judge's failure to have any regard to Clause 3 (8) of the Contract which allowed the Appellant a maximum of 3 grace periods during which they could not be penalised for the fuel falling below the stipulated level resulted in the awarding of excessive liquidated damages to the Respondent [para 162 of Judgment].

(n) The learned Judge misconstrued clause 10 (2) and 10 (4) of the Contract. The Contract allowed the Respondent to seek supplies from other sources if clause 10(2) operated with the result that the Respondent's storage levels fell. That right continued for the benefit of the Respondent while supplies were diminished because of the liberty granted to the Appellant by clause 10(2). It was clearly within the contemplation of the parties that the closure of the Hovensa facilities might have resulted in a diminished supply and for that reason the right of the Respondent to seek an alternative source to meet its needs was provided by clause 10(4) of the Contract for the benefit of the Respondent. The Judge ought to have held

that the said provision was intended to save the Respondent from a failure of supplies.

(o) The learned Judge's finding that the Hovensa closure could no longer be relied on as a basis for performance relief under clause 10 (1) of the Contract by May 29, 2015 was erroneous since clause 10 (1) (d) and (f) of the Contract did not place any time limit on the application by a Party for Performance Relief once the event was still a relevant consideration [para 163 of Judgment]. The learned Judge ought to have held that the provisions of the Contract relating to the supply over a period of four years and the right to terminate and other liberties particularly expressed in clause 10 were concurrent and co-terminous and that while the supply provisions remained in effect the right to terminate also subsisted. Further the learned Judge failed to take into consideration the fact that the transition from St. Croix to Antigua was a much further destination resulted in additional delays in the delivery of fuel as such the closure of the Hovensa storage facilities would still have been a relevant consideration for the purpose of seeking Performance Relief from the liquidated damages under Clause 3 (7) of the Contract."

[8] I will proceed to address the fifteen grounds of appeal in the same order that they were addressed in the written submissions/skeleton arguments filed by the appellant and the respondent. In the interest of better presentation, I will use upper rather than lower case in referring to the grounds of appeal.

Ground A

[9] In Ground A of its grounds of appeal, the appellant challenged the finding of the trial judge that the principle of waiver by election was applicable on the facts of the case. The trial judge arrived at this position by making a factual finding that by the time the appellant attempted to terminate the contract on 1st June 2015 on the basis of the closure of the Hovensa storage facility in St. Croix, from which it derived its supply of petroleum and petroleum products to sell to the respondent, it had already made an election, from which it could not then resile, to continue to sell the agreed products to the respondent from a storage facility in Antigua. In arriving at this position, the trial judge had also made a finding of law that, in the context of a contract, all that was necessary for the principle of election to apply is that a state of affairs exist in which one party becomes entitled to exercise a right and has to choose whether or not to exercise that right and, with full knowledge of

the facts giving rise to that right, the party chooses (as in this case) not to exercise the right; that election, once made, is final.

[10] On its challenge to the factual finding made by the trial judge, the appellant argued that in deciding to continue to supply the agreed products to the respondent after the closure of the Hovensa facility, the appellant was carrying out its contractual obligation to supply the agreed products to the respondent at the agreed prices, and that the right to terminate the contract as a result of the closure of the Hovensa facility was an independent contractual right which it exercised on 1st June 2015; the appellant was not therefore making an election when it decided to continue to supply the agreed products after the closure of the Hovensa facility, it was just carrying out its obligations under the contract.

[11] On its challenge to the legal determination made by the trial judge, the appellant argued that the trial judge confused legal concepts by holding that there was waiver by election. The appellant contended that estoppel prevents a person from unconscionably departing from a representation by words or conduct upon which another party has relied, where the departure will cause detriment to the party relying; the appellant had made no representation to create estoppel; the appellant had executed a contract which imposed upon it an obligation to supply; the respondent did not rely on any representation and could suffer no detriment while the appellant supplied it with the agreed products in fulfilment of its contractual obligations.

[12] The respondent defended the judge's factual finding on the basis that there was a clear choice available to the appellant after the closure of the Hovensa facility, either to continue to supply the agreed products to the respondent using an alternative facility, or to terminate the contract; that the appellant elected to continue to supply the respondent using an alternative storage facility; and that the appellant's decision to continue to do so was clearly communicated to the respondent by the appellant's words and actions.

[13] In terms of the finding of law made by the trial judge (referred to in paragraph 9 above), the respondent borrowed substantially from the words of Lord Justice Goff quoted below in submitting that waiver by election arises when a state of affairs comes into existence in which one party to a contract becomes entitled, either under the terms of the contract or by general law, to exercise a right and that party has to decide whether or not to do so; the party making the election has to choose between two alternative and inconsistent courses of action or remedies; once he has made his election to pursue one course he is bound by it and cannot thereafter pursue the alternative course; for the doctrine to apply, the party electing must have knowledge of the facts giving rise to the choice and must have made a clear and unequivocal representation to the other party that he has made his election between the two alternative courses of action; an election is binding once a clear representation is made, and it does not depend on reliance.

Analysis and Conclusion on Ground A

[14] As to the factual finding made by the trial judge (referred to in paragraph 9 above), I am of the view that there was ample evidence on the basis of which the trial judge could have found that the circumstances giving rise to the application of the principle of waiver were present on the facts of this case and that the principle did therefore apply. There was undisputed evidence that the appellant had been notified by its supplier in St. Croix by letter dated 1st December 2014 that the Hovensa storage facility will be closed on 1st March 2015, that the appellant had continued to supply the agreed products to the respondent using an alternative facility in Antigua, that the appellant had tried to negotiate a price increase with the respondent to make up for the added costs of shipment from Antigua instead of St. Croix, that on 28th May 2015 the respondent informed the appellant that they were not prepared to pay an increased price for the agreed products, and that on 1st June 2015 the appellant sought to invoke clause 10(2) of the agreement to terminate the contract on the basis of the closure of the Hovensa storage facility.

[15] Consistent with the principles enunciated by the House of Lords in **Watt v Thomas**,[1] which have since been applied in several cases both within and without the jurisdiction of this Court, there being no question of misdirection of herself by the trial judge, and there being no indication that the judgment of the trial judge on the issue was plainly unsound, there is no basis for interference by the appellate court with the factual finding of the trial judge.

[16] As to the legal determination made by the trial judge, she expressly stated that she was relying on the judgment of Lord Goff in the House of Lords in the case of **Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India, The Kanchenjunga**.[2] The judge quoted a passage from the judgment of Lord Goff, which included the following statement of principle:

> "In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with full knowledge of the facts giving rise to the right. His election once made is final; it is not dependent upon reliance on it by the other party."[3]

[17] As to what must be communicated to the other party by the party making the election, Lord Justice Goff said:

> "The party making his election is communicating his choice whether or not to exercise a right which has become available to him."[4]

[18] The trial judge's determination of the applicable law appears to be clearly consistent with the statement of principle from the House of Lords in **Motor Oil Hellas (Corinth) Refineries SA** and does not appear to be deserving of criticism, far less meriting reversal.

[19] I will accordingly dismiss Ground A of the appellant's grounds of appeal.

---

[1] [1947] AC 484.
[2] [1990] 1 Lloyd's Rep 391.
[3] At p. 399.
[4] At p. 399.

Ground H

[20] In Ground H, the appellant challenged the finding by the trial judge that clause 17 of the contract was not relevant to the issue of waiver by election. Clause 17 reads as follows:

> "Any neglect, forbearance or indulgence on the part of either Party relating to its strict rights under this Agreement shall in no way be deemed a waiver, implied or otherwise of such rights."

[21] The trial judge stated at paragraph 88 of her judgment that she does not agree with the appellant that the wording of clause 17 provided the protection which the appellant sought to ascribe to it as an answer to the application of the doctrine of waiver by election. She held that the protection of clause 17 could not be extended to a conscious commercial decision to develop an alternate supply route in order to maintain a contract, such as was done by the appellant in the present case.

[22] In support of Ground H, the appellant argued that the parties to the contract had, by the language of clause 17, specifically excluded the presumption of waiver of any rights by either party in clear and precise language which was only capable of one interpretation. The appellant therefore submitted that the trial judge had misconstrued the clause in holding that it was not relevant to the issue of waiver by election notwithstanding the fact that it had been specifically inserted into the contract by the parties in anticipation of such an eventuality.

[23] In response, the respondent argued that this was not a case of neglect, forbearance or indulgence. Clause 10 of the contract gave the appellant a right to suspend deliveries in the circumstances outlined in that clause, but did not create an obligation for it to do so. As such, the respondent argued, the appellant was not obliged to terminate the contract and could take other steps instead if it so wished. It made an election not to exercise its right to terminate the contract and instead made a commercial decision to shift its source of supply to Antigua to enable it to continue to perform its obligations under the contract. After so electing, the appellant communicated its decision to the respondent.

Analysis and conclusion on Ground H

[24] I am of the view that the respondent has the better argument on this issue. It cannot reasonably be argued that what may be described as a no-waiver clause is so sweeping in its application as to exclude waiver in every circumstance. The waiver in issue in this case is one arising from a conscious business decision made by a corporation engaged in business across states, territories and nationalities to take a certain course of action in what it considers to be its commercial interest, that is, to continue to supply products to a major statutory corporation with which it had contracted, notwithstanding a circumstance which entitled it to terminate the contract and relieve itself of its obligation to supply the agreed products to the statutory corporation at the agreed price. In so doing, it jettisoned the alternative course of action of terminating the contract when the opportunity to do so presented itself. There can be no argument that in making this election the appellant was fully aware of the facts giving rise to its right to continue to supply the agreed products to the respondent under the contract or to terminate the contract. Although the point was argued by the appellant, the trial judge found as a fact that the appellant had clearly and unequivocally communicated its choice to the respondent (by words and deeds) not to exercise the right to terminate which had become available to it upon the closure of the Hovensa storage facility.

[25] In the circumstances, I will dismiss Ground H of the appellant's grounds of appeal.

Grounds D and E

[26] The appellant appeared to have coalesced its fourth and fifth grounds of appeal and argued them together.

[27] On Ground D, the appellant argued that although the trial judge correctly stated the principle as it relates to reliance on waiver by election, namely, that there must be a "clear and unequivocal representation by the waivor having made his choice", she failed to properly apply the principle to the facts of the case and appeared to be of the erroneous view that the ambiguity which must be relied on to establish

that there has not in fact been a waiver did not depend on the state of mind of the party seeking to rely on the waiver.

[28] On Ground E, the appellant challenged the trial judge's finding that despite a valiant effort by the appellant's counsel to elicit an admission from the respondent's general manager that the acts of the appellant were ambiguous, the appellant was largely unsuccessful and, under rigorous cross examination, the respondent's general manager maintained that the correspondence between the parties was clear that the appellant had chosen to continue supplying product from Antigua. The appellant contended that this finding by the trial judge was against the weight of the evidence.

[29] The crux of the appellant's challenge on Grounds D and E is that the trial judge misconstrued and misapplied the principle of waiver by election in that she failed to have regard to the fact that there was an ambiguity as to whether the appellant elected to continue to supply the respondent with the agreed products instead of terminating the contract and, as such, waiver by election could not apply since a lack of ambiguity is the very essence of waiver by election

[30] In response, the respondent prayed in aid the case of **Kosmar Villa Holidays plc v Trustees of Syndicate 1243**[5] where Rix LJ, in delivering the judgment of the English Court of Appeal, cited with approval the following passage from the judgment of Lord Goff in the **Motor Oil Hellas** case:

> "where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him – for example, to determine a contract or alternatively to affirm it – he is held to have made his election accordingly …. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms."[6]

---

[5] [2008] EWCA Civ 147.
[6] At para. 37.

[31] The respondent's resulting submission is that it is what the appellant communicated to the respondent that matters; the question is not whether there was ambiguity as to what each party was thinking or as to the parties' understanding, but rather whether there was ambiguity in what was actually communicated (either by words or actions) to the respondent. The respondent further submitted that the trial judge appreciated the distinction and that in considering the application of the doctrine of election to the facts of the case, the trial judge explained that what the court must be satisfied of was that the conduct of the appellant, or "the objective circumstances", amounted to such an election. The respondent submitted therefore that the trial judge's analysis cannot be faulted.

[32] The respondent submitted that if it was that internally the appellant had decided to continue to supply the respondent from Antigua on a temporary basis only, this was irrelevant if that communication was not communicated to the respondent; and it was not, because the actual communication between the parties and the actions of the appellant were clear and unequivocal – it had chosen to affirm the contract by supplying fuel to the respondent from its new source of supply in Antigua.

Analysis and Conclusion on Grounds D and E

[33] The finding of law made by the trial judge that the ambiguity which must be relied on to establish that there has not in fact been a waiver did not depend on the state of mind of the party seeking to rely on the waiver, does not appear – in accordance with the authorities – to be an erroneous one, as contended for by the appellant in Ground D. In fact, it appears to be consistent with the decisions of the English Court of Appeal in **Kosmar Villa Holidays plc v Trustees of Syndicate 1243** and the House of Lords in **Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India, The Kanchenjunga**. The appellant was not able to cite any authority which would justify its criticism of the trial judge's finding of law.

[34] Moving from her finding of law referred to in the previous paragraph, the trial judge then proceeded to make a finding of fact that the words and actions of the appellant, manifested in the words contained in its written communication to the respondent and its actions in continuing to supply the agreed products to the respondent from a new source in Antigua after the closure of the Hovensa facility in St. Croix, "squarely falls within the parameters of the waiver by election".[7] The judge therefore concluded that the appellant had made an election to retain the contract and to continue to supply the respondent with the agreed products and could not thereafter seek to rely on the closure of the Hovensa facility to effectively terminate the contract.

[35] This factual finding made by the trial judge was certainly open to her on the evidence before her and – in accordance with **Watt v Thomas** and the cases which follow it – there is no basis upon which it could be overturned by this Court.

[36] I will accordingly dismiss Grounds D and E of the appellant's grounds of appeal.

Ground F

[37] On Ground F, the appellant challenged the trial judge's finding that the failure of the appellant to lead evidence on the date that it received the notice of closure from Hovensa dated 1st December 2014 was a telling omission on its part which would have been essential to the reliance which it sought to place on this fact. The appellant contended that this finding was inconsistent with the evidence, because the evidence is that the respondent was made aware of the possibility of the closure of Hovensa on 12th December 2014 and was not taken by surprise when it was provided with the formal notice on 27th January 2015, and that the respondent would not have acted any differently than it did had it received the notice of termination any earlier.

[38] In support of this ground of appeal, the appellant referred to various parts of the transcript which substantiate the fact that on 12th December 2014 the appellant

[7] Para. 83 of the judgment.

informed the respondent of the possible closure of Hovensa and the fact that the respondent's general manager admitted in cross-examination that the respondent would not have acted any differently if it had received any earlier a letter in the same terms as the letter of 27th January 2015.

[39] In response, the respondent pointed to the fact that in the letter of 27th January 2015 the appellant had not sought to terminate the contract and so it is understandable that the respondent's general manager admitted that the respondent would not have acted differently if it had received that letter earlier. The respondent also pointed to the fact that the only thing which the respondent got notice of on 12th December 2014 was the possible closure of Hovensa, which possibility the respondent was aware of from the beginning.

Analysis and Conclusion on Ground F

[40] I am of the view that if the appellant was depending on the intimation given to the respondent on 12th December 2014 of the possible closure of the Hovensa facility as equivalent to the respondent from then having notice of the closure, then the factual finding of the trial judge is beyond reproach. If it was depending on the admission by the respondent's general manager that the respondent would have acted no differently had it received actual notification of the closure on 12th December, then there is justification for its reproach of the trial judge on this issue, who appeared to have treated the date when the respondent was informed of the closure of Hovensa as being significant.

[41] The reality is that I do not regard this finding of the trial judge as being consequential to the outcome of this appeal. The fact is that the respondent was only notified of the closure of Hovensa on 27th January 2015, nearly two months after the appellant was notified of it, but this did not change anything for the respondent, because the appellant did not then or at any time before 1st June 2015 inform the respondent of its intention to terminate the contract on account of the closure of Hovensa. I also do not see how the trial judge's finding on this issue would have affected any of the material conclusions which she arrived at and/or

affected her final disposition of the case. Nothing therefore turns on this finding by the trial judge.

[42] This ground of appeal being of no significance to the outcome of this appeal, I will accordingly dismiss Ground F.

Ground G

[43] On Ground G, the appellant challenged the finding by the trial judge that the only relevant discussions between the parties with respect to the determination whether there had been a waiver by election were those discussions which related to the price increase and that discussions on additional incentives to offset the increased costs of supplying fuel from Antigua were not relevant, despite the fact that the effect of the latter was the same as the price increase.

[44] In support of this ground, the appellant argued that the trial judge appeared not to appreciate or to take into consideration in arriving at her determination on the issue of waiver the fact that the discussions between the parties with respect to additional compensation for the increased costs of shipment from Antigua constituted very compelling evidence that the respondent was fully aware that the Antigua supply was temporary and, consequently, on any objective analysis of the evidence, the court could not find that there was any waiver by election by the appellant. The appellant submitted that the trial judge was therefore wrong to hold that there was a waiver by election by the appellant.

[45] In response, the respondent argued that it was clear from the evidence that the appellant elected to continue to supply fuel to the respondent rather than terminate the contract, and that this election took place before the appellant requested a price increase. In fact, the respondent contended, the appellant made a commercial decision to continue to supply the respondent with fuel and to negotiate an increase in price outside the contract. The respondent further contended that, having made that decision, the appellant communicated it to the respondent in clear and unequivocal terms without any mention that supply was interim and was dependent on the respondent agreeing to a price increase, that

the appellant continued to supply the respondent with fuel from its new loading port in Antigua, and the appellant sought "performance relief" based on delays in Antigua. The respondent submitted therefore that the fact that it engaged in discussions with the appellant with respect to a price increase or other measures to compensate for increased costs in no way constituted evidence that the supply from Antigua was temporary, and the trial judge was correct in not considering it in determining the issue of waiver.

Analysis and conclusion on Ground G

[46] As to this ground of appeal, I have already found, in addressing Ground A, that there was ample evidence on the basis of which the trial judge could have found that the circumstances giving rise to the application of the principle of waiver were present on the facts of this case and that the principle did therefore apply. I need only add, in relation to Ground G, that the finding of fact made by the trial judge that the discussions between the parties with respect to measures to offset the increased costs of the supply of fuel from Antigua was not compelling evidence that the respondent was aware that the Antigua supply was temporary was one that the judge was entitled to make on the evidence before her. In fact, I would go further to say that the appellant's proposition to the contrary is entirely without merit.

[47] I will accordingly dismiss Ground G of the appellant's grounds of appeal.

Grounds B and O

[48] The appellant dealt with Grounds B and O together as related grounds of appeal, and they will be so addressed in this judgment.

[49] In the respondent's skeleton argument, Grounds B and O of the grounds of appeal are helpfully encapsulated, each in a single sentence, which I shall adopt and adapt. In terms of Ground B, the appellant's complaint is that the trial judge erred in taking into consideration non contractual matters, that is, matters which were outside the express and implied terms of the contract, in making a determination of the rights and obligations of the parties. In terms of Ground O, the appellant's

complaint is that the trial judge erred in finding that, by 29th May 2015, the Hovensa closure could no longer be relied on as a basis for performance relief under clause 10(1) of the contract.

[50] On the combined Grounds B and O, the appellant submitted that the trial judge concluded that the right to terminate the contract following closure of the Hovensa facilities was lost because the appellant decided to secure supplies out of Antigua for sale to the respondent. In so doing, the appellant submitted that the judge gave no consideration to the fact that there was no provision in the contract which would cause the appellant to lose its right to terminate conferred by clause 10(2) of the contract. The appellant submitted that the judge came to the conclusion that she did in reliance on matters external to the contract, taking the view that common law or equity will do what the contract did not. The appellant contended further that the judge was obliged to hold that there was no term in the contract, express or implied, to limit the exercise of the right to terminate when the Hovensa facilities ended, and that the right to terminate was properly and validly exercised by the appellant on 1st June 2015. The appellant concluded that the judge erred by failing to consider that the rights and obligations of the parties were contractual and had to be determined within the four corners of the written contract. There was nothing in the contract, according to the appellant, to support the judge's determination that the right of the appellant to terminate was lost by non-exercise after it arose.

[51] In response, the respondent argued on Ground B that the appellant's criticisms of the trial judge's findings were baseless and unfair; that there was no finding by the judge that the appellant had lost its right generally to terminate the contract; and that the judge simply found that the appellant had lost its right to terminate on the basis of the Hovensa closure, having elected to affirm the contract with full knowledge that the circumstances in fact entitled it to terminate. The respondent contended that the judge had properly applied the doctrine of election to the facts of the case; the appellant was aware that it was entitled to terminate the contract on the closure of Hovensa, but it chose to continue to supply fuel to the

respondent rather than to terminate; and it clearly and unequivocally communicated its decision to the respondent. The respondent submitted that fairness demanded that it be entitled to know where matters stood in relation to the contract and that it would have been unfair to it for the appellant to have elected to affirm the contract after the Hovensa closure, with full knowledge of its right to terminate, and then be allowed some four months later to rely upon that closure as a basis for terminating the contract.

[52] On Ground O, the respondent submitted that the authorities previously cited show that an election once made is irrevocable and final; that the court properly found that the appellant had elected to continue to supply the respondent with fuel from Antigua instead of seeking performance relief to permanently suspend the supply of fuel on the basis of the Hovensa closure or, put differently, instead of terminating the contract on the basis of the Hovensa closure; and that the appellant was bound by that election and could not properly be allowed to resile from it and rely on the closure as a basis for terminating the contract at some later date. The respondent submitted also that the President of the appellant, Mr. Thomas Esposito, in giving evidence on behalf of the appellant, revealed that by February 2015 Hovensa was no longer a source of supply under the contract. The respondent therefore concluded that on 1st June 2015, the appellant could not have relied on the closure of Hovensa as a basis for terminating the contract.

Analysis and conclusion on Grounds B and O

[53] On review of the judgment, I am not of the view that the trial judge erred by taking into consideration matters which were outside the express and implied terms of the contract in making a determination of the rights and obligations of the parties. On the contrary, the trial judge prefaced her analysis and conclusions on the rights and obligations of the parties with the following statement – “In determining this issue it is abundantly clear to this Court that the express provision in the Contract between the parties which governs this purported action of the Defendant must be

examined in some detail.[8]" Having so stated, the trial judge proceeded to reproduce the relevant clauses of the contract, in particular clauses 10(1) and 10(2), to discuss the rights and obligations of the parties arising from these clauses, in particular the rights and obligations of the appellant. She proceeded then to consider the application of the relevant judicial authorities to the facts and circumstances of the case, in particular the dicta of Rix LJ in **Kosmar Villa Holidays plc v Trustees of Syndicate** and of Lord Goff in **Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India, The Kanchenjunga**. From this consideration of the relevant evidence, clauses of the contract and applicable cases, the trial judge concluded that she was satisfied that the appellants, being fully aware of their rights, made the decision to continue to supply the respondents with the agreed products under the contract, instead of terminating the contract when it became entitled to do so between 1st December 2014 and 1st March 2015.

[54] I am also not of the view that the trial judge made an erroneous finding that the Hovensa closure could no longer be relied on as a basis for performance relief under clause 10(1) of the contract (in other words, as a basis to terminate the contract) by 29th May 2015. What the trial judge in fact found (which is at paragraph 85 of her judgment) was that:

> "by 1st June 2015, the Defendant having elected to retain the contract, and continue to supply fuel to the Claimant, despite of its eventual discovery that the same was uneconomical or unprofitable, could not then seek to rely on the closure some four months earlier which had given rise to that right."

This position the judge arrived at after journeying through all of the relevant evidence – both oral and documentary – and after discussing the earlier-mentioned clauses and cases, and I can find no fault with her finding on this issue.

[55] I will accordingly dismiss Grounds B and O of the grounds of appeal.

[8] Para. 53 of the judgment.

Grounds C, I and N

[56] The appellant dealt with Grounds C, I and N together as related grounds of appeal and I will endeavor, to the extent convenient, to so address them.

[57] In Grounds C and N, the appellant asserted that the trial judge had misconstrued clauses 10(2) and 10(5) of the contract, whilst in Ground I the appellant asserted that the trial judge's finding that "a business decision not to terminate the contract knowing they were entitled to terminate", but instead to engage in discussions/negotiations with the respondent with a view to maintaining the contract should be construed against the appellant was erroneous and against the spirit of the contract. In Ground I, the appellant also asserted that the trial judge's finding that the appellant only realized that the supply out of Antigua was "uneconomical and unprofitable" after they began supplying fuel from Antigua and as such sought to terminate the contract on 1st June 2015 was erroneous and against the weight of the evidence.

[58] In its 'skeleton submissions' on the combined Grounds C, I and N, the appellant conceded that when the Hovensa facilities ceased and it sought and obtained supplies at a higher cost from Antigua, it attempted to negotiate for higher pricing than the agreement allowed, but that these negotiations did not affect the operation of clause 10(2) of the contract. The appellant also conceded that the respondent was not obliged to agree to higher pricing and the respondent was not concerned with whether the appellant continued to supply at a loss. The appellant conceded too that it could not complain because it suffered loss after the closure of the Hovensa facilities. The appellant contended though that with the closure of the Hovensa facilities the contract made provision to avoid the loss which it suffered, which provision was contained in clause 10(2) of the contract. The appellant contended also that the details of that provision show that it was intended to relieve the appellant from performance by giving it liberty to withhold, reduce or suspend deliveries under the contract to the extent that the appellant may, in its absolute discretion, think fit. The appellant contended too that the respondent was not obliged to give a higher price, but the appellant having

continued to supply at a loss terminated the supply under the contract. The appellant submitted that termination was in the circumstances an event which the respondent could reasonably foresee and that the appellant's right to terminate was not lost.

[59] In response to the appellants submissions on Grounds C, I and N, the respondent argued (with respect to clause 10 (2)) that it was not disputed that the appellant had an absolute discretion to terminate the contract on the closure of Hovensa and, therefore, on the occurrence of that event it was for the appellant in its absolute discretion to decide whether to terminate or to continue to supply fuel to the respondent. The respondent also argued that the overwhelming evidence which the trial judge accepted was that the appellant chose to continue to supply fuel to the respondent and communicated that decision to the respondent in clear and unequivocal terms. In those circumstances, the respondent contended, the trial judge properly applied the principle of waiver by election and held that the appellant was bound by its election and could not resile from it; the result of the election was that the appellant lost its right to terminate the contract on the basis of the Hovensa closure. The respondent submitted that the simple point is that the appellant's right to terminate was absolute only to the extent that, on the happening of a specified event – in this case the closure of Hovensa – it had the right, in its sole discretion, to terminate, but if, as happened, it elected not to exercise that right, and instead to affirm the contract, clause 10(2) does not give it an absolute right to later resile from that election (however long after the specified event) and rely on that event as a basis for terminating the contract. The respondent submitted further that if the appellant's argument were to be accepted, it would mean that the appellant would be at liberty indefinitely to use the Hovensa closure as a basis for terminating the contract and the respondent, in these circumstances, would never know where it stood. The respondent concluded that this would be a clearly untenable position and so the criticism of the trial judge for taking the position that she did was therefore baseless.

[60] In terms of the appellant's submission on the misconstruction by the trial judge of clause 10(5) in particular (and not clause 10(4) as the appellant stated in error), the respondent contended that this clause, which gave the respondent the right to purchase the agreed products from other suppliers in the event of any deficiencies in supply caused by the operation of clause 10, was not misconstrued by the trial judge. The respondent contended further that it was acknowledged by its general manager that it would have to seek an alternative source of fuel if the appellant had ceased supplying it with fuel on the closure of Hovensa, but that the appellant did not do so, but continued to supply it with fuel from Antigua and sought "performance relief" on the basis of delays in supplies out of Antigua. The respondent therefore submitted that there was no failure to supply which would have forced the respondent to seek an alternative supplier, and that in fact to have done so would, in the circumstances, be a breach of contract.

[61] With respect to Ground I, the respondent contended that the criticisms levelled at the trial judge in the statement of that ground were unfair and baseless. The respondent contended also that it was clear that the trial judge simply accepted the appellant's evidence that it had made a business decision to continue to supply fuel to the respondent and she then treated that evidence as supportive of the evidence of the respondent's general manager that the appellant had chosen to continue to supply fuel from Antigua. The respondent submitted therefore that the judge could hardly be criticized for accepting a version of this aspect of the evidence which the appellant's own witness accepted as being a correct version of events.

Analysis and conclusion on Grounds C, I and N

[62] Grounds C and N of the appellant's grounds of appeal are concerned with clause 10(2) and (10)(5) of the contract, which I shall reproduce in full, along with the other relevant portions of clause 10.

[63] Clause 10 (with the irrelevant parts excluded) states:

> "(1) Subject to the remaining sub-clauses neither the Seller nor the Buyer shall be responsible for any failure to fulfill their respective obligations

under this Agreement (other than payment of money due) if fulfillment has been delayed, interfered with, curtailed or prevented by:

…

(d) Any curtailment, failure or cessation of supplies of crude oil or refined petroleum products from any of the Seller or its suppliers' sources 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."

"(2) If by reason of any causes referred to in paragraph (1)(a) – (c), (d), (e) and (f) of this Clause, either the availability from any of the Seller's or its suppliers' source of supply of crude oil or refined petroleum products or the seller's leased storage facilities on St. Croix, whether deliverable under this Agreement or not, or the normal means of transport of such crude oil or products, is delayed, hindered, interfered with, curtailed or prevented, then the Seller shall be at liberty to withhold, reduce or suspend the deliveries hereunder to such extent as a seller may in its absolute discretion think fit and the Seller shall not be bound to purchase or otherwise make good shortages resulting from such causes."

"(5) The Buyer shall be free to purchase from other suppliers on its account, any deficiencies caused by the operation of this Clause."

[64] The parties are in agreement that the closure of the Hovensa facility at the end of January 2015 was a circumstance which triggered clause 10(2) of the contract and entitled the appellant to terminate the contract. The only issue between them in relation to the operation of clause 10(2) is whether the appellant had made an election not to terminate the contract when it became entitled to do so and instead to continue to supply the agreed products to the respondent from a different source of supplies. The respondent contended that the appellant did make that election when it sought and got an alternative source of supply in Antigua and continued to supply the respondent with the agreed products after it became entitled to terminate at the end of January 2015. The respondent further contended that, having made that election, it was not open to the appellant to resile from that election and then terminate the contract on 1st June 2015 on the basis of the very closure of the Hovensa facility at the end of January 2015. The appellant on the other hand contended that, upon the closure of the Hovensa

facility at the end of January 2015, it became entitled to terminate the contract and cease supplying the agreed products to the respondent, and that it never lost that right even though it had made a 'commercial decision' to continue to supply the respondent from a different source whilst negotiating for a price increase.

[65] Here again, I believe that the respondent has the better argument, because although the closure of the Hovensa facility gave the appellant the right to terminate the contract, it did not give it the obligation to do so; the appellant also had the right, notwithstanding the closure, to seek an alternative source of supply and to continue to sell the agreed products to the respondent under the contract. The appellant clearly chose to exercise the right to seek an alternative source of supply and to continue to supply the respondent with the agreed products from its new source. The appellant also clearly and unequivocally communicated this to the respondent by its words and actions in referring consistently to its 'new loading facility' in Antigua and by actually supplying the respondent after the end of January 2015 from the 'new loading port' in Antigua. The appellant had therefore made its election well before 1st June 2015 and it was not therefore open to it on that date to resile from its election and terminate the contract on the basis of the Hovensa closure. The trial judge was accordingly correct when she held (at paragraph 85 of her judgment) that "by 1st June 2015, the [appellant] having elected to retain the contract, and continue to supply fuel to the [respondent] … could not then seek to rely on the closure some four months earlier which had given rise to that right", referring there to the right to terminate the contract.

[66] Although not elaborated in its written or oral submissions, the appellant did state in Ground N that clause 10(5) of the agreement gave the respondent the right to seek an alternative source to meet its needs in the event of a diminished supply of products caused by the operation of clause 10, and that the trial judge ought to have held that the provision in clause 10(5) was intended to save the respondent from a failure of supplies. On this statement extracted from the appellant's Ground N, I need only say that the appellant was justified in making no reference to it in its written or oral submissions, because there is simply nothing to it.

[67] As to the appellant's criticisms of the judge contained in Ground I, the judge did not in fact make any of the findings alleged by the appellant. In paragraph 82 of her judgment, the trial judge simply stated that the appellant's witness (Mr. Sylvester) admitted under cross-examination that the appellant made a business decision not to terminate the contract, though being fully aware that it was entitled to do so; and the trial judge reproduced portions of the witness's testimony in court to substantiate this. In paragraph 85, the trial judge did make a finding, but it was that by 1st June 2015, the appellant, having elected to retain the contract and to continue to supply fuel to the respondent, in spite of its eventual discovery that the same was uneconomical or unprofitable, could not then seek to rely on the Hovensa closure some four months earlier which had given rise to that right. The judge's finding was not therefore what the appellant alleged, that is, that the appellant only realized that the supply out of Antigua was uneconomical and unprofitable after it had begun supplying fuel from Antigua and that this was the reason why the appellant sought to terminate the contract on 1st June 2015. Not only did the trial judge not make the finding as alleged by the appellant, but there was no basis or need for her to make such a finding. The appellant's criticisms of the trial judge in Ground I are not therefore justified.

[68] I will accordingly dismiss Grounds C, I and N of the appellant's grounds of appeal.

Ground J

[69] In Ground J of its grounds of appeal, the appellant challenged the trial judge's award of liquidated damages to the respondent in the sum of $794,000 on the basis of clause 3.7 of the contract. Clause 3.7 of the contract reads:

> "Recognizing that the Buyer can suffer substantial financial losses and significant disruption of electricity to the British Virgin Islands community, if the stipulated storage fuel levels set out in sub-clauses (5) and (6) are not maintained, the provisions of sub-clauses (7) and (8) below will immediately apply. In addition subject to the provisions of sub-clause 8 below, the Seller agrees to pay to the Buyer damages per day, as outlined below, for each day that the storage level falls below the stipulated storatge fuel levels set out in sub-clauses (5) and (6). Terms of payments with regards to such penalties shall be in accordance with Clause 8

> (Terms of Payment) of this Agreement. In no event, including circumstances in which the Seller is entitled to performance relief under this Agreement, should the storage level fall below 1 day's storage capacity. Further, should the Seller fail to return fuel storage levels to those stipulated in sub-clause (5) above for more than 5 consecutive days, the Buyer shall have the right in its sole discretion to terminate this Agreement forthwith provided that the Buyer's right to claim liquidated damages or to terminate this Agreement in accordance with this clause shall not apply where the Sellers have incurred delays attributable to the storage facility which the storage facility acknowledges in writing."

[70] In its skeleton submissions, the appellant contended that the trial judge erred because the liquidated damages provision did not apply because of the cessation of the Hovensa facilities which was an event contemplated under clauses 10(1)(d) and 10(2) of the contract and because, as a matter of general law, a liquidated damages clause cannot be enforced unless it represents a genuine pre-estimate of damage and there was no damage or loss to the respondent and, in fact, any loss suffered was by the appellant who continued to supply fuel at agreed prices despite its higher costs after the Hovensa facilities closure. The appellant contended, therefore, that the enforcement of clause 3(7) became the enforcement of a penalty, which equity does not sanction.

[71] The submission as to the inapplicability of the liquidated damages provision because of the cessation of the Hovensa facilities cannot survive the determinations already made in paragraphs 14 to 17 of this judgment to the effect that the trial judge had correctly found that the appellant had made an election to affirm rather than to terminate the contract after the Hovensa closure and could not thereafter use the closure as a basis to terminate the contract. Just as the election by the appellant to continue to supply the agreed products to the respondent notwithstanding the Hovensa closure disentitled it from terminating the contract on account of the very closure, so too it disentitled the appellant from relying on that closure as a basis for not meeting its contractual obligations to maintain fuel storage levels at certain agreed minimums. The appellant's submission as to the unenforceability of the liquidated damages provision, however, is not affected by any previous holding in this judgment.

[72] As to the submission on the unenforceability of the liquidated damages provision, the appellant contended that the award of liquidated damages ought to be set aside because it is contrary to the contract and is a penalty. The appellant's contention is essentially that the sum claimed and awarded was not a genuine pre-estimate of damage and that, in fact, the respondent suffered no damage; it was the appellant which suffered loss and damage. The appellant called into service on this issue the case of **Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited**.[9]

[73] In its response to this submission, the respondent submitted that in the recent case of **Cavendish Square Holding BV v Talal El Makdessi**[10] the UK Supreme Court considered the **Dunlop Pneumatic Tyre** case and held that the tests laid down in that case by Lord Dunedin were not rules but only considerations which might prove helpful; the Supreme Court then proceeded to lay down the modern approach to the determination of whether a clause makes provision for liquidated damages or establishes a penalty. The respondent made other, less compelling, submissions in support of its position that clause 3(7) of the contract established liquidated damages payable for breaches by the appellant of the provisions of clauses 3(5) and 3(6) and did not lay day down a penalty for their breach.

Analysis and conclusion on Ground J

[74] A perusal of clauses 2 and 3 of the contract will reveal that the parties to the contract set out very specifically their duties and obligations under the contract. Of particular note is the fact that these clauses fixed the respondent with the obligation to purchase exclusively from the appellant its total requirements of diesel fuel and unleaded gasoline for a period of four years and set out the anticipated requirements of the respondent for the entire period at each of four locations to which the products were to be delivered by the appellant. In turn, clauses 2 and 3 laid down with considerable specificity when, where and how the

[9] [1915] AC 79.
[10] [2015] UKSC 67.

appellant would supply the diesel and gasoline to the respondent. Clause 3(7) then states (in part):

> "Recognizing that the Buyer can suffer substantial financial losses and significant disruption in the supply of electricity to the British Virgin Islands community, if the stipulated storage fuel levels set out in sub-clauses (5) and (6) are not maintained, the provisions of sub-clauses (7) and (8) below will immediately apply. In addition subject to the provisions of sub-clause 8 below, the Seller agrees to pay to the Buyer damages per day, as outlined below, for each day that the storage level falls below the stipulated storage fuel levels set out in sub-clauses (5) and (6)."

At the end of clause 3(7) there is a table which sets out the "Amount Due as agreed liquidated damages" for fuel storage levels falling below stipulated quantities. So that if, for example, the fuel storage level falls below nine days supply, the amount due as liquidated damages would be $7,000, which amount increases exponentially as the daily measure of supplies decreases, so that by the time the daily storage level is reduced to one day's supply the amount due would be $225,000.

[75] It is these amounts referred to in clause 3(7) as "agreed liquidated damages" that the appellant contended are really penalties which should not have been awarded by the trial judge.

[76] As indicated, the appellant relied on the case of **Dunlop Pneumatic Tyre Company, Limited v New Garage Motor Company, Limited** to support its contention that the amounts awarded are penalties.

[77] In **Dunlop Pneumatic Tyre**, Lord Dunedin suggested four tests which "may prove helpful, or even conclusive" to assist in determining whether a particular provision in a contract establishes an amount to be paid by way of liquidated damages or as a penalty. The four tests are:

> "(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach….
> (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ….

> (*c*) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage"….
> On the other hand:
> (*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

[78] Even on the **Dunlop Pneumatic Tyre** tests, the appellant would have difficulty in convincing this Court that the trial judge erred in awarding damages to the respondent on the basis of clause 3(7) providing for an award of liquidated damages to be paid to the respondent for the stipulated breach and not a penalty. There is, in my view, no doubt that some loss could conceivably be proved to have followed from a breach by the appellant of its contractual obligation not to allow the fuel storage level in the respondent's tanks to fall below a certain minimum level. The respondent is mandated to provide the entire Territory of the Virgin Islands with a constant and reliable supply of electricity, which is dependent entirely on fuel supplies from the appellant, and it is imperative that it will suffer loss if its fuel supply used in the generation of electricity is placed in jeopardy by its sole supplier allowing the fuel supply in the respondent's storage tanks to fall below the agreed prudential levels. Of course, the lower the level of the supply in storage then the greater will be the risk of loss.

[79] There is also, in my view, no doubt that the amounts stipulated for by way of liquidated damages for the identified breaches could not be said to be "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach[es]." The amounts involved in the sale and purchase of the fuel and gasoline, as is apparent from the schedules to the contract, would alone belie any notion of extravagance, but add the fact that the fuel being sold and purchased is the exclusive source of electrical power generation of the BVI and the immense business and reputational loss which the respondent can suffer by the failure of its exclusive source of

supply, makes the amounts stipulated for to be anything but extravagant and unconscionable.

[80] Once it is accepted that some loss would be suffered by the respondent by the appellant's breach of its obligation to retain the quantity of fuel above stipulated minimum levels and that the amounts stipulated for are not extravagant and unconscionable, then the first of Lord Dunedin's four tests is passed for the stipulated amounts to be regarded as liquidated damages and not penalties.

[81] The second test is not applicable on the facts of this case, because the breach here does not consist of failing to pay an amount due to be paid.

[82] The third test is also inapplicable on the facts of this case, because there was not on the facts a situation where "a single lump sum is payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling harm". On the facts of this case, there were different amounts stipulated for different degrees of breach in accordance with their likelihood to occasion the threatened harm.

[83] In terms of the final of Lord Dunedin's four tests, it is beyond doubt that the consequences of the breach in issue here are such as to make precise pre-estimation almost an impossibility, because one would not be able to calculate in advance (if at all) the quantum of the loss likely to flow from the failure of the appellant to maintain minimum fuel storage levels in the respondent's storage tanks. This circumstance, Lord Dunedin reasoned, "is just the situation when it is probable that pre-estimated damage was the true bargain between the parties".

[84] It would therefore appear that, even on the Lord Dunedin tests in the **Dunlop Pneumatic Tyre** case which was called into service by the appellant, the appellant would not get past its difficulty in convincing this Court that the trial judge erred in treating the stipulated amounts under clause 3(7) of the contract as liquidated damages and not penalties. But, if I am wrong in deciding that the appellant was not able to pass Lord Dunedin's tests in **Dunlop Pneumatic Tyre**, and if the

appellant was able to overcome this difficulty, it would run into an even greater one when confronting the **Cavendish Square Holding** case called into service by the respondent. That case was decided by the UK Supreme Court in 2015, over one hundred years after the House of Lords decision in **Dunlop Pneumatic Tyre** and can be regarded as laying down the contemporary approach to the determination of whether a provision in a contract is a penalty or a genuine pre-estimation of damages.

[85] In **Cavendish Square Holding BV v Makdessi**, the seven-member UK Supreme Court, after considering over one hundred cases decided between 1549 and 2015, held that:

> "The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent … does not add anything."[11]
>
> "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations."[12]
>
> "In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what was legitimate in a provision dealing with the consequences of breach."[13]

[86] Clause 3(7) of the contract between the parties to this appeal is a provision in a negotiated contract between two major commercial entities (one private and one public) of comparable bargaining power, which would both have had their legal and other expert advisors, and which had negotiated a contract over time within

[11] At para. 31.
[12] At para. 32.
[13] At para. 35.

their accustomed spheres of operation. The provision could not be described as a secondary obligation which imposed a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. In fact, the provision contained a primary obligation of the appellant to keep a sufficient quantity of fuel in the respondent's storage tanks to guarantee an adequate supply of the fuel required to generate the electricity which the respondent was legally and commercially bound to supply to the BVI. The detriment imposed on the appellant for breach of the obligation involved the payment of a pre-agreed sum of money which was certainly not out of proportion to the very legitimate interest which the respondent had in the enforcement of the appellant's obligation to provide a consistent and reliable supply of fuel for the generation of electric power in the BVI. The legitimate interest of the respondent would, without a doubt, extend well beyond the recovery of compensation from the appellant for loss occasioned by the insufficiency of the fuel supply. The fact therefore that – as stated in **Cavendish** – "the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal".

[87] I am accordingly of the view that the provisions contained in clause 3(7) of the contract between the appellant and the respondent pass the 1914 **Dunlop Pneumatic Tyre** tests for treatment as liquidated damages and not as a penalty, and of the even clearer view that the provisions satisfy the requirements of the 2015 **Cavendish Square Holding** case for similar treatment. I do not therefore consider that the trial judge erred in awarding liquidated damages to the respondent on the basis of clause 3(7) of the contract.

[88] I will accordingly dismiss Ground J of the appellant's grounds of appeal.

Ground K

[89] In Ground K, the appellant submitted that the trial judge, having made a finding at paragraph 156 of the judgment that the appellant did apply for performance relief under the contract for the period between 27th April and 3rd May 2015, and at paragraph 161 that it would be unconscionable for the respondent to seek

payment for breaches during that period, then made an erroneous finding at paragraph 162 that the appellant did not seek performance relief during that period and was therefore liable to pay liquidated damages to the respondent on account of fuel shortages during the period.

[90] In its skeleton argument in response to Ground K, the respondent conceded that the judge had in fact erred in the finding which she made in paragraph 162 of the judgment and that the liquidated damages for the period between 27th April and 3rd May 2015 ought to be deducted from the amount awarded.

Conclusion on Ground K

[91] Ground K of the appellant's grounds of appeal is accordingly allowed and the amount awarded to be paid by the appellant to the respondent by way of liquidated damages referable to the period between 27th April 2015 and 3rd May 2015 shall be deducted from the overall amount ordered to be paid for liquidated damages.

Ground L

[92] In Ground L, the appellant challenged the trial judge's award of liquidated damages to the respondent on account of the fuel level falling below the stipulated amount on 11th May 2015.

[93] In its submission on this ground, the appellant contended that the trial judge had held that, while there was no requirement for the respondent to inform the appellant that they would be seeking liquidated damages for the failure to maintain the minimum stipulated level, there was nevertheless an implied term in the contract that made it necessary for the respondent to inform the appellant that the fuel level was not at the stipulated level. The appellant further contended that, contrary to her finding on this issue at paragraph 152 of the judgment, the trial judge awarded damages to the respondent in respect of a May 11th breach of clause 3(7) when there was absolutely no evidence that there was any communication to the appellant of the fuel level on that day falling below the

stipulated level. The appellant therefore argued that the trial judge erred in awarding damages to the respondent in respect of the May 11th claim for liquidated damages, since the respondent had breached the implied term in the contract which was reflected in her finding that the respondent had to provide notice to the appellant that the fuel level had fallen below the minimum stipulated level in the contract.

[94] In its response, the respondent contended that the trial judge did not make any finding that the respondent was required to inform the appellant of any shortage in fuel levels, and that the finding by the trial judge recorded at paragraph 151 of the judgment is to the effect that there was no requirement for the respondent to inform the appellant that it would be seeking liquidated damages once the respondent was informed that the fuel levels were not at the stipulated levels. This, the respondent contended, is in keeping with the terms of clause 3(8)(a) of the contract that "the Seller gives the Buyer immediate notice in writing when the storage fuel levels fall below 10 days with an indication of when supply will be restored". The respondent submitted therefore that it was the appellant which was required under the contract to give the respondent notice in writing when the storage levels fall below the stipulated levels and not the respondent which was required to give any such notice to the appellant.

Analysis and conclusion on Ground L

[95] The appellant's argument on Ground L revolves principally on the question of whether the trial judge had made a finding that the respondent was required to inform the appellant that the fuel level had fallen below the stipulated level at any particular period before it could make a claim for liquidated damages for that period. The appellant argued that the trial judge did make such a finding whilst the respondent argued that the trial judge did not and that, in fact, the statement of the trial judge relied on by the appellant had the opposite meaning to the one contended for by the appellant.

[96] Paragraph 151 of the judgment reads as follows:

> "It is therefore apparent that the only triggering event of this clause was the failure to maintain the stipulated fuel levels. There was no requirement for the [respondent] to inform the [appellant] that they would be seeking damages once they were informed that fuel levels were not at the stipulated levels. It was in this Court's mind therefore an automatic device within the Contract terms."

The controversy centers around whether when the trial judge stated in paragraph 151 of the judgment "once they were informed", she was then referring to the appellant or to the respondent.

[97] This controversy reveals the dangers of the overuse of the pronoun in formal documents in which certainty of language can be crucial, because it is possible to argue ad infinitum as to whether the trial judge was there referring to the appellant or the respondent, since 'they' can equally be applied to either. I am, however, inclined to the submission of the respondent for two reasons. The first is that the appellant derived from this casual use of the pronoun "they" an implied term that the respondent was required to inform the appellant of the fact of the fuel level being below stipulated levels as a precondition to claiming liquidated damages. The importation of a term into a contract as an implied term is not something that would be lightly done by a judge, particularly when the contract is a detailed formal contract negotiated and entered into by two major corporations, and when the implication of the term is so consequential as to render it a condition precedent to the exercise by one of the parties of its rights under the contract. The argument of the appellant breaks down once you decline the importation of the implied term as a condition precedent to the respondent's exercise of its contractual rights. The second reason for my inclination towards the submission of the respondent is the fact that the use of the pronoun 'they' as referring to the appellant and not the respondent is in keeping with the specific words in the ensuing and related clause 3 (8) that "the Seller gives the Buyer immediate notice in writing when the storage fuel levels fall below 10 days with an indication of when supply will be restored".

[98] I will accordingly dismiss Ground L of the appellant's grounds of appeal.

Ground M

[99] The final ground of appeal, in terms of the order in which they were addressed by the parties in their written submissions/skeleton arguments, is Ground M. On this ground, the appellant contended that the trial judge's failure to have any regard to clause 3(8) of the contract, which allowed the appellant three grace periods during which it could not be penalized for the fuel falling below the stipulated level, resulted in the awarding of excessive liquidated damages to the respondent.

[100] In elaborating its submission on this ground of appeal, the appellant reproduced in full clause 3(8) of the contract and submitted that the trial judge clearly misconstrued the terms of the contract by her failure to take into consideration that under clause 3(8) the appellant was permitted three grace periods before the penalty clause in 3(7) could be enforced. The appellant submitted that this misinterpretation of the terms of the contract resulted in excess damages of $30,000 being awarded to the respondent.

[101] In responding to Ground M of the appellant's grounds of appeal, the respondent contended that to be entitled to the grace periods allowed under the contract, the appellant was required to give the respondent immediate notice in writing of the shortfall in the stipulated fuel storage level, with an indication of when supply would be restored, but that in respect of the periods for which performance relief was not granted to the appellant, no such notice was given, nor even was performance relief applied for by the appellant. The respondent further submitted that, in any event, clause 3(8) prevents the respondent from claiming liquidated damages if the number of times fuel levels fell below the stipulated storage levels did not exceed three occasions within a calendar year, but once the number of times storage levels fell below the stipulated levels exceeded three occasions within the year, then the respondent could claim liquidated damages for all of the shortfalls.

[102] Clause 3(8) of the contract reads as follows:

> "The Buyer shall forbear its claim to liquidated damages so long as the number of times that the storage level falls below the stipulated storage

fuel levels set out in sub-clauses (5) and (6) does not exceed 3 occasions in any calendar year during the Supply Period, provided that:

(a) the Seller gives the Buyer immediate notice in writing when the storage fuel levels fall below 10 days with an indication of when supply will be restored; and

(b) the storage fuel levels do not fall below 1 day's storage on any occasion

and thereafter the liquidated damages set out in sub-clause (7) above shall be payable to the Buyer except where the provisions of Clause 10 (1)(a)(c), (d) or (e) apply."

Analysis and conclusion on Ground M

[103] I am of the view that the appellant has the better argument in terms of its entitlement to three grace periods for shortfalls in the fuel supply level before it becomes liable to pay liquidated damages to the respondent. This view is borne out by the introductory and concluding words of clause 3(8). The introductory words speak to the requirement of forbearance by the Buyer of its claim to liquidated damages "so long as the number of times that the storage level falls below the stipulated storage fuel levels … do not exceed 3 occasions in any calendar year", while the concluding words provide that "thereafter the liquidated damages … shall be payable to the Buyer …" This must mean that the buyer is entitled to claim for liquidated damages only after the seller has benefited from the forbearance of the buyer for three previous shortfalls during the calendar year.

[104] Although the appellant will prevail on this point, it will not avail it though on the broader issue of its entitlement to any grace periods, because there is no evidence that the appellant ever complied with the preconditions to benefit from the provisions of clause 3(8), that is, giving immediate notice in writing to the respondent of the shortfall in the fuel storage levels, with an indication of when supply will be restored.

[105] The trial judge may in fact have failed to have regard to clause 3(8) of the contract, in terms of the three grace periods which it provided for, but even if she had paid regard to clause 3(8), it would not have given any benefit to the appellant by way

of entitling it to the grace periods, because it did not satisfy the conditions precedent to earning that benefit.

[106] I will accordingly dismiss Ground M of the appellant's grounds of appeal.

Conclusion

[107] The appellant succeeds on only one of its fifteen grounds of appeal, that is, Ground K, and fails on the other fourteen. In the result, Ground K of the grounds of appeal is allowed and Grounds A to J and L to O are dismissed.

[108] The appellant submitted that the effect of the trial judge's error in paragraph 162 of her judgment is that the award of liquidated damages to the respondent is overstated by $409,000.00. This figure was not disputed by the respondent and so the sum of $794,000.00 ordered to be paid by the appellant to the respondent (in paragraph 3 of the order) is reduced to $385,000.00, and the award of prescribed costs made in favour of the respondent (in paragraph 6 of the order) is to be calculated on a liquidated damages award of $385,000.00 and not $794,000.00.

[109] The respondent having prevailed on all but one of the fifteen grounds of appeal, and having in fact conceded on the other in its skeleton arguments filed nearly three months before the hearing of the appeal, is hereby awarded 90% of the costs on this appeal calculated on the basis of two-thirds of the costs in the court

below, which will reflect the downward adjustment in the amount of prescribed costs having regard to the appellant's success on Ground K.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom

By the Court

Chief Registrar