Trinity Term

[2017] UKPC 23

Privy Council Appeal No 0105 of 2015

JUDGMENT

Mediterranean Shipping Company (Appellant) vSotramon Limited (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lady Hale

Lord Kerr

Lord Wilson

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

17 July 2017

Heard on 6 April 2017

Appellant	Respondent
Michel Ahnee	Priscilla Balgobin-Bhoyrul
	Yudish Lutchmenarraidoo
	Nilen Vencadasmy
	Kushla Juggeewon
(Instructed by Mills & Co Solicitors Limited)	(Instructed by Sheridans)

LORD TOULSON:

1.
Under the law of Mauritius, can a party to a contract sue the other party in delict for non-performance of the contract, if the failure to perform it amounted to faute lourde?

2.
In the Supreme Court of Mauritius at first instance Matadeen, J held that the answer was “no”, but her decision was reversed by the Court of Civil Appeal (Balancy SPJ and Jugessur-Manna J).

Permission to appeal to the Board was granted by Balancy Ag CJ. The factual background is straightforward, but the procedural history has been less so.

Facts

3.
The claim was a simple claim for damages for short delivery under a contract of carriage. The goods were a crawler crane, which the plaintiff (Sotramon), a Mauritian company, hired from a Scottish crane company. Under the terms of the hire contract the plaintiff arranged for its bank to issue a letter of credit in favour of the company in the sum of £1.2m in case it failed to return the crane by 15 September 1999.

4.
The plaintiff arranged for return shipment of the crane from Port Louis, Mauritius, to Felixstowe by the defendant (Mediterranean Shipping) under a bill of lading contract. On 4 August 1999 the defendant issued a bill of lading in respect of 16 packages said to contain a complete crawler crane. The crane company was named as the consignee. The vessel arrived at Felixstowe by the due date, but, when the containers were unstuffed, a 15 ton ballast which formed part of the crane was said by the crane company to be missing. Correspondence followed between the interested parties.

5.
The plaintiff’s case is that it consigned the entire crane to the defendant for shipment and that there was short delivery. The defendant’s case is that it delivered all that was consigned.

6.
The contract contained a law and jurisdiction clause, which specified that all claims and disputes arising under or in connection with the bill of lading should be referred to the High Court in London and that English law should apply, subject to immaterial exceptions. It also contained a clause limiting the amount of the carrier’s liability for any loss or damage to or in connection with the goods.

History of proceedings

7.
On 9 October 2000 the plaintiff issued proceedings against the defendant in the Supreme Court of Mauritius claiming damages for breach of contract. The damages included approximately £30,000 representing the cost of a replacement ballast, for which the plaintiff had become liable to the crane company, and additional hire charges which the plaintiff had paid to the crane company under the hire contract because of its failure to return the entire crane by the due date.

8.
On 9 October 2002 the defendant lodged a challenge to the jurisdiction of the Mauritian court because of the jurisdiction clause in the contract.

9.
On 9 March 2004 the plaintiff applied to amend its plaint to include a plea that there was gross negligence on the part of the defendant in failing to ensure that the whole of the consignment was landed, and that such failure amounted to faute lourde. Leave to make the amendment was given on 28 October 2005. In its plea to the amended plaint, dated 26 July 2006, the defendant pleaded in limine litis that the court had no jurisdiction.

10.

On 2 July 2008 Matadeen J heard oral argument on the challenge to the court's jurisdiction. Counsel for the plaintiff said in the course of his submissions that the cause of action on which the plaintiff relied was not based on breach of contract, but was based on the tort of negligence.

11.
On 19 April 2012 Matadeen J gave judgment dismissing the jurisdictional challenge. She noted in her judgment that the action was now grounded in tort, not breach of contract, but she said that she did not consider that it mattered whether the cause of action was in contract or tort, because either way the question was whether the court should enforce the jurisdiction clause in the contract. She concluded that it should not do so for various reasons, including the inconvenience and expense which the parties would incur in litigating the matter in England. There was no appeal, and the Board is therefore not concerned with the question whether the judge erred in principle in not enforcing the contractual jurisdiction clause.

12.
The action was due to come into the cause list on 8 March 2013, but the defendant gave notice of its intention to apply for the dismissal of the action, on the basis that it ought to have been grounded on breach of contract and no action lay in tort, and the hearing that day was directed to that issue. The defendant submitted, in brief, that if between two parties bound by a contract there was gross negligence amounting to faute lourde in its performance or non-performance, the resulting cause of action was still based in contract rather than tort. The plaintiff argued that while a party in that situation could not sue both in contract and in tort, an action in tort based on faute lourde was maintainable.

13.
The point was not taken that while the court had previously declined on forum conveniens grounds to enforce the choice of forum provision in the bill of lading, there remained the contractual provision that English law should apply to all claims and disputes arising under "or in connection with" the bill of lading. The argument as to the availability of an action in tort for non-performance of the contract has proceeded at all levels on the premise that it was a matter of Mauritian law, and the Board will proceed on the same premise, without however expressing any view as to its correctness.

14.
In her judgment, dated 20 March 2013, Matadeen J said that Mauritian law of tort, under article 1382 of the Civil Code, incorporated the French principle of non-cumul de la responsabilité contractuelle et délictuelle, under which the two were mutually exclusive. She said that the Mauritian courts had followed the principle as it obtained in France and had consistently held that, where damages resulted from a breach of contract, it was not open to the plaintiff to base an action in tort. She cited a number of French text books and the decisions of Mauritian courts in TFP International Ltd v Itoola[2002] SCJ 147, The Hong Kong and Shanghai Banking Corpn v Mamad Safii [2002] SCJ 227 and Air Austral v Hurjuk[2010] SCJ 202. She disposed of the action by ordering that the plaintiff be non-suited. The Board takes this to have been a form of dismissal of the action without trial of the underlying facts, but there has been no discussion of the point and nothing appears to turn on it.

15.
The Court of Civil Appeal reviewed the authorities and concluded:

"(1) there are conflicting authorities as to whether the 'principe de non-cumul' should be extended to amount to a 'principe de non option';

(2) there are local authorities which have endorsed the French authorities to the effect that a party to a contract may sue another party to the contract in tort if the breach of contract amounts to a faute lourde, the idea behind this rule being to allow a party to a contract to benefit from certain advantages of an action in tort when he is able to prove that the breach amounted to a faute lourde on the part of the other party concerned;

(3) having regard to our rules and tradition in relation to pleadings and the spirit of fairness and justice, a plaintiff who wishes to plead faute lourde rather than breach of contract should be allowed to proceed in accordance with that option; …"

16.
It therefore allowed the appeal and ordered "that the case be heard on the merits as an action based on tort on the basis of faute lourde on the part of the defendant in the context of its contractual relationship with the plaintiff."

French law

17.
In 1984 Tony Weir, writing in the International Encyclopaedia of Comparative Law, Volume on Torts (vol X1), on "Complex Liabilities", Chapter 12, p 27, para 52, described the position in French law as follows:

"A contractor may not treat as a delict the breach of any obligation contained in the contract; tortious liability can exist only where contractual liability does not; the rule is not concurrence but incompatibility. The Court of Cassation has said on many occasions 'que les articles 1382 et suivants ne sont pas applicable lorsqu'il s'agit d'une faute comprise dans l'exécution d'une obligation résultant d'un contrat.' Legal writers are almost unanimous that this is the positive law and a clear majority approve of it, though some would prefer the distinctions in the regulation of the two regimes [contract and tort] to be diminished or abolished. It has been suggested that a contractor may be sued in delict if his breach was deliberate or criminal or an abuse of rights; Savatier has contended that concurrence is admissible unless the only harm complained of is the failure to receive the promised performance. But the overwhelming view is that concurrence is quite excluded."

18.
The Board notes that in this case the only harm complained of is the failure to receive the promised performance. More broadly, the material before the Board leads it to conclude that Weir's summary continues to be accurate.

19.
It has been recognised that to describe the principle as "non-cumul" is potentially misleading, but most legal writers appear to agree about its effect, although there are exceptions. Prof Legier, the editor of Encyclopédie Dalloz, Vo Responsabilité Contractuelle (1989), p 2, para 5, described it in this way:

"Principe dit du non-cumul - Ce principe, dont la dénomination n'est pas suffisamment claire, interdit à la victime, non seulement de cumuler ou de combiner les deux régimes de responsabilité, mais encore de choisir l'un ou l'autre. Si les conditions de mise en jeu de la responsabilité contractuelle sont réunies, ses règles doivent s'appliquer, sinon il convient de se référer à celles de la responsabilité delictuelle."

20.

Similarly, Dalloz, Droit Civil: Les Obligations, 11th ed (2013), (edited by Prof Terré, Prof Simler and Prof Lequette) contains the following passage, which appeared also in earlier editions (p 884, para 876):

“Jurisprudence. La jurisprudence, après avoir hésité, s’est prononcée, en principe, contre le ‘cumul’ des responsabilités. Elle a décidé que les dispositions des articles 1382 et suivants sont sans application lorsqu’il s’agit d’une faute commise dans l’exécution d’une obligation résultant d’un contrat.”

21.
The authors add:

“On a parfois proposé d’admettre le cumul des responsabilités en cas de faute intentionnelle d’un contractant, le dol permettant alors l’application des règles délictuelles … Des partisans du ‘cumul’ ont prétendu que les règles ordinaires de la responsabilité contractuelle ne jouent pas en cas de dol, celui-cí faisant naître une responsabilité délictuelle. Le raisonnement est inexact: en cas d’inexécution dolosive, les règles de la responsabilité sont certes différentes, mais cela ne tient pas à ce que la responsabilité cesse d’être contractuelle. Comment le cesserait-elle, puisqu’il y a toujours inexécution du contrat?”

It is a telling question.

22.
As to the reference in this passage to the rules being different in the case of an “inexécution dolosive”, it is common ground between the parties that faute lourde would disentitle the guilty party from relying on a term of the contract excluding or limiting the amount of its liability, but that is part of the law of contract. The rationalisation may perhaps be that the parties are not to be taken to have intended that an exclusion or limitation clause should provide the guilty party with protection in such circumstances, but this point was not discussed in argument because it has no direct bearing on the issue before the court. The question raised in the previous paragraph is how an action for damages for failure to comply with an obligation created by a contract can have a non-contractual foundation.

Mauritian case law

23.
The structure of the Mauritian Civil Code relating to contract and tort follows closely the provisions of the French Civil Code as it was before the reform of French contract law in 2016, and the influence of French law is reflected in Mauritian case law.

24.
The plaintiff relied heavily on L’Inattendu Co Ltd v Cargo Express Co Ltd [2001] SCJ 7. The plaintiff retained the services of the defendant freight forwarding company for the transport of goods from Port Louis to Reunion Island. The contract took the form of a combined transport bill of lading. The goods were shipped in a container but owing to the fault of a third party cargo handling company they were not off loaded in Reunion but went on to the Seychelles and were finally unloaded in Reunion some weeks later. The consignee claimed damages from the plaintiff, who in turn sued the defendant. Under the terms of the bill of lading, the defendant accepted responsibility for the faute of any third party which it used for the purpose of performance of the contract, but its liability was qualified by a limitation clause. Mindful of the limitation clause, the plaintiff brought its claim in tort. It alleged that

there was negligence amounting to faute lourde on the part of the defendant's agent for which the defendant was liable.

25.
The judge at first instance said that the general rule was that tortious liability could only exist where contractual liability did not, but that there could be a case for "tortious liability in a contract" where there had been faute amounting to dol, which he treated as synonymous with faute lourde. He considered that there had been a faute lourde on the part of the third party for which the defendant was fully responsible and he concluded, at p 6:

"I find that [the] plaintiff is entitled to go beyond the contract and to ground his claim in tort, but I accept that the tort arises out of the non-performance of the normal obligations contained in the contract."

There was no appeal.

26.
The Board does not consider the judgment satisfactory for several reasons. The concept of "tortious liability in a contract" and a tort which "arises out of the non-performance of the normal obligations contained in the contract" is inherently problematic, but the judgment does not grapple with, still less resolve, the doctrinal difficulty. In his references to legal writings the judge did not clearly differentiate between faute lourde as a factor disentitling the guilty party from relying on a limitation clause as a matter of contract law and the more radical concept of it giving rise to an independent cause of action not under contract law. Further, he made no reference to text book writings which identified this distinction and contradicted his conclusion. Not only does his reasoning give rise to unanswered questions, but it is difficult to follow it through into his treatment of the damages claimed. At one point, at p 8, he stated that "Neither the limitation of liability clause nor the time bar clause in the contract would avail the defendant in the present case even though [the] plaintiff had agreed to the terms of the contract embodied in the Bill of Lading.". That appears to be a statement of general principle, but in the next paragraph, at p 9, he said that "… it is imperative, on the other hand, that [the] plaintiff company should not be allowed to go beyond the contract … (thus bypassing the limitation and exclusion clauses contained therein) by claiming an exaggerated sum as damages", and he held that its claim for damages should be limited to what was specified in clause 9 of the bill of lading, namely twice the amount of the freight paid. Because of the importance attached to this decision by the plaintiff and by the appellate court in the present case, the Board has struggled to find a coherent analysis in the judgment, but to no avail.

27.
In TFP International Ltd v Itoola[2002] SCJ 147 the buyer of a set of armchairs sued the seller, alleging that the goods were defective. At first instance the buyer was awarded moral damages in tort, based on the judge finding that there was faute by the seller in its dealings with the buyer. The buyer had not sought to argue that the gravity of a breach of contract affected the foundation of the innocent party's right to sue for the resulting loss. Rather, the argument advanced was that the "non-cumul principle" prevented the innocent party from suing both in contract and in tort but allowed an option between an action in tort and an action in contract, depending on which was considered more favourable. The seller appealed on various grounds, including that the judge was wrong to award damages in tort as opposed to breach of contract. The Court of Civil Appeal agreed with the seller on this point. It said, at pp 2-3:

“Our system of civil liability which is set down in our civil code which is of French origin does not permit a ‘Cumul de la responsabilité contractuelle et de la responsabilité délictuelle’. In fact the problem is one of ‘option’ and not ‘cumul’ since according to certain authors and a number of decided cases a breach of contract would give an aggrieved party an option between an action in tort or in contract at his choice depending on which of the two is deemed to be the more favourable. The problem of ‘option’ has however been widely abandoned now. Liability is either based on contract or on tort and the basis of liability is an exclusive one.

There is now a well established doctrine and jurisprudence whereby parties who are linked by contract must ground any claim they may have on the basis of contractual liability and not in tort - Vide Starck, Droit Civil Obligations, 1972, par 2058; P Le Tourneau, la responsabilité civile, 3e éd, 1982, Dalloz no 164 et s; Civ 1re, 16 nov 1965, D 1966.61.”

28.
The court held that the award could not stand on the basis of tort. However, exercising its powers under section 15 of the Courts Act, it found on the evidence that the seller was liable for breach of contract, and it ordered that there should be judgment in favour of the buyer on that basis.

29.
In TheHong Kong & Shanghai Banking Corpn v Mamad Safii [2002] SCJ 227 the plaintiff held a “Global Access” card issued by the defendant bank. He and his wife were due to spend a holiday in South Africa and he went to a branch of the bank to inquire about buying currency. He was told by a member of the staff that this was unnecessary because he would be readily able to use his card to withdraw money from ATMs in South Africa. This proved not to be so, because the machines denied him access. He sued for damages in tort, alleging that he had negligently been given incorrect information, and his claim succeeded at first instance. The bank appealed. It contended, first, that the relationship between the parties was contractual and the court had therefore been wrong to hold it liable in tort; and, secondly, that liability was excluded by the terms and conditions of the contract.

30.
On the first point, the Court of Civil Appeal agreed with the bank. It said, at p 5:

“There is no doubt that there exists between the parties a contractual relationship of client and banker and more specially with regard to the operation of the Global Access Card which is the subject matter of the present litigation.

Any matter whereby one party would be in breach of his obligation would therefore have to be governed by the contractual terms existing between them. Pursuant to the ‘non-cumul’ rule, liability can be based either in tort only or in contract only. The two types of liability cannot be mixed up.”

31.
In support of that statement of principle the court cited a number of passages from Encyclopédie Dalloz, Responsibilité (en général) and the decision in TFP International Ltd v Itoola.

32.
On the second point, the court said that there were numerous decisions (identifying four) to the effect that an exclusion clause will be of no effect where there is a faute lourde, and that a number of considerations might be relevant in determining whether faute lourde was triggered.

33.

The court therefore allowed the appeal, set aside the judgment and ordered that the case should go to trial. It said that it would be the task of the trial court (p 8), “if and when called upon to decide on any eventual liability of the appellant under contract”, to find whether the exclusion clause was of avail. So the essence of the judgment was that faute lourde was potentially relevant to the claim in contract, because it could prevent the guilty party from relying on the exclusion clause, but it did not alter the foundation of the plaintiff’s cause of action or provide a gateway to a claim in tort.

34.
Air Austral v Hurjuk[2010] SCJ 202 concerned a contract of carriage by air. In Mauritian law such contracts are governed by the Code de Commerce, articles 437 to 473, which give effect to The Convention for the Unification of Certain Rules Relating to International Carriage by Air (referred to in the judgment of the Court of Civil Appeal as the Warsaw Convention, after the original Convention concluded in Warsaw in 1929, although it is more often referred to as the Montreal Convention, which in 1999 superseded the original version). The code includes limitation and time bar provisions. The plaintiff sued the defendant airline for damages for loss of three suitcases which he checked in on a flight from Reunion Island to Mauritius but never recovered.

35.
The claim was brought long out of time under the code provisions, but the plaintiff sued in tort and contended that the time bar under the code was irrelevant. He asserted, and the first instance court found, that the airline was guilty of faute lourde since it had no valid explanation for what happened to the suitcases. Accordingly, it gave judgment for the plaintiff in tort for the full value of the suitcases. The airline appealed.

36.
The Court of Civil Appeal set aside the judgment and ordered that the action be dismissed because it was time barred. It held that the trial court was wrong to find that it was permissible for the plaintiff to base his claim in tort, and it rejected the argument that faute lourde was capable of taking the action outside the contractual realm. It said, at pp 4-5:

“The concept of the ‘faute lourde’ in the execution of obligations under a contract has been developed by the French courts to temper the strict application of the principle of ‘non-cumul des responsabilités’ which may in instances lead to unjust results … The French courts have developed a notion of ‘faute lourde’ and have assimilated it to the notion of ‘dol’ under article 1150 which would give rise to damages not foreseen or foreseeable under a contract and as a result, rendering ‘clauses de non-responsabilité’ and ‘clauses limitative de responsabilité’ which may be found in a contract, null and void. The action remains one on the contract and not in tort.

The question whether an action based on the non-execution of a contractual obligation albeit on the commission of a ‘faute lourde’ is an action under article 1382 of the Code Civil has not been without controversy as attested to by the numerous views of the French doctrine. However the general view is that the action is still one of breach of contractual obligation ...”

37.
The court cited the decisions of the appellate court in TFP International Ltd v Itoola and The Hong Kong & Shanghai Banking Corpn v Mamad Safii and quoted passages from Dalloz Droit Civile: Les Obligations, including the extracts set out in paras 20 and 21 above, from what was then the latest edition.

38.

The court also considered L'Inattendu Co Ltd v Cargo Express Co Ltd. It described the circumstances of that case as easily distinguishable on the basis that there was tortious liability of a third party, the cargo handler, for which the freight forwarder assumed responsibility. There was therefore a fault which was independent of the contract and so a "cumul" was possible. The plaintiff's counsel in the present case was highly critical of this attempt to distinguish that decision and the Board is sympathetic to his criticism. The Board sees force in the analysis that the bill of lading was a contract by which the freight forwarder became obliged to ensure that certain things were done, and it made no difference to its contractual obligation whether it chose to perform it through an employee or agent or through an independent third party contractor (the cargo handler). Any liability on the part of the freight forwarder was therefore for its own breach of contract in failing to provide the promised performance. However, it is of no importance to the issue in this case whether the court was right in the way that it distinguished L'Inattendu Co Ltd v Cargo Express Co Ltd, for it is clear from its central reasoning that this was the only acceptable rationale that it could see for the decision. Its statement of general principle about faute lourde in the context of the non-performance of a contractual obligation was unambiguous.

39.
In Cascadelle Distribution et Cie Ltée v Nestlé Products (Mauritius) Ltd[2015] SCJ 120 the judge at first instance allowed a claim to proceed in tort where it was alleged that the defendant had committed an "abus de droit" in the manner and circumstances in which it exercised its contractual right to terminate a distribution agreement with the plaintiff. His decision was upheld by the appellate court: [2016] SCJ 371. Its judgment followed the decision in the next case.

40.
In La Patinoire Ltée v Lakepoint Ltd[2013] SCJ 344 the first instance judge in an interlocutory judgment allowed a tenant of leasehold premises to proceed with a claim in tort against the landlord based on various alleged deficiencies of the premises and the landlord's failure to inform the plaintiff about them. There was no allegation of faute lourde in the performance of the landlord's contractual obligations but there was an allegation that the landlord acted mala fide in leasing the premises to the plaintiff. After referring to cases including L'Inattendu Co Ltd v Cargo Express Ltd and Cascadelle, the judge, at p 4, said that it was clear that "an action in tort is receivable irrespective of the contractual relationship of the parties if such breach also amounts to a distinctive 'faute dolosive', 'faute intentionnelle' or 'faute lourde'", and that it would be premature to hold that the plaintiff did not come within one of those exceptions (which the judge appears to have regarded as separate). Unfortunately the judge was not referred to, or at any rate did not mention in his judgment, any of the decisions of the appellate court in TPP International Ltd v Itoola, The Hong Kong and Shanghai Banking Corpn v Mamad Safii and Air Austral v Hurjuk.

41.
In Cascadelle the appellate court approved the statement that an action in tort is receivable irrespective of the parties' contractual relationship if the breach also amounts to a "distinctive" faute dolosive, faute intentionnelle or faute lourde. It is not entirely clear what "distinctive" means in this context. If it means that there may be conduct which gives rise to a cause of action independently of whether it happens also to involve a breach of contract (ie, "irrespective of the parties' relationship"), that is one thing. (Cascadelle could be seen as an example inasmuch as an abusive exercise of contractual rights may be said to involve a distinctive type of wrong not dependant on the conduct being a breach of contract, and this was how the judge at first instance in Cascadelle approached the matter. In particular, he identified, at p 26, a need "for the plaintiff to establish those facts which

would entitle it to claim damages for the tortious act of the defendant distinct from the breach of contract.") But if it involves faute only because the conduct is in breach of contract, to permit such an action to be brought in tort would undermine the central principle laid down by the appellate court in TFP International Ltd v Itoola, The Hong Kong and Shanghai Banking Corpn v Mamad Safii and Air Austral v Hurjuk.

Analysis

42.
The only relationship between the parties was an ordinary form of commercial relationship arising from entering into a contract of carriage of goods. The loss claimed to have been suffered by the plaintiff was the consequence of the defendant's alleged failure to perform its contractual obligation to deliver. On the face of things, such a claim is by its very nature purely contractual.

43.
The contention that the plaintiff was entitled nevertheless to sue in tort if the failure to deliver amounted to faute lourde is not a novel argument, but it has generally been considered to be heretical.

44.
The mainstream opinion of experts in French law has been and continues to be that the argument is doctrinally unsound for reasons articulated in the extracts from Dalloz previously cited.

45.
Although the relevant parts of the Mauritian civil code are derived from French law, the Mauritian courts are not bound to follow French law if there is good reason to do otherwise.

46.
In L'Inattendu Co Ltd v Cargo Express Co Ltd the first instance judge thought that he was following French law in finding that the plaintiff might bring a claim in tort arising out of the non-performance of the defendant's normal contractual obligations, from the references which he made to French texts, but the judgment was not satisfactory for reasons already set out. Then came three decisions of a Mauritian appellate court, in all of which the court decisively rejected as a matter of principle the argument now advanced by the plaintiff: TFP International Ltd v Itoola, The Hong Kong and Shanghai Banking Corpn v Mamad Safii and Air Austral v Hurjuk.

47.
In the present case at first instance Matadeen J followed those three authorities. The decision of the appellate court involved a volte face from the principle established in those cases. Although the appellate court referred to those decisions as authorities on which Matadeen J had relied, it did not itself seek to analyse the decisions or state any reason to regard them as suspect.

48.
The appellate court expressed the view in its conclusions that in the spirit of fairness and justice, a plaintiff who wishes to plead faute lourde rather than breach of contract should be allowed to proceed in accordance with that option. The Board understands the considerations of fairness and justice which led the French courts, followed by the Mauritian courts, to develop the doctrine that a contracting party guilty of a particularly grave breach of contract (whatever may be the precise parameters of faute lourde) should not be entitled to rely on an exclusion or limitation clause. However, it sees no unfairness or injustice in a principle which recognises that an action for damages

resulting from the non-performance of a contractual obligation is an action founded in contract, no less when the breach is particularly bad than otherwise. The gravity of the breach does not alter the fact that it is founded on the non-performance of an obligation which arose from the contract.

49.
The point was made, as succinctly and incisively as it could be, in the passage from Dalloz cited at para 21: "… en cas d'inexécution dolosive, … cela ne tient pas à ce que la responsabilité cesse d'être contractuelle. Comment le cesserait-elle, puisqu'il y a toujours inexécution du contrat?". The judgment of the appellate court provides no answer to this fundamental question and the question is indeed unanswerable.

50.
The Board concludes that Matadeen J's judgment was correct and that the appellate court was wrong to overrule it. It will therefore allow the appeal, set aside the judgment of the appellate court and restore the order made by Matadeen J. The plaintiff must pay the defendant's costs before the Board and the appellate court, unless within 28 days the plaintiff makes submissions in writing as to why a different order should be made.