Michaelmas Term

[2020] UKPC 23

Privy Council Appeal No 0029 of 2019

JUDGMENT

Delta Petroleum (Caribbean) Ltd (Appellant) v British Virgin Islands Electricity Corporation (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Kerr

Lord Briggs

Lord Sales

Lord Hamblen

Lord Leggatt

JUDGMENT GIVEN ON

12 October 2020

Heard on 6 and 7 May 2020

Appellant	Respondent
James Guthrie QC	Paul B Dennis QC
Naina Patel	Nadine Whyte Laing
(Instructed by Sperrin Law)	(Instructed by Myers Fletcher and Gordon (Hammersmith))

LORD LEGGATT:

1.
The central issue in this appeal is whether a party with a right to claim relief from further performance of its obligations under a contract had in law to make an election between exercising the right and continuing to perform the contract such that, if the latter choice was made, the right to claim “performance relief” was lost.

The contract

2.

The contract in question was a Refined Petroleum Products Supply Agreement made on 30 August 2014 between the appellant ("the Seller") and the respondent ("the Buyer"). The Seller is a company incorporated in the Territory of the Virgin Islands ("BVI") which supplies petroleum products in the BVI and other Caribbean islands. The Buyer is a statutory corporation and the sole provider of electricity in the BVI. Under the supply agreement the Buyer agreed to buy exclusively from the Seller the Buyer's total requirements for diesel fuel and premium gasoline during a period of four years from 1 September 2014 to 31 August 2018. The diesel fuel was required by the Buyer for generating electricity.

3.
The supply agreement was negotiated against the background of the potential closure of an oil refinery and storage facilities operated by Hovensa LLC on the island of St Croix in the United States Virgin Islands. Hovensa supplied petroleum products to the Seller, which also leased storage facilities from Hovensa on St Croix. In clause 10(1)(d) and (2) of the supply agreement, specific provision was made for the potential consequences of closure of the Hovensa terminal to allow the Seller in that event to claim relief from its obligations to supply fuel to the Buyer. Clause 10, headed "Performance Relief", was in these terms (with emphasis added):

"(1) Subject to the remaining sub-clauses of this clause 10 neither the Seller nor the Buyer shall be responsible for any failure to fulfil their respective obligations under this Agreement (other than payment of money due) if fulfilment has been delayed, interfered with, curtailed or prevented by:

(a) Act of God, fire, any consequences of war, invasion, act of foreign enemy, hostilities, (whether war has been declared or not), civil war, rebellion, revolution or insurrection;

(b) Any strike, lock-out or labour dispute whether or not the Seller, its suppliers or the Buyer as the case may be, are party thereto or would be able to influence or procure the settlement thereof;

(c) Tropical storm, hurricane, earthquake, flooding resulting from heavy rainfall or any other natural disaster;

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

(e) Any compliance with any order, demand or request of any international, national, port of transportation, local or other authority or agency relating to health or safety regulations; and

(f) Any other circumstances which are not within the reasonable control of the Buyer or the Seller or its suppliers.

(2) If by reason of any causes referred to in paragraph (1) (a) to (c), (d), (e) and (f) of this clause, either the availability from any of the Seller's or its suppliers' sources 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 the 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.

(3) A request for Performance Relief shall be made in writing and shall specify the reason for the request with supporting documents. In addition to the foregoing, in all requests for Performance Relief the nonperforming party must prove that the party took all reasonable steps to minimise delay or damages caused by foreseeable events, that the party substantially fulfilled all non-excused obligations, and that the other party was timely notified of the likelihood or actual occurrence of an event described in this clause 10.

(4) For the purpose of this clause, the Seller's suppliers shall mean any body or person by whom, directly or indirectly the refined petroleum products to be purchased and sold hereunder are supplied, stored and/or transported to the Seller.

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

4.
Also relevant in the events which happened is clause 3 of the supply agreement, which required the Seller to ensure that the Buyer's storage tanks were maintained at all times at stipulated minimum levels and provided for the Seller to pay damages to the Buyer at an agreed daily rate for each day that the storage level fell below the stipulated minimum level.

The Hovensa closure

5.
On 1 December 2014 Hovensa gave notice to the Seller that it was terminating the service agreement under which the Seller leased storage facilities on St Croix with effect from 1 March 2015. After representations made to the Senate of the US Virgin Islands to halt the closure of the Hovensa terminal proved unsuccessful, the Seller sent a copy of the notice received from Hovensa to the Buyer on 28 January 2015 and requested a meeting to discuss its implications for the supply agreement.

6.
By letters dated 27 January and 2 February 2015, the Seller claimed performance relief under clause 10(1)(d) and (f) of the supply agreement from its obligation to maintain storage levels in the Buyer's tanks at or above the stipulated minimum levels. The Seller's letter of 2 February 2015 stated that it was "now in the transition phase to Antigua for the lifting of product" and that the performance relief sought was "in relation to the closing of Hovensa … and the transition to a new loading port in Antigua".

7.
On 6 February 2015 discussions began between the parties in which the Seller sought a price increase to offset the increased costs incurred in making supplies under the agreement as a result of the closure of the Hovensa terminal. Negotiations continued over the following months but ultimately broke down. Throughout this time the Seller continued to supply fuel to the Buyer purchased and shipped from Antigua.

8.
On 1 June 2015 the Seller wrote to the Buyer stating that, although it had used its best efforts to identify alternative sources of supply on similar terms, it had not been able to do so and as a result the Seller would no longer be able to continue to supply fuel to the Buyer under the terms of the agreement. The letter requested performance relief from the Seller's supply obligations on the grounds of the closure of the Hovensa oil refinery and the Seller's leased storage facility.

9.
The Buyer replied on 4 June 2015 rejecting the request on the ground that any right to performance relief in respect of the Hovensa closure was “exhausted” after the Seller notified the Buyer that it had found a new supplier in Antigua and opted to continue performing the contract by making deliveries from Antigua.

10.
The Seller maintained its claim for performance relief but agreed to continue to supply fuel at the contract price on an interim basis until 15 July 2015 to allow the Buyer time to identify an alternative source of supply.

Court proceedings

11.
On 11 June 2015 the Buyer commenced proceedings against the Seller in the Eastern Caribbean Supreme Court (the “High Court”) and also issued an application for an interim injunction. The application was heard on 14 July 2015 when an injunction was granted to compel the Seller to continue to deliver fuel to the Buyer in accordance with the terms of the supply agreement pending the determination of the Buyer’s claim or further order of the court.

12.
An expedited trial of the action took place on 2 November 2015 before Justice Nicola Byer. In her judgment given on 13 January 2016 the judge identified the issues as being:

i)
Whether on 1 June 2015 the Seller “was entitled to avoid its supply obligations from that point onward and thereby effectively terminate the contract on the basis of the Hovensa closure”.

ii)
If not, whether an order for specific performance of the contract should be made in favour of the Buyer.

iii)
Whether the Buyer was entitled to liquidated damages for the Seller’s failure to maintain the minimum storage levels stipulated by the contract on certain occasions.

13.
The judge decided all three issues in favour of the Buyer. On the first issue she held, in summary, that the Seller’s right to claim performance relief by reason of the closure of the Hovensa facility arose, at the very latest, at the end of January 2015; that the principle of waiver by election applied to the exercise of that right; that by the end of February 2015 the Seller had on three occasions categorically referred to Antigua as its “new loading port” and made it clear that it had chosen to continue to supply fuel to the Buyer from Antigua; and that, having made this election, the Buyer could not on 1 June 2015 rely on the closure of the Hovensa facility to claim performance relief which “effectively would have terminated the contract”. The judge concluded that the Seller was therefore not entitled to refuse to supply fuel under the contract.

14.
The judge further considered that it was appropriate to make an order for specific performance of the contract and that damages would not be an adequate remedy, principally because if the Buyer had to find an alternative source of supply, it was likely to have to increase the price of electricity to its

customers which in turn would cause unquantifiable and uncompensatable losses to the general public. The judge ordered that the contract was “to continue in full force and effect for the duration of its tenure.” She also found the Seller liable to pay US$794,000 to the Buyer as liquidated damages for failures to maintain the stipulated minimum storage levels.

15.
The Seller appealed to the Court of Appeal of the Eastern Caribbean Supreme Court. In a judgment given on 8 May 2017 the Court of Appeal reduced the award of liquidated damages to US$385,000 but in all other respects dismissed the appeal. On the question whether there had been a waiver by election of the Seller’s right to claim performance relief from its delivery obligations, Michel JA (with whom the other members of the court concurred) said (at para 24):

“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 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 … at the agreed price. In so doing, it jettisoned the alternative course of action … when the opportunity to do so presented itself. There can be no argument that in making this election the [Seller] was fully aware of the facts giving rise to its right to continue to supply the agreed products to the [Buyer] under the contract or to terminate the contract. Although the point was argued by the [Seller], the trial judge found as a fact that the [Seller] had clearly and unequivocally communicated its choice to the [Buyer] (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.”

16.
The Seller has appealed from the Court of Appeal’s decision to the Judicial Committee as of right.

The central issue

17.
The central issue in the appeal is whether the courts below were right in law to decide that the principle of waiver by election is applicable in this case.

The principle of waiver by election

18.
There is no dispute about the legal principle. As stated by Lord Diplock in Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850, 883, waiver by election arises:

“in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did.”

19.
Lord Goff of Chieveley further explained the principle in Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India (The Kanchenjunga) [1990] 1 Lloyd’s Rep 391, 398, where he said:

“Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the

contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. … In particular, 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 … [An election] 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 … Once an election is made, however, it is final and binding." (citations omitted)

20.
More recently, in Kosmar Villa Holidays Plc v Trustees of Syndicate 1243 [2008] EWCA Civ 147; [2008] Bus LR 931, para 38, Rix LJ said:

"[Election] generally requires knowledge of the facts giving rise to the choice on the part of the party electing, and knowledge of the choice having been made on the part of the other party. Those are the conditions which make the doctrine mutually fair. It typically arises where the parties to a contract have to know where they stand. Thus the choice has either to be communicated unequivocally by the party electing to the other party or else the objective circumstances have to be such that the effluxion of time by itself constitutes that communication. Since the election is the choice of the party electing, it is his conduct which is decisive. Once made the election is final and irrevocable."

21.
The principle of waiver by election is not needed to explain why a decision to terminate a contract, once communicated, is final and irrevocable. A valid termination has the legal effect of discharging both parties (from then on) from their obligations under the contract. Those obligations could only be reinstated by making a new contract. But the principle is needed to explain why a party who communicates unequivocally an intention to continue with performance thereby loses the right to terminate the contract (in so far as the right was based on facts then in existence and known to the electing party). What is fundamental to the principle of waiver by election and crucial for present purposes is that it is only capable of applying where a choice must be made between two alternative and inconsistent (in the sense of mutually exclusive) courses of action, such that adopting one of them necessarily entails forsaking the other.

Did the principle of waiver by election apply in this case?

22.
For the Buyer, Mr Paul Dennis QC submitted that the courts below correctly held that the principle of waiver by election was applicable in this case and that there was ample evidence to support the finding of the High Court, affirmed by the Court of Appeal, that the Seller made such an election from which it could not afterwards resile. Thus, having decided not to terminate the supply agreement on the closure of the Hovensa facility (its original source of supply of fuel) but rather to continue to provide the Buyer with fuel from another source, and having clearly communicated that decision to the Buyer, the Seller could not subsequently rely on the closure as a basis for seeking to terminate the contract in June 2015.

23.
Where, in the opinion of the Board, this reasoning goes wrong is in regarding the right to claim performance relief under clause 10 of the supply agreement as (or as equivalent to) a right to

terminate the contract. As already noted, where a party has a right to terminate a contract and clearly manifests an intention to do so, the legal consequence is that both parties are discharged from all their contractual obligations which have not already accrued. Treating those obligations as still in force is therefore inconsistent with exercising the right to terminate the contract. Accordingly, if a party which has a right to terminate the contract acts with knowledge of the relevant facts in a way which clearly conveys that it is treating the contract as still in force, that party will be treated as having made an election to affirm the contract which is final and irrevocable.

24.
The right under clause 10 of the supply agreement to claim performance relief is a right of a different nature. Where it arises, this right does not present the Seller with a binary, all-or-nothing choice between, on the one hand, putting an end prospectively to all the parties' obligations or, on the other hand, treating all those obligations as still binding. Rather, the Seller is "at liberty to withhold, reduce or suspend the deliveries hereunder to such extent as the Seller may in its absolute discretion think fit". This gives the Seller a range of options. At one end of the scale, the Seller might merely delay a delivery of fuel with the result that the level in the Buyer's storage tanks falls briefly below the stipulated minimum level (as happened on several occasions in the period January to June 2015). At the other extreme, the Seller might decide to cease all further deliveries under the contract (as happened in June 2015). Even in the latter case, however, the parties are not thereby discharged from all their future obligations, as would happen on termination, but are merely excused from performance by clause 10 for as long as the suspension of deliveries lasts. If the Seller were subsequently to resume deliveries, the Buyer would be bound to accept them unless it had by reason of the Seller's conduct become entitled and elected to terminate the contract or to assert a waiver by estoppel of the Seller's right to make further deliveries of fuel.

25.
There is also nothing in clause 10 which, where there is a continuing interference with supply, requires the right to claim performance relief to be exercised only once or at a single point in time. So long as the interference with the Seller's source of supply resulting from an event specified in clause 10(1) continues, so does the Seller's liberty to withhold, reduce or suspend deliveries in response to such interference. In the present case it is clear that the closure of the Hovensa terminal and the Seller's leased storage facilities on St Croix meant that petroleum products ceased to be available from that source and that this remained the position throughout the relevant period from January to June 2015 (with no prospect that the terminal would re-open). The curtailment of supply was therefore a continuing state of affairs.

26.
A further feature of the right conferred by clause 10 is that, despite the words "as the Seller may in its absolute discretion think fit", the exercise of the right is qualified by clause 10(3). That requires the Seller to prove (amongst other things) that it "took all reasonable steps to minimise delay or damages caused by foreseeable events". It would have been difficult if not impossible for the Seller to satisfy that requirement in this case unless it could show that, before suspending all further deliveries under the contract, it had investigated whether it could continue to perform its obligations by purchasing and supplying the relevant products from another source without incurring financial loss. One way of seeking to achieve this was to discuss with the Buyer whether the Buyer was willing to agree a price increase or other concessions which would mitigate the additional cost of supplying fuel from Antigua.

27.

In these circumstances there was no inconsistency between the Seller's conduct in continuing to perform the supply agreement by purchasing and shipping fuel from Antigua between January and June 2015 and the Seller's decision in June 2015 to stop supplying fuel on account of the continuing unavailability of fuel from the Hovensa terminal and its inability to mitigate the loss caused by that occurrence. These were not alternative and mutually exclusive courses of action but were entirely compatible with each other.

28.
Thus, the right to claim performance relief under clause 10 of the agreement was not a right that in law required the making of an election. It follows that it was wrong to hold that the Seller made an election which caused the right to be lost.

Other potential arguments

29.
Where the principle of waiver by election does not apply, a different form of waiver may nevertheless arise by estoppel. If a party represents or promises unequivocally that it will not exercise a contractual right, the party will be estopped from afterwards exercising the right if and to the extent that the other party's reliance on the promise would make this inequitable: see eg The Kanchenjunga [1990] 1 Lloyd's Rep 391, 399. Hence if the Seller had unequivocally represented or promised that it would not withhold deliveries under the supply agreement on account of the closure of the Hovensa terminal, the Seller would have been estopped from going back on that promise if and to the extent that the Buyer had relied on it in a way which made it inequitable to do so. However, the Buyer has never suggested that there was such a waiver by estoppel in this case.

30.
The Buyer has also not disputed that the requirements of clause 10(3) were met. Thus, the Buyer has not suggested that the Seller failed to take all reasonable steps to minimise delay or damages caused by the closure of the Hovensa terminal or that the Seller had not "substantially fulfilled all non-excused obligations". Nor did the Buyer assert that it was not "timely notified" of the impending closure of the Hovensa terminal and termination of the Seller's leased storage facility arrangements.

31.
The only basis on which the High Court found that the Seller was not entitled in June 2015 to cease further deliveries under the supply agreement was that the Seller had lost the right to do so as a result of having made an inconsistent election. As in the Board's opinion the principle of waiver by election was not applicable in this case, it follows that the High Court and Court of Appeal were wrong to conclude that the Seller was not entitled to performance relief. The order of the court compelling the Seller to continue to deliver fuel under the supply agreement was therefore wrongly made.

Liquidated damages

32.
The Seller has also appealed against the award of liquidated damages for its failure on several occasions to maintain fuel levels in the Buyer's storage tanks at the minimum levels stipulated in clause 3 of the supply agreement. By the end of the hearing, however, the Board did not understand there to be any remaining dispute between the parties about the effect of this clause.

33.

The Court of Appeal upheld the Buyer's claim for damages in relation to five occasions when fuel levels fell below the stipulated minimum levels. For the last two of these occasions (29 to 30 May and 8 to 12 June 2015) the Seller had claimed performance relief based on the closure of the Hovensa terminal. It is accepted by the Buyer that if - as the Board has concluded - the Seller had not by then lost the right to claim performance relief based on the closure, then the claims for such relief were valid so that the Seller is not liable to pay damages in respect of these two occasions.

34.
Under clause 3(8) storage levels were permitted to fall below the stipulated minimum levels on up to three occasions in any calendar year without the Seller incurring a liability to pay damages, provided that the Seller gave the Buyer immediate notice in writing when the storage levels fell below ten days' supply with an indication of when supply would be restored. The Seller argued in the courts below that this exemption applied to the three further occasions (19 March, 14 April and 11 May 2015) for which damages have been awarded. However, before the Board the Seller accepted that there is no finding or evidence that on any of those three occasions the notice required by clause 3(8) was given and that in these circumstances the Seller cannot take advantage of the three grace periods allowed by clause 3(8) of the supply agreement.

35.
An argument that the clause providing for payment of liquidated damages was a penalty clause and therefore unenforceable was rejected by the Court of Appeal and - properly in the Board's view - has not been maintained on this appeal.

36.
It follows that the Buyer is entitled to damages in respect only of the Seller's failure to maintain the stipulated minimum fuel levels in the Buyer's storage tanks on 19 March, 14 April and 11 May 2015. As set out in the statement of claim, the amount of damages payable for each of those occasions was US$7,000, producing a total liability of US$21,000.

The Seller's counterclaim

37.
The Seller made a counterclaim for damages for loss sustained as a result of continuing to perform the contract after its request for performance relief made by letter of 1 June 2015 was rejected by the Buyer. The counterclaim was dismissed by the High Court without separate consideration as, in view of its conclusion that the Seller had lost the right to claim performance relief, the counterclaim did not arise.

38.
Although on appeal to the Court of Appeal the Seller advanced no fewer than 15 grounds of appeal, none of those grounds was directed to the dismissal of its counterclaim. Before the Board the Seller nevertheless submitted that, if its claim for performance relief made in its letter of 1 June 2015 was valid, it follows that its counterclaim for damages ought to have succeeded, with the measure of damages being the loss that the Seller sustained as a result of the Buyer's breach of contract in refusing to grant the requested performance relief.

39.
Leaving aside any procedural difficulty in raising this argument on this appeal, the counterclaim presupposes that, in failing to "grant" the Seller's request for performance relief, the Buyer was in

breach of a contractual obligation and that this breach caused the Seller to suffer loss. In the opinion of the Board, this is not a tenable contention.

40.
Although clause 10(3) of the supply agreement specifies requirements which a “request” for performance relief must satisfy, nothing in clause 10 (or elsewhere in the contract) states that the Seller is only at liberty to withhold, reduce or suspend deliveries if such a request is “granted” by the Buyer, nor that the Buyer has an obligation to grant any such request if the requirements specified in clause 10(3) (or any other conditions) are met. It is not necessary to imply any such terms in order to give business efficacy to clause 10. Indeed, it is difficult to see how clause 10 would be practically workable if, when performance was prevented or interfered with by a circumstance specified in clause 10(1), the Seller nevertheless remained bound to deliver fuel unless and until the Buyer granted a request for relief from the obligation to do so - and even if the Buyer’s refusal to grant the request was unjustified.

41.
In the Board’s view, the effect of clause 10(3) is simply that, where a request for performance relief is rejected by the Buyer, its validity - as in the case of any other dispute under the contract - is for a court to determine and the matters specified in clause 10(3) which the nonperforming party “must prove” are matters which, if contested, must be proved in court in order to establish the claimed entitlement to performance relief. The liberty of the Seller to withhold, reduce or suspend deliveries under clause 10(2) is not conditional on obtaining the Buyer’s consent and, if the Buyer denies the Seller’s entitlement to withhold deliveries when a valid request for performance relief has been made, it is simply failing to recognise or accept the existence of the Seller’s contractual right, not acting in breach of a contractual duty.

42.
What caused the Seller to continue to deliver fuel to the Buyer in accordance with the terms of the supply agreement and suffer any consequential loss after 1 June 2015 was not any breach of contract by the Buyer. The Board has concluded that the Seller had no contractual obligation to deliver fuel after that date. From 1 June until 14 July 2015, the Seller did so voluntarily as a gesture of commercial goodwill. From 15 July 2015 until 13 January 2016, the Seller was compelled to continue to deliver fuel to the Buyer on the terms of the supply agreement by the interim injunction granted by the court on 14 July 2015. From 13 January 2016 until the contract period ended on 31 August 2018, the source of the Seller’s obligation was the final order for specific performance made by the High Court following the trial.

43.
Accordingly, the Board agrees with the Buyer that the Seller’s counterclaim is unsustainable - based, as it is, on the erroneous contention that the Seller’s continued performance of the contract after 1 June 2015 was the result of a breach of a contractual obligation by the Buyer.

The Buyer’s undertaking in damages

44.
When the interim injunction was granted on 14 July 2015, the Buyer in the usual way gave an undertaking to the court to comply with any order that the court might make as to damages if it were later found that the Seller had sustained any damage by reason of the injunction which the Buyer ought to pay. This provides the Seller with a basis on which it can seek compensation for any loss that it suffered as a result of complying with the interim injunction in the period before the final order for

specific performance was made on 13 January 2016. The appropriate forum in which to seek an inquiry into the amount of damages payable pursuant to the Buyer's undertaking is the High Court.

45.
No such undertaking in damages was given, however, when the order for specific performance was made on 13 January 2016 following the trial of the Buyer's claim. That is unsurprising, as there is no practice to require a cross-undertaking in respect of loss which may be incurred as a result of a final judgment or order which may later be the subject of a successful appeal: see eg PricewaterhouseCoopers v SAAD Investments Co Ltd (No 2) [2016] UKPC 33; [2017] 1 WLR 953, para 17. Save in very exceptional circumstances such as where a judgment was procured by fraud, a claimant for whom judgment is given does not thereby commit any wrong and is not responsible for any loss caused to the defendant by the court's judgment if it later turns out to have been erroneous, unless the claimant has given an undertaking to the court to be responsible for such loss. As the Buyer was not required to and did not give such an undertaking, there is accordingly no basis on which the Seller can claim damages for loss that it sustained by performing the supply agreement in compliance with the court's order of specific performance as made on 13 January 2016.

Reversing an order on appeal

46.
In a written submission made after the hearing of this appeal, the Seller asked the Board, if the appeal is allowed, to make a different form of remedial order, based on the inherent jurisdiction of an appellate court to direct the respondent to restore to the appellant money paid or property transferred under an order which is reversed on appeal. The Seller submitted that, if the order for specific performance is reversed, the Buyer should be required to restore to the Seller the value of the fuel transferred to the Buyer pursuant to the order for specific performance in so far as this exceeded the contract price paid for the fuel, together with interest on that sum.

47.
In Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1997] 1 WLR 1627 the question arose whether, when ordering repayment of damages and costs paid under a judgment varied on appeal, the House of Lords had jurisdiction to award interest on the money ordered to be repaid. In explaining why the answer to this question was "yes", Lord Nicholls of Birkenhead, with whom the rest of the House agreed, said (at p 1637) that:

"when ordering repayment the House is unravelling the practical consequences of orders made by the courts below and duly carried out by the unsuccessful party. The result of the appeal to this House was that, to the extent indicated, orders made in the courts below should not have been made. This result could, in some cases, be an idle exercise unless the House were able to make consequential orders which achieve, as nearly as is reasonably practicable, the restitution which this result requires. This requires that the House should have power to order repayment of money paid over pursuant to an order which is subsequently set aside. It also requires that in suitable cases the House should have power to award interest on amounts ordered to be repaid. Otherwise the unravelling would be partial only.

This power seems to me to fall squarely within that range of powers which are necessarily implicit if a court of law possessed of appellate functions is to carry out its prescribed functions properly. It is, as such, a power derived from what is usually referred to as the inherent jurisdiction of the court. It is a power equally possessed by the Court of Appeal consequential upon orders made by it. The only surprising aspect of this power is that its existence has not previously arisen for decision."

48.
Although the appellate committee does not appear to have been aware of it, the existence of the power had in fact previously arisen for decision by the Privy Council in Rodger v Comptoir d'Escompte de Paris (1871) LR 3 PC 465. In that case the Supreme Court of Hong Kong had awarded damages against the defendant which the defendant had paid. Following a successful appeal to the Board, the defendant applied to the Hong Kong court for an order for repayment of the damages, with interest. The court ordered repayment of the principal sum but considered that it had no power to award interest. The case was brought back before the Privy Council, which held (at pp 474-475) that:

"it was in the power, and it became the duty, of the court at Hong Kong to do everything, and to make every order which was fairly and properly consequential upon the reversal of the original judgment by this tribunal."

That included an order for the payment of interest. If it were otherwise, then, as Lord Cairns observed (at pp 475-476):

"[the petitioners] will by reason of an act of the court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld."

49.
The reference in this passage to the person who "by mistake and by wrong obtained possession of the money under a judgment which has been reversed" should not be understood to mean that the claimant to whom damages were awarded by the lower court was guilty of any wrongdoing, nor that the basis for the right to repayment is that the money was paid by the defendant under a mistake. As already noted, a claimant who obtains the benefit of a judgment that is later reversed on appeal does not ordinarily commit any wrong thereby; nor does a defendant who pays money when ordered by the court to do so make the payment by reason of any mistake. As is clear from his earlier use of the words, what Lord Cairns was describing as a "mistake" and as "wrongful" was the order of the lower court which required the payment to be made. The essence of the Board's reasoning was simply that, to give full effect to its decision that the defendant had wrongly (in the sense of erroneously) been ordered to pay a sum of money, repayment was required not only of the principal sum but of a further sum in the form of interest to reflect the fact that the defendant, instead of the claimant, had had the use of the money in the period between payment and repayment.

50.
Although such an order for repayment is restitutionary, there is no need to look for any reason to justify restitution beyond the fact that the appellate court has decided that, on a true view of the law and the facts, the order appealed from should not have been made. To give practical effect to that decision, it is necessary to reverse transfers of money or other property which have been made pursuant to the order set aside on appeal. The position is analogous to that which obtains where, for

example, a contract is rescinded and there is required to be a giving back and a taking back on both sides.

51.
Such restitution may not compensate the successful appellant for all the loss which it has suffered as a result of complying with the order of the lower court. There is in the Board's view no injustice in that. On the one hand, the process of appeal would be nugatory if the losing party was not required to return money or property transferred under the judgment set aside on appeal. At the same time, as commentators have argued, so long as a claimant has a judgment in its favour, the claimant should generally be entitled to act on the judgment without being exposed to a liability in damages by doing so: see DM Gordon, "Effect of Reversal of Judgment on Acts Done Between Pronouncement and Reversal" (1958) 74 LQR 517; B McFarlane, "The Recovery of Money Paid Under Judgments Later Reversed" (2001) 9 RLR 1. Requiring the respondent to restore what it received but not to have to compensate the successful appellant for anything else it has lost strikes an appropriate balance between the need to respect judgments for as long as they are binding and the need to enable error to be corrected through an effective system of appeals. It is a balance which may, if justified in particular circumstances, be adjusted in favour of an appellant by ordering a stay of execution or requiring an undertaking in damages as a condition of granting leave to appeal.

52.
A final judgment or order differs in this respect from an interim order where, as noted earlier, the claimant is generally required to give an undertaking under which it can be ordered to compensate the defendant for loss suffered as a result of complying with the order. Such broader protection is justified where the claimant is granted an injunction as an interim measure without the benefit of a decision in its favour on the merits of its claim. In such a situation, it is usually just that the claimant should be required to undertake to compensate the defendant for loss caused by the injunction in the event that its claim subsequently proves to be unsound. A judgment on the merits, by contrast, gives the claimant a presumptive entitlement on which it should generally be free to rely without risk of itself suffering loss if an appellate court later decides that the judgment was wrong.

53.
These principles are consistent with United States and Australian authorities discussed by Jacob LJ in SmithKline Beecham plc v Apotex Europe Ltd [2006] EWCA Civ 658; [2007] Ch 71, paras 51-60. In one of those cases, National Australia Bank Ltd v Bond Brewing Holdings Ltd [1991] 1 VR 386, a decision of the Supreme Court of Victoria, the judgment of Brooking J contains an extensive and scholarly survey of English, Australian and American case law, leading to the following conclusion (at p 597):

"This survey shows that the principle on which the courts have for centuries acted is that when an erroneous judgment or order is overturned, whether by means of appeal or by any other procedure, the court will achieve a just result by requiring anything that has been taken from him by the other party by virtue of the wrong decision to be restored. … The principle is, as it was in the reign of the first Elizabeth (Eyre v Woodfine (1590) Cro Eliz 278), one of restitution or restoration. The court is seeking to restore to one party what it has wrongly taken from him and given to the other. It does not seek to restore the successful party to his former position by awarding damages to compensate him for loss flowing from the erroneous judgment or order."

54.

In some cases where the order reversed on appeal required the transfer of property, it may be necessary and appropriate to require the property itself to be restored to the successful appellant. For example, such a remedy will normally be appropriate where, by the order reversed on appeal, the appellant was dispossessed of land. In a case such as the present, however, where the property transferred to the respondent was a fungible commodity (and in any case no longer exists), such an order for the specific restoration of property would plainly be inapt. In principle what is required is restoration of the monetary value of the property transferred in so far as this exceeded the price paid for it. In accordance with the Rodger and Nykredit cases, the reversal of the order for specific performance would not be complete unless interest is also awarded on the principal sum payable.

The Buyer's argument that no benefit was retained

55.
The Buyer accepts that, based on the authorities cited, the Board has power to make a restitutionary order as part of its appellate function, but submits that it would not be appropriate to do so in this case, because the benefit received by the Buyer from the order for specific performance was not retained by the Buyer but was passed on to its customers. Rates and charges for the electricity supplied by the Buyer to its customers are regulated by By-Laws made pursuant to section 33 of the Electricity Corporation Ordinance, by which the Buyer was established. Paragraph 1(2) of the Third Schedule to the By-Laws provides for a fuel oil surcharge to be added to the standard rates charged to customers for electricity consumed. This surcharge varies according to the cost per gallon of fuel supplied to the Buyer in the previous calendar month. If the Seller had not been compelled by order of the court to continue to supply fuel to the Buyer at the contract price, the additional cost which the Buyer would have incurred by having to purchase fuel at a higher price would have been passed on to its customers through the fuel oil surcharge. The Buyer argues that in these circumstances it did not retain the benefit of a lower fuel price and should not be ordered to restore a benefit which it has not retained.

56.
In support of this argument, the Buyer relies on the decision of a Divisional Court in R (Seago) v Her Majesty's Courts and Tribunal Service [2012] EWHC 3490 (Admin). The claimant in that case was convicted of acting as a director of a company whilst disqualified. A confiscation order was made against him for the amount of the company's turnover during the relevant period. The court also ordered part of the confiscated sum to be paid to the liquidator of the company as compensation to its creditors. After the time for any appeal had expired, the money was paid to the liquidator and distributed in the liquidation; but two years later a decision of the Court of Appeal (Criminal Division) in another case established that the amount confiscated should not have been the company's entire turnover, but the very much smaller sum which the claimant had actually drawn from the company in salary and other personal benefits. The claimant requested repayment from the Court Service of the amount that he had wrongly been ordered to pay. The Court Service repaid part of this amount but not the part which it had passed on to the liquidator in accordance with the court's order. A claim that the Court Service was liable to repay the latter sum was rejected by the Divisional Court.

57.
In the course of his judgment Openshaw J (with whom Pitchford LJ agreed) quoted a passage from Goff & Jones, The Law of Restitution, 7th ed (2007) at para 16-001, which included this statement:

"It is then settled that a successful appellant can compel the respondent to restore all benefits gained through the judgment which has been reversed. The appellant has a right of 'restitution' of money

paid by him, and to property transferred which is still in the defendant's possession, under a judgment now reversed."

Openshaw J (at para 30) stressed the reference in this passage to, in his paraphrase, "all benefits which are still in the defendant's possession". Counsel for the Buyer relied on this and submitted that where, as in this case, no benefit has been retained by the respondent, the respondent cannot be said to have been unjustly enriched and it would be wrong in principle to make a restitutionary order.

58.
In the Board's view, the simplest explanation of the Seago case is that the person to whom the court had ordered the compensation element of the confiscated sum to be paid, and to whom that amount was paid pursuant to the court's order, was the liquidator. As Openshaw J put it (at para 31), the Court Service "acted merely as the conduit of the money" to the liquidator. In order to reverse the court's order, it would therefore have been necessary to order the liquidator to repay the money. The Divisional Court expressed no view about whether or not an action against the liquidator would have succeeded. The editors of the most recent edition of Goff & Jones, The Law of Restitution, 9th ed (2016) at para 26-15 suggest that the answer is most likely no, as the liquidator would have been entitled to a change of position defence - and in circumstances where the money was distributed to creditors at a time when there was no extant appeal or right of appeal, that view seems hard to fault.

59.
Neither the decision in the Seago case nor the passage quoted by Openshaw J from an earlier edition of Goff & Jones (which is not contained in the most recent edition) supports a principle that restitution should not be ordered of "benefits which have not been retained by the respondent". The Board does not read the reference by Goff & Jones to property "which is still in the defendant's possession" as intended to suggest that, if the property transferred is no longer in the defendant's possession, no restitutionary order should be made - but only that in that event restitution cannot be made of the property itself. Indeed, the same section of the book went on to state that, "If the respondent has sold the property transferred, he is liable to make restitution of the proceeds": see Goff & Jones, The Law of Restitution, 7th ed (2007) at para 16-001. In accordance with general principle, the respondent should be required to restore assets (or their value) transferred under the order reversed on appeal, unless and to the extent that (a) the respondent has changed its position as a consequence of that order such that it would be worse off if the transfer is reversed than if the transfer had not occurred in the first place and (b) it would be unjust in the circumstances to require restitution.

Change of position

60.
As counsel for the Seller observed, what the Buyer is in substance asserting is such a change of position defence. The Buyer has pointed out that, if it had had to pay a higher price for fuel during the contract period, the additional cost would automatically have been recouped from its customers through the operation of the fuel surcharge provision in the By-Laws. If, on the other hand, the Buyer is ordered to pay an equivalent sum to the Seller now, the cost will not be recovered from its customers under the pricing formula fixed by the By-laws. Nor can the Buyer levy an additional charge or increase prices without an amendment to the By-laws, which would require the approval of the Minister for Electricity. The Buyer has also informed the Board that, although its most recent publicly available accounts (for 2015) showed a healthy operating profit, its financial position has deteriorated since then, mainly as a result of the catastrophic impact of two hurricanes in 2017. Furthermore, even if the Buyer could increase the prices charged for electricity in order to fund a

payment to the Seller, the customers who would have to bear this cost are in many cases not the same customers who benefited from paying less for electricity during the contract period, as there have been significant changes in the territory's population in the last few years and hence in the Buyer's customer base. The Buyer submits that it would be unfair to impose on its current or future customers the burden of repaying a benefit enjoyed by past customers and that, in the circumstances, funding the restoration of the benefit derived from the order for specific performance by raising the prices charged for electricity would not be a viable course of action for the Buyer.

61.
In response, the Seller has submitted that, as a matter of principle, a defence of change of position is only available where the defendant has changed its position in reliance on receipt of the relevant benefit. Counsel for the Seller argue that the Buyer cannot say that it relied on the order for specific performance when it knew that the order was being appealed and must have contemplated that, if the order was found on appeal to have been wrongly made, it would be required to restore the benefit derived from the order.

62.
The Board does not accept the premise of this argument. In the Board's view, there is no reason why relevant changes in position should be restricted to those which have come about through decisions made and steps taken voluntarily in reliance on the receipt of a benefit. It is sufficient that receiving the benefit has caused the change of position: see Goff & Jones, The Law of Restitution, 9th ed (2016), para 27-35; Burrows, A Restatement of the English Law of Unjust Enrichment (2012) p 19; Scottish Equitable plc v Derby [2001] EWCA Civ 369; [2001] 3 All ER 818, paras 30-31. In this case the Buyer does not suggest that it took any relevant action in reliance on the order for specific performance. It is therefore unnecessary to consider whether any such action could have given rise to a defence. The Buyer's argument is that its position has materially altered, not because of any action that it voluntarily took, but because of the way in which its prices are fixed by law. The Board accepts that such an impediment to restoration of the defendant's position could in principle provide a basis for refusing to order restitution.

63.
It is clear that if the Buyer had had to pay a higher price for fuel during the period from 13 January 2016 (when the order for specific performance was made) until 31 August 2018 (when the supply agreement expired), the additional cost would automatically have been passed on to its customers under the pricing formula in the By-Laws. However, the Buyer could only be regarded as worse off if required to pay the additional cost now if the cost could not in that event be recovered from its customers. The Board accepts that levying an additional charge would require an amendment to the By-laws. The Buyer has not suggested, however, nor identified any reason to think, that the Minister would be unwilling to approve an amendment to the By-laws should it be considered financially necessary or expedient to increase the price charged for electricity for this purpose.

64.
In considering what justice requires as between the parties to the proceedings, the focus must be, in the Board's view, on the position of the Buyer and not that of its customers. The Board is in any case not persuaded that it would be unfair to any of the Buyer's current or future customers to require them to fund the cost of restoring the benefit received by the Buyer from the order for specific performance. It seems to the Board that if someone moves to the BVI and becomes a customer of the Buyer, they should expect to take the Buyer's financial situation as they find it. If such customers are required to pay more for electricity because of events which happened before they came to live in the

BVI – whether those events were hurricanes which caused severe damage in the territory, as occurred in 2017, or events which have caused the electricity company to incur a legal liability (whether to pay compensation to a third party or, as in this case, to restore a benefit received as a result of a court decision reversed on appeal) - that is a matter of fortune so far as the customers are concerned, no different in kind from other fortuities which affect their electricity bill such as what the price of oil currently happens to be or whether the company has accrued profits in past years which enable it to keep prices low. There would be no injustice to customers in the imposition of an additional charge such as could justify excusing the Buyer from restoring the benefit that it received.

65.
In principle, in the Board's view, the financial benefit received by the Buyer pursuant to the order for specific performance ought to be restored to the Seller, provided that the Buyer's own position can be restored. The Buyer has not shown that its own position cannot be restored by an amendment to the By-laws to increase the price charged for electricity, if such an increase is thought financially necessary or expedient to cover the cost. In these circumstances the Board considers that, to give full effect to its decision that the Seller was not liable to perform the supply agreement, it is just to order the Buyer to pay to the Seller the additional sums which it would have had to pay for supplies of fuel between 13 January 2016 and 31 August 2018 if the Seller had not been compelled to perform the agreement, together with interest on those sums. The relevant amount, if not agreed, will need to be assessed by the High Court, along with any damages payable by the Buyer pursuant to its undertaking to the court to be responsible for loss sustained by the Seller by reason of the interim injunction while this was in force between 15 July 2015 and 13 January 2016.

Conclusion

66.
For the reasons given, the Board will humbly advise Her Majesty that this appeal be allowed and the Buyer's claim dismissed, save that the Buyer is entitled to liquidated damages in the sum of US$21,000, and an inquiry should be made by the High Court to determine what sums the Buyer must pay to the Seller to give effect to this judgment.