

## *Commercial: Performance Relief: Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation (British Virgin Islands) [2020] UKPC 23*

Dominic Bright

Is it necessary to elect between the right to claim relief from further performance of contractual obligations and continuing to perform the contract; and, when you elect to continue to perform, is the right to performance relief extinguished?

### *Facts*

The contract was to supply fuel (“the contract”). The seller is a company incorporated in the Territory of the British Virgin Islands (“BVI”) supplying fuel (“the seller”). The buyer provides electricity in the BVI (“the buyer”).

The contract provided for the potential closure of an oil refinery and storage facility (“the original source”), so as to allow the seller to claim relief from its obligations to supply fuel to the buyer (“performance relief”). The original source gave notice to the seller that it was closing. The seller notified the buyer.

The seller claimed performance relief under the contract. The seller continued to supply fuel to the buyer. This fuel was purchased and shipped from another source (“the other source”).

The seller then notified the buyer that it was not possible to find an alternative source on similar terms, so the seller would no longer supply fuel to the buyer under the contract. The buyer rejected the claim for performance relief on the basis that any such right was extinguished for two reasons. First, the buyer notified the seller of the other source. Secondly, the seller elected to continue to perform the contract.

### *Procedural history*

The seller issued a claim and an application for an interim injunction to compel the seller to continue to supply fuel under the contract. There were three issues.

First, whether the seller was entitled to terminate the contract on the basis of the performance relief clause in the contract. Secondly, whether an order for specific performance should be made. Thirdly, whether the buyer was entitled to damages.

An interim injunction was granted pending determination of the claim.

All three issues were resolved in favour of the buyer. The seller elected to continue to supply fuel from the other source. The principle of waiver by election applied. The seller was not entitled to refuse to supply fuel under the contract.

An order for specific performance was granted because damages would not be an adequate remedy. The seller was also ordered to pay about US\$800,000 due to the seller’s failure to maintain the levels of fuel required to be stored by the contract.

On appeal, damages were reduced by about half. In all other respects, the appeal failed.

As of right, the seller appealed to the Judicial Committee of the Privy Council.

### *Discussion*

Lord Leggatt gave the only speech (on behalf of Lords Kerr, Briggs, Sales and Hamblen).

#### Waiver by election

It is fundamental that “the principle of waiver by election [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.”

There was no inconsistency between the seller’s conduct in continuing to perform the contract by supplying fuel from the other source, and the seller’s decision to stop supplying fuel because of the closure of the original source. These were not alternative and mutually exclusive courses of action. They were entirely compatible.

The seller did not make an election extinguishing the right to performance relief.

#### Waiver by estoppel

Where the principle of waiver by election does not apply, waiver by estoppel may arise: “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.”

In the instant case, however, waiver by estoppel was not asserted.

#### Inherent appellate jurisdiction to restore following an order reversed on appeal

Where the order reversed on appeal required the transfer of property, it may be necessary and appropriate to require its restoration to the successful appellant.

Where the property transferred to the respondent is a fungible commodity, however, such an order for the specific restoration of property is inapt. Restoration of the monetary value of the property transferred is required, in so far as this exceeded the price paid for it.

Unless interest is awarded on the principal sum payable, reversal of an order for specific performance is incomplete.

#### *Disposal*

The Board advised the Queen to allow the appeal, however, an inquiry was needed to determine the sums that the buyer must pay to the seller to give effect to the judgment.

### ***Property: Access to Social Housing and Discrimination: R (on the application of Z and another) v Hackney London Borough Council and another [2020] UKSC 40, 16 October 2020***

Barbara Zeitler

The Supreme Court has unanimously dismissed a challenge under the Equality Act 2010 (‘EqA’) to the housing allocation policy of a charity providing benefits to a particular group of people.

The Equality Act 2010 ('EqA') prohibits discrimination in relation to a protected characteristic such as race and religion/belief. There are exemptions to this prohibition. A person is not prevented from taking positive action to alleviate disadvantage (S. 158 EqA) nor is a charity prevented from restricting the provision of benefits to particular groups of persons if it can be justified as a proportionate means of achieving a legitimate aim or is for the purpose of 'preventing or compensating for a disadvantage linked to the protected characteristic' (S. 193 EqA).

The Agudas Israel Housing Association ('AIHA') is a charitable housing association with properties in a part of Hackney in East London with a substantial Orthodox Jewish community. AIHA's primary object is to provide social housing for the benefit of the Orthodox Jewish community. The London Borough of LB Hackney ('Hackney') has nomination rights to properties owned by AIHA. Hackney nominates those on the housing list to AIHA who are not Orthodox Jewish, but in practice, given the dearth properties in the area, only members of the Orthodox Jewish community are allocated housing.

The First Appellant 'Z', a mother with four children who is not a member of the Orthodox Jewish Community and who, due to the health of two of her children, has priority need for housing, challenged the allocation policies of Hackney and AIHA and claimed direct discrimination on the grounds of race and religion.

Her challenge, having been dismissed by both the Divisional Court and the Court of Appeal (*see the July 2019 Lamb Chambers Round-Up*), was further and roundly dismissed by the Supreme Court. The Court held that the charity's allocation policy is proportionate and lawful under ss .158 and 193(2)(a) EqA. It was a legitimate aim for the charity to endeavour to minimise the disadvantages suffered by the Orthodox Jewish community in Hackney, and the measures taken to promote that aim, such as rules about who could apply for social housing provided by the charity, were proportionate. The Court of Appeal had been correct to say that the Divisional Court's proportionality assessment could only be set aside if it had misdirected itself or reached a decision that was wrong.

This case highlights an instance where a charity was able to take positive action to help a particular disadvantaged group and not fall foul of discrimination laws.