

# Elections and changes of position in the Caribbean (Delta Petroleum v BVI Electricity Corp)

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**Dispute Resolution analysis: The Privy Council board in Delta Petroleum has considered the application of the doctrine of waiver by election and provided useful guidance on when the doctrine will apply in the performance of contracts. Furthermore, the board reviewed the inherent power of appellate courts to award restitution with interest, and the considerations that will apply to a change of position defence if raised by a public entity. Written by James Saunders, barrister at New Square Chambers.**

*Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corp (British Virgin Islands)* [\[2020\] UKPC 23](#)

## What are the practical implications of this case?

The decision in *Delta Petroleum* raises a number of important points in the law of contract and restitution.

Parties must distinguish clearly between actions which truly waive a right to terminate a contract, and the exercise of a contractual right which does not in truth require an election. Parties may in future wish to formulate arguments in terms of estoppel rather than waiver where a party appears to have acted inconsistently with its contractual rights.

The board has also signaled an interesting approach to the change of position defence in restitution. The court was willing to hold that where a party making restitution would be worse off in the short-term but could recoup its losses from customers in future, there was no sufficient change of position. The board demonstrated that what is required is more than an arithmetical calculation of the position of the restoring party at the date of judgment, but an inspection of that party's rights against others to restore its position.

It is, in this author's view, likely that this approach will be limited to public entities with a broad remit to restore their positions via increased charges, and would be less well suited in application to private bodies or individuals.

## What was the background?

Delta Petroleum (the 'seller') was a supplier of refined petroleum products incorporated in the British Virgin Islands (BVI). BVI Electricity Corporation (the 'buyer') was the purchaser of said products, being a statutory corporation and the sole provider of the electricity in the BVI. The buyer contracted to purchase supplies exclusively from the seller under a 2014 supply agreement (the '2014 agreement').

In December 2014, Hovensa, a supplier to the seller, gave notice that it was terminating its service agreement for storage facilities leased to the seller. As a result, the seller transferred its storage facilities to Antigua. The seller claimed performance relief under the 2014 agreement which would

exonerate any failure to perform obligations due to a curtailment or cessation of leased facilities and entitle the seller to reduce or suspend deliveries. In the events, the seller continued to supply the buyer from its Antigua facility despite claiming relief. The buyer rejected a supply price requested by the seller.

In June 2015, the seller informed the buyer that it would no longer be able to supply services and requested performance relief, citing the Hovensa closure. Performance relief was rejected by the buyer as being 'exhausted' once the new supply arrangement was notified to the buyer and performance had continued. The seller maintained its right to relief but agreed to continue performing until July 2015.

At first instance, upheld on appeal, the court concluded that the seller was not entitled to rely upon the Hovensa closure to effectively terminate its obligation to perform in July 2015. Waiver by election applied and the right to terminate had been lost. The court therefore ordered that the seller specifically perform its obligations under the contract.

## **What did the court decide?**

### **Waiver by election**

The Privy Council corrected a straightforward error of application which had prevailed at first instance and upon domestic appeal. A waiver by election occurs where a party is entitled to alternative inconsistent rights and, with knowledge of the facts giving rise to the alternatives, acts in a manner consistent with relying upon one of them. An election, once made, is final and irrevocable.

Waiver by election will only apply where there are two inconsistent rights; the adoption of one necessarily entails forsaking the other. This was not so under the 2014 agreement. Here the seller was afforded a contractual right to performance relief where the terms of the clause were engaged. This right was not a right to terminate the contract, but a right to suspend or reduce performance without liability. There was no inconsistency between continuing to perform via Antiguan facilities and later ceasing supply on account of the Hovensa closure. These decisions had no effect on the existence of the contract nor upon the parties' future obligations, contrasting with a genuine right to terminate.

It must be remembered that proprietary or conduct estoppels can operate even where waiver does not. The outcome might have been different if the seller was estopped from relying upon its right to performance relief.

### **Unjust enrichment**

Under the first instance and appellate judgments, the buyer had received payment of liquidated damages for the seller's failure to perform. This award was reversed by the board, and the seller requested restitution of the value of fuel transferred pursuant to a specific performance order made below with interest. The board reaffirmed the inherent jurisdiction of appeal courts to order restitution, including the payment of interest.

As a statutory entity, the buyer sought to argue that it had retained no benefit from the seller, with any benefit passed on to customers. If the seller had not been ordered to continue to supply the buyer, the additional cost the buyer would have incurred for market rate fuel would have been passed on to customers. Thus, the benefit of a lower fuel price was not retained but passed on to customers. Further, the buyer sought to argue that whereas paying a higher price *at the time of supply* would have engaged the customer surcharge in the by-laws to cover the cost, the same would not apply if it were required to make repayment post-appeal.

The board held that a change of position defence is not restricted to changes taken *in reliance* on the receipt of a benefit. It is sufficient that receiving the benefit has simply *caused* the change of position. The board accepted that a body's inability to recoup losses could provide a basis for refusing restitution. However, in this case the board held that because the buyer could amend its by-laws to recoup its loss its position had not sufficiently changed to afford a defence. This is tantamount to finding that, because the buyer had the ability to recoup its loss, it was not worse off for the purposes of change of position.

**Case details:**

- Court: Judicial Committee of the Privy Council
- Judges: Lord Kerr, Lord Briggs, Lord Sales, Lord Hamblen and Lord Leggatt
- Date of judgment: 12 October 2020

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