IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C. L 1993/L081

BETWEEN	LUBRICANTS (DISTRIBUTORS) LTD.	PLAINTIFF
AND	PERRY GAYLE	FIRST DEFENDANT
AND	MERRICK GAYLE	SECOND DEFENDANT

Mr. S. Shelton instructed by Messrs. Myers Fletcher and Gordon for Plaintiff

Mr. Dennis Morrison Q. C and Ms. George instructed by Messrs. Vaccianna and Whittingham for Defendants.

Heard : September 21,22 1998, February 1, 2, 3, 12; March 4, November 2, 1999

HARRISON J

Trial of this matter commenced in September of 1998 but had to be adjourned on several occasions for a number of reasons. Finally, on the 4th March 1999 I completed hearing the evidence and reserved judgment. I must apologize however, for the delay in handing down the judgment but this could not be avoided as I was on vacation leave during the Easter term.

Introduction

The plaintiff company is a distributor of petroleum products but it was not until 1991 that it began distributing fuel. In that year, the plaintiff was associated with at least five (5) National Service Stations and a supply agreement was executed between Petroleum Corporation of Jamaica ("Petro Jam") and itself in order to gain access to the refinery. Subsequent to the grant of the licence, National Fuels and Lubricants was incorporated and the plaintiff assigned its access to this company.

On the 1st July 1991, National Fuels and Lubricants Ltd placed an advertisement in the "Daily Gleaner (Exhibit 9) inviting "operators of all dealer owned service stations Island-wide" to purchase

their fuel and lubricants from "National". This invitation was also open to persons who were interested in establishing service stations.

The evidence given on behalf of the plaintiff reveal that the first defendant responded to the advertisement. Roy D'Cambre, managing director of the plaintiff company had discussions with him and after several meetings they eventually finalised an oral agreement for the establishment of a "National Service Station" at Southfield, St. Elizabeth.

The defendants on the other hand, claimed that no agreement was made between the parties and on May 2nd, 1992, a service station was opened by the first defendant at Southfield under the trade name of Petro South with"Pet Com" being the suppliers of fuel.

As a consequence, the plaintiff brought this action against the defendants for breach of contract and is seeking to have damages awarded for the breach.

The Pleadings

The Statement of Claim

The plaintiff alleges inter alia:

> "……
>
> 3. In or about the month of July, 1991 the Plaintiff and the Defendants entered into an oral contract whereby it was agreed that in consideration of the Plaintiff:
>
> (a) assisting the defendants in obtaining the necessary permits from the then Petroleum Filling Board to operate a Petroleum Filling Station at Southfield in the Parish of St. Elizabeth;
>
> (b) at its own expense, providing the necessary legal representation at the hearing of all necessary applications and appearances before the Petroleum Filling Board;
>
> (c) procuring all the equipment (e.g. Pumps, underground storage tanks and a compressor) necessary for the operation of a retail petroleum outlet;
>
> (d) furnishing technical, supervisory and practical services in respect of the

establishment of the plant;

(e) furnishing an agreement between the plaintiff and themselves that the said defendants would procure all their stocks of petroleum products from an established distributor, to wit, the Plaintiff, which is a condition precedent to Petroleum Filling Board considering and granting the permit;

the defendants would purchase all their stock i.e fuels, tyres and lubricants from the plaintiff for a minimum of three years in the first instance.

4. The plaintiff in pursuance of the performance of its obligations to the defendants under the aforesaid agreement, provided legal representation for the defendants to apply for and procure the necessary permits from the Petroleum Filling Board, identified and procured the necessary equipment, entered into an agreement with the defendants to supply petroleum products as a Distributor of such products, and furnished technical and professional services as regards the lay-out and installation of equipment on the site.

5. In breach of their agreement, the defendants on or about the 23rd November, 1991, cancelled the order placed by the plaintiff with a supplier for petrol pumps without notice to the plaintiff. (The underlined words were deleted by virtue of an amendment to the pleadings on the 21st September, 1998.)

6. In further breach of their contract, the defendants wrongfully failed to purchase supplies of petroleum products from the plaintiff as agreed or at all, as a consequence whereof the plaintiff has suffered loss and damages.

The Defence

The defence alleges inter alia:

"2. The defendants deny that they both purported to trade under the name and style

of Petro South and aver that the 2nd Defendant at all material times, acted as the agent of the first defendant.

3. The defendants deny that they entered into a contract as alleged in paragraph 3 of the Statement of Claim or at all and further deny that there was any agreement on the matters mentioned in the said paragraph 3. The defendants aver as follows:

(A) that they had discussions with a Mr. Roy D'Cambre, the Managing Director of the Plaintiff company about the establishment of a petrol station and the supply of petroleum products to the said station.

(B) that such discussions were conducted with Mr. D'Cambre in his capacity as Managing Director of National Fuels & Lubricants Limited.

(C) that no agreement was reached or derived from the said discussions or at all.

4. The defendants deny the entire contents of paragraph 4 of the Statement of Claim.

5. The defendants deny paragraph 5 of the statement of claim and will say that the 1st defendant ordered three petrol pumps from the plaintiff on or about the 26th September, 1991 and on or about the 23rd November 1991 when the plaintiff had failed to supply the said pumps in keeping with the order, the 1st defendant cancelled the order and the plaintiff refunded the money paid by the 1st defendant to the 1st defendant on or about the 6th December, 1991.

6. The defendants deny that they breached any contract as alleged in paragraph 6 of the statement of claim and while they did not purchase any petroleum products from the plaintiff, they deny that that was wrongful or contrary to any agreement.

7. If which is not admitted, the plaintiff suffered the alleged or any loss and damage,

the same was not due to any breach of contract by the defendants as alleged in paragraph 6 of the statement of claim or at all.

8. The defendants will say that the only agreements which either of them had with the plaintiff was:
(i) that the 1st defendant requested the plaintiff to order and supply two (2) fuel storage tanks and in pursuance of this agreement paid the total price of $82,420.00 to the Plaintiff. The Plaintiff in breach of that agreement failed to deliver the said tanks to the 1st defendant and the 1st defendant had to collect said tanks directly from the supplier; and
(ii) the transaction relating to the petrol pumps referred to in paragraph 5 hereof.

9. In the premises, the defendants deny that they are liable to the plaintiff for and that the plaintiff is entitled to damages for breach of contract as alleged or at all."

Reply to the Defence

"2. Paragraph 3 of the Defence is specifically denied and the Plaintiff in reply says that the defendants and the Plaintiff's Managing Director Mr. Roy D'Cambre on behalf of the Plaintiff arrived at a firm agreement in the terms set out in paragraph 3 of the Statement of Claim. The ordering of the pumps by the plaintiff on behalf of the Defendants constituted a part performance of the said Agreement.

3. In reply to paragraph 5 of the Defence, the Plaintiff says that the Defendant cancelled their order for the three (3) pumps on the 23rd November 1991, well within the period of three (3) months, which was the period of time that the Plaintiff had advised the Defendants would be the estimated time for delivery. The cancellation of the said order was in breach of the agreement that the defendants had with the Plaintiff.

4. In reply to paragraph 7 of the Defence, the Plaintiff says that pursuant to the agreement between the parties the plaintiff gave the defendants a letter of undertaking to supply them with petroleum. This letter of undertaking was a pre-requisite to the Defendants being granted a Petroleum Filling Station Permit by the relevant authorities. Then in breach of their said agreement with the Plaintiff the Defendants failed and/or refused and/or neglected to purchase petroleum or petroleum products from the Plaintiff."

Assessment of the Evidence

Meetings

There is evidence led on behalf of the plaintiff which reveal that the parties met on several occasions in order to discuss the setting up of the service station at Southfield, St. Elizabeth. D'Cambre testified that he had his first meeting with the first defendant at the plaintiff's registered office in Kingston. The first defendant made the appointment to see him about the advertisement in the newspaper and said that he was interested in operating the service station under the brand name of "National". D'Cambre said he told him that the plaintiff company would assist him in obtaining a licence from the Petroleum Filling Station Board . D'Cambre also testified that he told the first defendant that the plaintiff would supply the storage tanks, fuel pumps and provide him with standard drawings for the structure and layout of the service station. D'Cambre said this meeting was a preliminary one and he had agreed to visit the proposed site in order to advise the defendants on the viability of the service station. D'Cambre said he did a traffic count in the area and also looked at competition in the area in order to determine the buying pattern of people.

D'Cambre also testified that Perry Gayle contacted him again and he met the second defendant at a luncheon at his house in Southfield. He said the second defendant told him that he was "a part of the business". According to D'Cambre, Perry told him that his father was interested in "putting Merrick into a business but he being a lay- preacher and an idiot in business, he would be the one fronting it." They went into the details of the contract at this meeting. D'Cambre said he explained to Perry that at all times he would sell gas at $1.00 per gallon below Esso's price and that he would

be taking $2.40 per gallon above the ex-refinery costs and transportation costs to be added. He also explained to him that due to the plaintiff taking a lower margin the resultant saving should be passed on to the consumer and he agreed. D'Cambre said they further agreed that :-

1. He would prepare the application to be submitted to the Petroleum Filling Station Board .
2. He would supply the necessary letter of undertaking to the Filling Station Board for the supply of fuel.
3. The company would secure a suitable manufacturer of under-ground fuel tanks and source the fuel pumps.
4. The company would provide legal assistance when needed.
5. The company would do all the maintenance on the tanks, pumps and pipe lines and oversee the installation of all the equipment.

D'Cambre said that Perry Gayle was given a copy of a supply agreement for the defendants' lawyer to look over, and for execution, but this agreement was never returned to him. He also said that whenever he asked for the agreement the first defendant told him that it was still with his Lawyers.

After the second meeting with the defendants, the first defendant telephoned him and told him that he would come in to see him in order to 'firm up' the arrangements for the service station. As a result of this conversation, a third meeting was held sometime in July, 1991, and it was at that meeting that the first defendant agreed and accepted the terms and conditions whereupon, he told D'Cambre, "let's go ahead". According to D'Cambre, it was also at this third meeting that the first defendant agreed that all the petroleum products would be purchased from the plaintiff company as this was the norm with other marketing companies. He denied that the only agreement he had with the defendants was for the supply of the fuel and storage tanks and pumps. He also said he had discussed the anticipated monthly sales for the service station with the defendants and they had arrived at a figure of 60,000 gallons minimum, per month. It was also agreed between the parties that the plaintiff company would exclusively supply the service station with all fuels and lubricants for a period of three years at the rate of $2.40 per gallon. There was also agreement for a review of the rate

per gallon.

The first defendant did not testify and no witness was called on his behalf. The second defendant admitted under cross-examination however, that he was the agent of the first defendant. He said he first met D'Cambre in early 1991 at his supermarket where D'Cambre sold him oil and lubricants. He further testified that he had no discussions with D'Cambre about the construction of a service station but was "privy" however, to the conversation between the first defendant and D'Cambre about the establishment of a petroleum service station in Southfield. He said that this discussion took place at D'Cambre's office in Kingston and that his brother spoke to D'Cambre about "the procedures of setting up a fuel station. The second defendant also testified that he was the one who went to the plaintiff's office for the first meeting. He said there could have been a telephone call leading up to this meeting. He said "At that meeting we discussed our intention, my brother and myself, plans to enter the gas station business and I would assist him with the technical part." Then he continued: " I never told D'Cambre we wanted to go into the gas station business." He said however, that his brother had asked D'Cambre to make the application to the Filling Station Board and that he would refund D'Cambre the fee of $300. He could not recall if his brother had any further discussions with D'Cambre but under cross-examination he said they might have had two or three meetings and he had spoken with D'Cambre on the telephone on several occasions concerning the service station.

The second defendant also said that he did not enter into an agreement with D'Cambre for the supply of petroleum products and neither did he have any discussions with him about operating the service station under the brand name "National". He could not say if the first defendant had spoken to D'Cambre on the telephone about the service station and neither could he say if he had offered to buy gasolene from the plaintiff. He admitted under cross-examination that he had most of the discussions with D'Cambre. He could not recall the details but he remembered that there was a discussion that once construction of the service station was completed the plaintiff would be given preference. He said he told D'Cambre that he could not make a decision before.

Purchasing of the fuel pumps and storage tanks

The fuel pumps were sourced by D'Cambre and paid for by the defendants at a cost of U.S$7,905 but the equivalent of this sum in Jamaican dollars was refunded to the defendants. D'Cambre said that the refund was made after the first defendant told him that he had a very good deal on some pumps out of Miami. D'Cambre further testified that the storage tanks were also paid for by the defendants after he had placed the order for them to be manufactured. He also said that the first defendant had asked him if he could own the tanks. He explained to him that this was not the "norm" but he nevertheless agreed to the request. He had likewise agreed for the defendants to own the fuel pumps. The normal thing was for the marketing company to own the tanks, pipe lines, valves and pumping equipment, but as they were just starting and to encourage the business this was how the defendants came to own the tanks and fuel pumps.

The second defendant testified on the other hand, that D'Cambre told them that he would purchase the pumps as he was purchasing pumps for his other service stations and it would be cheaper buying in bulk. They were expecting the pumps to arrive in early October of 1991 and when they were not delivered, they requested a refund as the deadline was not met. The second defendant maintained that it was for this reason that the refund was made by D'Cambre. As for the storage tanks, the second defendant said that the deadline was also not met, so he approached the manufacturer and was told something. A balance which was due on the tanks was paid by the defendants. They took delivery of them shortly thereafter, and their truck was used to convey the tanks to Southfield.

Granting of the permit

The defendants' application was dealt with and approved by the Petroleum Filling Station Board on the 13th August, 1991. D'Cambre said that an Attorney at Law was provided by the company on behalf of the defendants, but they had refused his services. The second defendant on the other hand, said that although D'Cambre was present in respect of applications for his other service stations, he did not provide any legal representation on behalf of the defendants. It was he who had "marshalled everything". He addressed the Board and in due course the first defendant was granted a licence to operate a service station at Southfield, St. Elizabeth. He said there was no agreement for the

company to provide legal representation at the hearing and none was provided.

There is evidence where D'Cambre said he would have supplied the necessary letter of undertaking (Exhibit 2) for the supply of fuel. The second defendant said he was aware that D'Cambre had sent a letter to the Filling Station Board but he was seeing it for the first time in Court. He was aware however, that the letter was written by D'Cambre as he had discussed the writing of it with him. He was asked:

> "Q. At time of discussion had you entered into agreement with him to supply petroleum products to the station?
> A. No"

Under further cross-examination, the second defendant testified that he could not say if there was an arrangement in place with a supplier at the time when the application came before the Filling Station Board. In correcting himself, he said there was none in place but, it is of interest to note however, that Petro South Ltd was already incorporated by the defendants at the time their application was before the Board. D'Cambre had testified that before the hearing before the Filling Station Board, the defendants did tell him that they would be using the trade name "Petro South." The second defendant agreed however, that at the hearing before the Filling Station Board, this letter was presented in support of the application to operate the service station. This is what the letter says:

July 9th , 1991

"Ministry of Mining and Energy
36 Trafalgar Rd.
Kingston 10

TO WHOM IT MAY CONCERN

We write in support of the application of Perry A. Gayle, P. O Box 12, Southfield, St. Elizabeth.

I hereby give undertaking to supply all fuels on successful completion of the applicants permits.

Thanks.
Lubricants (Dist) Ltd
Sgd. Roy D,Cambre
Managing Director."

Visits to the site and giving assistance to the defendants

D'Cambre testified that having concluded the agreement, he visited the site on several occasions. The first visit took place when the site was cleared and the building was marked out. He advised on the set back from the road and according to him, "nothing would be done unless I was called and was present. He wanted assurances on almost everything." He had charged no fees for his services as it was part of his contractual obligations. However, the first defendant began evading him after the permit was granted and was once seen dodging behind a building when D'Cambre was told that he was not in the area. He observed that construction of the service station was in progress.

Finally in May 1992, D'Cambre said he saw an advertisement in the newspaper announcing the opening of the service station under the trade name Petro South with Pet Com being the suppliers of fuel and petroleum products. He journeyed to Southfield and saw for himself that this service station was on the same site that he was working on with the defendants for the last ten months.

The second defendant said the defendants received no technical, supervisory or practical services from the plaintiff company. He said that D'Cambre was never present when the tanks were installed and a Mr. Deidrick, was the person responsible for the installation of the fuel pumps and storage tanks. He was the person who had given all the necessary advice. Norwood Miller, a retired senior civil engineer, testified that he had prepared the lay-out plan for the site. He had also prepared a location map and the service station was constructed according to the lay-out plan by the contractor Blandford Ritchie. Ritchie also testified that he was the contractor who had entered into a contract

with the first defendant for the building of the service station.

Contribution to the Health Centre

The evidence in relation to the contribution towards the Health Service is quite instructive. Here are excerpts of the cross-examination of the second defendant on this issue:

1. Q: Did D'Cambre ever tell you that if you operated station run by National you would give some of earning to Health Service?

2. A: No, not to my knowledge.

(Excerpt of meeting shown to witness. Ex. 12)

Q: Do you recall telling Board that your supplier was going to give 5c out of every gallon of gas sold?

A: Now that I have read document I say yes.

Q: Who was supplier you were speaking about?

A: The supplier could have been National. It was National run by Lubricants Distributors.

Q: When you told Board that statement, you told them with a view to influence them granting a licence?

A: Yes.

Q: At time application was made Petro South Ltd was not yet incorporated?

A: Yes.

Q: You had intended to use name Petro South in the business?

A: Yes.

The issues

Mr. Shelton, Counsel for the plaintiff, submitted that there was abundant evidence establishing the existence of a valid contract between the parties and that the plaintiff had performed its part of the bargain. Mr. Morrison, learned Queen's Counsel, for the defendants, submitted however, that the material before the court did not demonstrate sufficient certainty or clarity in respect of the alleged contract. He further submitted that if the defendants were given a specimen contract (Ex. 10) in order to obtain legal advice, then this would clearly demonstrate that there was no legally binding contract between the parties.

In my view, the undermentioned issues arise for consideration:

1. Was there an oral agreement between the parties for the defendants to purchase petroleum products from the plaintiff in consideration of the plaintiff:

(a) assisting the defendants in obtaining the necessary permits from the then Petroleum Filling Board to operate a Petroleum Filling Station at Southfield in the Parish of St. Elizabeth;

(b) at its own expense, providing the necessary legal representation at the hearing of all necessary applications and appearances before the Petroleum Filling Board;

(c)procuring all the equipment (e.g. Pumps, underground storage tanks and a compressor) necessary for the operation of a retail petroleum outlet;

(d) furnishing technical, supervisory and practical services in respect of the establishment of the plant;

(e) furnishing an agreement between the plaintiff and themselves that the said defendants would procure all their stocks of petroleum products from an established distributor, to wit, the Plaintiff, which is a condition precedent to Petroleum Filling Board considering and granting the permit;

2. If there was an agreement, did the parties intend to create legal obligations?

3. If the defendants failed to execute the written supply agreement, is this evidence that there was no agreement between the parties?

Now, it is a general principle of contract law that parties may reach agreement on broad matters of principle, but leave important points unsettled so that their agreement is incomplete. A problem arises however, where the agreement is too general to be valid in itself and is dependent on the making of a formal contract. The situation may also arise where the parties have in fact completed their agreement so that the execution of a further formal contract, though desirable, is not essential. The words of Parker J. in Von Hatzfeldt - Wildenburg v Alexander (1912) 1 Ch284 are quite instructive where he said:

> " It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed will in fact go through. In the former case there is no enforceable contract either because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the mere formal document may be ignored..."

At paragraph 2-082 of Chitty on Contracts 27th Edn. Vol. 1 the authors state:

> "The effect of a stipulation that an agreement is to be embodied in a formal written document depends on its purpose. One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, until the terms of the formal agreement are agreed and the document is duly executed in accordance

with the terms of the preliminary agreement (e.g by signature). An alternative possibility is that such a document is intended only as a solemn record of an already complete and binding agreement."

The issue in relation to the price of the fuel was also raised by Mr. Morrison. He submitted that there was uncertainty regarding the price since no mention was made of it in the written supply agreement. Mr. Shelton submitted however, that the defendants knew of the rate per gallon before the supply agreement was given to them so, they could not complain that there was any uncertainty.

The principle of certainty of terms of the contract is set out at paragraph 2-100 of Chitty (supra). It is stated inter alia:

"…..the requirement of certainty could result in the striking down of agreements intended by business-men to have binding force. The courts are reluctant to reach such a conclusion particularly where the parties have acted on the agreement. As Lord Wright said in Hillas & Co. Ltd v Arcos Ltd (1932) 147 LT 503 at p. 514:

" Businessmen often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law: *verba ita sunt intelligenda ut res magis valeat quam pereat".* That maxim however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as they are appropriate implications of law."

Findings

I have had the benefit of seeing and hearing the parties and I have assessed their demeanour. I find D'Cambre to be an honest, truthful and forthright witness. He did in fact err when he said it was the first defendant he had first met and spoke to on different occasions, but I hold that this error has not affected his credibility. On the other hand, I do not believe the second defendant. He has not been frank with the Court.

The following are my findings of fact:

1. An oral agreement was concluded in July, 1991 between the parties that the defendants would have purchased all their petroleum products (fuels and lubricants) from the plaintiff for a minimum period of three years at the rate of $2.40 per gallon.

2. A written supply agreement was given to the defendants for perusal and execution but it was never returned to the plaintiff.

3. D'Cambre had erred when he referred to the first defendant meeting with him initially, since he had pointed out the second defendant in court as the person with whom he had the first meeting and with whom he had discussions concerning the establishment of the service station from time to time.

4. The second defendant was the person who had responded to the advertisement concerning the establishment of the service station in Southfield, St. Elizabeth.

5. The second defendant was the agent on behalf of the first defendant.

6. The second defendant was the person with whom D'Cambre had most of the discussions concerning the establishment of the service station and it was through him that D'Cambre met the first defendant at their second meeting in Southfield.

7. The first defendant had admitted to D'Cambre that he was "a part of the business" in the

establishment of the service station and that he also had discussions with D'Cambre concerning this venture.

8. The plaintiff had prepared and submitted the defendants' application to the Petroleum Filling Station Board.

9. The plaintiff's managing director, Roy D'Cambre had advanced the application fee on behalf of the defendants but payment of the fee was refunded to D'Cambre.

10. D'Cambre had given the defendants a letter of undertaking to supply the service station petroleum products and this letter had assisted the defendants in obtaining the grant of the permit by the Petroleum Filling Station Board.

11. D'Cambre had not offered to present this letter on behalf of the defendants as a friend.

12. Although the minutes of the Board meeting, (Exhibit 12) show that both defendants were present and that the presentation was made by the second defendant, D'Cambre had offered legal representation to the defendants but they had refused it.

13. D'Cambre had given technical advice as to the setting up of the service station. He had the experience and necessary skills to give such advice as he had worked with Shell Co. (W.I) for some years as an operational Superintendent.

14. D'Cambre had visited the site on several occasions. His first visit was from the clearance of the land and the marking out of the building. He had advised on the set back from the road and he had given the defendants a copy of his blue print for other National service stations to assist them in the layout of the service station. He had gained knowledge from Shell Co (W.I) and from the various courses he had attended in Venezuela ,concerning the set back for service stations and the installation of fuel pumps.

15. D'Cambre had sourced and ordered the fuel pumps for the defendants overseas but he had to refund the sum of money paid by the defendants when they told him that they had sourced cheaper pumps coming out of Miami and which were destined for Haiti.

16. D'Cambre had also sourced and ordered the fuel tanks for and on behalf of the defendants.

17. D'Cambre had allowed the defendants to own the fuel pumps and storage tanks although it was customary for the marketing company to own them.

18. The plaintiff did not supply the compressor.

19 The offer in relation to the Health Service contribution by National Fuels and Lubricants Ltd was used by the defendants to influence the Board in granting the licence.

20. The defendants took the benefit of D'Cambre's expertise, went to another supplier and began trading under the name Petro South on the 2nd May, 1992.

Conclusion

The plaintiff has satisfied me therefore, on a balance of probabilities that there is indeed an oral enforceable contract between the parties for which there was part performance and valuable consideration given. In the circumstances, the defendants are in breach of this agreement since they failed to purchase their fuel and lubricants from the plaintiff for the minimum period of three years. The plaintiff is therefore entitled to damages.

Damages

I now turn to the award of damages. In Chitty on Contracts 24th Edition, at paragraph 1551, the learned authors state inter alia:

"Damages for breach of contract are a compensation to the plaintiff

> for the damage, loss or injury he has suffered through that breach. He is, as far as money can do it, to be placed in the same position as if the contract had been performed...."

Exhibit 11 was agreed upon in order to assist the Court in the calculation of monthly supplies of fuel. Having regards to these figures, Mr. Shelton submitted that the plaintiff is entitled to the award of special damages which is set out in the amended particulars. They are as follows:

1. Sale of 787,331 gallons of fuel at $2.40 per gallon between May 1992 and May 1993 (inclusive)= $1,889,594.40

2. Sale of 609,300 gallons at $5.00 per gallon of profit for period January 1994 to May 1995 = $3,046,500.00.

Total $4, 936,094.40

In the alternative, he submitted that the least the company would be entitled to, was the supply of 1,396,631 gallons at $2.40 per gallon for a period of three years amounting to $3, 351, 914.00. On the other hand, if the Court was of the view that the evidence adduced was not sufficiently specific to ground the claim in special damages, then the court would be entitled to make an award under general damages for breach of contract.

On the question of damages, Mr. Morrison Q.C argued that if the Court accepted the plaintiff's evidence that there was a contract to supply fuel at $2.40 of profit per gallon for three years, then it was clear from the plaintiff's evidence that there would be an additional obligation of providing marketing services as well as maintenance and these services could only be provided at a cost. He submitted that if the Court were to award damages based on that sum per gallon the plaintiff would be put in a better position than he would have been if the alleged contract had been performed.

The evidence is quite clear that there was no discussion nor agreement between the parties regarding the $5.00 per gallon increase. This sum ought not to be included in the calculation when quantifying

the damages. In light of my findings, I am constrained to apply the rate of $2.40 per gallon which represents the plaintiff's profit margin. When this rate is applied to the overall figure of 1,396,631 gallons, the sum for the three (3) years period would be $3, 351, 914.00. Should this sum be reduced? Mr. Morrison Q.C had submitted that the final figure ought to be reduced since the plaintiff's managing director conceded that the plaintiff was obliged to provide marketing services and maintenance of the equipment. It is my considered view however, that this figure should not be reduced. My reasons are two-fold. Firstly, no evidence was led as to the exact cost of marketing services so I would be hesitant in applying an arbitrary figure. Secondly, so far as maintenance fees are concerned, one needs to be reminded of the evidence. Clause 4 of Exhibit 10 (specimen copy of the standard supply agreement) states as follows:

> "4. The title and property in the said equipment shall remain in NATIONAL, who shall be solely responsible for the repair, maintenance, replacement and removal thereof, provided that normal day - to - day maintenance, repair and replacement of parts that do not require the services of a mechanic or any damage caused thereto by negligence of dealer, his employees or agents, it is expressly agreed dealer shall be entirely responsible."

The supply agreement was never executed by the parties so no reliance can be placed upon clause 4. There is evidence coming from D'Cambre however, which states that the plaintiff would be responsible for all maintenance on the tanks, pumps and pipe lines. But, he goes on to say later, "the defendants having bought the tanks and pumps outright I would have no obligation to service them." According to him, this would be the subject of another negotiation because the defendants could not carry out this function. He had anticipated this and had expected that there would have been terms but it was never finalized.

Let me now turn to question of interest. The plaintiff would be entitled to interest on the sum due and it was agreed that the rate of 19% per annum would be applicable. It was further agreed that interest would accrue from the 1st May, 1995 but learned Queen's Counsel, Mr Morrison, submitted

that withholding tax at the rate of 33⅓% should be applied to the interest due. This maybe so, but it is my considered view that this would be better dealt with by the relevant authorities responsible for income tax.

Conclusion

There shall be judgment in favour of the plaintiff in the sum of $3,351,914.00 with interest thereon at the rate of 19% per annum from the 1st day of May 1995 up to today. There shall be costs to the plaintiff to be taxed if not agreed.