

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2013-00449**

BETWEEN

PATRICK GORDON

Claimant

AND

TRINIDAD AND TOBAGO NATIONAL PETROLEUM MARKETING COMPANY LTD

Defendant

Before the **Honourable Madame Justice Mira Dean-Armorer**

Appearances:

Mr. Seunath S.C. and Mr. Neebar, attorney-at-law for the Claimant

Mr. Bronock Reid, instructed by Ms. Sanika Tyson, attorneys-at-law for the Defendant

REASONS

Introduction

1. The Claimant, Patrick Gordon, was the operator of a service station situated at Guapo, Point Fortin. The Defendant, is a state owned Company entrusted with the Marketing of Petroleum Products. On April 7, 2009, the Claimant entered a Written Agreement with the Defendant.¹
2. On the February 4, 2013, the Claimant instituted these proceedings, seeking damages for the breach of a Dealership and Supply Agreement with the Defendant.

¹ The Dealership and Supply Agreement was exhibited to the Defendant's Defence and marked 'A'

3. After hearing the evidence on behalf of both parties and considering their Written Submissions, I delivered a *viva voce* decision, dismissing the Claim. My reasons for so doing are set out below.

The Evidence

4. The Claimant filed three witness statements: his own, that of Mr. Dev Lester Ramnath, the Manager of the Service Station, and of Jael Ogis, Administrative Assistant. ²
5. The Defendant relied on 3 witnesses. They were: Rawley Mohammed, Project Auditor, NP, Ann Margaret Baboolal-Hector, Retail Sales Representative, NP and Hezron Phagoo Maintenance Superintendent NP. These witness statements were filed on June 3, 2014.

Facts

6. In the year 1996, Jonathan Gordon, father of the Claimant, Patrick Gordon began operating a gas station in Gonzales Village Point Fortin. The gas station came to be known as "*the Gordon Gas Station*".
7. The operation of the Gordon Gas Station was taken over by the Claimant. He held a Retail Marketing Licence which was issued by the Ministry of Energy, upon payment of the prescribed annual fee to the Comptroller of Accounts. The Claimant produced a copy of his application for the retail Marketing Licence and the receipt for the year 2012. ³
8. Mr. Gordon was also party to a Dealership and Supply Agreement with the Defendant, Trinidad & Tobago National Petroleum Marketing Company Limited (NP)⁴.

² The Witness Statement of Patrick Gordon and Dev Lester Ramnathsingh were filed on June 3, 2014 while the witness statement of Jael Ogis was filed on June 25, 2014

³ See the Exhibit A to the Witness Statement of the Claimant, Patrick Gordon

⁴ The Dealership and Supply Agreement dated April 7, 2009 exhibited as "A" to the Defence of NP.

9. The purpose of the agreement was stated at article 2.1, which stipulates:

“2.1 The purpose of this Agreement is to create and define the contractual relationship which will enable the Dealer to use the NP Brand Image, Proprietary Marks and to purchase Motor Fuels and NP Supplied Products, and to use the Location to conduct and operate the Business. “

10. At article 7.1.3 of the Agreement, Patrick Gordon, as Dealer, agreed to exclusivity of supplies in these words:

“The Dealer shall purchase exclusively from NP, the Dealer’s total requirements of Motor Fuels and NP Supplied Products and shall not stock, sell, advertise or permit to be stocked or sold or advertised at or from the Business any motor fuels or products other than NP’s Motor fuels and NP Supplied Products without prior written consent of NP...”

11. At article 15.1, the parties agreed on termination in these words:

“...NP may terminate the Agreement at anytime forthwith in any event specified in 15.1.1, 15.1.2 or 15.1.3 or in the event that the Lease is terminated in accordance with the terms therein. In any of the events specified in paragraphs 15.1.4 to 15.1.12 NP may terminate the Agreement after 14 days of written notice of termination (provided the Dealer fails to cure the breach within the 14 day-notice period)

12. Article 15.1.4 to 15.1.12 comprises a menu of events which were agreed to constitute non-compliance on the part of the Dealer. Of relevance to these proceedings, was article 15.1.4.

At Article 15.1.4, under the heading of “Non-Compliance” (Main Obligations), one finds one of the events which would entitle the Defendant to terminate the Agreement after having given notice of termination. Article 15.1.4 provides:

“If the dealer otherwise neglects or fails to perform or observe or comply or commits a breach of any obligations hereunder”.

13. Accordingly, by the Dealership and Supply Agreement, NP was authorized to terminate the agreement after 14 days of Written Notice of Termination where any of the events specified from 15.1.4 to 12 occur and the Dealer fails cure the breach, within 14 day period.
14. On November 19, 2011, while the Claimant was absent from the Service Station and it was being manned by the Manager, Lester Ramnathsingh, guards from the First Guard Security Company visited the Service Station and placed a chain and a pad lock on the front door of the building⁵.
15. The first issue which arose, being one of fact, was whether the First Guard Security Company was assigned by the Defendant or by the Ministry of Energy and Energy Affairs. This was part of a larger issue, as to whether the closure was at the instance of the Ministry of Energy or of NP. This issue will be resolved in the discussion, which follows.
16. Following the closure of the Service Station, the Manager, Mr. Ramnathsingh upon instructions from the Claimant, attempted to obtain information as to the reason for the closure of the service station. On November 23, 2011, Mr. Ramnathsingh made enquiries at the NP South Office to the Ministry of Energy. Mr. Ramnathsingh was unsuccessful in obtaining information from the Defendant.

⁵ See paragraph 8 of the Witness Statement of the Claimant

17. This was confirmed by Ms. Hector, Retail Sales Representative for the Defendant. Ms. Hector confirmed that between November 21 and November 25, 2011, Mr. Ramnathsingh visited the South Sales Office. It was her evidence that she had received an e-mail dated November 21, 2011 from Retail Sales Superintendent Ramlal Dhoray, indicating that the Service Station would be locked down by the Ministry of Energy and the Customs Department. The contents of the e-mail are set out below:

“Good morning Angie

*Further to our conversation on Saturday 19th November, 2011, please note that I received a telephone call from Mr. Fraser from the MEEA advising that a joint investigation with Customs & Excise was currently taking place as a result of some issues. However, the nature of the **issues** was not revealed to me.*

I was further advised that the station was going to be locked down.

Please be advised.

Regards,

Dhoray”⁶

18. In the days that followed, Mr. Ramnathsingh continued his enquiries. On the November 24, 2011 in particular, he called NP at Point-a-Pierre, in order to enquire about deliveries for the Service Station. He was told that there were problems with deliveries as a result of industrial action.⁷
19. Mr. Ramnathsingh testified that he visited Mr. Myers, Permanent Secretary, Ministry of Energy on December 14, 2011. He made several unsuccessful repeat visits. Mr.

⁶ Exhibited as “A.H.1” to the witness statement of Ann Margaret Baboolal Hector.

⁷ See paragraph 5 of the Witness Statement of Dev Lester Ramnathsingh.

Ramnathsingh eventually met Mr. Myers on December 22, 2011. However, on that day, he received no information.

20. It was common knowledge that a delivery of fuel was made on January 28, 2012, but that the Claimant stated that he had not ordered any fuel and refused to pay for the fuel⁸.
21. Thereafter, on February 02, 2012, Ms. Hector received an e-mail from Mr. Dhoray which stated:

“ Ann,

I just received an instruction from Ms. Cattine. She will like you to get in touch with Mr. Gordon letting him know that he can now order product and reopen the station.

*Dhoray”.*⁹

It was Ms. Hector’s evidence that she immediately called the Claimant and advised him that permission was given to re-open the service station.¹⁰

22. In February, 2012, the Defendant assigned their Project Auditor, Mr. Rawley Mohammed, to conduct an investigation into the operations of the Claimant’s service station.¹¹
23. Mr. Mohammed visited the Claimant at his Cap-de-Ville office on February 23, February, 2012 and requested inventory records, purchase records, cheque payments and other related documentation. The Claimant supplied the requested documents but was unable to supply the inventory records which were locked in the service station.

⁸ See paragraph 10 of the witness statement of Ann Maragret Baboolal-Hector

⁹ Exhibit “A.H.5” of the witness statement of Ann Margaret Baboolal Hector.

¹⁰ See paragraph 14 of the witness statement of Ann Margaret Baboolal Hector.

¹¹ See paragraph 3 of the Witness Statement of Rawley Mohammed

24. On February 22, 2012 Mr. Mohammed met with the Claimant. Mr. Mohammed also met with Mr. Lester Ramnathsingh and learnt of an off-site storage tank in Cap-de-Ville. Mr. Mohammed accompanied Mr. Ramnathsingh to the Cap-de-Ville site, which was adjacent to Mr. Ramnathsingh's home. Mr. Mohammed stated that he was able to conclude that by storing diesel in an unapproved off-site tank, Mr. Ramnathsingh was in contravention of the ***Petroleum Act Chap 62:01***.¹²

25. Mr. Mohammed prepared a report ("the Audit Report") which was exhibited as "R.M.2" to his witness statement. In his Audit Report, Mr. Mohammed provided this "*Summary of Findings*"

"

- *Between August and September, 2011 Patrick Gordon Service Station sold approximately 113, 712 liters more diesel than it purchased from NP.*
- *The Manager of Patrick Gordon Service Station appeared to be in breach of Part II and III of the Petroleum Act 62:01*
- *Certain RTW's make unauthorized deliveries at the Cap-de-Ville site.*
- *Patrick Gordon was in breach of Article 13.1 of the NP Sale of Motor Fuels and NP Supplied Products Agreement",¹³*

On the final page of his Audit Report, Mr. Mohammed made these recommendations:

¹² See paragraph 7 of the Witness Statement of Rawley Mohammed

¹³ See R.M.2, annexed to the Witness Statement of Rawley Mohammed filed herein on June 3, 2014

“RECOMMENDATIONS

“1. The dealer and the manager of Patrick Gordon Service Station should be requested to respond to the findings/observations in the report before final determination is made on the appropriate course of action that NP should take.

2. NP should seek to have mandatory tracking software (GPS) for all vehicles used in the transport of fuel.”¹⁴

26. Mr. Mohammed indicated that, in making his assessment, he considered a number of factors which could account for volume disparities in output fuel. Such factors include faulty equipment, storage and environmental elements. Such factors, according to Mr. Mohammed, would lead to miniscule volume discrepancies.¹⁵

27. On August 06, 2012, the Defendant wrote to the Claimant, in order to inform him that the Defendant had initiated an investigation into the operation of the service station. The letter, was signed by the then Chief Executive Officer of the Defendant, and requested the Claimant’s specific response on the listed items. The full text of the letter is set out below:

“Dear Sir,

We write to you in connection with the subject service station which you currently operate and wish to advise you of the following:

1.It was brought to the attention of the Company that the Ministry of Energy and Energy Affairs (MOEEA) together with the Customs and Excise Department

¹⁴ See R.M.2, annexed to the Witness Statement of Rawley Mohammed.

¹⁵ See paragraph 8 of the Witness Statement of Rawley Mohammed filed on June 3, 2014

had launched an investigation at the service station and as a result the site was closed.

2. The company also initiated an investigation into the operations of the service station and completed an internal investigation to which we require the following specific response from your good self.

- i. Kindly advise the Company as to the circumstances which would have resulted in your service station selling approximately 113, 712 litres of fuels in excess of your purchase from NP during the period 2011 August to 2011 October.*
- ii. Why the service station was unable to supply our personnel with your records on monthly gross sales and purchases.*
- iii. It has come to the Company's attention that the manager of the subject service station was allegedly involved in the purchase and storage of similar products sold at the subject service station. There was also no evidence that the storage tank into which the product was being dispensed was approved by the requisite Authorities for fuel storage. As the employer of this individual therefore, the Company is requesting your comments on these matters.*

In this regard, the Company requests to receive your response to this letter on or before 2012 August 17.

In closing, NP wishes to communicate its concerns about the negative impact on its customer base as a result of the closure of the service station.

Kindly sign the attached copy of this letter confirming its receipt...¹⁶

20. It was the Claimant's evidence that he responded to this letter by way of a letter dated September 03, 2012¹⁷. The Claimant was cross-examined extensively as to the authenticity of this letter, which was denied by the Defendant. The ensuing issue of fact will be resolved in the discussion below.
21. On November 01, 2012, the Defendant wrote to the Claimant in order to provide notice of termination in accordance with Article 15.1.4 of the Agreement. The terms of this letter are set out below:

"Dear Mr. Gordon,

Reference is made to the Agreement between yourself and the Trinidad & Tobago National Petroleum Marketing Company Limited (NP) dated 2010 April 07 for the Supply of NP Products to a Branded Motor Fuels Forecourt at Gonzales Village, Guapo, Point Fortin.

It has been noted that an investigation revealed that between August and October 2011 the said service station sold approximately 113,712 litres more diesel than it purchased from NP.

Article 7.1.3 states "the Dealer shall purchase exclusively from NP the Dealer's total requirements of Motor Fuels and NP Supplied Products and shall not...sell...any motor fuels or products other than NP's Motor Fuels and NP Supplied Products without the prior consent of NP..."

¹⁶ See Exhibit 'C' to Witness Statement of the Claimant

¹⁷ See paragraph of the Claimant's witness statement, exhibit "D"

Having regard to the aforementioned and in accordance with Article 15.1.4. NP hereby gives you notice of termination.

Please be guided accordingly...¹⁸

Issues

22. Two issues arose for my consideration:

- firstly whether the Defendant had acted in breach of the Agreement by effecting the closure of the Claimant's service station on November 19, 2011; and
- whether the Defendant had acted in breach of the Agreement by bringing about its termination

23. The resolution of these issues depended on the Court's findings of fact on the following issues:

(i) Whether the Claimant's service station had been closed on November 19, 2011 by the Defendant or by the Ministry of Energy

(ii) Whether there had been miscalibration of the diesel pumps at the service station and whether this led to the volume discrepancy which was found by Mr. Rawley Mohammed who conducted an investigation on behalf of the Defendant.

(iii) whether the Claimant ever responded to the Defendant's letter of August 06, 2012.

Discussion and Determination of Issues

¹⁸ See exhibit E to the Witness Statement of the Claimant.

24. This Claim was built on the allegation that the Defendant, on November 19, 2011, placed guards at the service station of the Claimant and locked it down. The Defendant contended that the admitted closure of the Gordon Service Station was carried out by the joint effort of the Ministry of Energy and the Customs and Excise Division.
25. The only evidence which was led by the Claimant suggested that the Claimant's manager, Mr. Lester Ramnathsingh came to the Service Station at 7:00p.m. on November 19, 2011 and found three security guards stationed at the service station and the front door of the station was chained and padlocked.
26. Mr. Ramnathsingh did not make any enquiries of the guards but seemed to have assumed that they were placed there by the Defendants.
27. He was cross-examined rigorously on this issue and agreed that the Service station had been closed by customs officials, but stated that the Defendant's officials were present, as well as those of the Ministry of Energy, Customs officials.
28. In the course of cross-examination, it was brought to Mr. Ramnathsingh's attention that he had omitted to include such details in his witness statement and it was put to him that the details were omitted because they were fabricated.
29. In his witness statement, Mr. Ramnathsingh had not included, the officials who were present at the closure of the service station. His attempt to identify the officials under cross-examination, appeared to me to be an afterthought, fabricated to meet the demands of the questions in cross-examination. It was therefore my view that Mr. Ramnathsingh's evidence in this regard was unreliable ought to be rejected.
30. On the other hand, the Defendant produced documentary evidence to prove that the closure had been effected at the direction of the Ministry of Energy.

31. In her witness statement, Ms. Ann Hector, Retail Sales Representative of the Defendant, indicated that she became aware of the closure of the service station, two days after the event. Her knowledge came about by way of an e-mail which had been copied to her from Mr. Dhoray. The purpose of the email was to inform Retail Network Manager, Ms. Angelita Cattine, that a joint investigation had been undertaken at the Ministry of Energy and the Customs and Excise Division and that the station was going to be locked down. The full text of the email is set out below:

*“ From: Ramlal Dhoray
Sent: Monday, November 21, 2011 8:37AM
To: Angelita Cattine
Cc: Ann Hector; Retail
Subject: Patrick Gordon – Guapo
Importance: High*

*Good Morning Angie
Further to our conversation on Saturday 19th November 2011, please note that I received a telephone call from Mr. Fraser from the MEEA advising that a joint investigation with Customs & Excise was currently taking place as a result of some issues. However, the nature of the issues was not revealed to me. I was further advised that the station was going to be locked down.
Please be advised.*

*Regards
Dhoray”¹⁹*

32. The Defendant also produced contemporaneous documentary proof by its letter of August 06, 2012. The opening paragraph of that letter referred to an investigation by the Ministry of Energy and the Customs and Excise Division. The author, the Chief Executive Officer of the Defendant notes:

¹⁹ See Exhibit A.H.1 to the Witness Statement of Ann-Magaret Baboolal-Hector.

“It was brought to the attention of the Company that the Ministry of Energy and Energy Affairs together with the Custom and Excise Dependant had launched an investigation at the service station and as a result the site was closed”²⁰

33. The Claimant did not contradict the suggestion that the service station was closed by the joint initiative of the Ministry of Energy and the Customs and Excise Division. Their letter of September 03, 2012, the authenticity of which was in issue, recorded that efforts were made to obtain information from Ms. Hector and Mr. Ramlal Dhoray. The Claimant noted in the letter that both Ms. Hector and Ms. Dhoray informed him that they were not aware of the situation.
34. The Claimant did not proceed to indicate that he had any ground to suspect that the Defendant had in any way been involved in the closure of the service station.
35. Accordingly it was my view and I found as a matter of fact, that the contemporaneous documentation does not support the contention that the Claimant’s service station had been closed by the defendant. On the contrary, the documentation suggests that the employees of the defendant were totally in the dark about what was transpiring at the time of closure, and that closure was effected by the joint effort of the Customs Excise Division and the Ministry of Energy and Energy Affairs. No blame could therefore be ascribed to the Defendant, for the closure of the Claimant’s service station on November 19, 2011.
36. I turned next to consider whether the Defendant was justified, under the Retail and Supply Agreement, to have terminated the agreement or whether the Defendant had breached the Agreement by its letter of termination.

²⁰ The letter from the Defendant to the Claimant dated August 6, 2012 was exhibited to the Claimant’s Witness Statement as P.G.4.

37. The decision of the defendant to terminate the agreement was based on the Audit Report of Mr. Rawley Mohammed and on the two-fold finding that the Claimant's sale of diesel fuel exceeded what had been purchased from the defendant company and that certain RTW's made unauthorized deliveries to a Cap-de-ville site. The Claimant responded by saying that the pumps were miscalibrated.
38. There was extensive cross-examination on the issue of calibration. It emerged during the cross-examination of both the Claimant and of Mr. Ramnathsingh, that the defendant responded to the request for re-calibration and that the pumps had been re-calibrated in June of 2011.
39. I accept the evidence of Mr. Rawley Mohammed that he took into account factors such as faulty equipment and environmental elements, but that these factors yielded miniscule discrepancies.
40. Accordingly, it was my view that on a balance of probabilities, there was no on-going miscalibration and even if there were such miscalibration, it would have resulted in miniscule volume discrepancies. I therefore accept on a balance of probabilities that the Claimant's service station was selling more diesel than it had purchased from the defendant, leading inexorably, to the conclusion that the Claimant was purchasing from another source in breach the exclusivity clause of Article 7.13 of the Dealership and Supply Agreement.
41. It was my view that in effecting the termination of Agreement, the Defendant acted according to the provisions of the Agreement.
42. Mr. Rawley Mohammed, in his Audit Report, recommended that Mr. Gordon should be requested to respond to the findings/observations before a final determination was made

by the defendant (See the Audit report). In accordance with Mr. Mohammed's recommendation, the Defendant in its letter of the 6th August, 2012, included this request:

"In this regard the company requests to receive your response to this letter on or before 2012 August 17"²¹

43. The Claimant produced an unsigned letter dated the 3rd September, 2012. The unsigned letter was annexed to his Statement of Case and the Witness Statement.
44. The Claimant was subjected to intense cross-examination on the letter. Under cross-examination he could not at first recall the date of the letter. He could not explain why it was unsigned and he could not prove that it had been delivered to the Defendant.
45. It was my view that on a balance of probabilities the letter of the 3rd September, 2012 was generated after the event and lacks authenticity. This finding implies that the Claimant failed to avail himself of the opportunity to explain the apparent breaches. I considered that even if I was wrong in my finding that the letter of September 3, 2012 lacked authenticity, the Claimant failed to abide by the deadline set for response, that is to say, by August 17, 2012.
46. Having had no response from the Claimant, the Defendant was entitled to conclude that the findings of Mr. Rawley Mohammed were justified, that the Claimant was selling more fuel than he purchased from the Defendant and that fuel from an extraneous source was probably being stored at the premises of Mr. Ramnathsingh. The Defendant was therefore justified in finding that the Claimant was in breach of the exclusivity clause of Article 7.1.3. The Claimant was therefore culpable for the non-compliance envisaged at

²¹ See P.G.4, annexed to the Witness statement of the Claimant.

article 15.1.4. This entitled the Defendant by operation of Article 15.1 and 15.1.4, to terminate the Agreement after having given the Claimant 14 days notice.

47. It was therefore my view that the Defendant terminated the Agreement, according to the terms agreed between the parties. The Claimant failed to prove a breach on the part of the Defendant and I dismissed the Claim.

Date of Delivery: August 8, 2019
Justice Dean-Armorer