JUDGMENT : The Hon Mr Justice Ramsey: TCC. 7th May 2008

Introduction

1. On 19 November 2003 Port of Tilbury (London) Limited *("Tilbury"*) entered into an agreement *("the Agreement*") to provide paper handling facilities ("the Facilities") and paper handling services ("the Services") at Tilbury Docks for Stora Enso Transport and Distribution Limited and Stora Enso Transport and Distribution AB (together "*Stora Enso"*).

2. The Agreement provided that Tilbury would provide the Services for a period of fifteen years from the commencement date and that Tilbury would be paid for the Services on the basis of a freight price per tonne of paper shipped to the Facilities.

3. The Agreement included the following provisions:
   (1) By Clause 5, the Services included unloading paper shipped to the Facilities, storage of paper at and retrieval of stored paper from the Facilities, loading of paper orders for despatch from the Facilities and provision of an electronic management system and the production of various documents and reports.
   (2) By Clause 8.1.2 Stora Enso were obliged to pay Tilbury the *"freight price"* of £13.30 per tonne of paper sent to the facilities during the *"first contract year",* which ran from 1 July 2005 to 30 June 2006.
   (3) By Clause 8.4 if the total tonnage of paper sent to the facilities in the first contract year was less than a *'minimum tonnage',* calculated in accordance with a formula set out in the clause, then Stora Enso were also obliged to pay to Tilbury £13.30 for every tonne short of the minimum tonnage which Stora Enso sent to the facilities ("the minimum tonnage payment").

4. An invoice was sent to Stora Enso dated 17 July 2006 claiming the minimum tonnage payment for the first contract year, in the sum of £1,829,574.60. It was not paid and on 27 October 2006 Tilbury commenced these proceedings against Stora Enso claiming the sum contained in that invoice.

5. There is no dispute between the parties as to the minimum tonnage of 680,000 tonnes for the first contract year nor as to the tonnage of 542,438 tonnes sent to the facilities during that year, nor that applying the rate of £13.30 per tonne gives a sum of £1,829,574.60 due to Tilbury under Clause 8.4. However, Stora Enso contends that the reason that it could not send the minimum tonnage of 680,000 tonnes was that Tilbury failed to provide the Services and so Stora Enso had to divert paper to other ports. Stora Enso puts its case in two ways. First it contends that there was an implied term relating to the operation of Clause 8.4 which provided it with a defence if the failure to provide the minimum tonnage was the failure of Tilbury to provide the Services. Secondly, Stora Enso contends that it is entitled to bring a counterclaim for damages for Tilbury's breach of the terms of the Agreement and set that off against the claim made by Tilbury for payment under Clause 8.4.

6. Tilbury applied for and obtained summary judgment in respect of the sum of £1,829,574.60 plus interest. By a judgment dated 1 October 2007 Master Fontaine held that there was no implied term as alleged by Stora Enso and that Stora Enso could not set-off its claim for damages against the sum claimed by Tilbury under Clause 8.4. I gave permission to appeal and heard the appeal on 25 April 2008.

Background

7. The application for summary judgment dated 30 April 2007 was supported by the first and second witness statements of Perry Dean Glading dated 30 April 2007 and 5 July 2007, and was opposed by the witness statements of Lars Gunner Almryd dated 27 June 2007 and Sven-Ake Johanssen dated 6 July 2007.

8. The witness statements of Mr Glading and Mr Almryd deal with the reasons why, as alleged by each party, the minimum tonnage was not shipped by Stora Enso under the Agreement. These allegations are more fully pleaded in the Defence and Counterclaim and the Reply and Defence to Counterclaim.

9. Stora Enso contend that Tilbury was in breach of the terms of the Agreement and claim damages. That claim is denied by Tilbury and it is common ground on this application that the counterclaim is not suitable for summary determination.

10. In order to understand the nature of Stora Enso's defence it is necessary to consider the allegations made by Stora Enso. Mr Almryd says that Tilbury was unable to handle the volume of cargo up to the Minimum Tonnage and expressly agreed that Stora Enso should re-route some of that cargo to other ports. He states that the fact that Tilbury was unable to carry out the Services was not a matter of controversy at the time and that the reason for Stora Enso having to re-route paper deliveries was that inability of Tilbury to provide the Services. He states that Stora Enso had more than the Minimum Tonnage available to come to the Facility and wanted at least the Minimum Tonnage to come through the Facility but the only reason that it did not was because Tilbury was unable to provide the Services. In his second statement, Mr Glading takes issue with this, and states that Tilbury complied with its obligations under the Agreement and performed the Services with reasonable skill and care but that where it was unable to perform the Services that was because of Stora Enso's failure to comply with their obligations under the Agreement.

The Relevant Contractual Provisions

11. In addition to Clauses 5, 8.1.2 and 8.4, to which I have already referred, there were also the following provisions of the Agreement, relevant to the matters which I have to decide:
    (1) By Clause 4 Tilbury was to procure the design and construction of the Facilities. By Clause 4.3 Stora Enso was to use its reasonable endeavours to procure that the Facilities were available for use by 1 July 2005, with provision being made for a commissioning period.

(2) By Clause 4.3.2, once the Facilities had been completed and commissioned, Tilbury was to notify Stora Enso that the Facilities were available for the commencement of the provision of the Services. This was the Services Commencement Date as defined in Clause 1.1.1.

(3) By Clause 5.1, Tilbury was to provide the Services (defined in Clause 1.1.1 to mean those referred to in Clause 5) from the Services Commencement Date.

(4) By Clause 8.1, Stora Enso were to pay the Freight Price for Cargo shipped to the Facilities. The Freight Price was expressed at a rate per tonne. Payment was to be by way of Billing Statements, usually prepared by Stora Enso under a self-billing system (Clause 8.8) with the 'due date' for payment being the last day of the month in which the Billing Statement was received.

(5) By Clause 8.10.1, the sum to be paid was the sum shown on the Billing Statement "subject to Clauses 8.10 and 8.11 (*Disputed Sums*), without any claim, deduction, counterclaim or set-off'.

(6) Clause 8.11.1 provides:

"If either [Stora Enso or Tilbury] genuinely and bona fide disputes that any sum or part thereof (the ***"Disputed Sum"****) due in terms of this Agreement is payable, then, provided that on or before the due date for payment of the Disputed Sum, such Party shall have given notice to the other Party of its intention to withhold the Disputed Sum stating in reasonable detail the bases upon which it so genuinely and bona fide disputes that the Disputed Sum is payable it shall be entitled to withhold, pending resolution of such dispute, the Disputed Sum".*

(7) Clause 15 provides that

"Save as expressly permitted in terms of this Agreement, all payments to be made by any party under this Agreement shall be made:-

(a) without set-off, deduction or counterclaim, save to the extent that any such set-off, deduction or counterclaim is expressly permitted in terms of this Agreement;"……

12. Tilbury submits that Stora Enso are liable to pay the minimum tonnage payment, because they have failed to ship the minimum tonnage for the first contract year. Tilbury also submits that under Clause 15, Stora Enso are liable to pay the minimum tonnage payment without deduction or set-off in respect of their claim for damages set out in their counterclaim. Rather, Tilbury contends that Stora Enso's claim is a separate issue to be determined at trial, and if that claim succeeds, it will be paid by Tilbury at the appropriate time.

13. Stora Enso submit that the intention of the parties was that from the Services Commencement Date Tilbury would provide the Services in accordance with its obligations under the Agreement and that the obligation to ship the minimum tonnage is to be understood against the background of the parallel obligation of Tilbury to provide the Services. On that basis where, as it contends was the position here, the minimum tonnage was not shipped to the Facilities because Tilbury was unable to provide the Services under the Agreement, Tilbury is not entitled to the minimum tonnage payment. Stora Enso rely on an implied term that Tilbury would not be entitled to claim the minimum tonnage payment in respect of periods where Tilbury was not ready, willing or able to carry out the Services in respect of paper to meet the minimum tonnage figure.

14. Alternatively, in the event of a genuine and bona fide dispute over whether a sum due under the Agreement is payable, which Stora Enso submits is the position here, either party could, upon giving notice, withhold that sum and the provisions of Clause 15 do not operate to prevent Stora Enso from setting-off their counterclaim. Accordingly, where Tilbury was unable to provide the Services, Stora Enso submits that it can set-off its counterclaim for damages against the sum claimed by Tilbury under Clause 8.4 of the Agreement.

15. The application for Summary Judgment therefore depends on whether Stora Enso is correct either as to the existence of an implied term or as to the ability to set-off its counterclaim for damages. I shall deal with each of these arguments in turn.

Implied Term

16. Clause 8.4 of the Agreement deals with "*Payment for Minimum Tonnage Not Taken*" and provides that:

"*Subject to the terms of Clause 10 (Maintenance, Insurance and destruction of, or Major Damage to, the Facilities) if in any Contract year the aggregate tonnage of Cargo in respect of which the Freight price is paid to [Tilbury] is less that the Minimum Tonnage then with the payment in respect of the last month of that Contract Year [Stora Enso] shall pay to [Tilbury] a sum calculated by reference to the formula:*

((MT-T) x FP)

where:

MT is the Minimum Tonnage;

T is the tonnage of Cargo (other than Cargo within Direct Transit Trailers) discharged at the Facilities in the relevant Contract Year;

FP is the Freight Price per tonne for the Minimum Tonnage."

17. There is no dispute as to the commercial purpose behind this clause. Tilbury had undertaken a large capital expenditure to build the Facilities, for which Stora Enso were to be the major customers. Tilbury therefore reasonably sought a guaranteed level of income for a long period of years to make the initial expenditure worthwhile, and to protect against future fluctuations in the level of business for the Facilities.

18. As can be seen, Clause 8.4 is expressly subject to the terms of Clause 10, which deals with the position in the event of repair, exceptional maintenance, destruction of or major damage to the Facilities. In such a case, "*the*

Parties' obligations (other than any outstanding obligation to pay any sum then due) under this Agreement shall be suspended and the Minimum Tonnage in the Contract Year(s) in which suspension occurs shall be reduced pro rata to reflect the period of such suspension".

19. Stora Enso submit that, in addition, if Tilbury is unable to provide the Services for reasons other than those set out in Clause 10 of the Agreement, there must be an implied term to the effect that Tilbury is not entitled to payment under Clause 8.4. Otherwise, Stora Enso submit that Clause 8.4 would entitle Tilbury to payment in circumstances when Stora Enso were willing and able to ship the Minimum Tonnage, and would have done so but only failed to do so because of Tilbury's inability to provide the Services. Stora Enso contend that otherwise Tilbury would be entitled to benefit from its own breach of contract.

20. Accordingly, Stora Enso contend that there was an implied term of the Agreement as set out in paragraph 33 of the Defence and Counterclaim, as follows:

"…that Tilbury would not be entitled to claim the minimum tonnage payment in respect of periods in which Tilbury was not ready willing or able to carry out the Services in respect of products in quantities equal to or above the minimum tonnages provided for in the Agreement, consistently, reliably or at all."

21. Stora Enso submit that such an implied term would be obvious to the parties and necessary to give business efficacy to the Agreement.

22. Stora Enso rely on the judgment of Potter J (as he then was) in ***The Bonde*** [1991] Lloyds Reports 136. In that case there was a contract for sale and purchase of goods which were to be shipped and it contained provisions setting out the liabilities of each party for demurrage and carrying charges. The sellers claimed that the buyers were liable to pay carrying charges for a period of delay. The buyers argued that they were not liable to pay those charges for any period of delay when loading was delayed because the sellers could not load at the guaranteed loading rate.

23. The defendant appealed an award holding them liable for such charges and relied on a passage in Chitty on Contracts (26th Edition) at paragraph 912, now at paragraph 12-082 of the 29th Edition, that "*as a matter of construction, in the absence of clear express provisions to the contrary it will be presumed it was not the intention of the parties that either should be entitled to rely on his own breach of contract to avoid the contract or obtain a benefit under it*".

24. In dealing with the question of whether there should be an implied term Potter J said at 144:

"I am prepared to accept the principle as stated in Chitty subject to the reservation that as an exercise in construction the requirement of "clear express provisions to the contrary" it should not be read as meaning more than a clear contractual intention to be gathered from the express provisions of the contract. In my view, any exercise in construction must be considered in the context of the particular contract, and must pay particular regard to the nature and purpose of the term in relation to which the party seeking the remedy is said to have been in breach and to the nature of the benefit or advantage said to accrue by permitting recovery on his part. It seems to me that this is particularly so bearing in mind that, treating the matter as one of construction (at least in a case where no question of morality or policy arises) the application of the so-called presumption that no man may take advantage of his own wrong (in the sense of his own breach of contract) so as to deprive him of the benefit of a provision which on its face entitles him to recover the sum claimed, is to do no more than imply a term that the right expressly given shall not be available whenever the plaintiff is in breach of some parallel term in the contract."

25. In that case Potter J concluded at 145 that the term contended for by the buyers was not to be implied because he did not consider "*that the parties or the officious bystander, if asked at the time of contract whether a 'breach' of the guaranteed loading rate should automatically disentitle the seller pro tanto to his carrying charges, would have necessarily have answered 'Yes'* ".

26. Stora Enso submit that the principles which Potter J set out apply and that the relevant term falls to be implied in this case.

27. Tilbury submits that Stora Enso have no real prospect of success in their contention of such an implied term. Tilbury refers to the judgment of Sir Thomas Bingham MR (as he then was), giving the judgment of the Court of Appeal in ***Phillips Electronique Grand Public SA v. British Sky Broadcasting Ltd*** [1995] EMLR 472 and the quotation at 481 of the following passage from the speech of Lord Simon of Glaisdale in ***BP Refinery (Western Port) Pty Ltd v The President Counsellors and Ratepayers of the Shire of Hastings*** (1978) 52 ALJR 20 at 26:

"*for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is ineffective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.*"

28. At 481 Sir Thomas Bingham M.R. said:

"The court's usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."

29. He continued at 482:

"The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. For, as Scrutton LJ said in ***Reigate v Union Manufacturing Co (Ramsbottom) Ltd*** *[1918] 1 KB 592 at 605:*

"A term can only be implied if it is necessary in a business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case', they would both have replied 'Of course, so and so will happen; we did not trouble to say that; it is too clear'. Unless the court comes to such a conclusion as that, it ought not to imply a term which the parties themselves have not expressed …"

In the familiar cases already mentioned there could be little room for doubt what the parties' joint answer would have been had the question been raised at the outset. There would, almost literally, have been only one possible answer. But this may not be so where a contract is novel, known to involve more than ordinary risk and known to be more than ordinarily uncertain in its outcome. And it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would, without doubt, have been preferred; ***Trollope & Colls Ltd v Northwest Metropolitan Regional Hospital Board*** *[1973] 2 All ER 260, [1973] 1 WLR 601 at 609-10, 613-14."*

30. Tilbury submits that the implied term for which Stora Enso contend fails to meet the conditions for the implication of a term set out in the ***BP Refinery*** case and for similar reasons to the ***Phillips Electronique*** case should not be implied. In particular it submits that:

(1) There is no need for the implied term because if Stora Enso succeed on their counterclaim, they will be entitled to compensation for all Tilbury's alleged breaches and that, consistent with Clause 15 which precludes set-off, Stora Enso are required in common with many commercial agreements, to pay first and argue later;

(2) The Agreement is perfectly effective without the implied term;

(3) There was a comprehensive written contract showing signs of careful professional drafting in respect of which the parties had the benefit of legal advice;

(4) The Agreement relates to an operation which was known to be novel, to involve more than ordinary risk and to be more than ordinarily uncertain in its outcome; and

(5) If the parties had addressed their mind at the outset to the eventuality, it is by no means clear how they would have agreed that the risk should be allocated or, if they had agreed that the plaintiffs should be protected, what form that protection should take.

31. Tilbury also contends that the reference in Clause 8.4 to the exception arising in the case of Clause 10 negatives any implication of other exceptions. In particular it relies on the judgment of McKinnon LJ in the Court of Appeal in ***Broome v. Pardess Co-operative Society of Orange Growers Ltd*** [1941] All ER 603 at 612 where he said:

"Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject matter, as to which there is an express provision, there is also an implied provision or condition in the contract."

32. I now turn to consider those arguments.

33. The underlying obligation contained in Clause 8.4 provides that if in any Contract Year the aggregate tonnage of Cargo in respect of which the Freight Price is paid to Tilbury is less that the Minimum Tonnage then with the payment in respect of the last month of that Contract Year Stora Enso shall pay to Tilbury a sum calculated by reference to the formula: ((Minimum Tonnage - tonnage of Cargo discharged at the Facilities in the relevant Contract Year) x Freight Price).

34. Obviously disputes might occur as to the Minimum Tonnage, the tonnage of Cargo discharged or the Freight Price. If they do occur then Clause 15(a) of the Agreement provides that all payments to be made by any party shall be made without set-off, deduction or counterclaim, save to the extent expressly permitted in terms of the Agreement.

35. Clause 8.4 contains a qualification by making that clause subject to the terms of Clause 10. That provides at Clause 10.5(b) that in the event that the Facilities, or any substantial part thereof, are destroyed or suffer material damage then "*the Minimum Tonnage in the Contract Year(s) in which the period of suspension occurs shall be reduced pro rata to reflect the period of suspension*." If that provision applied, it would change the Minimum Tonnage figure to be included in the formula. Again there could be a dispute as to the pro rata reduction to arrive at that figure.

36. In this case, Stora Enso essentially say that the reason why the tonnage of Cargo discharged at the Facilities was less than the Minimum Tonnage in the Contract Year was because Tilbury failed to provide the Services. The failure by Tilbury to provide the Services would amount to a breach of contract and, to the extent that it caused loss to Stora Enso, there would be a claim for damages. This is the basis of the counterclaim made by Stora Enso in this case. If Stora Enso had to pay Tilbury a sum under Clause 8.4 which was larger than it would have been in the absence of Tilbury's breach of contract, then that would be recoverable as damages for breach of contract. Subject to the effect of Clause 15 and any other express provisions of the Agreement, the general position at law is, as set out by Lord Diplock in ***Gilbert Ash*** at 718, cited below, that a party is entitled to remedies "*including the remedy of setting up a breach of warranty in diminution or extinction of the price of materials supplied or work executed under the contract*."

37. Given that position, is a term to be implied that Tilbury would not be entitled to claim the minimum tonnage payment under Clause 8.4 in respect of periods in which Tilbury was not ready willing or able to carry out the Services in respect of products in quantities equal to or above the minimum tonnages provided for in the Agreement, consistently, reliably or at all?

38. Applying the conditions in the ***BP Refinery*** case:
    (1) I do not consider that it is "*reasonable and equitable*". In the terms set out, Tilbury would not be entitled to claim for particular periods when, for instance, Tilbury were not able to provide certain Services in terms of documents or reports, even if this did not affect the ability of Stora Enso to discharge Cargo at the Facilities. Unlike Clause 10(5)(b) which applies a pro rata reduction for the period in respect of which the parties' obligations are suspended.
    (2) I do not consider that the terms is "*necessary to give business efficacy to the contract*". The contract operates without it. The sum payable under Clause 8.4 can, subject to Clause 15 and the other provisions of the Agreement, be diminished or extinguished by the remedy at law. If the parties have agreed to exclude that remedy then Stora Enso would be left with an unliquidated cross-claim which would have to be tried separately.
    (3) As expressed, the term is not "*so obvious that it goes without saying*". If, at the time of the contract, this question had been posed: "what would happen to the sum payable under Clause 8.4 if the failure to achieve the minimum tonnage were caused by a breach of contract by Tilbury?" there might have been a number of different solutions, including the remedy at law of diminishing the sum due.
    (4) Again the term is not "*capable of clear expression*". There would be a number of possible ways in which the term might be expressed.
    (5) The term would "*contradict an express term of the contract*". It would contradict the terms of Clause 8.4 by making that clause inapplicable in certain circumstances.

39. Having reviewed the necessary conditions for the implication of a term, I have therefore come to the conclusion that they would not support the implied term alleged in this case.

40. As Tilbury submits, the parties chose to deal with the effect of destruction or material damage to the Facilities on Clause 8.4. I consider that this makes it less easy for the court to imply a term to the effect that some other event has the same effect, particularly where the event is not within the control of the parties. In this case the allegation is that Tilbury was in breach of the terms of the Agreement in relation to the provision of the Services. The usual way of dealing with cases of breach is to provide a remedy by way of damages and not to imply a term as to the consequences of breach on certain other obligations.

41. Whilst Potter J in ***The Bonde*** contemplated that a term might be implied to the effect that a "*right expressly given shall not be available whenever the plaintiff is in breach of some parallel term in the contract*", he held that on the particular terms of the contract in that case, such a term was not to be implied. In the present case, if there were no remedy at law for an act which prevented Stora Enso from achieving the Minimum Tonnage, then the court might be more willing to imply a term. However, I do not consider that such a term would be implied if the parties had agreed that the remedy, otherwise available, should be limited or excluded.

42. Accordingly, although for different reasons, I do not consider that the term alleged by Stora Enso is to be implied. It follows that Stora Enso do not have a real prospect of success in their defence based upon the alleged implied term as set out in paragraph 33 of the Defence and Counterclaim.

Set-off and Counterclaim

43. Stora Enso's alternative case is that the provisions of Clauses 8.10.1 and 8.11.1 mean that, if Stora Enso wish to challenge Tilbury's claim to be paid the minimum tonnage payment under Clause 8.4, they can do so and are not obliged to make payment to Tilbury. In particular, Stora Enso contend that Clause 15 does not preclude Stora Enso from setting-off its counterclaim, because Clause 15 is subject to the express exception "*Save as otherwise expressly permitted in terms of this Agreement*" which applies because the sum claimed is a "*Disputed Sum*" as defined by Clause 8.11.

44. The relevant provisions of the Agreement are:
    (1) Clause 8.10.1 which provides that:
    *"The sum (the "**Payment Sum**") shown payable by [Stora Enso] as such on a Billing Statement rendered pursuant to Clause 8.8 (Self Billing)" shall be paid, subject to Clauses 8.10.2 and 8.11 (Disputed Sums) without any claim deduction, counterclaim or set-off by [Stora Enso] not later than the last day of the month in which the Billing Statement is received.........(the date upon which the Payment Sum is so payable being hereinafter referred to as "**the due date**")."*
    (2) Clause 8.11.1 which provides that:
    *"If either [Stora Enso] or [Tilbury] genuinely and bona fide disputes that any sum or part thereof (the "**Disputed Sum**") due in terms of this Agreement is payable, then, provided that on or before the due date for payment of the Disputed Sum, such party shall have given notice to the other party of its intention to withhold the Disputed Sum stating in reasonable detail the bases upon which it so genuinely and bona fide disputes that the Disputed Sum is payable it shall be entitled to withhold, pending resolution of such dispute, the disputed sum."*

45. Stora Enso contend that the parties have expressly agreed that the *"no set-off"* provisions do not apply to "*Disputed Sums"*. They submit that the words of Clause 8.11.1 are wide enough to cover a deduction for a counterclaim by set-

off, and would provide a reason why a sum otherwise due under the Agreement would not be *"payable"*. Stora Enso contend that Clause 8 is obviously intended to put in place a mechanism by which disputed sums can be identified and withheld and that there is no justification for limiting the scope of such express provisions.

46. Stora Enso submit that there could be a set-off under Clause 8.11.1 separate from the implied term argument as the phrase '*genuine and bona fide dispute*' is not limited but would include a defence of abatement, a defence giving a right of non-liability to pay and a defence by way of set-off and counterclaim. In this case, Stora Enso contend that there was a '*genuine and bona fide dispute*' as to whether the amount invoiced for the minimum tonnage payment was payable when Tilbury had been unable to provide the Services.

47. Stora Enso refer to a well-known passage from the speech of Lord Diplock in ***Gilbert-Ash v. Modern Engineering*** [1974] AC 689 at 717 to 718 where, in relation to the ability to set-off in respect of unliquidated cross claims, he said:

"It is of course open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law or such remedy may be excluded by usage binding upon the parties (cf Sale of Goods Act 1893 s.55). But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption….

So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by the operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of materials supplied or work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be unavailable in respect of breaches of that particular contract."

48. Tilbury submits that Clause 8.11 does not take matters any further. It makes provision for those situations where there is a genuine and *bona fide* dispute as to whether a sum is payable at all. In this case, the only ground for saying that the sum claimed is not payable is the alleged implied term which, as I have found, does not fall to be implied. Tilbury therefore submits that there can be no dispute as to what sum is owing.

49. Tilbury also submits that it would make a nonsense of the provisions of Clause 15 if Stora Enso could rely on their Counterclaim to allege a dispute that then entitled them to withhold funds pursuant to Clause 8.11.1.

50. Whilst, in addition, Tilbury contends that the notice provisions of Clause 8.11.1 have not been fulfilled by Stora Enso, it is accepted that this could not be relied on as a ground for establishing that Stora Enso have no real prospect of success on this summary judgment application.

51. Like the Master, I accept Stora Enso's submissions that Clause 8.11.1 is wide enough to cover the amount of the invoice which is the subject of Tilbury's claim and that Clause 8.11.3 contemplates that either the whole or a part of an invoice could form a "Disputed Sum". I also accept, as the Master did, that Clause 15 was subject to exceptions expressly provided for in the Agreement and that this includes Clauses 8.10.2 and 8.11 which are expressly provided for in Clause 8.10.1.

52. In my judgment, the provision of Clauses 8.10 and 8.11 when read together allows Stora Enso to withhold unliquidated damages as a "Disputed Sum" from sums which would otherwise be payable under Clause 8.10.1, including sums otherwise due in relation to the minimum tonnage payment under Clause 8.4.

53. Clause 15 makes it clear that it applies "*save as otherwise permitted in terms of this Agreement*". Thus the provision of Clause 15 that all payments must be made "*without set-off, deduction or counterclaim*" gives way to any terms to the contrary.

54. Clause 8.10.1 repeats the provision in Clause 15 that sums shown as being payable by Stora Enso on a Billing Statement shall be paid "*without any claim, deduction, counterclaim or set off*" by Stora Enso but expressly states that this is subject to Clauses 8.10.2 and 8.11.

55. If therefore Clause 8.11 permits a claim, deduction, counterclaim or set-off to be made against a sum otherwise payable under Clause 8.10.1 then Clause 8.11 overrides any exclusion in Clause 15 or Clause 8.10.1.

56. The requirements under Clause 8.11 which must be complied with before a party is entitled to withhold part or the whole of a sum otherwise payable under Clause 8.10.1 are these:
    (1) The party (Stora Enso or Tilbury) must "*genuinely and bona fide dispute*" that any sum (the "Disputed Sum") due in terms of the Agreement is payable.
    (2) The party must, before the due date for payment of the Disputed Sum give notice of its intention to withhold the Disputed Sum, stating in reasonable detail the basis upon which it so genuinely and bona fide disputes that the Disputed Sum is payable.

57. A party may dispute that a sum is payable for a number of reasons. The Disputes clause at Clause 11 of the Agreement defines Dispute as "*a dispute or difference arising out of or in connection with this Agreement"*. In relation to reasons why a party might dispute a payment, Clause 8.10.1 refers to "*any claim, deduction, counterclaim or set off*".

58. As set out by Lord Diplock in ***Gilbert Ash*** a party is entitled at law to "*the remedy of setting up a breach of warranty and diminution or extinction of the price of materials supplied or work executed under the contract*", that is,

to set-off any counterclaim for breach of the same transaction. I do not consider that Clause 8.11.1 is to be read down to exclude the defence of set-off, whilst permitting other defences.

59. Rather, by Clause 8.11.1, which overrides Clauses 15 and 8.10.1, the parties have agreed that provided there is a genuine and bona fide dispute and proper notice is given then a party may withhold sums otherwise payable under Clause 8.10.1 until it is agreed or determined to be payable, at which stage interest is payable at 3% over base rate if the sum is found to have been payable. The dispute includes the contention that there is a set-off arising from a counterclaim.

60. For the purpose of this application, it is accepted and, in any event, evident from the correspondence and witness statements that Stora Enso have a real prospect of succeeding in establishing that there was a genuine and bona fide dispute and that they gave notice under Clause 8.11.1.

61. Accordingly, I find that Stora Enso do have a real prospect of success in their defence based upon being able to set-off their counterclaim for damages under the Agreement against sums otherwise payable under Clause 8.10.1 including the sums otherwise payable under Clause 8.4 in respect of the Minimum Tonnage.

62. For this reason I allow the appeal and invite the parties to make submissions as to the appropriate order in the light of this judgment.

John McCaughran QC and Laurence Emmett (instructed by McGrigors LLP) for the Claimant
David Streatfeild James QC and Patrick Clarke (instructed by Campbell Hooper Solicitors) for the Defendants