[2013] UKPC 23
Privy Council Appeal No 0063 of 2012

JUDGMENT

Antigua Power Company Limited (Appellant) *v* (1) The Attorney General of Antigua and Barbuda (2) The Hon. Baldwin Spencer (As Minister of APUA & Energy) (3) Antigua Public Utilities Authority (4) Commissioner of Police of Antigua and Barbuda (Respondents)

From the Court of Appeal of Antigua and Barbuda

before

Lord Neuberger
Lord Mance
Lord Sumption
Lord Carnwath
Lord Toulson

JUDGMENT DELIVERED BY LORD NEUBERGER ON

23 JULY 2013

Heard on 20-21 May 2013

Appellant
Geoffrey Robertson QC
Dane Hamilton QC
Kim Franklin

(Instructed by Howard Kennedy Fsi LLP)

1st, 2nd, 4th Respondent
James Dingemans QC
Hafsah Masood
3rd Respondent
Sir Gerald A. Watt QC
Dr David Dorsett Ph.D
(Instructed by Simons Muirhead & Burton)

LORD NEUBERGER: (WITH WHOM LORD MANCE, LORD SUMPTION AND LORD TOULSON AGREE)

Introductory

1. This is an appeal brought by Antigua Power Company Limited ("APCL") against a decision of the Eastern Caribbean Court of Appeal dismissing its appeal from a decision of Thomas J in the High Court of Antigua and Barbuda. Thomas J had dismissed APCL's claim for relief against (i) the Attorney General, (ii) Antigua Public Utilities Authority ("APUA"), (iii) The Hon Baldwin Spencer who, at all relevant times, was the Prime Minister ("the Prime Minister"), but was sued in his capacity "as Minister of APUA and Energy", and (iv) the Commissioner of Police ("the Commissioner").

2. From its inception, the case has been rendered far more complex than it should have been by the inappropriate procedure adopted by APCL and by the over-elaboration of the points at issue. Because of that, it is sensible to identify the only issues raised by this appeal. Those issues are: (i) the extent of the approval given by Cabinet on 16 May 2006 ("the 16 May approval") to a Joint Venture Agreement ("JVA") contained in a letter dated 12 May 2006; (ii) if approval to the JVA as a whole was not given, whether APUA is effectively estopped from so contending; (iii) whether it is appropriate to grant APCL any relief, and if so what relief, against the Prime Minister; and (iv) whether this appeal should be allowed because of the Court of Appeal's delay in giving judgment.

The facts

3. By 2005, it had become apparent that there was both a short term problem and a longer term problem, so far as the supply of electricity in Antigua was concerned. The short term problem arose from the fact that the Cricket World Cup ("the CWC") was due to take place in Antigua in 2007, and it was clear that this would result in a demand for energy beyond the then existing capacity. The longer term problem arose from the fact that projections for future energy consumption in Antigua suggested that, even if capacity was increased to accommodate the CWC, there would be an undercapacity in the not too distant future.

4. With a view to dealing with these problems, APUA (a public utility, which is the national Antiguan power generator and supplier) entered into discussions with various possible contractors. Those contractors included APCL, an Antiguan-owned

corporation, which in 1996 and 2003 had agreed to supply APUA with a total of 27 megawatts ("MW") of power. APCL had performed that agreement with generators made by Wärtsilä Finland Oy and its subsidiary Wärtsilä Caribbean Inc (which can be referred to together indiscriminately for present purposes as "Wärtsilä").

5. In December 2005, APUA invited APCL to submit proposals for supplying and installing generators to fulfil these short term and longer term needs. On 25 April 2006, a meeting of the Cabinet was adjourned, according to the certified minute, so that members could consider a presentation from representatives of APUA, APCL and Wärtsilä "with regards to supply of generators(s) to [APUA]". At that meeting, the sort of terms which were likely to be agreed between APUA and APCL were explained. It was made clear that Wärtsilä could provide, and APCL could install, "a [17] mega watt plant which could provide electricity by December, 2006 or in time for Cricket World Cup 2007".

6. The Cabinet was apparently enthusiastic about these proposals, but was concerned at the absence of any draft agreement. Negotiations ensued between representatives of APUA and of APCL, with some government involvement. On 2 May 2006, the matter was further discussed in Cabinet, albeit as a result of a letter from another company which was involved in litigation with the government. The Cabinet encouraged Mr Wilmoth Daniel, the Minister of Works for Transportation and the Environment ("the Minister"), to get all relevant parties together to discuss the way forward.

7. On 3 May 2006, Wärtsilä wrote to APCL in connection with "the supply delivery and erection of a diesel power plant of nominal capacity of approximately 40 [MW] consisting of 1 x [17MW] V46 and 2 x 12 V46 Wartsila diesel generator sets and related auxiliary equipment". The letter went on to say that the 17MW generator would only be reserved for APCL if "[o]n or before May 12, 2006", it made "an initial non-refundable payment of US$1 million followed by a down payment of USD 3.0 million to be made on or prior to May 30, 2006".

8. The following day, APCL sent to the Minister a summary of the proposed terms to be agreed in the JVA. The proposed JVA was to be for a "turnkey project" to "be installed on a Green field site". The proposed project had four components, namely "(i) One 17 Megawatts generator and associated auxiliaries by the 31 January, 2007 in sufficient time for World Cup 2007", "(ii) Three 11.3 megawatts generators each with associated auxiliaries by the end of year 2007", (iii) a substation to accommodate the generators, and (iv) a substation on the southern part of the island. While the other terms set out in that letter were expanded over the next few days, the four components remained in place, and the other terms were added to rather than changed or abandoned.

9. The proposed terms of the JVA were further refined in two letters dated 8 and 9 May 2006. The 8 May letter was signed on behalf of APCL and APUA and set out the main terms of a "Proposed APCL/APUA Joint Venture", and referred to the venture as concerning a "new 50.9MW turnkey project". The letter of 9 May was sent to the Minister, and referred to the 8 May letter and mentioned that the work would be carried out in two phases, and that any arrangement would be subject to Cabinet approval.

10. On 9 May 2006, the Cabinet met again. The certified minute of that meeting recorded that the Cabinet was told about the proposed JVA between APUA and APCL, which was described as "using a phased approach". Phase 1 was described as involving "(a) the provision, installation and commissioning of a 17MW Wärtsilä Gen-Set by 31st January, 2007 … to be financed by APCL and its shareholders", (b) "a new company to be created", 55% owned by APCL and 45% by APUA "specifically in regards to the purchase of the 17MW Gen-Set", and (c) a 7% reduction in the unit price charged to APUA under existing agreements. This was consistent with the description given by the Minister in his Circulation Note to Cabinet dated 9 May 2006.

11. The certified minute went on to record that Cabinet considered that the "critical" aspect of this "was the acquisition of a 17MW Generator by APCL from Wärtsilä". Accordingly, as the minute recorded, the Minister was "authorize[d] … together with … APUA and … APCL to proceed immediately to make all necessary arrangements for the purchase of one (1) 17MW Generator from Wärtsilä". The Cabinet also asked APUA to "compile all of the relevant documentation" and to prepare "a full report" to the Minister "for presentation to the Cabinet".

12. The Cabinet decision to approve the purchase of the 17 MW generator was formally passed on to APUA and APCL on 12 May 2006. On the same day, APCL signed the JVA, which had been sent to them the previous day, signed on behalf of APUA, and by the Minister, also purportedly on behalf APUA (although the presence of the other signatories renders irrelevant any issues as regards his possible lack of authority in the latter capacity).

13. It is appropriate to set out the JVA in full (albeit that irrelevant parts have been omitted and paragraph numbering added for ease of reference):

> (i) APCL and APUA agree to enter into a Joint Venture for the new 50.9 Megawatt turnkey project, utilizing a phased approach so as to ensure effective preparation and implementation of the Joint Venture Agreement.

(ii) The following is therefore mutually agreed to and confirmed by the parties with the approval of Cabinet:

Phase 1:

(iii) Provide, install, commission and maintain a 17MW Wärtsilä gen-set with associated auxiliaries and substation facility by 31st January, 2007 …. This 17MW generator with associated auxiliaries will form part of the 50.9 megawatt turnkey project. … [Certain] tests will be done approximately once monthly … financed by APCL and its shareholders.

(iv) A new company shall be created for the purpose of this Joint Venture with APCL holding 55% of the shares in the new 50.0 megawatt turnkey project and APUA holding 45% of the said shares.

(v) As of the 1st June 2006, there shall be a [7%] reduction in the unit price across the board charged to APUA under the existing … Agreement … .

(vi) APCL and APUA shall each have representation on the Board of Directors. …

(vii) The minimum dispatch guarantee for contract year 2007 shall be 220,000,000 units … of electricity.

(viii) The Power Plant generating facility right to first dispatch when energy in excess of the minimum dispatch guarantee is required will not be unreasonably withheld. …

(ix) All day to day management and plant operational activities of the turnkey project will be the responsibility of APCL in consultation with APUA.

(x) APUA will appoint a Project Engineer and a Site Engineer in consultation with APCL during the project execution phase of the 17MW turnkey project. …

(xi) This Joint Venture shall enter into a PPA agreement along a Build, Own, Operate and Transfer (BOOT) concept for the new 50.9 Megawatt project that shall commence January 2007 and terminate January 2029.

(xii) The understanding arrived at herein shall be subject to the approval of the cabinet of Antigua and Barbuda.

Phase 2:

(xiii) Provide, install, commission and maintain a further 33.9 megawatts comprising of Three-l1.3 megawatts generators with associated auxiliaries and substation facility to meet the growing consumer demand by December 2007. Requisite substation facility in the Southern side of … Antigua will also be installed so as to connect the consumers in that part of the island. Financing for such substation will not exceed US$ One Million …. These installations will complete the 50.9 Megawatt turnkey project … .

(xiv) As at 1st February 2007, the price for energy delivered from the new generating facility will be 14.1 U.S. cents per unit … . In order to assure a line of revenue, APUA will establish an account at the bank holding the APCL loan.

(xv) The Power Plant generating facility right to first dispatch when energy in excess of the minimum dispatch guarantee is required will not be unreasonably withheld.

(xvi) The interest rate to be borne by the joint venture company shall be no more than nine (9) percent … on the total assessed value … .

(xvii) All day to day management and plant operational activities of the turnkey project will be the responsibility of APCL in consultation with APUA.

(xviiii) APUA will appoint a Project Engineer and a Site Engineer in consultation with APCL during the project execution phase of the 33.9MW turnkey project. …

(xix) Two engineers from APUA will be appointed in consultation with APCL so as to be involved in plant operations and energy dispatch and curtailment. …

(xx) Neither APUA nor APCL will sell or assign any of their shares without the prior written consent of either party.

(xxi) At a later stage there will be Public participation in the joint venture at a percentage to be determined by both parties.

(xxii) At any time during the life of the Joint Venture, each party has the right to purchase the shares of the other party at an agreed upon price. …

(xxiii) The Joint Venture shall terminate on 31st January 2029 or at an earlier date mutually agreed upon by the parties.

(xxiv) The understanding arrived at herein shall be subject to the approval of the Cabinet of Antigua and Barbuda."

14. Also on 12 May 2006, Wärtsilä required APCL to pay the US $1m downpayment for the 17MW generator, which APCL paid a few days thereafter.

15. On 15 May 2006, a fourteen page synopsis, entitled "A Synopsis Of The Quest To Ascertain Reliable Generation For The State Including Cricket World Cup 2007" ("the Synopsis"), prepared by APUA, was circulated to members of the Cabinet. The Synopsis set out the background, including an analysis of Antigua's current generating capacity and the need for an "urgent solution" for the increased demand for power in the light of the forthcoming CWC. It then explained that there had been various discussions, and they had culminated in the JVA. The arrangement was summarised as consisting of (i) the 45%/55% ownership of the joint venture, (ii) "the financing of" a 17MW generator, (iii) the acquisition of "a further 33.9MW of power in the near future", and (iv) incorporation of the existing agreement between APCL and APUA in the JVA.

16. The Synopsis then set out the JVA as agreed three days earlier virtually verbatim. After saying that "time is of the essence in that this agreement must be signed on or before May 15th 2006" to enable the 17.5MW generator to be purchased and working in time for the CWC, the Synopsis continued:

"**Benefits of the Proposed Joint Venture**
This venture can be considered justifiable for the benefits it brings to APUA and the people of Antigua & Barbuda on a whole. There is no question that any arrangement or agreement once scrutinized will be found as not going far enough. However, APUA is confident that this proposed venture between APUA and APCL is one that accommodates and benefits each entity. At a minimum it affords APUA and by extension the government to meet the demand for electricity for [the CWC] and beyond … . The Benefits from the proposed APCL/APUA Joint Venture can be categorized as immediate, medium term and long term".

17. The "immediate benefits" were described in the Synopsis as being a significant saving due to the 7% reduction in the existing unit price payable by APUA to APCL and the "[a]bility to meet the World Cup demand". The "medium term benefits" were the ability to supply many customers who currently operate "standby generators" and others who suffer from the "shortage of supply", the taking out of service of outdated generators, reduction in operating cost and the opportunity to increase revenue. The "long term benefits" included improved productivity, "[o]pportunity for nationals to purchase shares", and satisfying customer demand for at least the next five years.

18. The Minister also prepared a Circulation Note for Cabinet dated 15 May 2006, in which the Minister sought Cabinet approval of (i) the JVA "in respect of producers of electricity", and (ii) a "shareholding of 55%/45% APCL and APUA respectively".

19. The following day, 16 May 2006, the Cabinet met and the Minister was in attendance. The certified Cabinet minute records that the meeting was suspended to allow representatives of APUA and of APCL "to give explanations on the contents of the circulation note". The minutes then stated as follows:

> "96. The following subjects were raised during the presentation followed by discussion:
> - worker participation ….
> - improved cash flow for APUA
> - manpower exchange with APCL
> - reduction in electricity staff
> - achieving efficiency in electricity production
> - public ownership
> - 45% ownership by APUA could be divided 25% APUA and 20% Public in the future
>
> 97. Following the presentation by Management of [APUA] and [APCL], Cabinet decided that, further to its decision of 9 May, 2006 to approve the following:
> (i) the Joint Venture Agreement between APCL/APUA in respect of producers of electricity;
> (ii) Shareholding of 55%/ 45% to APCL and APUA respectively.
>
> 98. Cabinet further decided that the Honourable Attorney General is to determine any legal implications for the way forward."

20. On 23 June 2006, APCL entered into an agreement with Wärtsilä for the construction of a "51MW HFO Diesel Power Plant at [Crabbs Peninsula] Antigua." This contract envisaged the same two phases as the JVA. During September 2006, representatives of APUA and of APCL inspected the 17MW generator at Wärtsilä's premises in Finland. The first phase proceeded substantially as contemplated, and was completed by 31 January 2007.

21. During the second half of 2006 (and possibly before that), it appears that the Prime Minister, and others on behalf of the government and APUA, had been having discussions with Chinese contractors called Beijing Construction Engineering Group Co Ltd ("BCEG"), with a view to installing other generators in Antigua. These negotiations resulted in a memorandum of understanding between APUA and BCEG signed on 11 November 2006.

22. These negotiations were initially unknown to APCL and Wärtsilä, who were proceeding with both phases, but they learned of them through newspaper articles around early November 2006.

23. Meanwhile negotiations continued with APCL over the details of the proposed joint venture arrangements, which were to include (inter alia) a power purchase agreement, and a lease of the Crabbs Peninsula site. Commenting on these issues in a letter dated 28 March 2007, the Attorney General indicated (for the first time in express terms) the Government's view that Cabinet had only given "definitive approval" for the installation of the 17 MW generator. There appears to have been no formal response to this assertion from APCL's solicitors until a letter dated 10 August 2007, to which the Attorney General replied on 24 August 2007. From that exchange it seems that one of the main unresolved issues was whether a lease of the site should be given to APCL or, as the government wished, only to the new joint venture company following its capitalisation. In his letter the Attorney General restated the government's position that no Cabinet approval had yet been given to phase 2.

24. Neither party at that stage took any legal action to resolve the dispute over the status of phase 2. Nonetheless, APCL continued preparations for the delivery of the three generators involved in phase 2. They did so with the knowledge and some participation of APUA (whose engineers attended acceptance tests of the new engines in Italy in September 2007).

25. On 30 October 2007, Cabinet reviewed the position and determined that, pending the outcome of final negotiations, the new engines should not be installed at the site. APCL and Wärtsilä had agreed that the three generators involved in phase 2 would be delivered to the Crabbs Peninsula site in early December 2007. APCL's General Manager, Mr Calid Hassad, wrote to the Minister informing him of this on 7 November. The Minister replied the following day saying that the government had no jurisdiction over the privately owned dock facility and would not prevent the three generators being landed, but that this was without prejudice to the continuing negotiations on the JVA. This was followed on 13 November 2007, by a letter to Mr Hassad from the Prime Minister (writing also as "Minister for APUA and Energy") by way of "further clarification" to the Minister's letter, stating that the government "will not give approval for the engines to be housed at the APUA Power Plant at Crabbs [Peninsula]", which would only be given following agreement "as per the recent Cabinet decision".

26. The three generators arrived on 30 November and were loaded onto barges for transfer to Crabbs Peninsula, where off-loading began on 3 December. The following day, a contingent of armed police arrived and brought the operations to a halt. It appears from the affidavit evidence (sworn on behalf of both APUA and the Prime Minister) that this happened following "instructions" which, on the advice of the

Attorney General, the Prime Minister gave to the superintendent in charge of the contingent through the Commissioner. Those instructions were variously described in the evidence as instructions "to stop the offloading of the engines and to prevent any of the said engines from entering the power plant compound" or "to take the necessary steps to stop the engines from being transported into the power plant". There was no direct evidence by or on behalf of the Commissioner as to how this communication was regarded by the police.

27. As a consequence of this stalemate, APCL began the current proceedings on 6 December 2007. The following day, 7 December 2007, APCL obtained an interim injunction from Harris J, which enabled the three generators to be delivered to the Crabbs Peninsula site.

28. A formal claim form was served some two weeks later. This made it clear that the proceedings were judicial review proceedings in which APCL was seeking (i) a determination that it had a binding and unconditional agreement with APUA (in the form of the JVA), (ii) alternatively a determination that it was to be treated in law as having such a relationship with APUA, (iii) damages from APUA and the government for breach of the JVA, (iv) aggravated or exemplary damages against the Prime Minister, (v) an order that his actions had been "arbitrary, unfair, contrary to law, an abuse of his power as Prime Minister and the substantive Minister of APUA and Energy …", (vi) an injunction to restrain the Commissioner from preventing the generators being brought into Antigua, and (vii) other declaratory and injunctive relief.

29. Thereafter the action proceeded in the usual way, and it was heard by Thomas J over four days between 29 September and 3 October 2008. He gave a judgment dismissing all of APCL's claims on 23 February 2009. APCL appealed and its appeal was heard before the Court of Appeal on 8 December 2009. On 19 October 2011, for reasons given in a judgment by Gordon QC JA (Ag), with which Pereira JA, and Baptiste JA (Ag) agreed, APCL's appeal was dismissed.

30. APCL now appeals to the Board.

Preliminary observations

31. As mentioned above, by far the most important question for APCL is whether there is a binding and unconditional agreement for phase 2 of the JVA, and this turns on the question whether the Cabinet has approved that phase, as APCL alleges, and APUA and the other respondents deny. If Cabinet approval has been given to the whole of the JVA, then phase 2 has been approved, and was therefore unconditionally binding on APUA. If it has not been approved, then APCL would have to fall back on

the alternative argument that APUA and/or the government are estopped by conduct or are precluded by the doctrine of legitimate expectation from denying that phase 2 has been approved by the Cabinet. If APUA was unconditionally contractually bound, or to be treated as so bound, to phase 2, then the question of damages arises, but it is common ground that the evidential basis for assessing damages is not available, so the case would have to be remitted for an assessment.

32. There are two other issues between the parties. While no claim is now made against the Commissioner, relief is still sought against the Prime Minister (and, indirectly, the Attorney General). In that connection, Mr Robertson QC, on behalf of APCL, accepted that the only claim which survives is a claim for a declaration that, in instructing the Commissioner as he did, the Prime Minister acted in excess of his powers.

33. While it can be said that this raises a point of some significance as a matter of principle, it seems to the Board that the whole proceedings have been mischaracterised, confused and over-complicated by being brought as public law proceedings, which has led to some rather futile and over-refined debates about public law, rather than the parties concentrating on the main issue, namely whether there is a binding contract (as a matter of common law or through estoppel or legitimate expectation) for phase 2. The fact that this issue has been obscured by the parties is nowhere more apparent than from a reading of the judgment of Thomas J.

34. APCL also raise the contention (*ex hypothesi* not raised below) that the delay in the Court of Appeal giving judgment itself is a ground for allowing this appeal.

35. The Board now turns to address the four questions which arise on this appeal.

Was there an unconditional binding agreement for phase 2 of the JVA?

36. Despite the fact that both the trial judge and the Court of Appeal reached a contrary conclusion, it appears clear to the Board that, on 16 May 2006, the Cabinet approved the JVA in its entirety, and therefore approved phase 2 as well as phase 1. Accordingly, with effect from that date the JVA became unconditionally binding as between APUA and APCL. That this is right appears clear from a number of factors.

37. First, there is the plain meaning of para 97(i) of the minutes of the meeting of the Cabinet, which are quoted in para 18 above. What was "approve[d]" was the "Joint Venture Agreement between APCL/APUA", and as a matter of ordinary language, that must include the whole of the JVA. It is hard to see how it could be said to mean phase 1 alone, as that was only the first phase of what was recorded as having

been approved. The fact that the reference to the JVA was followed by the words "in respect of producers [presumably 'production' was intended] of electricity" does not help the contrary view. Both phase 1 and phase 2 were concerned with producing electricity, and the words cannot have been limiting: they were merely descriptive. The Minister's Circulation Note to Cabinet (referred to para 18 above) reinforces this view, as the Minister must have been seeking Cabinet approval of the whole JVA, which he had just signed.

38. It is true, as Mr Dingemans QC pointed out on behalf of the Attorney General and the Prime Minister, that para 97(ii) of the minutes was, on this basis, surplusage. However, as para (iv) of the JVA (quoted in para 13 above), which dealt with the joint venture company and its ownership was part of phase 1, that point could be made even if the approval was limited to phase 1. Furthermore, approval for the "shareholding of 55%/45%" sought by the Minister in the Circulation Note, in addition to approval of the JVA, is another instance of surplusage. But in any event, on issues of interpretation, arguments based on surplusage are rarely of much force – see *Arbuthnott v Fagan* [1995] CLC 1396, 1404 (per Hoffmann LJ) and *Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd* [1999] 1 AC 266, 274 (per Lord Hoffmann).

39. Secondly, particularly as the minute in question refers to the Synopsis, it is significant that this conclusion is supported by the terms of the Synopsis. Ignoring for the moment the detailed provisions of the JVA (which are set out in the Synopsis), the Synopsis distinguishes very clearly between the JVA and its two component phases. Further, the Synopsis, while distinguishing between the phases, makes it clear, for instance when discussing the benefits, that the JVA is being treated as a single exercise, albeit one being carried out in two phases. That is not only from APUA's perspective. The fact that APCL had agreed an immediate 7% reduction in the price it would receive under earlier agreements makes it hard to accept that it would simply be taking its chance on phase 2 being approved.

40. Thirdly, the provisions of the JVA, which were set out almost verbatim in the Synopsis, make it clear that the two phases were not regarded as independent of each other. Para (iv), while under "Phase 1", refers to the joint venture company and a "50.0 megawatt turnkey project", and is therefore clearly intended to apply to both phases. Precisely the same applies to paras (vi), (ix), and (xi). Para (xi) is worthy of special note, as it is under "Phase 1", but is clearly dealing with the working of the whole 50MW project. Paras (xviii) to (xxii), while under "Phase 2", must have been intended to apply from the inception. In other words, while the two phases of work were distinct in terms of generators and the time when the generators were to be supplied and installed (and any other associated work was to be carried out), the JVA was not only a single contract, but it envisaged a single project – or "venture".

41. Fourthly, it is very difficult to accept that the parties would have regarded it as commercially sensible or realistic that the first phase would be approved while the second was left in the air. A site was going to be acquired not merely for the first, 17MW generator, but for three further generators, and no doubt the infrastructure work involved for the first generator would also be expected to be used for the three further generators.

42. In their argument to the contrary, Sir Gerald Watt QC for APUA, supported by Mr Dingemans, relied on four points. The first was that the JVA envisaged three separate approvals by the Cabinet – in paras (ii), (xii), and (xxiv), although they alternatively contended that only two approvals were required on the basis that para (ii) did not envisage a separate approval. The second point was that the Cabinet decision of 12 May 2006 had to be read in the light of its earlier decision. The third point was that lack of communication of the Cabinet decision was relevant to the question as to whether there was in fact a positive Cabinet decision. The fourth point was that the Attorney General's evidence at trial showed that Cabinet approval was only given to phase 1. The Board rejects these four points.

43. As to the first, the respondents' primary case was that para (ii) envisaged the Cabinet approving the JVA in principle, but it still left each phase to be separately approved under paras (xii) and (xxiv) respectively. The alternative case was that para (ii) either referred to such approval as had been given or looked forward to the approval required by the latter two paragraphs.

44. The fact that the JVA refers to Cabinet approval in three places does not mean that three (or two) independent approvals were anticipated. It is equally consistent with the parties' desire to emphasise the need for Cabinet approval. In the Board's view, para (ii) looks forward to paras (xii) and (xxiv), and, while those two provisions emphasise the need for Cabinet approval of each of the two phases, there is no reason to think that the parties did not envisage, and the Cabinet did not intend, that there would be a single approval for the whole JVA, ie for the two phases. Indeed, for the reasons already given, that appears much more likely to have been the intention of the parties and, even more importantly, of the Cabinet.

45. In any event, the notion that there were to be two or three separate approvals runs into difficulties once one analyses what happened. All that was approved by the Cabinet on 9 May 2006 was the commitment to the purchase of the 17MW generator. Accordingly, on the respondents' primary argument, the Cabinet never approved phase 1, as the approval on 12 May must have been the approval required by para (ii) of the JVA. On the respondents' alternative argument, it is fair to say that the 12 May approval would have been that required by para (xii), but there is no intrinsic reason why that approval should not be what it states itself to be in para 97(i) of the minute, namely approval for the JVA – ie approval under paras (xii) and (xxiv).

46. The respondents' second argument relies on the fact that the Cabinet minute of the 12 May meeting has to be read in the light of the minute of the 9 May meeting. The Board agrees, but cannot find any assistance for APUA's case in the 9 May meeting minute. If anything, in the light of the fact that it is limited to the 17MW generator, and does not extend to approval of phase 1 or any joint venture, the 9 May meeting minute emphasises the much greater scope of para 97(i) of the minute of the 16 May meeting. This is confirmed by the Minister's Circulation Note to Cabinet dated 9 May 2006 and from paras 100-101 of the 9 May meeting minute, which make it clear that Cabinet only decided to underwrite the cost of the purchase of the 17MW generator. The two Cabinet minutes therefore provide no support for the notion that the Cabinet viewed the JVA as divided into two phases.

47. As to the respondents' third argument, Mr Dingemans rightly conceded that lack of any immediate or formal written communication of the Cabinet decision was not essential, but he maintained that lack of such communication was nevertheless relevant to the question as to whether a Cabinet decision was made. The obvious difficulty with this argument is that Mr Dingemans accepted, indeed asserted, that some form of Cabinet decision was made on 16 May 2006. Lack of communication can therefore be of no assistance in deciding on the scope of that decision.

48. As for the Attorney General's evidence, the Board accepts that, as a matter of principle, what he says happened at the Cabinet meeting on 16 May 2006 is admissible on the issue of what was decided at that meeting. However, when one turns to the transcript of his evidence before Thomas J, it does not help. The Attorney General said that, at the 16 May meeting, (i) Cabinet never approved phase 2, (ii) he was waiting for more "technical and financial information" before he could advise Cabinet. At best, the first aspect represents his view of the decision minuted at para 97(i), and it is wrong. As to the second aspect, it is reflected in para 98 of the minute, but it does not address the issue of the extent of the approval recorded in para 97(i).

Other issues between APCL and APUA

49. As the Board has reached the clear conclusion that the Cabinet approved the JVA, ie both phase 1 and phase 2, on 16 May 2006, APCL's alternative case based on estoppel by conduct or on legitimate expectation does not have to be considered.

50. As for APCL's claim for damages for breach of contract against APUA, Mr Robertson and Sir Gerald are agreed, as mentioned above, that the assessment of damages should be remitted to the High Court for determination. During argument before the Board, it appeared that there was a dispute as to whether the JVA had been determined by an accepted repudiation. That issue would seem to turn on whether APUA had been in repudiatory breach and, if so, whether the repudiation had been

accepted by APCL. The Board is of the view that those issues should be determined at the same time as the assessment of damages.

APCL's claim against the Prime Minister

51. All that is now being sought against the Prime Minister is a declaration that he acted in excess of his powers when he ordered the Commissioner to stop the three generators being landed and installed in early December 2007. It appears to the Board that this raises two questions. The first question is substantive: did the Prime Minister act in excess of his powers as alleged? The second question is procedural: if he did, is it appropriate for the Board so to declare?

52. As explained above, the basic complaint against the Prime Minister is that he should not have instructed the Commissioner or any other member of the police force to carry out a specific policing operation. As Lord Denning MR said in *R v Comr of Police of the Metropolis v Blackburn* [1968] 2 QB 118, 136, it was "the duty of the Commissioner, as it is of every chief constable, to enforce the law of the land". Having given examples of what could be done "that honest citizens may go about their affairs in peace", he said:

> `The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

53. This view was repeated in the more recent decision of the Divisional Court in *R v Secretary of State for the Home Department, Ex p Northumbria Police Authority* [1989] QB 26, 39, where it was described as "common ground" (between highly experienced counsel) that "[t]he Chief Constable has complete operational control of his force", and that "[n]either the police authority nor the Secretary of State may give him any directions about that"

54. On that simple basis, APCL's case against the Prime Minister is made out. Because the only relief sought is a declaration, it is unnecessary to consider whether the Commissioner or the superintendent was entitled to take the action which was taken on 4 December. That is just as well, because the Commissioner is no longer a party to the proceedings. It would also be inappropriate to resolve the issue as the relevant evidence is exiguous, and the Board had only limited oral argument on the points it raises. Those points would include the following questions: (i) whether the landing and/or installation of the generators would have been a trespass; (ii) whether the police can use their powers to prevent a trespass; and (iii) if there was no trespass, but the police could have used their powers to prevent one, whether it would have been sufficient if the police had believed that there would or might be a trespass.

55. Reverting to the case against the Prime Minister, the only outstanding question is whether it would be appropriate to grant a declaration that, in giving the instructions in question to the Commissioner, he acted in excess of his powers. This is the only relief which APCL seeks against him, and it raises a question which has been considered by judges on a number of occasions, namely whether it is right to grant a declaration whose function is only to record that a wrongful action was taken in the past, as the dispute has ceased to have any practical significance between the parties - see for example Supperstone, Goudie and Walker, *Judicial Review* (4th ed, para 17.22.1).

56. It is neither necessary nor appropriate to discuss in this judgment the circumstances in which the court should grant a declaration in a situation where the issue has no practical significance as between the parties. It is inevitably an issue which turns on the particular facts of the case in question. It is sufficient to say that, for the following reasons, the Board considers that this is a case where a declaration should be granted.

57. First, the issue whether the Prime Minister, or any other Minister, can instruct the Commissioner or any other member of the police to take a particular action, is one of substantial public importance. Secondly, while the facts of this case are very unusual, the issue of a Minister's powers over the police may well recur. Thirdly, the Prime Minister (supported by the Attorney General) has maintained before the Board that he was entitled to tell the police what to do. Fourthly, although no damages are claimed against the Prime Minister, the action he requested from the police did have a significant effect on APCL, who therefore have a justified wish to have their complaint vindicated by a declaration. Thus, the fact that no damages are sought cuts both ways: although it enables the Prime Minister to say that any declaration would be of no practical value, it also enables APCL to say that the only way of formally recognising that its rights have been breached is by the grant of a declaration.

58. It is right to acknowledge that, in its conduct of this litigation, APCL has not rendered its claim for such a declaration very attractive. The basis of its case against the Prime Minister, and the nature of the relief it sought from the Prime Minister, were only finally limited to a declaration that he had acted in excess of his powers, in Mr Robertson's reply on this appeal, and even then, the Board required further written submissions on the issue. At trial and in the Court of Appeal, APCL's arguments were far more wide-ranging and diffuse, and substantial damages were sought against the Commissioner as well as the Prime Minister.

59. However, while these matters may well be relevant on the issue of costs, the Board does not consider that they disentitle APCL from being granted the declaratory relief which it now seeks. Having considered the transcript of the evidence and argument at first instance, the Board is of the view that the point on which a

declaration is now sought was raised in sufficiently clear and unambiguous terms to enable the Prime Minister and those representing him to appreciate that it was being run by APCL, and to deal with it in argument and evidence.

60. Furthermore, it is significant that, at every stage of these proceedings, the Prime Minister has consistently resisted the grant of any relief to APCL, on substantive grounds as well as on the ground that a bare declaration would be inappropriate. By denying APCL's entitlement to a declaration, the Prime Minister has effectively asserted that he did not act in excess of his powers in giving the instructions which he gave to the Commissioner. That is a factor which reinforces the Board's view that a declaration is appropriate in order to record what is potentially an important constitutional point.

The delay in the Court of Appeal

61. As mentioned in para 29 above, there was a delay of over twenty-two months between the argument concluding in the Court of Appeal and the handing down of the judgment. The notion that serious delays in obtaining a court determination amount to a denial of justice is too obvious and too well established to require any detailed explanation or authority. In the context of a delay of a similar length by a trial judge in England in *Bond v Dunster Properties Ltd* [2011] EWCA Civ 455, Arden LJ, in the Court of Appeal, after saying that such a delay was unfair on the parties, observed that "[a]n unreasonable delay of this kind reflects adversely on the reputation and credibility of the civil justice system as a whole, and reinforces the negative images which the public can have of the way judges and lawyers perform their roles". As she also said, such an "extraordinary delay clearly called for an apology and, if any existed, an explanation of the mitigating circumstances."

62. In the present instance, the issues before the Court of Appeal were not very complex, as is evidenced by the fact that the appeal took a day to argue, and the judgment ran to fifteen pages. Despite a politely worded request last year from APCL's solicitors, there has, even now, been no explanation, not even an apology, for the delay. A serious and unexplained delay of nearly two years by an appellate court in giving a decision on an appeal of no unusual complexity not only causes uncompensatable and unjustified worry, uncertainty and expense to the parties. More widely, as Arden LJ indicated, it risks bringing the legal system into disrepute, and therefore undermining the rule of law. There may have been a good reason for the delay in this case, but, if there was, it should have been promptly and voluntarily communicated to the parties. Indeed, after six months, and certainly nine months, one would have expected a letter from the Court of Appeal to the parties, acknowledging, explaining, and apologising for the delay.

63. Although Mr Robertson identified one or two factual errors in the judgment of the Court of Appeal, it is right to record that, although lamentable, the delay in this case would not have justified the Board ordering a rehearing of the appeal from the Judge. Indeed, it would be a very rare case where a rehearing would be ordered on the ground of delay when the decision in question did not depend on the evidence. However, the longer the delay in giving judgment, the more likely it is that the judge will misremember or overlook arguments as well as evidence, and therefore the more likely it is that the judge will make a mistake, which will result in a successful appeal.

Disposal

64. As it is, the Board will humbly advise Her Majesty that (i) APCL's appeal should be allowed, (ii) it should be declared that the JVA was approved by the Cabinet on 16 May 2006, and thereby became unconditional, (iii) there should be remitted to the High Court (a) the assessment of APCL's claim for damages for breach of contract against APUA, and (b) the issue as to whether the JVA had been determined by an accepted repudiation, and (iv) it should be declared that the Prime Minister acted in excess of authority when he instructed the Commissioner to prevent the three generators being installed.

65. The parties should agree a form of order and make written submissions as to the costs of this appeal within 14 days of the handing down of this judgment.

LORD CARNWATH: (DISSENTING)

66. I agree with the majority's reasoning and conclusion on the contractual issue, which lies at the heart of the appeal, and on the orders which should follow against APUA. I am unable, with respect, to persuade myself that this is an appropriate case for a declaration against the Prime Minister. The issue to which it relates is now wholly academic as between the parties. Although there is discretion to grant relief in such circumstances, it should be exercised with caution and only where there is good reason in the public interest for doing so (see *R v Secretary of State for the Home Department, Ex p Salem* [1999] 1 AC 450, 457 per Lord Slynn). Against the very unusual and factual and procedural background of this case, APCL has failed to show how a bare declaration in the narrow form now proposed would be of any practical utility for them or for the public generally.

67. Caution is particularly necessary, in my view, in a commercial context such as the present, where there are ample common law remedies for any substantive wrongs suffered by the claimant. ACPL was suing as a commercial organisation seeking commercial remedies, not as an independent champion of constitutional rights. That is

not altered by the fact that one of the main respondents was a public corporation, in which the Prime Minister had a direct involvement. It was in his capacity as Minister for APUA, not as Prime Minister, that he was sued. The interests of APCL as a commercial organisation have been amply vindicated by their success on the main issue.

68. The commercial nature of the ultimate showdown in December 2007 is apparent from the chain of events leading up to it. Both parties must bear some responsibility, and there seems to have been an element of brinkmanship on both sides. The critical dispute between them on the interpretation of the contract had come to light not later than March 2007. Both at that stage must have realised that time was running out, if the December target for installation was to be met. Yet neither took steps to resolve their legal differences in court or otherwise. APCL continued with preparation of the generators for installation, and APUA appears to have been willing to co-operate for a time, at least at the operational level. No doubt it was assumed that the negotiations would in practice be completed in time.

69. Once it had been made clear to APCL in early November that they would not be allowed access to the site, their decision to press ahead regardless appears to have been a calculated gamble. Initially they may have thought there would be sufficient co-operation from the staff on site, even if they knew it to be unauthorised by management. But once that co-operation was removed, it is not clear how they intended to complete the task of moving the generators onto the site. Although it was the police who brought their efforts to an end, it is not clear that their position would have been materially different if, instead of involving the police, APUA had simply barred their access the site. It is not suggested that APCL could or would have forced entry. By that stage, the need for an application to court for interim relief and directions for trial had become virtually inevitable.

70. On the other hand, although both sides can be criticised, it cannot fairly be said that there was any deliberate flouting of the law by either. If APCL had not thought that they had a contractual right to install the generators, it is very unlikely that they would have pressed ahead as they did. Equally, had APUA and the Prime Minister been advised that APCL did indeed have such rights, there is no reason to think they would not have honoured them. The Prime Minister's own actions, so far as they can be distinguished from those of APUA, including his recourse to the police, were carried out with the advice and support of the Attorney General as his senior legal officer. Although that advice is now shown to have been wrong, there is no suggestion that it was not given in good faith.

71. I accept that, if the Prime Minister had before this court maintained the assertion that he was entitled to "instruct" the police to act on his behalf, that would have raised a constitutional issue of sufficient importance to justify an exception to the

ordinary practice as seen by Lord Slynn. But that is far from the case. The majority have directed attention to the wording of the affidavit sworn by the APUA representative, on behalf of APUA itself and of the Prime Minister, at the very outset of the proceedings. But that is not the basis on which the claims were defended either before the judge or at any time since. The application of *Blackburn* principles has never been in dispute in these proceedings. The majority's disagreement with the lower courts therefore depends on a difference of fact not law. That is hardly an issue of constitutional significance necessitating the intervention of the Privy Council. The particular facts are unlikely to be repeated, and there is no evidence of any more general threat to proper relations between the police and the executive.

72. There are further factors which in my view make this an inappropriate order. In the first place, it is highly unsatisfactory at this late stage for the Board to be asked for the first time to consider the position of the Prime Minister as distinct from that of the Commissioner. Whether he purported to give a Prime Ministerial "instruction" to the Commissioner, or (as the courts below were prepared to accept) was simply seeking their assistance in asserting his right to prevent a trespass to land for which he was responsible, is an issue of very limited significance in relation to the events as they occurred. Judicial review is concerned with acts or decisions having practical consequences (see per Lord Diplock, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408F). The illegality, if any, under *Blackburn* principles lay, not in the words directed to the Commissioner, but how she responded to them. It was the intervention of the police, not the communication of the Prime Minister as such, which gave rise to APCL's complaint. The courts below, having been referred to the relevant passage in *Blackburn*, found that the Commissioner had acted lawfully. That is not a finding which can be fairly challenged at this stage in proceedings to which the Commissioner is no longer a party. The case against the Prime Minister is thus divorced from the only context which it gave it legal or practical significance.

73. The procedural context has also been changed in another way. In the lower courts, APCL's assertion of illegality by the Prime Minister was not a free-standing claim but was linked to constitutional or common law claims for financial relief. Those claims at least gave this aspect of the case some arguable commercial significance. They have been put in various forms at various times, including allegations of bad faith, and misfeasance in public office. In the end no real attempt was made to support them before the Board. Nor was it shown that any additional loss was caused to APCL. The appellants' failure to make good those claims is no reason for allowing them at the final stage to fall-back on an abstract declaratory remedy, entirely separate from the financial context in which it has hitherto been advanced.

74. In so far as the appellants were seeking to rely on constitutional rights (as asserted in their printed case, and maintained even into the second day of the hearing before the Board), their case was clearly misconceived. This is so not only on the clear

terms of the articles relied on (as was in the end conceded), but also in principle. The Board has made clear that, other than in exceptional circumstances, claims based on constitutional rights should not be advanced where parallel remedies exist (see eg *Jaroo v Attorney General of Trinidad and Tobago* [2002] 1 AC 871 para 29ff, *Webster v Attorney General of Trinidad and Tobago* [2011] UKPC 22 para 16ff). I repeat that these were in essence commercial claims for which appropriate common law remedies were available.

75. Finally, I would not wish the Board to give any implied endorsement or encouragement to the scatter-gun manner in which the claimants' case has been presented at every stage. What are essentially common law claims should not be dressed up in constitutional or public law clothes unless there is very good reason to do so. If it is to be done, the basis of the claim needs to be clearly, precisely and consistently formulated, and the reasons for exceptionally pursuing a separate constitutional or public law remedy need to be explained and made good. That was not done before the trial judge, and that failure has continued into and beyond the oral hearing before the Board.

76. For these reasons, while of course not wishing to diminish the importance of the well-known principles in the cases cited by the majority, it is in my view neither necessary nor appropriate to grant a declaration in the form now proposed.