EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCM2020/0005

BETWEEN:

SOL EC LTD

Claimant

And

1. **SPENCER'S FUEL STATION AND GARAGE SERVICES LIMITED**
2. **SPENCER AMBROSE**

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:
Mrs Diana Thomas-Hunte with Ms Cleopatra McDonald for the Claimant
Mr Sahleem Charles with Mrs Esther Green-Ernest for Defendants

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2025: June 10; 11;
July 14;
October 23;
2026 August 03.

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** These proceedings concern the assessment of damages following the Court's judgment delivered on 14th August 2023, after a full trial to determine liability. In summary, the Court held that: (i) the first defendant breached the Service Station Operation Agreement dated 9th May 2019 ("the Agreement") and is liable to the claimant

(SOL) for damages; (ii) the second defendant (Mr Ambrose) made negligent misrepresentations to the claimant and is liable in damages; and (iii) the defendants' counterclaim was dismissed.

[2] It had been previously agreed that trial should be bifurcated with liability being determined prior, and thereafter the Court's attention would turn to trial on assessment of damages. Thus, the matters which will be addressed in this judgment touch and concern the proper quantification of damages.

The Issues

[3] The principal issues which arise for determination are best framed as follows:

1. Whether clause 9.4.1 of the Agreement provides an enforceable mechanism for calculating damages consequent upon early termination?

2. Whether the evidence of the Single Joint Accounting Expert, Mr. Frank Myers, ought to be accepted?

3. Whether clause 9.4.1 constitutes a penalty?

4. Whether SOL is barred from recovery of damages by reason of clauses 16.1 and 16.2 of the Agreement?

5. What is the quantum of damages assessed against the first defendant?

6. What damages are recoverable against the second defendant for negligent misrepresentation?

Preliminary Issue: The Claimant's Objections to Portions of the Second Defendant's Witness Statement

[4] By way of a Notice of Objection to Evidence filed on 22nd November 2024 the claimant took issue with what it considered was inadmissible evidence contained in the witness statement of the second defendant. By order dated 10th June 2025 the Court directed that the claimant amplify the Notice of Objection to include a table containing the relevant paragraphs or words and the basis for each objection was raised. The expanded notice of objection containing further particulars of the complaints was filed on 11th June 2025 and will form the basis for

the Court's assessment of these objections. In it, the claimant objected to a number of passages in the second defendant's witness statement which will be addressed in broad categories, rather than individually. The claimant contends that the material:

(i) seeks to reopen matters conclusively determined in the liability judgment;

(ii) contradicts judicial admissions previously made by the defendants;

(iii) advances matters not pleaded in the defence and counterclaim; or

(iv) constitutes inadmissible opinion evidence in relation to matters reserved for expert witnesses or the Court.

[5] The Court accepts that the findings made in the liability judgment are binding for the purposes of this assessment. Accordingly, no weight will be attached to any portion of the second defendant's evidence which seeks to relitigate whether the first defendant was required to obtain a licence in its own name, whether the Agreement was frustrated, whether the first defendant took all reasonable steps to obtain the required licence, or whether the second defendant intended that the first defendant operate under his personal licence. These matters were determined in the liability judgment and are res judicata.

[6] Further, no weight will be placed on the portions of the witness statement which amount to legal submissions concerning the construction of clause 9.4.1, the interpretation of the Agreement, or the calculation of damages, all of which are matters for the Court and, where appropriate, the jointly appointed experts.

[7] The Court will admit and consider those portions of the second defendant's evidence that are relevant to matters arising on assessment, including his observations concerning the chronology of events, communications between the parties, the history of the equipment, mitigation, and the circumstances surrounding the continued storage and use of assets, and will accord such weight to that evidence as considered appropriate.

The Evidence

[8] It is useful to explain here that for the purposes of this judgment the evidence is limited to matters relevant to quantum, namely, contractual loss, expert valuation, mitigation, and

negligent misrepresentation damages. The lay evidence will be addressed first, followed by the expert evidence.

Claimant's Witnesses

[9] Nicholas Waithe ("Mr Waithe") testified that he is SOL's Caribbean Retail Network Planner and a civil engineer, and that he assisted the Project Engineer by screening the defendants' site for design suitability and compliance with SOL brand standards, having previously worked on numerous similar projects across the Eastern Caribbean. In cross-examination, when asked about the timing of his review, he stated that he did not recall the exact date on which he reviewed the design but confirmed he was approached by Mr Edward (the Project Engineer) to review the project proposal and designs for the facility.

[10] Mr Waithe testified that the design concept for the defendants premises included canopy layout, positioning, and convenience-store optimization, aimed at improving sales performance, and that significant time and resources were spent on consultations and layout revisions to bring the existing fuel station into conformity with the SOL brand expectations, despite the limitations posed by the site. He testified that the property's size and shape meant that the SOL's standard layouts and ideal "toll gate" canopy design could not be used, resulting in a design uniquely tailored to the first defendant's fuel station (meaning it was not interchangeable with other locations of the claimant). This included customized canopy structural steel and brand identity elements. He stated that the brand elements were proprietary to the claimant, returning them to the manufacturer was not viable, and that the canopy's structural steel, being custom designed for the site, was unlikely to be redeployable. He added that any redeployment of brand elements would require crating, shipping, and potential duties if sent to another territory, and that no suitable projects were available regionally within six months.

[11] In cross-examination, Mr Waithe was asked whether he was aware that, during 2023 – 2024, multiple projects of SOL had used equipment allocated to the first defendant's fuel station. He responded that while he could not recall the precise timeframe, he was aware that some equipment had been used for other projects. When asked to identify the specific items, he

stated that he did not know what particular equipment had been used, only that he knew it had occurred.

[12] Randy Edwards ("Mr Edwards") testified that, as SOL's Project Engineer and later Project Manager, he prepared the design concept for converting the first defendant's fuel station into a SOL-branded flagship location in the south of the island and placed all related equipment orders in accordance with site-specific designs prepared with Retail Network Planner Mr Waithe, and in consultation with the second defendant, Mr Ambrose. He stated that all major equipment, including the canopy and forecourt branding (exhibit RE1), perimeter lights (exhibit RE2), tanks and dispensers (exhibit RE3), the fuel management system (exhibit RE4), the air meter (exhibit RE5), tank liner (exhibit RE6), and canopy lights (exhibit RE7), were custom-built to the specifications and dimensions of the first defendant's site.

[13] He stated that when the project collapsed in or around October 2019, only items which were not yet in production were cancelled, while all other ordered items were delivered and stored at the claimant's depot. In his professional view, none of the equipment could be returned to the manufacturer because the items had been manufactured to the claimant's designs specifically for the first defendant's site and no comparable project existed. He further explained that the site's layout, being attached to another building and located at a T-junction, rendered the canopy and branding elements unsuitable for redeployment elsewhere in Saint Lucia. He also gave evidence on the condition and expected deterioration of various items during prolonged storage. Canopy components likely experienced corrosion; electrical components in the fuel management system may have degraded; the tank liner was expected to have deteriorated beyond safe use; branding elements may no longer meet SOL's brand standards; and electrical fittings and dispensers required testing, factors relevant to any assessment of loss or depreciation claimed by the claimant.

[14] In cross-examination, when asked whether he was aware that since the filing of his witness statement, equipment originally intended for the first defendant's fuel station had been used on multiple other SOL projects, he confirmed that he was aware that some of the equipment had in fact been used elsewhere. However, he was not fully aware of the exact items

because he had returned to Barbados a few days before the onset of COVID-19 in 2020. When asked whether his knowledge of the first defendant's project effectively ended at that point, he explained that while the day-to-day running of the project was no longer under his supervision following his return to Barbados, the present Operations Manager of SOL St. Lucia, had updated him during the course of the trial on any use of the equipment.

[15] Curtis Isaac ("Mr Isaac") testified that he is the Operations Manager of SOL, in Saint Lucia, and gave evidence concerning the equipment purchased for the planned Vieux Fort service-station upgrade to be operated by the defendants. The project was never executed. He stated that the equipment ordered for that site was stored at SOL's Buckeye compound after the Agreement was terminated. In cross-examination, he was asked when the various orders for equipment had been placed. He stated that the dates were included in the witness statement of Earl Caribbon (the claimant's witness at the liability trial) and that the orders would have been placed leading up to the intended start date of the project. He confirmed that at the time the orders were placed he was already the Operations Manager, having taken up that position in November 2018. When asked when he became aware of the orders being placed, he explained that the order-placement procedure involved himself working with Mr Edwards to submit purchase orders for approval, but he did not know the specific dates from memory.

[16] He explained that in July 2021, the court-appointed Single Joint Engineering Expert inspected the equipment and later issued an expert report listing the items examined. Mr. Isaac testified that following inquiries made of him in November 2024, he conducted a full review of the claimant's records to determine whether any of the equipment purchased for the defendants project had been used elsewhere. He confirmed that the claimant had purchased three 5,000-gallon underground storage tanks for the project[1]. He stated that, after the expert's inspection, one of those tanks was shipped to St. Kitts in 2023 for use on a SOL project in that market, and he further stated that the remaining two tanks are currently being installed for a separate SOL project in Saint Lucia.

[1] See exhibit EC14(1)(a) to the witness statement of Earl Caribbon

[17] Mr. Isaac testified that the air meter intended for the defendants project was installed at SOL's service station in Anse La Raye. He confirmed that several parts of the Fuel Management System purchased for the project were used on two SOL projects in Saint Lucia between 2023 and 2024[2]. In cross-examination, he confirmed that each item listed in the table below paragraph 10 of his witness statement related to the fuel management system, including the system's hardware. He explained the composition of that system, which included pumps, controllers, fuel lines, fittings, wiring, and safety devices and noted the values reflected in the expert's report and in Bolivar Trading's invoices. He stated that SOL paid US$65,343.34 for the system and provided an itemized list of the remaining components still stored at the Buckeye Compound, with a total residual value of US$17,196.04.

[18] Mr Isaac also testified that the Engineering Expert's report duplicated certain costs relating to tanks and dispensers from Soltech, and clarified the correct actual expenditure figures reflected in the supporting invoices. In cross-examination, he was asked whether paragraph 10 of his witness statement was intended to clarify an overstatement by the expert, and he explained that the expert had used a quote, whereas SOL relied on the final invoice amount, which was lower due to differences in shipping or item cost. He confirmed that paragraph 11 corrected a discrepancy between the quotation and the actual invoice cost used in the expert's report. He confirmed that the total value of equipment and materials used by SOL in 2023 and 2024 was US$122,851.27, leaving unused materials valued at US$97,021.19. In cross-examination he confirmed that the latter figure represented the adjustment to be made to the figures in the Single Joint Engineering Expert's first report.

<u>Defendants' Witness</u>

[19] **Spencer Ambrose** ("Mr Ambrose") was the sole witness for the defendants. He testified that he is the director of the first defendant and the second defendant in the proceedings.

[2] See exhibit EC14(2)(f) to the Witness Statement of Earl Caribbon)

[20] Regarding damages, he stated that SOL paid him XCD$25,000.00 on 16th April 2019 (AS7) and XCD$125,000.00 on 30th May 2019, but that none of SOL's equipment was ever installed at his property. He stated that all equipment remained at SOL's Cul de Sac compound and that during a 2021 site visit agreed between the parties, he observed the equipment (documented in Appendix VII referenced in his statement) stored in conditions he regarded as improper and that SOL bore responsibility for any deterioration caused by poor storage practices. He also observed that the equipment was not unique to his station (unbranded for his station) and in his view, was capable of being used at alternative locations. He says these matters should inform any assessment of SOL's alleged expenditure and depreciation losses. He further testified that many items appeared to have been ordered after he had already notified SOL in July 2019 of licensing restrictions.

[21] In cross-examination he rejected the suggestion that as at 3rd September 2019 he expected SOL to be installing equipment, and was asked when he expected installation to occur. He responded that Mr Caribbon had informed him that everything would be ready by December 2019. He agreed that by 19th September 2019, and continuing through 24th September 2019, he expected that SOL would already have submitted a DCA application. He confirmed that he expected to be open by December 2019. He agreed that he terminated the agreement on 5th October 2019 and accepted that SOL had told him that equipment was being ordered, although he stated there was a breakdown in communication about what had actually been ordered or shipped. He confirmed that he expected SOL to order equipment to meet the expected opening date and accepted that he now knows the orders were placed before termination. He stated, however, that although Mr Caribbon gave him "dates for shipping," he did not take this as confirmation that the equipment had actually been shipped.

[22] When referred to exhibit AS13 and his 3rd September 2019 correspondence, he rejected the suggestion that SOL could not have installed equipment because RUBIS equipment remained on the site, explaining that only the underground tank remained and that some of SOL's equipment could at least have been installed, though not all. He agreed that some items were already on island by 19th September 2019 and further shipments were expected around 25th September 2019. He accepted that he terminated the agreement in October 2019 despite knowing that some equipment was already shipped or was on island. He

maintained that he did not assert that SOL should not have ordered the equipment; rather, he said he lacked knowledge of licensing requirements and believed that because the license was transferred into his name, he was compliant. He accepted that obtaining a license was the responsibility of the first defendant and not that of SOL, and acknowledged that the contract did not require SOL to instruct him on how to fulfil his obligations.

[23] Mr Ambrose further accepted that the equipment referred to in his witness statement was intended for the first defendant's fuel station, but he disagreed that the equipment was "not meant for storage," stating that although the intention was installation, he did not accept that storage was inappropriate. He maintained that SOL should have arranged storage. He confirmed he did not know the cost of proper storage and therefore could not say whether it would have been better for SOL to relocate the items or leave them at the compound. He accepted that he had not identified any other station, did not know the forecourt area, and explained that when he said equipment was "not unique," he meant it consisted of standard industry materials and components even if dimensions varied. He stated that canopy materials were "standard" and any necessary adjustments could be made. Finally, regarding his experience as an operator, he confirmed he had operated a gas station for about ten years selling gas and diesel, though he said he could not answer whether he sold more gas or diesel annually. He agreed that fuel prices and margins were set by the Government but said he did not know the current margins "off the top of his head."

Expert Witnesses

[24] *Engineering Expert:* Expert engineering evidence was provided by the Single Joint Engineering Expert, **Verne Edward Emmanuel** P.Eng ("Mr Emmanuel"), who was tasked with valuing the equipment purchased for the intended service station, determining its remaining useful life, and addressing concerns raised by the parties. In his original report, he adopted the standard cost approach because all equipment had been purchased new, explaining that the replacement cost of engineering equipment properly includes direct costs, indirect costs, and cost of money, rather than mere purchase price. He acknowledged the general limitations of the method, including the potential for subjective judgments on depreciation and the risk of overstating economic obsolescence, but affirmed that no such

limitation affected its utility in the present assessment. Using the cost approach, he assessed the replacement value of the equipment at XCD$941,040.87 and, after applying financing costs and minimal depreciation appropriate for new, unused items, calculated the current value at XCD$959,108.86. In explaining his valuation, the expert outlined the inputs used to calculate the current value of the equipment. He assessed the direct and indirect equipment costs at XCD$941,040.87. He applied a 4% cost-of-money factor and a straight-line depreciation rate of 1% per annum over two years, producing a replacement cost of XCD$978,682.51 and a final value of XCD$959,108.86. He noted that this calculation assumes the claimant's access to commercial financing at 4%; if that assumption were incorrect, the replacement cost would require adjustment, although he identified no evidence that the assumption was invalid.

[25] Mr Emmanuel found that the equipment was unused, in good condition, and capable of functioning for approximately fifteen years once installed as an integrated system, with the underground tanks having an even longer expected lifespan of twenty-five to thirty years. He stated that the equipment could be repurposed at another site of similar dimensions, subject to planning approval, thereby confirming that the equipment retained substantial commercial value. When addressing the potential for the equipment to be used at an alternative location, Mr Emmanuel indicated that neither party had identified a specific available site, nor was he aware of any specific site where the said equipment could be used. His assessment was therefore informed by his own knowledge of locations in Saint Lucia where such equipment could be installed subject to DCA approval, including two abandoned service stations in Castries South-East and Micoud South.

[26] He also stated that the equipment is compatible with any site having similar dimensions to the originally intended location and confirmed that the canopy could be modified to suit a minimum length of 9 meters with appropriate dispenser spacing. The estimated cost of this modification was XCD$20,000.00. Mr Emmanuel also explained that his assumptions about the availability of alternative sites were based on the likelihood that the claimant would seek to avoid creating stranded assets, noting recent developments in the fuel retail sector, including new SOL-operated stations at Anse la Raye and Bois D'Orange and the redevelopment of another site by RUBIS. He stated that, even if no suitable site existed, the

equipment could still be put to alternative uses: the canopy could be sold in parts, tanks could replace non-compliant units elsewhere, and other items could serve as spares within existing operations.

[27] In response to SOL's questions, he confirmed that his valuation reflected industry-accepted methodologies and that installation costs were not included because they were not requested as part of the valuation exercise. Mr Emmanuel also addressed the condition of certain items of equipment that had suffered damage to packing crates, boxes and some metal fittings due to water exposure, which he considered consistent with the passage of a hurricane on 2nd July 2021. He noted that such damage “may” be recoverable under insurance. He confirmed that no insurance policy or cover note was supplied by either party. He did not review any actual insurance documents. Instead, he relied on Section 18 of the contract, which requires the claimant to maintain all-risks insurance from the commencement of the contract. On that basis, he assumed that insurance coverage was in place. He explained that it is standard industry practice for operators in this sector to maintain a suite of policies, including public liability, employer’s liability, property and contents, goods in transit, and business continuity cover. He stated that he could not assume non-compliance in circumstances where the contract expressly required insurance and the omission of the actual policies from the disclosure bundle might simply be inadvertent. When asked whether insurers would cover losses caused by exposure to the elements, he again relied on the contractual obligation in Section 18 and the nature of SOL’s operations as a transporter and distributor of fuel, stating that similar coverage applicable to loaned equipment would ordinarily exist even when stored at SOL’s compound. Mr Emmanuel acknowledged that his conclusions rested on assumptions. If those assumptions proved false, meaning if the parties did not in fact maintain the required insurance, this would mean they were operating in a negligent and non-compliant manner, which he did not consider consistent with the circumstances.

[28] In questions from the defendants’, Mr. Emmanuel was also asked whether he had overvalued the equipment or improperly included engineering, procurement, and mobilization costs. He firmly rejected these criticisms, explaining that such costs are essential components of replacement cost valuation and are standard in engineering

assessments. He also clarified that the straight-line method of depreciation was used and that depreciation was low because the equipment had not been used, and greater depreciation would only commence once the items were installed and operational. In their follow-up questions, the defendants suggested the valuation should have been lower due to the passing of time, but Mr Emmanuel reiterated that deterioration is minimal where equipment remains unused and safely stored. Mr Emmanuel also noted that notwithstanding the suboptimal storage conditions, what was affected was the packaging material of the equipment, e.g., pallets and paper boxes and not the items themselves, save for some fittings which exhibited some surface corrosion due to exposure to water.

[29] His supplemental report in March 2025 documented a verification exercise at SOL's Buckeye compound and listed the remaining loaned items. Mr Emmanuel noted that most of these items had been stored outdoors and exposed to weathering, with some degradation of labels and paper-based branding materials, though major electrical and mechanical components remained intact as they were stored indoors. This supplemental assessment did not alter his core conclusion that the equipment retains value and usability, specifically with regard to the canopy, electrical equipment, dispensers and all other items which were properly stored. Across both his original report and subsequent answers, Mr. Emmanuel provided no support for the argument that SOL's claimed losses were exaggerated or punitive; instead, his evidence indicated that SOL made genuine capital investment in equipment with long remaining life, and that the valuation placed on the equipment was technically justified and not inflated.

[30] <u>*Accounting Expert:*</u> The Court received expert evidence from the Single Joint Accounting Expert, **Mr. Frank Myers** FCCA ("Mr Myers"). He was required to compute the termination fee payable under Clause 9.4.1 of the Service Station Operation Agreement. In his report he set out the contractual framework governing the calculation, namely that the termination fee consists of three components: the number of years remaining in the Agreement, the average annual sales volume, and seventy-five per cent of SOL's gross unit margin for the preceding twelve months. As no sales ever occurred, and the defendants never sold SOL's fuel, Mr Myers adopted the minimum monthly sales potential of 48,000 gallons specified in the Sixth Schedule, explaining that the Agreement itself contemplated this fallback and that

using it was the most reliable method of deriving sales volumes in the absence of historical data. He determined that at the time of termination on 5th October 2019, the remaining contractual period was approximately 14.92 years. For the gross margin component, he relied on the regulated petroleum price build-up published by the Government of Saint Lucia, adopting margins of XCD$0.22 per litre for gasoline and XCD$0.20 per litre for diesel, which had remained unchanged throughout 2018 and up to the time of termination. Applying these figures and the parties previously used 80:20 gasoline–diesel split, he calculated the termination fee as XCD$5,269,533.93, and on a 70:30 split as XCD$5,220,741.95. He emphasized that these amounts were not punitive but were the natural result of applying the contractual formula, which measures SOL's lost economic benefit over the remainder of the contract.

[31] In his answers to the defendant's questions, Mr Myers confirmed that his calculations strictly followed the wording of Clause 9.4.1 and that the regulated margin figures were the most accurately available. He stated that it was unnecessary and inappropriate to speculate about hypothetical margins or alternative methods because the Agreement itself already supplied the required inputs. Mr Myers rejected any suggestion that the clause produced arbitrary or inflated compensation, reiterating that all components were verifiable and derived directly from the Agreement or from public regulatory data. He further denied that the absence of actual sales prevented the clause from operating, explaining that Schedule 6 supplied the necessary data to quantify annual volumes and that the formula was expressly designed to operate even in the absence of trading history. His responses therefore reinforced his conclusion that Clause 9.4.1 provides a complete, workable, and compensatory formula that yields a definite quantum without any need for subjective adjustment.

[32] Mr Myers confirmed that he expressly considered Clause 9.4.1 in light of the Court's findings in the liability judgment that the first defendant had breached the Agreement, and the order of 29th May 2024 directing him to consider Clauses 9.4.1, 1.1.13, 5.2.1 and the Sixth Schedule in preparing his assessment. He explained that his reference in the Report to the defendants not having traded in SOL's goods was made in the context of the finding of breach, rather than as a factual statement that no trading occurred. He stated that Clauses 5.2.1 and 9.4.1, together with the Sixth Schedule, all contemplate anticipated or minimum

sales volumes for the site. In his view, these provisions justified the adoption of the minimum monthly sales potential in the Sixth Schedule as the appropriate proxy for the "average annual sales volume" required under the contractual formula. Given the absence of actual sales data resulting from the premature termination of the Agreement, Mr Myers stated that reliance on the Sixth Schedule was both necessary and consistent with the contractual risk allocation. He noted that under Clause 5.2.1, if SOL delivered less than 48,000 American gallons in any month the defendants would have had no claim for under-delivery; conversely, if SOL was capable of supplying that quantity but the defendants failed to sell it, SOL would have had a claim against the defendants up to that threshold. In his opinion, this confirmed that the Sixth Schedule provided a reliable and contractually intended method of estimating annual volumes for the purposes of Clause 9.4.1.

[33] Mr Myers then applied the Sixth Schedule's 48,000-gallon figure to compute the corresponding litre volumes and inserted those figures into the formula prescribed by Clause 9.4.1. Using an 80:20 split between gasoline and diesel derived from industry consultations, he provided comparative computations showing the different compensation figures produced under varying fuel-mix scenarios, including cases where only one class of fuel is considered. On the question of applying SOL's gross unit margin in the absence of actual sales, he explained that once a finding of breach is accepted, Clause 9.4.1 applies in full. As that clause expressly requires the use of the gross unit margin that SOL "received or was entitled to receive" in the prior twelve months, the weighted average unit margin was properly applied notwithstanding the absence of actual trading.

[34] In response to further questions from counsel for the defendants, Mr Myers stated that the Agreement does not use the terminology "liquidated damages" but instead provides for "compensation for early termination." He confirmed that he applied the formula in Clause 9.4.1 exactly as written and agreed that the clause contains specific inputs for deriving a calculable sum, and rejected the suggestion that he failed to use those inputs. He understood "specific inputs" to mean those expressly stated in the contract. He acknowledged that there was no historical "average annual sales volume" available but reiterated that the contractual scheme allowed the minimum monthly sales potential in the Sixth Schedule to operate as the appropriate proxy. As to the gross unit margin, he

confirmed that he used the regulated petroleum margins published by the Government of Saint Lucia, explaining that this represented what SOL would have earned "as if" sales had taken place.

[35] He rejected the proposition that he had departed from the formula in respect of the gross unit margin, explaining that Clause 9.4.1 expressly permits the use of what SOL "received or was entitled to receive" in the preceding twelve months. He interpreted "entitled to receive" as addressing the distinction between a contract that proceeded as intended and one that did not, but where an entitlement nevertheless arose because performance had commenced. He maintained that this interpretation was consistent with the clause and with the Court's earlier finding that compensation was payable. He disagreed that this amounted to an assumption, stating that the entitlement arises directly from the wording of Clause 9.4.1 itself. When asked whether "entitled to receive" could mean receivables, he rejected this interpretation, explaining that receivables would only arise if the contract had proceeded, whereas in this case entitlement to compensation followed from the breach and the determination that compensation was due.

[36] Mr Myers accepted that the formula was dictated by the Agreement, although he noted that the Court correctly concluded that compensation was payable under it. He stated that the only unavailable data concerned actual sales volumes, but this did not impede the calculation because the Agreement contained sufficient information to determine compensation. He did not consider it necessary to alert the parties or the Court to any limitation because none prevented the application of the formula.

[37] He confirmed that his instructions were undertaken in his capacity as an accountant. Although he referred at paragraph 1.5(iii) of his written answers to drawing on his experience as a consumer in assessing the range of products that would likely have been sold, he did not regard this as involving any improper assumption or conflict. In his view, it was an appropriate application of professional skill in circumstances where actual sales data did not exist. He accepted that he did not identify the persons whom he surveyed in relation to consumption estimates, explaining that confidentiality concerns in a competitive industry made this impractical, and that he had simply reported the information he was provided. The

purpose of the information was to assist in determining likely compensation, and he emphasized that he did not rely on any single figure but instead included a range of values, including calculations based on 100% gasoline and 100% diesel, to illustrate the breadth of potential outcomes. He explained that sampling was necessary because market participants were reluctant to disclose confidential information, and that presenting a range demonstrated that no fixed assumption drove the conclusion.

Issue 1: Whether clause 9.4.1 of the Agreement provides an enforceable mechanism for calculating damages consequent upon early termination?

[38] The Court has read and given full consideration to the submissions of the parties concerning this issue. In the written and oral submissions Clause 9.4.1 of the Agreement attracted heavy scrutiny. It is found under the heading "Compensation for Early Termination", and states as follows:

> "In the event this Agreement is terminated prior to expiry of the Term due to no default on the part of SOL, AND where SOL IS NOT ALLOWED TO CONTINUE ITS OPERATIONS at the site, SOL shall be entitled to a termination fee equal to the number of years (or any part thereof) remaining in the Term multiplied by the AVERAGE ANNUAL SALES VOLUME multiplied by 75% SOL's GROSS UNIT MARGIN (CENTS PER LITRE) that SOL RECEIVED or WAS ENTITLED TO RECEIVE in the prior twelve (12) months. The Operator agrees that this fee is not a penalty but is a bona fide estimate of SOL's loss of profit that it would have expected on the investments made during the contract period."

[39] The starting point is that a written commercial contract must be interpreted objectively. In **Arnold v Britton and others**[3], the English Supreme Court stated that the court's task is to identify the intention of the parties through the language they chose, read in light of the contract as a whole, the surrounding circumstances known at the time of contracting, and commercial common sense. A court should avoid rewriting the bargain merely because one interpretation produces an inconvenient result.

[3] [2015] UKSC 36 at paras. 14-23.

[40] Similarly, in **Rainy Sky SA v Kookmin Bank**[4], the English Supreme Court held that where there are two competing constructions, the court is entitled to prefer the construction most consistent with business common sense. In this regard the court's task is to ascertain what a reasonable person, equipped with the available background knowledge, would have understood the parties to mean.

[41] The defendants rely on authorities such as **Kenneth Krys v New World Value Fund Ltd**[5], **Attorney General of Belize v Belize Telecom Ltd**[6], and **Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd**[7] for the proposition that courts may not rewrite contracts or insert terms that the parties did not choose to include. This proposition is uncontroversial and accepted. The issue however is whether the claimant's construction rewrites the contract or simply interprets clause 9.4.1 consistently with the Agreement as a whole.

[42] The defendants submit that clause 9.4.1 is a self-contained formula, which requires the number of years remaining in the term; the average annual sales volume, and 75% of claimant's gross unit margin which SOL received or was entitled to receive in the prior 12 months. They contend that none of these critical inputs existed because the claimant never commenced operations at the service station; no fuel was sold; there was no average annual sales volume; no gross unit margin was earned; and there was no twelve-month operating period from which data could be drawn. Thus, the formula cannot operate and necessarily produces a result of nil.

[43] In this Court's view, if clause 9.4.1 is to be read in complete isolation, that submission would possess some force. However, contractual provisions are not construed in isolation, and the Agreement must be read as a whole. It contains a number of provisions directly concerned with the anticipated sales performance of the service station. Clause 1.1.13 defines "Sales Potential" by reference to estimates set out in the Sixth Schedule. Clause 5.2.1 records that the parties "thoroughly reviewed and discussed" the minimum sales potential reasonably anticipated at the station. The Sixth Schedule contains the agreed sales potential estimates.

4 [2011] UKSC 50
5 BVIHCMAP2013/0017
6 [2009]1 WLR 1988
7 [2006] EWCA Civ 1732

Clause 1.1.17 defines the claimant's Gross Unit Margin by reference to the Government regulated petroleum price build-up.

[44] More significantly however, by order dated 29th May 2024, the Accounting Expert was directed to carry out his task of calculating damages under clause 9.4.1, to consider clauses 1.1.13, 5.2.1, the Sixth Schedule, clause 9.4.1 of the Agreement and the Petroleum Price Build-Up. That order was neither appealed nor set aside. Thus. the contractual assessment exercise was expressly directed to be undertaken by reference to those provisions. The clause applies where the Agreement is terminated before expiry through no default of SOL and where SOL is not allowed to continue its operations at the site. As the Court had already found that the first defendant breached the Agreement and terminated it prematurely liability was not open for reconsideration at this stage.

[45] If the defendants' interpretation is to be accepted, the practical consequence would be that the party responsible for terminating the Agreement almost immediately after commencement would escape all liability under clause 9.4.1 precisely because the breach occurred before sales history could accumulate. Such construction would deprive the clause of much of its commercial utility. It is trite, that the earlier the breach, the less likely actual sales data would exist, and the less likely any compensation would be available. It is difficult to conclude that reasonable commercial parties would enter into a fifteen-year agreement intending that result. Applying the principles in **Rainy Sky**, the Court considers that a reasonable businessperson would regard that outcome as commercially improbable.

[46] Further, the wording of clause 9.4.1 does not refer only to margins actually received. It provides for: *"75% of SOL's Gross Unit Margin (cents per litre) that SOL received or was entitled to receive in the prior 12 months*". The inclusion of the alternative phrase "was entitled to receive" is significant. Had the parties intended actual operational performance to be an absolute precondition, it would have been sufficient to refer only to the margin actually received. However, the additional language indicates that the clause contemplates circumstances in which actual receipts may not exist, but entitlement may nevertheless be assessed.

[47] The defendants urged the Court to focus upon the definition of Gross Unit Margin as margin "earned" by SOL and contend that, because none was earned, the inquiry ends. However, that approach places disproportionate emphasis upon one part of the contractual language while failing to give meaningful effect to the phrase "entitled to receive." Contractual interpretation requires effect to be given, so far as possible, to all parts of the bargain.

[48] The defendants repeatedly argue that the claimant's construction imports terms not found within clause 9.4.1. This characterization is not accepted. The claimant merely relied upon provisions that already form part of the Agreement itself, namely clauses 1.1.13, 1.1.17, 5.2.1 and the Sixth Schedule. Using contractual sales potential data to inform the assessment does not amount to rewriting the bargain. It is construing the Agreement as a coherent whole in circumstances where the parties expressly provided estimates of anticipated sales performance for the operation of the service station.

[49] That conclusion is reinforced by the order which directed the expert to consider those very provisions.

[50] Applying the principles in **Arnold v Britton** and **Rainy Sky SA v Kookmin Bank**, and construing the Agreement as a whole, I conclude that clause 9.4.1 provides an enforceable mechanism for calculating damages consequent upon early termination.

[51] This Court does not accept the defendants' submission that the absence of actual sales data renders the clause incapable of operation or produces a mandatory result of nil damages. Such a construction would defeat the commercial purpose of the clause and deprive substantial portions of the Agreement of practical effect. The proper construction is that clause 9.4.1 is to be applied by reference to the contractual materials identified in the Agreement, including the Sales Potential provisions, the Sixth Schedule and the Petroleum Price Build-Up.

[52] Accordingly, the Court finds that clause 9.4.1 is capable of implementation and furnishes the contractual measure of damages for the first defendant's early termination of the Agreement.

Issue 2: Whether the evidence of the Single Joint Accounting Expert, Mr. Frank Myers, ought to be accepted?

[53] Expert evidence is generally admitted in proceedings to assist the court in matters requiring specialized knowledge. However, such evidence does not usurp the role of the court, which remains responsible for determining what weight, if any, should be given to an expert's conclusions. The opinion of an expert is admissible because of the expertise which he or she brings to the issue under consideration, but acceptance of that opinion depends upon the cogency of the reasoning and methodology employed.

[54] In **Griffiths v TUI (UK) Ltd**[8], it was said that an expert report may properly be rejected where it lacks sufficient reasoning or amounts merely to assertions unsupported by analysis. Even where expert evidence is uncontroverted, a court is not obliged to accept it unreservedly. Equally, deficiencies in an expert report do not automatically require wholesale rejection of the evidence. The court is required to evaluate the reliability of the report and determine the appropriate weight to attach to it.

[55] In **Hoyle v Rogers**[9], the English Court of Appeal emphasized that issues concerning hearsay and factual material relied upon by experts often go to weight rather than admissibility. In the result, the court is entitled to receive the evidence, identify any shortcomings in the expert's methodology, and then decide how much reliance can safely be placed upon the resulting opinion.

[56] The principles articulated in **National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)**[10] require that expert evidence be independent, objective and transparent. An expert should identify the facts and assumptions upon which his opinion is based and should clarify any limitations affecting the reliability of his conclusions. Where an expert considers that insufficient data is available, that fact should ordinarily be disclosed.

[8] (UK) Ltd [2023] 3 WLR 1204 at paras 22, 25, 48
[9] [2014] EWCA Civ. 257
[10] [1993] 2 Lloyd's Rep 68

[57] It is against these principles that this Court must assess the evidence of Mr. Myers.

[58] The defendants have raised a number of substantial criticisms. Mr. Myers accepted in cross-examination that the contractual inputs required by clause 9.4.1 did not exist in the form contemplated by the Agreement. He acknowledged that there was no actual annual sales volume and that no gross unit margin had been earned by SOL at the site, because operations never commenced. The defendants challenge his reliance on information obtained from unidentified fuel retailers concerning the likely split between diesel and gasoline sales. The identities of these sources were not disclosed and the underlying information was not independently verified. The defendants further say that Mr Myers acknowledged limitations in the available information and accepted that he did not seek directions from the Court notwithstanding that the rules contained provisions permitting an expert to do so where assistance was necessary or required. The defendants also contend that aspects of cross-examination revealed that Mr Myers drew in part upon his experience "as a consumer" when considering fuel sales patterns, and submit that this demonstrates speculation rather than expert accounting methodology.

[59] These criticisms require careful consideration. However, the Court does not accept that they justify rejecting the report in its entirety.

[60] Mr. Myers was not appointed by one side. He was appointed as a Single Joint Accounting Expert pursuant to a consent order of the parties. His function was to assist the Court independently rather than to advance the position of either litigant. By order dated 29th May 2024, the Court specifically directed that he was to proceed with his assessment and instructed him to consider clause 9.4.1 together with clauses 1.1.13, 5.2.1, the Sixth Schedule and the Petroleum Price Build-Up. That direction was given after the Court declined the claimant's application for specific disclosure from the defendants. The expert was therefore required to perform his task within the evidential constraints that existed and in accordance with the Court's directions.

[61] Mr Myers did not present his conclusions as mathematically precise findings. Rather, he repeatedly emphasized that he was providing a range of possible compensation because

actual operational data was unavailable. In cross-examination he explained that he aimed to arrive at a reasonable range of values rather than a definitive figure.

[62] The absence of actual sales data arose because the Agreement was terminated before operations commenced. The breach therefore prevented the accumulation of the historical information that would ordinarily have informed the assessment, in a functioning business relationship.

[63] Applying the reasoning in **Griffiths v TUI** and **Hoyle v Rogers**, this Court concludes that the identified weaknesses affect the weight to be attached to particular aspects of the report rather than its admissibility as a whole. The Court will address these deficiencies in the following way:- first, reduced weight will be attached to the evidence derived from unidentified third-party operators regarding the likely diesel/ gasoline sales mix, because the inability to evaluate the underlying sources diminishes its reliability; secondly, greater weight will be attached to those aspects of the report grounded directly in the express provisions of the Agreement, the Sales Potential figures contained within the contractual documentation, the Petroleum Price Build-Up, the agreed term of the contract, and the dates fixed by the Court's orders.

[64] The Court also accepts that some aspects of the exercise necessarily involved estimation, but notes that the need for estimation in a damages assessment does not of itself render the resulting opinion inadmissible or unreliable. As noted in **Parabola Investments Ltd v Browallia Cal Ltd**[11], the law allows for a degree of imprecision where loss is difficult to quantify.

[65] Taking all these matters in the round, the Court does not accept the defendants' invitation to discard the Accounting Expert's report in its entirety. Admittedly, the report contains shortcomings, particularly regarding the retailer-derived sales split evidence and the expert's failure to seek directions concerning information limitations. However, these are matters which justify caution and warrant a reduction in the weight attached to certain aspects of the analysis.

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[11] [2010] EWCA Civ 486 at 25.

[66] The report remains the only expert evidence directed to the contractual compensation mechanism contained in clause 9.4.1. It was prepared by a jointly appointed expert acting pursuant to a court order and it provides a reasoned framework for assessing loss in circumstances where precise historical data could never exist because the Agreement was terminated before operations commenced.

[67] Accordingly, the report is admitted and the evidence of Mr Myers is accepted, whilst giving reduced weight to those aspects of the report dependent upon anonymous retailer information and unsupported assumptions. It will therefore be treated as reliable evidence of the range within which the claimant's contractual loss falls, rather than as establishing with exact precision the highest figure identified by the expert.

Issue 3: Whether clause 9.4.1 constitutes an unenforceable penalty?

[68] The defendants submit that, even if clause 9.4.1 is capable of calculation, it operates as a penalty and is therefore unenforceable. They contend that the sum generated by the expert's exercise, of approximately XCD$5.2 million, is extravagant and disproportionate when compared with the claimant's actual expenditure and the value of the equipment acquired for the project. They further argue that, given the uncertainty surrounding the grant of a petroleum licence and the fact that operations never commenced, the clause cannot represent a genuine pre-estimate of loss.

[69] The claimant submits that clause 9.4.1 was expressly agreed by the parties to be "a bona fide estimate of Sol's loss of profit", that it was negotiated as part of a long-term commercial agreement between sophisticated parties, and that the defendants have neither pleaded nor proven facts sufficient to displace the contractual characterization of the clause as a genuine pre-estimate of loss.

Discussion

[70] Here, the decision of the House of Lords in **Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd**[12] is paramount. Lord Dunedin held that the question whether a contractual provision is a penalty or liquidated damages is one of construction to be determined by examining the terms and circumstances of the contract as they existed at the time the contract was made, and not at the time of breach. That case establishes that a clause will not be regarded as a penalty merely because precise estimation of future loss is difficult. On the contrary, where the consequences of breach are uncertain or incapable of exact prediction, are the very circumstances in which parties legitimately agree a pre-estimate of loss.

[71] These principles have been reaffirmed throughout the Commonwealth. In **Ringrow Pty Ltd v BP Australia Pty Ltd**[13], the High Court of Australia observed that Lord Dunedin's formulation had endured for many decades and remained the governing approach.

[72] Similarly, in **Philips Hong Kong Ltd v Attorney General of Hong Kong**[14], the Privy Council emphasized the need for judicial restraint before interfering with a commercial bargain freely negotiated between parties, and cautioned that courts should not readily label a clause as penal merely because hypothetical circumstances can be imagined, in which the stipulated sum exceeds actual loss. The true inquiry is whether, at the time of contracting, the stipulated amount was extravagant or unconscionable when compared with the range of losses reasonably contemplated by the parties.

[73] Applying these principles to the facts here, this Court is not persuaded that clause 9.4.1 is a penalty. The Agreement was a long-term commercial arrangement with a contractual term extending over approximately fifteen years. The clause was directed towards compensating the claimant in circumstances where the Agreement was terminated before expiry through no fault of the claimant and where the claimant was not allowed to continue operations at the site. The obvious commercial purpose was to protect the claimant against the loss of anticipated profits from a lengthy petroleum retail arrangement.

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[12] [1915] AC 79
[13] [2005] HCA 71
[14] [1993] 1 LRC 775

[74] Further, the clause expressly records the parties' agreement that the termination fee "*is not a penalty but is a bona fide estimate of Sol's loss of profit that it would have expected on the investments made during the contract period*." While such wording is not conclusive, **Dunlop** clarifies that it is nevertheless a relevant consideration in determining the parties' intention.

[75] The defendants' focus heavily upon the disparity between the amount claimed and the claimant's actual expenditure. However, clause 9.4.1 is directed not to reimbursement of expenditure but to compensation for anticipated loss of profit over the remaining contractual term. A comparison between the contractual termination fee and the cost of equipment acquired for the project does not, by itself, demonstrate that the clause was extravagant or unconscionable when viewed at the date of contracting.

[76] The Court does not accept the submission that the uncertainty relating to the petroleum license necessarily renders the clause penal. The liability judgment has already determined that the first defendant breached the Agreement and that the claimant is entitled to damages. The issue before this Court is quantum. The possibility that future events may have affected profitability is not unusual in commercial contracts and does not establish that the parties were incapable of making a genuine assessment of likely loss.

[77] In this regard, the Court must bear in mind Lord Dunedin's observation that a clause is not penal in nature simply because precise prediction of future loss is difficult. The loss contemplated by clause 9.4.1 concerned future sales volumes and future margins over a substantial period. Such losses are inherently difficult to predict with precision. These circumstances support, rather than undermine, the use of a pre-estimated measure of compensation.

[78] Therefore, having regard to the language of the Agreement, the nature of the transaction, the commercial context in which the parties contracted, and the authorities discussed above, this Court is unable to conclude that clause 9.4.1 is extravagant, unconscionable, or out of all proportion to the legitimate interests which it was designed to protect. The Court therefore concludes that the defendants have failed to establish that clause 9.4.1 is a penalty.

[79] The clause is enforceable and may properly be used as the contractual measure for assessing damages consequent upon the first defendant's breach of the Agreement.

Issue 4: Whether SOL is barred from recovery of damages by reason of clauses 16.1 and 16.2 of the Agreement

Defendants' Submissions

[80] The defendants submitted that, pursuant to clauses 16.1 and 16.2 of the Agreement, obtaining an arbitral award is a condition precedent to any right of action in respect of any dispute, other than a claim for a liquidated sum. Counsel accepted that the claim for liquidated damages under clause 9.4.1 properly engaged the Court's jurisdiction and did not require prior arbitration. However, it is submitted that the claimant could not, consistently with its pleadings, or clause 16.2, pursue unliquidated damages without first satisfying the arbitration condition precedent. Accordingly, counsel submitted that the Court's jurisdiction on the assessment of damages was confined to the relief pleaded, namely liquidated damages, and that there was no waiver by the defendants of any right to challenge the Court's jurisdiction in respect of unliquidated claims.

Claimant's Submissions

[81] Counsel for the claimant submitted that the defendants have either submitted to the Court's jurisdiction or waived any right to challenge it by taking clear and unequivocal steps in the conduct of the proceedings. Counsel argued that pursuant to CPR 9.7, any objection to jurisdiction ought to have been raised at the case management stage, and that the principles governing waiver do not permit such an issue to be advanced at such a late stage of the litigation. The defendants had actively defended the claim throughout its course, including by filing a defence and counterclaim, adducing evidence, participating fully in the trial on liability up to judgment, opposing an application for specific disclosure, jointly instructing two experts and submitting written questions to them, and further filing evidence and participating in the trial on the assessment of damages to its conclusion. In support of this

position, the claimant relied on **Calvin Ayre v Reuters News & Media Inc**[15] where the Court articulated that the applicable test is whether the step taken is "wholly unequivocal" of a submission to jurisdiction, assessed from the perspective of a disinterested bystander with knowledge of the relevant facts. Counsel for the claimant contended that, when viewed through this lens, the defendants' conduct was capable of only one conclusion, namely, submission to the Court's jurisdiction, and therefore amounted to a waiver of any right to challenge it now.

[82] Relying on the guidance of our Court of Appeal in ***Hualon Corporation (M) SDN BHD (in receivership), acting by its Receiver and Manager Mr. Duar Tuan Kiat v Marty Limited***[16] Counsel further submitted that the defendants had waived and thereby lost any right to refer the dispute to arbitration. In ***Hualon***, the Court of Appeal considered waiver of a mandatory arbitration provision arising under both statute and the New York Convention, and held that, at a certain point, a party who commences and pursues court proceedings, or a defendant who actively defends them, must be taken to have elected litigation over arbitration, rendering the arbitration agreement "inoperative" and disentitling that party to a stay. There, the court explained that, although there is a strong presumption against waiver of arbitration and the burden of proving waiver rests on the party alleging it, an election may nonetheless arise where a party, with knowledge of the arbitration agreement or willful blindness to it, takes unexplained substantive steps in the litigation or otherwise acts inconsistently with the right to arbitrate, without reserving that right. Counsel contends that when assessed objectively in accordance with these principles, the conduct of both parties in pursuing court proceedings amounted to an election in favour of litigation, with the consequence that reliance on clause 16.1 of the Agreement has been waived.

Discussion

[83] There is no dispute that parties are generally free to agree that disputes be referred to arbitration and may even make arbitration a condition precedent to litigation. In support of

[15] ANUHCVAP2023/0029
[16] BVIHCOM2014/0090

their position the defendants rely on **Peter Barnard v New India Assurance Co. (Trinidad & Tobago) Ltd**[17], in which a court upheld an arbitration clause requiring referral to arbitration before legal proceedings could be pursued. However, it is equally well established that a party may waive its right to insist upon arbitration.

[84] In **Hualon Corporation (M) SDN BHD v Marty Limited**, cited by the claimant, the Court of Appeal held that a party may lose its right to require arbitration by commencing or participating in court proceedings in a manner inconsistent with reliance on the arbitration agreement. There the Court stated:

> "By taking an unexplained substantive step in court litigation, or acting inconsistently with the right to arbitrate ... a party may be taken to have elected court litigation. When it has done so, the arbitration agreement becomes inoperative."

[85] Similarly, in **Calvin Ayre v Reuters News & Media Inc**, the Court of Appeal reaffirmed that the relevant question is whether the conduct of the party, viewed objectively, is wholly unequivocal of a submission to the court's jurisdiction. A party who takes substantive steps in litigation may be treated as having elected the court process.

[86] In the present case, the defendants did not seek a stay of proceedings at the outset. Instead, they filed a defence and counterclaim, participated in case management, consented to the appointment of experts, consented to bifurcation of liability and quantum proceedings, participated fully in the trial on liability, pursued the matter through judgment on liability, participated in the expert evidence process (including the provision of questions to both experts), and participated in the assessment of damages proceedings over several years.

[87] These are not procedural steps directed at preserving an arbitration objection. They are substantive steps directed at obtaining determination of the dispute by the court. On the authority of **Hualon** and **Calvin Ayre**, this Court accepts that the defendants objectively elected to have the dispute determined by the court and thereby waived any right they may otherwise have had to insist on arbitration.

[17] SLUHCV2011/0590 (delivered on 1st November 2013-unreported)

[88] In reply submissions, Counsel for the defendants clarified that this was not a challenge to the Court's jurisdiction, but rather, clauses 16.1 and 16.2 limit the remedies available because the claimant chose to pursue a claim for liquidated damages instead of first obtaining an arbitral award in relation to any non-liquidated claim.

[89] The Court does not accept this submission.

[90] First, the liability judgment has already determined that the first defendant is liable to the claimant in damages for breach of contract. The question before the Court at this time is the quantification of damages arising from that breach.

[91] Secondly, the Claimant's pleading was not confined exclusively to liquidated damages. The pleadings included alternative claims for damages. More importantly, the issue of liability and entitlement to damages has already been adjudicated by the Court. The assessment stage is not the occasion for reopening questions which were available to be raised much earlier in the proceedings.

[92] Thirdly, to permit reliance on clauses 16.1 and 16.2 at this stage would be inconsistent with the defendants' conduct throughout the litigation. One may not participate fully in proceedings through liability and quantum and only after an adverse finding seek to rely upon an arbitral condition precedent that was never pursued. Such conduct falls squarely within the principles discussed in **Hualon** concerning waiver and election.

[93] The case of **Peter Barnard** does not assist the defendants.. In that case, the arbitration objection was relied upon as a substantive answer to the claim, before the court had proceeded through a full trial on liability and years of litigation. The present case is materially different as the defendants proceeded through pleadings, trial, judgment on liability, expert evidence, and assessment proceedings, without invoking any right to arbitrate. The doctrine of waiver and election therefore assumes central importance and distinguishes the present circumstances from **Peter Barnard**.

[94] The Court therefore concludes that by their conduct throughout these proceedings, the defendants unequivocally elected to have the dispute determined by the court and thereby

waived any right to insist upon arbitration pursuant to clauses 16.1 and 16.2 of the Agreement. The arbitration provisions can no longer operate as a bar to the claimant's recovery in these proceedings, and these clauses do not prevent the Court from assessing and awarding damages consequent upon the liability already established against the defendants.

Issue 5: . **What is the quantum of damages assessed against the first defendant?**

[95] The Court has already determined that the first defendant breached the Agreement and is liable to the claimant in damages. The issue then is not liability but the proper quantification of the loss occasioned by that breach.

[96] The fundamental principle governing contractual damages is articulated in **Robinson v Harman**[18], namely, that so far as money can achieve it, the innocent party is to be placed in the same position as if the contract had been performed. Where the parties themselves have agreed in advance a mechanism for assessing anticipated loss, and that mechanism is enforceable, the Court will ordinarily give effect to that bargain. As Lord Dunedin explained in **Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd**, a genuine pre-estimate of loss is enforceable notwithstanding the difficulty of calculating actual loss with precision.

[97] The Court has already determined that clause 9.4.1 is enforceable and provides the contractual measure of the claimant's loss. The Court has also rejected the defendants' submission that the clause constitutes a penalty. Accordingly, the assessment must proceed in accordance with clause 9.4.1 and the evidential material available to the Court.

[98] Mr Myers ultimately assessed the claimant's loss within a relatively narrow range and in his report he identified damages between XCD$5,220,741.95 and $5,269,533.93. The report also contained alternative calculations derived from different assumptions concerning fuel-product composition.

[18] (1848) 1 Ex. 850

[99] The Court has already concluded, applying **Griffiths v TUI (UK) Ltd**, **Hoyle v Rogers**, and **The Ikarian Reefer**, that the deficiencies identified by the defendants affect only the weight to be attached to relevant portions of the report, rather than requiring its wholesale rejection. In this regard several considerations are material. The expert was operating in unusual circumstances because the Agreement was terminated shortly after commencement, and the very historical data ordinarily available for such assessment did not exist. The absence of this information was a consequence of the premature termination itself. Further, the expert's task was not self-defined, but was prescribed by a consent order and by the Court's directions requiring consideration of the contractual provisions dealing with anticipated sales potential and margins. The expert himself candidly recognized the limitations affecting his exercise and expressed his conclusions as a range rather than as a single precise figure.

[100] The criticisms directed at the diesel/gasoline split do not undermine the entirety of the analysis. The term of the contract, the termination date, the contractual sales potential and the petroleum margin information are all grounded in objective contractual and regulatory materials. Consequently, this Court remains satisfied that the report is the best available evidence of the loss sustained by the claimant under clause 9.4.1.

[101] The claimant seeks the upper end of the expert's range, namely XCD $5,269,533.93. This Court does not consider it appropriate simply to adopt the highest figure available. The concerns surrounding the anonymous retailer data, and the uncertainty surrounding the projected fuel mix are legitimate matters affecting the precision of the assessment, even if those matters do not justify rejecting the report. However the upper figure depends most heavily on the disputed fuel-mix assumption.

[102] The Court's task is to assess damages fairly, not mechanically. In **Parabola Investments Ltd v Browallia Cal Ltd**[19], it was recognized that quantification of loss may involve approximation where exact proof is impossible, and a court may perform a reasoned assessment on imperfect evidence. The Court accepts that this is such a case.

[19] [2010] EWCA Civ 486

[103] The claimant submitted, in the alternative, that if concerns existed regarding the diesel/gasoline split evidence, the Court could adopt a figure representing the midpoint of the expert's assessed range.

[104] While the expert's methodology is accepted, the evidential uncertainties should be resolved conservatively and in favour of the figure requiring the fewest assumptions. The major difference between the lower and upper range arose from assumptions regarding the split between diesel and gasoline sales. Mr Myers himself acknowledged limitations such as no actual annual sales volume, no actual SOL gross unit margin earned at the site, no completed operational data, and he relied partly on information obtained from other operators. These limitations would justify choosing the most conservative figure within the range.

[105] Contract damages are compensatory, not windfalls. Here the award represents projected profits over roughly 15 years from a fuel station that never commenced operations. This Court considers that an adjusted recalculation would better reflects the uncertainties inherent in such a projection. This would better reflect the general principle that damages should compensate rather than risk overcompensating.

[106] Given the absence of actual operating history, the lack of historical sales data, and the uncertainty regarding sales mix, this Court determines that the an overall adjustment of 40% of the Expert's lower figure is an amount best supported on the balance of probabilities, and the damages payable by the first defendant for breach of the Agreement is assessed at XCD$3,132,445.17.

[107] Concerning interest the claimant says that it should be applied on the sum assessed from the date of termination (5th October 2019). Damages were not a fixed, ascertainable debt in 2019, but required expert reconstruction, judicial interpretation of clause 9.4.1, and ultimate selection by the Court. In these circumstances the award remained unliquidated until judgment. Justice and fairness requires that interest should commence once the amount was judicially fixed, and the Court will so order.

Issue 6: What damages are recoverable against the second defendant for negligent misrepresentation?

[108] In the liability judgment the Court determined that the second defendant made negligent misrepresentations to the claimant concerning the ability of the first defendant to enter into and perform the Agreement, and is liable in damages. The Court further found that, as a consequence of that reliance, the claimant suffered loss and incurred expense. The issue for determination here is the proper measure and quantum of such damages. The assessment of damages for negligent misrepresentation is governed by the principle that the claimant should be compensated for losses directly caused by reliance upon the misrepresentation.

[109] In **Esso Petroleum Co Ltd v Mardon**[20] it was said that in claims for negligent misrepresentation, damages are assessed by reference to the loss suffered as a result of the claimant acting upon the representation. The objective is to restore the claimant to the position it would have occupied had the misrepresentation not been made.

[110] The recoverable loss must also satisfy the requirement of foreseeability. In **The Wagon Mound (No 1)**, it was held that a defendant is liable only for loss that is a reasonably foreseeable consequence of the wrongful conduct. In the present case, the Court must therefore identify the loss caused by the claimant's reliance upon the misrepresentation, whether that loss was reasonably foreseeable, and whether any reduction is required for mitigation or to avoid double recovery.

<u>Nature of the Loss</u>

[111] Acting on the strength of the Agreement, the claimant procured and imported equipment intended specifically for the defendants' project. The Engineering Expert, Mr Emmanuel,

[20] [1976] QB 801

subsequently undertook a detailed inspection and valuation exercise as directed by the Court. His Supplemental Report of 4 July 2025 assessed:

(i) Total cost of all remaining items: XCD$255,068.33.

(ii) Cost of non-usable items: XCD$82,010.55.

(iii) Cost of usable items: XCD$173,057.78.

(iv) Associated equipment supply costs: XCD$195,995.63.

(v) Total value of items and associated costs: XCD$451,063.96.

[112] As these expenditures were incurred because the claimant relied upon the representations which induced it to proceed with the project, they constitute losses falling within the scope of recoverable reliance damages contemplated by **Esso Petroleum v Mardon**.

[113] The claimant contends that the figure provided by Mr Emmanuel should be recovered in full, and submits that the defendants failed to establish any failure to mitigate and that the expenditure was incurred as a direct consequence of his negligent misrepresentation. The Court does not accept that the full amount is recoverable. The evidence establishes that a substantial quantity of equipment remains serviceable and capable of deployment elsewhere. Mr Emmanuel concluded that, save for items affected by water damage and corrosion, the remaining equipment remained usable. Further, the claimant's own witnesses acknowledged that portions of the equipment allocated to the defendants' project were subsequently used on other projects undertaken by the claimant. The Court is therefore faced with a situation where the claimant continues to possess assets of measurable value.

<u>Mitigation of Loss</u>

[114] It is settled law that a claimant must take reasonable steps to mitigate loss and that the burden lies on the defendant to prove failure to mitigate. Concerning mitigation and avoidance of double recovery, the governing authority is **British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd**[21], where Viscount Haldane LC explained that damages are compensatory and that a claimant must

[21] [1911-13] All ER Rep 63

take reasonable steps to mitigate its loss. The law does not permit recovery for loss that could reasonably have been avoided, nor does it permit a claimant to obtain a windfall. The principle was recently reaffirmed by the English Supreme Court in **Sharp Corporation Ltd v Viterra BV**[22], which emphasized that recoverable damages must reflect the claimant's actual economic loss after taking account of assets, benefits or opportunities remaining available to it.

[115] Here, the defendants say the equipment could be used elsewhere, some was used elsewhere, deterioration resulted from exposure and storage, and a reduction should therefore be made. In response, the claimant says some equipment was in fact redeployed, the defendants did not identify reasonable alternative steps the claimant should have taken, and the engineering valuation already reflected the condition of the equipment.

[116] In this Court's view, while the evidence establishes that certain items remained usable and some were redeployed by the claimant, the defendants have not discharged the burden of proving that the claimant acted unreasonably in storing the equipment or failed to take reasonable steps to mitigate its loss. Additionally, no evidence was led in relation to what alternative measures were reasonably available, what the cost would have been, or what loss would have been avoided. Accordingly, this Court declines to make any reduction on account of alleged failure to mitigate.

<u>Assessment</u>

[117] The Court accepts the defendants' submission that the claimant cannot simultaneously retain ownership and use of equipment valued at XCD$173,057.78 and recover that same value in damages from the second defendant. Such an award, the defendants submit, would offend the compensatory principle and result in impermissible double recovery.

[118] The evidence demonstrates that associated procurement, freight, shipping and supply costs were incurred because of the misrepresentation and remain lost, even after credit is given for usable equipment retained by the claimant. These costs are independent reliance

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expenditures which cannot be recouped merely by retaining equipment of continuing utility. Applying the principles from **Esso Petroleum v Mardon**, **The Wagon Mound (No 1)**, **British Westinghouse**, and **Sharp Corporation v Viterra BV**, this Court finds that the claimant is entitled to recover reliance losses directly caused by the negligent misrepresentation. The assessment must, however, reflect the continuing value of usable equipment retained by the claimant and must avoid double recovery.

[119] Moreover, the claimant should not be confined to recovery of the value of non-usable items only, and the most appropriate assessment is recovery for (i) non-usable equipment, and (ii) associated supply costs, while giving credit for the value of usable equipment which remains available to the claimant.

[120] The formula for assessing such damages is as follows: *Total items and associated costs of XCD$451,063.96, less usable equipment retained by the claimant of XCD$173,057.78, resulting in XCD$278,006.18.* This figure represents the claimant's net unrecovered expenditure directly attributable to the negligent misrepresentation and avoids compensating the claimant twice for assets it continues to own and use. Thus, the proper measure of compensatory damages against the second defendant is assessed at XCD $278,006.18.

Conclusion

[121] In light of the foregoing, I make the following orders:

1. Judgment against the first defendant for XCD$3,132,445.17, with interest at 6% per annum from the date of judgment.
2. Judgment against second defendant for XCD$278,006.18, with interest at 6% per annum from the date of this judgment.
3. Any payments made by the second defendant shall be credited against the first defendant's liability to prevent double recovery.
4. Costs to the claimant to be assessed, if not agreed within 21 days.

[122] In closing, the Court wishes to express sincere thanks to learned counsel for their assistance with comprehensive and helpful submissions and authorities in this matter. The Court is also grateful to counsel and the parties for exercising patience in awaiting delivery of the judgment.

Cadie St Rose-Albertini
High Court Judge

By the Court

Registrar