Neutral Citation Number: 2007 EWHC 292 (Comm) Case No. 2005 Folio 1045

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 February 2007

Before :

MR JULIAN FLAUX QC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

(1)	**RHODIA INTERNATIONAL HOLDINGS LIMITED**	
(2)	**RHODIA UK LIMITED**	**Claimants**
	- and -	
	HUNTSMAN INTERNATIONAL LLC	**Defendant**

Thomas Beazley QC and Andrew Green (instructed by **DLA Piper**) for the Claimants
Antony Edwards-Stuart QC and Charles Pimlott (instructed by **Dickinson Dees**) for the Defendant

Hearing dates: 12, 13 and 14 February 2007

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Julian Flaux QC:
Introduction

1. By a Sale and Purchase Agreement ("the SPA") dated 27 February 2001, the First Claimant (then called Allbright & Wilson Overseas Limited) and the Second Claimant (then called Rhodia Consumer Specialties limited) agreed to sell to the Defendant (to whom I will refer as "Huntsman") and/or its "Designated Purchaser" (identified in the SPA as Huntsman Surfactants UK Limited, referred to hereafter as "HSSUK") its European chemical surfactants business, including the surfactants business operated by the Second Claimant at Whitehaven in Cumbria. At the time of the sale, the Claimants (to whom I will refer, save where it is necessary to distinguish between them, as "Rhodia") also operated two other manufacturing facilities at the Whitehaven site, manufacturing phosphates and phosphates derivatives and acrylics respectively which they retained, although those other operations were closed just over a year later.

2. Steam and electricity at the Whitehaven site were (at the time the SPA was entered into) produced by a Combined Heat and Power Plant ("the CHP Plant") at the site. The CHP Plant was supplied, and electricity and steam were provided, by National Power (Cogeneration) Limited (to which I will refer hereafter as "Cogen") pursuant to a CHP Energy Supply Contract dated 31 March 1993, made between the Second Claimant and Cogen ("the Energy Supply Contract"). Subject to a buy-out clause, the CHP Plant was to remain the property of Cogen for the contract duration, which was 15 years from 12 August 1994 (i.e. until 12 August 2009). Clause 24.5 of the Energy Supply Contract provided as follows:

> *...[the Second Claimant] may assign, novate or otherwise transfer any of its rights or obligations under this Contract Provided Always that [the Second Claimant] satisfies [Cogen] that the party to which the proposed assignment is to be made is capable of fulfilling its obligations and duties under this Contract and [the Second Claimant] gives [Cogen] not less than 90 days prior notice in writing of such intention to assign, novate or otherwise transfer this Contract.*

3. The SPA contained in Clause 15 detailed provisions relating to the obtaining of consent to novation of certain identified Restricted Contracts (of which the Energy Supply Contract was one). In particular, the Clause imposed on both

parties obligations to use reasonable endeavours to obtain the consent to the novation of the other party to the relevant Restricted Contract. Pending novation, Huntsman undertook in effect to perform Rhodia's obligations under the Energy Supply Contract and did in fact do so between March 2001 and March 2004. From 1 May 2002, the Second Claimant had no day-to-day involvement with the operation of the CHP Plant, since at that time it closed down its remaining operations at the Whitehaven site.

4. By March 2004, the Energy Supply Contract had not been novated to HSSUK and on 5 March 2004, Huntsman gave notice to Rhodia that it no longer intended to perform Rhodia's obligations under the Energy Supply Contract. At that time, Rhodia had no operational presence at the Whitehaven site and so was not in a position to perform those obligations itself. On 9 March 2004, the CHP Plant was shut down and has not operated since, having now been substantially dismantled. In October 2004, Huntsman announced that it intended to close down the plant at Whitehaven.

5. In October 2005, Cogen commenced arbitration proceedings against the Second Claimant for the non-payment of invoices submitted by Cogen for the supply of steam and electricity under the Energy Supply Contract which contains so-called "take or pay" provisions which (Cogen contends) require substantial payments to be made for steam and electricity whether or not such steam and electricity is actually required and produced. That arbitration was heard in December 2006. Cogen is claiming in total some £14.8 million plus interest and costs. An Award has just been published.

6. In the present proceedings, Rhodia claims that any liability it has to Cogen was caused by Huntsman's breaches of the terms of the SPA, particularly Clause 15. Rhodia claims an indemnity, alternatively damages. The central dispute thus concerns whether or not Huntsman complied with its obligations under Clause 15. By virtue of an Order of Mr Justice Langley dated 15 December 2006, the trial was limited to issues of liability only, with all issues of quantum (including issues of causation, mitigation, remoteness and quantification) stood over for determination at a later trial.

The terms of the SPA

7. The relevant terms of the SPA with which the case is principally concerned provided as follows:

> *1.2.14 Any right or benefit conferred on or granted to or obligation owed to the Purchaser shall be conferred on, granted or owed to and capable of exercise by the relevant Designated Purchaser(s) and any obligation of the Purchaser shall be capable of being performed by the relevant Designated Purchaser(s) provided that this provision shall not discharge the Purchaser from its obligations hereunder save to the extent such obligations are duly and properly discharged by any relevant Designated Purchaser, with the intent that the Purchaser enters into this Agreement for itself and as trustee and agent for each Designated Purchaser, and (where the context permits) references to "the Purchaser" shall be construed accordingly provided always that at no time will the provisions of this sub-clause 1.2.14 apply to the provisions of Schedule 17 [the Environmental Covenant].*
>
> *2.2* ***Sale and Purchase of the UK Business***
>
> *2.2.1 Subject to Clause 2.2.2, [the Second Claimant] shall sell, or procure the sale of, and the Purchaser shall purchase with effect from Completion, subject to and in accordance with the terms of this Agreement with a view, inter alia, to the Purchaser carrying on the UK Business as a going concern free from all mortgages, charges, options, rights of pre-emption and other security interests:-*
>
> *(b) subject to Clause 15, the benefit (subject to the burden) of the Contracts [which were defined as including Customer Contracts and Supplier Contracts]*
>
> *2.9* ***Designated Purchasers***
>
> *In the event that the Purchaser nominates a Designated Purchaser the Purchaser agrees to guarantee all liabilities and obligations of each Designated Purchaser under this Agreement in the terms set out in Clause 18.*
>
> *14.1* ***Purchaser to complete Contracts***
>
> *With effect from Completion…the Purchaser shall, subject to Clause 15.2, carry out and complete each of the Contracts (so far as the Purchaser is lawfully able to do so) and the Purchaser will, subject to Clause 15.2, duly and punctually perform and discharge each of [the Second Claimant's] …obligations and liabilities under the Contracts….*
>
> *15.1* ***Restricted Contracts….***

15.1.1 The [Sale and Purchase] Agreement shall not constitute an assignment or an attempted or purported assignment of any Contract if and to the extent that such an assignment or attempted or purported assignment would constitute a breach of that Contract ("Restricted Contract").

15.1.2 With effect from the date of the [Sale and Purchase] Agreement, [the Second Claimant] and the Purchaser [ie Huntsman] shall use their respective reasonable endeavours (with the Purchaser making the relevant application with assistance from [the Second Claimant] save that where the relevant contract stipulates or if it is agreed that [the Second Claimant] shall make the application, in which event [the Second Claimant] shall make the application with assistance from the Purchaser) to obtain all requisite consents or agreements of all parties to each Restricted Contract to whatever assignment, transfer or novation is necessary to enable the Purchaser to perform such Restricted Contract on or after Completion or, as the case may be, to transfer the benefit and, subject to clause 15.2, burden of such Restricted Contract to the Purchaser after Completion. For the purpose of obtaining any such consent or agreement, the Purchaser shall supply to [the Second Claimant]and the relevant third party such information reasonably requested (including information reasonably requested about the financial position of the Purchaser's Group) and other assistance as may reasonably be required by [the Second Claimant] or any other party to a Restricted Contract…and, if such other party to the Restricted Contract…so reasonably requires, the Purchaser, its immediate parent company or one of the Purchaser's subsidiaries or subsidiary undertakings with sufficient standing and net worth shall enter into a direct covenant with such other party to perform and observe such Restricted Contract…from the date of its assignment, novation or transfer in favour of the Purchaser.

15.1.3 Subject to and with effect from Completion, and until such time as (in relation to each Restricted Contract…) the consents or agreements referred to in Clause 15.1 are obtained or the provisions contained in the final sentence of Clause 15.1.3(c) come into effect:

…

(b) unless the relevant Restricted Contract…prohibits it, the Purchaser shall, subject to Clause 15.2, perform all the obligations of RCSL under such Restricted Contract…as agent for or subcontractor to RCSL, but at Purchaser's expense, and, subject to Clause 15.2, the Purchaser covenants to pay [the Second Claimant] (as principal and, if applicable, as agent for the relevant other member of the Retained Group) by way of adjustment to the Final Consideration an amount equal to all costs, claims, liabilities and demands arising under or in respect of such Restricted Contract…as a result of non-performance or negligent performance of the obligations of the Purchaser under this sub-clause.

(c) if the relevant Restricted Contract…prohibits performance of the obligations of [the Second Claimant] by the Purchaser as agent for or sub-contractor to RCSL. RCSL shall, after reasonable prior consultation with the Purchaser and so far as it reasonably considers it is not in breach of such Restricted Contract or of any obligation in relation to such Restricted Third Party Right by doing so,' continue to

perform its obligations under such Restricted Contract ...and to provide for the Purchaser the benefits of such Restricted Contract,... provided that the Purchaser, subject to Clause 15.2, (i)shall as requested by [the Second Claimant] promptly discharge all reasonable costs and expense of [the Second Claimant] (or the relevant other member of the Retained (Group) of doing so (ii) shall on behalf of [the Second Claimant] discharge all liabilities arising as a result of such performance by [the Second Claimant] (unless [the Second Claimant] shall have acted negligently or in breach of the relevant Restricted Contract. without the consent of the Purchaser) (iii) provide all necessary materials, facilities, rights and assistance to [the Second Claimant] free of charge for such purpose (including, without limitation, the services of any relevant employees) and (iv) covenants to pay [the Second Claimant] (as principal and, if applicable, as agent for the relevant other member of the Retained Group) by way of adjustment to the Final Consideration an amount equal to all costs, claims, expenses and liabilities arising in connection therewith. To the extent that, in relation to any Restricted Contract,... such sub-contracting or agency is not permissible and [the Second Claimant] and the Purchaser agree that it is not reasonably practicable for [the Second Claimant] to continue to perform its obligations thereunder or in relation thereto as envisaged in the foregoing provisions of Clause 15.1.3(c) or provided that in the case of a relevant material Restricted Contract such Restricted Contract constitutes a Disclosed Matter, [the Second Claimant] reasonably considers it is in breach of such Restricted. contract ...by continuing to do so, then, subject to Clause 15.1.4, neither [the Second Claimant] nor the Purchaser shall have any further obligation to any other party to this Agreement in relation to such Restricted Contract....

15.1.4 *If, and provided that the Purchaser shall have performed its obligations pursuant to Clause 15.1.2, the rights and obligations of [the Second Claimant] under any of the Novated Contracts listed in Schedule 14 cannot be transferred to the Purchaser whether by way of novation or assignment within six months of the date of Completion, then the Purchaser will be entitled by notice to [the Second Claimant] in writing to require [the Second Claimant] to exclude such Novated Contract from the sale of the Business Assets [defined as being all property, rights and assets forming part of the UK Business sold under Clause 2.2.1] whereupon, unless the other party to such Restricted Contract has indicated to the Vendors in writing or to the Purchaser that it is not willing to consent to the assignment or the novation of the relevant Novated Contract principally because of the identity of the Purchaser or any other members of the Purchaser's Group, the Vendors shall pay to the Purchaser an amount equal to the diminution in the value of the Surfactants Operations [defined as comprising, among other things the UK Business] caused by the fact that such Novated Contract was not novated or assigned, such diminution in value to be calculated using the discounted cash flow method set out in Schedule 19 and neither [the Second Claimant] nor the Purchaser shall have any further obligation to any other party to this*

[Sale and Purchase] Agreement in related to such Novated Contract and the provisions of Clause 15.1 shall cease to apply to such Novated Contract.

The issues

8. There are essentially three issues on liability to be determined:

(1) Did Huntsman use its reasonable endeavours to obtain the consent of Cogen to the novation of the Energy Supply Contract to HSSUK. In large measure, this involves determining whether or not Cogen required Huntsman to provide a direct covenant within the meaning of clause 15.1.2 and, if so, whether Huntsman was in breach of its obligations under that provision because it did not do so;

(2) Whether the notice given by Huntsman on 5 March 2004 was a valid notice under clause 15.1.4 of the SPA.

(3) Whether Huntsman remained under an obligation under 15.1.3 of the SPA.

Factual background

9. At the trial, Rhodia called two witnesses of fact, Mr John Scott, a director of the Second Claimant who had overall responsibility for the operation of the whole Whitehaven site immediately prior to the conclusion of the SPA and Mr Chris Beasley who at the relevant time was director of legal services of the Second Claimant, with responsibility within Rhodia for procuring the novation of the Restricted Contracts. They were both patently honest witnesses, although I found their evidence of limited assistance in determining the issues. The Defendant elected not to call any witness evidence. It follows that, save where the evidence of Mr Scott and Mr Beasley was of assistance, I have to determine the issues by reference to the written communications between the parties and between each of the parties and Cogen, together with such legitimate inferences as I can draw from those communications and the limited witness evidence I have heard. What follows is a summary of the principal communications that are relevant to the issues I have to decide.

10. Although in a letter dated 13 October 2000, Cogen specifically drew Rhodia's attention to the need for notice to be given under Clause 24.5 of the Energy Supply Contract of any intention to assign or novate that contract, for whatever reason (and Mr Beasley did not provide any explanation in his evidence) Rhodia did not serve any such notice on Cogen before the conclusion of the SPA. In fact, it was Huntsman which initiated the process of novation, since its then solicitors, Slaughter & May, drafted a form of novation to be sent to all the counter-parties under the Restricted Contracts which they sent to Rhodia's then solicitors, Jones Day, on 12 March 2001 prior to Completion on 31 March 2001. It was not until 29 May 2001, some three months after the SPA was signed, that Rhodia sent drafts of an agreement providing for novation to HSSUK (largely based upon what Slaughter & May had produced) to Huntsman for signature, informing it that Cogen was happy in principle for the novation to proceed. Huntsman signed the novation agreement and Rhodia then sent it to Cogen on 2 July 2001.

11. In response, on 20 July 2001, Mr Kevin Ansell of Cogen wrote to Mr Beasley of Rhodia raising concerns Cogen evidently had about the proposed novation to HSSUK. That company was of course a special purpose vehicle recently incorporated to take over the surfactants business at Whitehaven, as contemplated by its designation as Designated Purchaser under the SPA. The letter provided:

> *"...Whilst [Cogen] has no objection in principle to the proposed novation of the Energy Supply Contract to Huntsman Surface Sciences (UK) Limited ("Huntsman"), a company search of the proposed transferee has revealed that it was incorporated on 21 August 2000 and therefore has yet to file any statutory accounts. Consequently [Cogen] will not be prepared to novate the Energy Supply Contract to Huntsman until such time that its obligations thereunder have been the subject of a guarantee in a form acceptable to ourselves....".*

12. Although that letter was not copied to Huntsman at the time, it was sent by Cogen to Huntsman as an attachment to an e-mail from Mr Ansell to Mr Butler of Huntsman of 8 August 2001 the text of which stated:

> *'No reply to our enquiries to Rhodia as yet I'm afraid. I must chase Chris Beasley tomorrow.*

> *For your information I have attached a copy of the letter sent to Rhodia. If you would like me to write to you formally on the areas you can answer, please let me know."*

13. Neither Mr Ansell nor Mr Butler gave evidence before me, although Rhodia had served a witness statement from Mr Ansell and Huntsman had served a witness statement from Mr Butler. I have of course ignored all such statements from witnesses who were not called to give evidence. Nevertheless, it can be inferred from the first sentence of this e-mail that Mr Ansell (who had an existing relationship with Mr Butler as a consequence of Cogen's involvement in another Huntsman site in Grimsby) had discussed with Mr Butler at the very least the matters set out in his letter of 20 July 2001 which required a response from Rhodia. Accordingly, it is likely that Mr Butler was aware of Cogen's requirement, as stated in that letter, for a guarantee.

14. In any event, although Rhodia itself had not sent a copy of the 20 July 2001 letter to Huntsman, on 5 October 2001, Mr Beasley of Rhodia wrote a detailed letter to Mr Butler of Huntsman on the subject of novation of the various Restricted Contracts. So far as the Energy Supply Contract is concerned, that letter stated:

> *...Cogen have stated "...Cogen will not be prepared to novate the Energy Supply Contract to Huntsman until such time that its [Huntsman's] obligations thereunder have been the subject of a guarantee in a form acceptable to ourselves."* (a direct quote from the 20 July 2001 letter) *We held a meeting with [Cogen] on 24 September 2001 at which we attempted to explain that [HSSUK] was backed by the worldwide Huntsman group but Cogen apparently are still insisting on a guarantee. I imagine that some form of letter of comfort will probably suffice. May I leave it to you to determine which way you wish to proceed with Cogen. If you would like to contact Cogen direct then the contact names are as follows...*
> *I am amending the Novation deed to include the Technical and Operating Agreement and will then send three signature copies to Mr Ansell in the hope that he will sign after having received from Huntsman the relevant comfort or undertaking."*

15. Perhaps unsurprisingly, given the period of more than six years which has expired since the meeting on 24 September 2001, Mr Beasley was unable in his evidence to recall the detail of that meeting and specifically could not recall any discussion about the provision of a guarantee. Nonetheless, given that his letter of 5 October was written only some 11 days after the meeting, it seems to me that it is likely to reflect accurately the fact that at the meeting, Cogen was

expressing a concern about the financial status of HSSUK as a start up company, that Rhodia sought to allay that concern by referring to the fact that HSSUK was backed by the Huntsman Group, but that this did not allay that concern. The reference to Cogen *"apparently still insisting on a guarantee"* only makes sense if either Cogen actually mentioned its requirement for a guarantee at the meeting or, at the very least, whatever was in fact said, Mr Beasley was left with the clear impression that Cogen still wanted a guarantee, the "still" being a reference to the fact that notwithstanding the assurances about the Huntsman Group sought to be advanced at the meeting, Cogen still required a guarantee, as had been clearly stated in its letter of 20 July 2001.

16. Thereafter, there seems to have been some confusion internally within Huntsman that the issue raised by Cogen about the financial status of HSSUK had been resolved. This message was passed to Mr Beasley who in turn wrote to Mr Ansell of Cogen to that effect. However, on 3 December 2001, Mr Ansell wrote to Mr Beasley informing him that the issue of the financial status of HSSUK had not been resolved and on 8 January 2002, this information was passed on in a letter from Mr Beasley to Mr David Bunker, the in-house lawyer at Huntsman. Mr Bunker circulated Mr Beasley's letter internally within Huntsman, commenting in an internal e-mail:

> *"My concern is to understand whether there is an issue over Huntsman's financial status. I had understood that this was not an issue any more. If it is an issue, we need to find out what their issue is and how we can solve it. Please let me know your views. The best person to get any necessary financial information off is Duncan Emerson, who I understand that Keith knows."*

Mr Emerson was the Group Financial Controller of Huntsman.

17. On 21 January 2002, Mr Ansell sent e-mail to Mr Beasley copied to Mr Bunker and Mr Butler of Huntsman. The relevant part read:

> *"At our meeting in the latter part of last year* [clearly a reference to the meeting on 24 September 2001] *we identified that three key actions were necessary in order for us to be able to consent to the novation...*
>
> *3. [Cogen] has requested that information be made available regarding the financial status of the recently registered [HSSUK] as no statutory accounts had yet been published.*
>
> ...

Finally, item 3, no information, parent company guarantee or similar has been offered to [Cogen] to date.

I have copied this email to my contact at Huntsman as I believe this will allow item 3 to be expedited..."

18. This e-mail led to a prompt response from Huntsman. On 25 January 2002, Mr Butler sent Mr Ansell a so-called "Fact File" setting out financial information about HSSUK, evidently prepared by Mr Emerson. Item 8 of that document stated:

> "*Huntsman International does not guarantee the debts of its subsidiaries. However, HSSUK currently trades on open terms with all of its suppliers*"

If the first sentence was intended to be a statement of fact rather than of general group policy, it cannot have been correct, since Huntsman did provide guarantees for the obligations of its subsidiaries on occasions, as the Guarantee of HSSUK's obligation under the so-called Shared Services Agreement with Rhodia demonstrates. Mr Emerson was not called to give evidence to explain how he came to make such a categorical statement or what he meant by it, but in the absence of any qualification, one would expect the recipient of the Fact File to take it at face value.

19. On 18 March 2002, Mr Ansell e-mailed Mr Butler of Huntsman stating:

> *"As promised, I have been pursuing the outstanding elements of the novation.*
> *Following a written assurance from Rhodia, I am now satisfied regarding the CHP lease arrangements.*
> *The assignment of the Connection Agreement and related documents from Rhodia to HSSUK is underway although this will be at the pace of Norweb (United Utilities) legal services and Rhodia legal services. [Cogen] has no interest in this process beyond:-*
>
> *a) confirmation that it is complete, and*
> *b) that there have been no material changes to the terms of the connection agreement.*
>
> *I regret to say that it is the financial position of HSSUK that is causing me the most difficulty ('embarrassment').*
>
> *As you know, there are as yet no published, audited accounts for HSSUK (although much appreciated, I'm sure you'll understand that the figures supplied cannot be taken as a substitute for full accounts. My advisers in these matters are adamant that we should not agree to the novation of the ESC in the absence of these accounts unless an alternative arrangement be put in place to protect [Cogen] in the unlikely event that HSSUK were to be unable to fulfil its obligations and duties under the ESC.*

> *An arrangement such as a letter of credit or bond to an agreed value, or parent company guarantee has been suggested. I would hope that this would only be required as a 'bridging' arrangement pending publication of satisfactory accounts.*
>
> *I regret the need to request this, it is unfortunate that Rhodia chose not to satisfy this requirement of the ESC novation clause when [Cogen] were first informed of their intention to sell a part of the Whitehaven site to an un-named buyer.*
>
> *I look forward to our meeting on Wednesday in the hope that we can progress these issues."*

20. Since there was no evidence from either Mr Ansell or Mr Butler, one does not know what, if any, discussion of the novation issues there was at the meeting with Cogen at Whitehaven on 20 March 2002. However, the e-mail prompted internal discussions within Huntsman. Mr Butler obtained contact details of a person within Cogen's credit group and passed these on to Mr Emerson. His response is in an internal e-mail dated 19 March 2002:

> *"There is no simple way out of this. Huntsman will not give a parent co guarantee/grant an LOC. The stat accounts will not be ready until some time towards the end of Q2. Is that early enough? My other worry is what they will do with them when they get them – my bet is they will still ask for a guarantee...."*

21. On 3 July 2002, Mr Beasley wrote to Mr Ansell asking whether there had been any progress on the question of the novation. In response on 8 July 2002, Mr Ansell stated:

> *"Huntsman Surface Sciences have as yet been unable to provide suitable information (or alternative arrangements) with regard to their financial status. I have requested a further update as HSSUK were due to publish statutory accounts in June 2002."*

On 5 August 2002, Mr Butler of Huntsman received what seems to have been a final draft of the first statutory accounts for HSSUK. After some prompting, he sent these to Mr Ansell on 9 October 2002. A month later, he sent Mr Ansell some details of further financial information available from Huntsman's website.

22. This prompted a response from Mr Ansell in an e-mail of 11 November 2002 in which he stated:

> *I have had an initial response from our Risk Management people which was not particularly favourable.*

My difficulty is that they do not entirely grasp the circumstances and are working from the premise of a free choice between remaining with Rhodia or moving to HSSUK. I have explained that I need a constructive proposal that allows [Cogen] to agree to the novation and hope to receive something this week. I'll be in touch as soon as I have something"

23. This was followed by a telephone call from Mr Ansell to Mr Butler on 20 November 2002 in which Mr Ansell raised Cogen's concerns about the novation. Mr Butler set these out in an e-mail to Mr Bunker, Mr Emerson and others within Huntsman the same day:

> *"a. Cogen are saying that Rhodia did not give them the required 90 days notification of intention to novate (first time I've heard this complaint but apparently Cogen are upset because they had requested such notification before the sale of the Rhodia business and it wasn't forthcoming from Rhodia).*
>
> *b. Cogen want evidence of novation of the Norweb Electrical Connection Agreement and Norweb Technical and Operating Agreement (I've no further update from my comments detailed in my previous note to you attached below).*
>
> *c. Cogen are not happy with Huntsman financials.*
>
> *I suggested that Cogen take up points a and b with Rhodia in writing to Chris Beasley. I suggested Cogen detail their concerns about financials directly to us (in writing to yourself David with copy to me) and we will then have an opportunity to respond."*

24. On 27 November 2002, Mr Scott of Rhodia e-mailed Mr Tony Girgis of Huntsman about a number of issues. Under the heading "CHP Contract" he wrote:

> *'It is taking forever to complete novation of the CHP Contract to Huntsman. According to Rhodia counsel (Chris Beasley); 'The CHP energy supply contract has not been novated to Huntsman because Huntsman have failed to comply with the key condition in the contract for novation – which is that the Huntsman party has a financial status and standing acceptable to [Cogen]. [Cogen] said that they would accept some form of guarantee or undertaking from the parent company of the Huntsman company but none has yet been provided by Huntsman nor has Huntsman provided any other form of comfort as to its financial status to [Cogen]. [Cogen] are currently holding the original deeds of novation which have been signed by Rhodia and [Cogen] are perfectly happy to sign as soon as they receive the comfort as to financial status from Huntsman." There are other contract assignment issues, but these seem mostly to revolve around the relevant third parties taking their time rather than any Huntsman or Rhodia failings…"*

25. On 3 December 2002, Mr Ansell wrote to Mr Beasley telling him that Cogen remained unable to consent to the completion of the novation. He commented:

> *"The financial position of [HSSUK], as understood by [Cogen] credit risk management, is such that [Cogen] is not yet satisfied as to HSSUK Ltd's ability to fulfil Rhodia's obligations and duties under the Energy Supply Contract in accordance with clause 24.5 of its terms. We are corresponding with HSSUK Ltd in order to seek a solution as soon as possible."*

26. By this stage, Huntsman was beginning to investigate the closure of its own operations at the site. In that context, Huntsman was looking into the financial implications of site closure so far as the Energy Supply Contract was concerned if it were novated to HSSUK. This emerges from an internal e-mail from Mr Ziman of Huntsman to various people within the group dated 17 January 2003:

> *Whitehaven CHP site closure implications - Summary*
>
> *Briefly,*
> *Lee has modelled the Take or Pay penalties at £2M per year assuming full site closure. This would apply from closure to end 2009 and might be mitigated to some extent by negotiation but in practice, we probably have a better option.*
> *The contract does not envisage site closure but we do have the option to introduce a purchaser and effectively buy the plant. I'm sure we could find a way to do this even though we are limited from buying it ourselves by the terms of the contract This would require 12 months notice and if applied in 2004 would incur a one off cost of £6.2M. In other words, if we served the notice and shut down now, we would in fact incur 12 months take or pay and then a £6.2M termination cost. At this point, we would also own the assets so could presumably sell them or possibly use them elsewhere to offset the cost. In any event, this would be preferable to the full Take or Pay option above.*
>
> *I think that there is good prospect of negotiated reduction in both the 12 months notice and the termination (purchase) cost since I doubt Innogy Cogen are making any money on this unit at the moment and I doubt the real value to them of the equipment is as much as the table of purchase values in the contract.*
>
> ***In summary, I think including a one off economic hit of £5M would be a reasonable target following negotiation.*** *As far as I can see now, the only ways of significantly reducing this are to fight with Rhodia on the basis that this is still not novated (dont think this is practically viable and would need Legal Counsel advice) or by an unexpectedly favourable negotiation.*

27. On 31 January 2003, a letter was sent by Cogen's legal department to Huntsman in relation to the novation which stated:

> *"As you will be aware, clause 24.5 of the ESC provides that [Rhodia] may assign, novate or otherwise transfer any of its rights or obligations thereunder provided it has satisfied [Cogen] that the party to which the proposed assignment is to be made is capable of fulfilling its obligations and duties under the ESC. Accordingly, [Cogen's] Credit Risk Management division has conducted a detailed analysis of HSSUK's latest published accounts. This revealed, inter alia, that the Company made a loss before tax of £84,000 and, after paying a preference share dividend, transferred a loss*

of £400,000 to its profit and loss account. Whilst the balance sheet shows a net worth of some £8.2 million, I understand that HSSUK has significant inter-company debt including a £14 million loan secured against the assets of the business.

We have therefore reluctantly concluded that until HSSUK posts substantially improved financial results demonstrating its ability to discharge all duties and obligations under the ESC, [Cogen] will not grant its consent to the proposed novation."

28. Following that letter, no attempt was made by Huntsman to persuade Cogen to change its mind nor was there any other relevant communication concerning the novation. Finally, on 5 March 2004, Huntsman wrote two letters, one to Cogen withdrawing any request for novation of the Energy Supply Contract and the other to Rhodia giving notice under clause 15.1.4 in the following terms:

"We refer to:

(1) the sale and purchase agreement (the "SPA") dated 27 February 2001 between, inter alia, Rhodia Consumer Specialties limited ("RCSL") and Huntsman International LLC ("Huntsman"); and

(2) the CHP Energy Supply Contract dated 31 March 1993 (the "CHP Contract") between Albright & Wilson Limited (now Rhodia Consumer Specialties Limited) and National Power (Cogeneration) Limited (now Innogy Cogen Limited) ("Cogen").

Capitalised terms not defined herein shall have the meaning given to them in the SPA.

The CHP Contract is a Novated Contract for the purposes of the SPA. The CHP Contract has not, as at the date of this letter, been novated to Huntsman or the Designated Purchaser. Accordingly, pursuant to Clause 15.1.4 of the SPA, we hereby give notice to RCSL requiring RCSL to exclude the CHP Contract from the sale of the Business Assets.

The provisions of Clause 15.1 of the SPA have therefore ceased to apply to the CHP Contract and Huntsman and the Designated Purchaser shall, with effect from the date of this letter, have no further obligations in relation to the CHP Contract

This letter shall be governed by English law."

29. From 5 March 2004, Huntsman did not perform any of the obligations of Rhodia under the Energy Supply Contract, which it had been performing since Completion. Since Rhodia had no personnel on site, there was no one to perform those obligations. The CHP Plant was shut down a few days later. Huntsman ceased operations at Whitehaven later in 2004. Cogen subsequently made the claim against Rhodia in arbitration. Following a hearing in December 2006, an Award has just been published.

Reasonable endeavours

30. Before considering in detail the parties' rival submissions as to whether on the facts Huntsman did use reasonable endeavours to obtain the consent of Cogen to the novation to HSSUK of the Energy Supply Contract, I should deal with two preliminary points.

31. First, there was some debate at the hearing as to whether "reasonable endeavours" is to be equated with "best endeavours", a question on which there seems to be some division of judicial opinion. At the end of the day I am not convinced that it makes much difference on the facts of this case, but since the point was fully argued, I should deal with it. Mr Beazley QC for Rhodia contended that there was no difference between the two phrases. He relied upon a passage from the judgment of Buckley LJ in ***IBM v Rockware Glass*** [1980] FSR 335 at 339:

> *"in the absence of any context indicating the contrary, this [an obligation to use its best endeavours] should be understood to mean that the purchaser is to do all he reasonably can to ensure that the planning permission is granted".*

There are similar statements in the judgments of Geoffrey Lane LJ at 344-5 and Goff LJ at 348.

32. Mr Beazley also relied upon what Mustill J said in ***Overseas Buyers v Granadex*** [1980] 2 Lloyd's Rep 608 at 613 lhc:

> *"it was argued that the arbitrators can be seen to have misdirected themselves as to the law to be applied, for they have found that EIC did "all that could reasonably be expected of them", rather than finding whether EIC used their "best endeavours" to obtain permission to export, which is the test laid down by the decided cases. I can frankly see no substance at all in this argument. Perhaps the words "best endeavours" in a statute or contract mean something different from doing all that can reasonably be expected-although I cannot think what the difference might be. (The unreported decision of the Court of Appeal in IBM v Rockware Glass upon which the buyers relied, does not to my mind suggest that such a difference exists…).*

Mr Beazley pointed out that in ***Marc Rich v SOCAP*** (1992) Saville J equated best endeavours with due diligence and that Rix LJ in ***Galaxy Energy v Bayoil*** [2001] 1 Lloyd's Rep 512 at 516 equated reasonable efforts with due diligence, which suggested that best endeavours and reasonable endeavours meant the same thing. He sought to distinguish the unreported decision of Rougier J in

UBH (Mechanical Services) v Standard Life (1986) that an obligation to use reasonable endeavours was less stringent than an obligation to use best endeavours, on the grounds that the point was not argued but conceded by Counsel.

33. I am not convinced that (apart from that decision of Rougier J) any of the judges in the cases upon which Mr Beazley relied were directing their minds specifically to the issue whether "best endeavours" and "reasonable endeavours" mean the same thing. As a matter of language and business common sense, untrammelled by authority, one would surely conclude that they did not. This is because there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours and it seems to me that is essentially what Mustill J is saying in the ***Overseas Buyers*** case. One has a similar sense from a later passage at the end of the judgment of Buckley LJ in ***IBM v Rockware Glass*** at 343, to which Mr Edwards-Stuart QC for Huntsman drew my attention.

34. That there is a distinction between best endeavours and reasonable endeavours and that the latter is less stringent than the former is not only supported by the decision of Rougier J in ***UBH*** but by the decision of Kim Lewison QC (as he then was) sitting as a Deputy High Court Judge, in ***Jolley v Carmel Limited*** [2000] 2 EGLR 154 upon which Mr Edwards-Stuart relied. At p 159 the judge said:

> *"Where a contract is conditional upon the grant of some permission, the courts often imply terms about obtaining it. There is a spectrum of possible implications. The implication might be one to use best endeavours to obtain it (see Fischer v Toumazos [1991] 2 EGLR 204), to use all reasonable efforts to obtain it (see Hargreaves Transport v Lynch [1969] 1 WLR 215) or to use reasonable efforts to do so. The term alleged in this case [to use reasonable efforts] is at the lowest end of the spectrum."*

Mr Beazley sought to suggest that somehow this analysis was distinguishable because it was concerned with the implication of a term, but I cannot see any

basis for such a distinction. It seems to me that the judge's analysis is equally applicable to the construction of the phrase reasonable efforts or reasonable endeavours whether it is an express or an implied term of any particular contract.

35. Accordingly, in so far as it is necessary to decide this point, I agree with Mr Edwards-Stuart that an obligation to use reasonable endeavours is less stringent than one to use best endeavours. As to what reasonable endeavours might entail, he relied upon a recent decision of Lewison J in ***Yewbelle v London Green Developments*** [2006] EWHC 3166 (Ch) at paragraphs 122-3 where the judge said:

> *"However, the essence of the obligation required Yewbelle to use reasonable endeavours to reach an agreement, not with the other party to the contract, but with a third party. To that extent it seems to me that at the very least Phillips is a useful analogy. In using reasonable endeavours towards that end, I do not consider that Yewbelle was required to sacrifice its own commercial interests.*
>
> *123. I come back to the question: for how long must the seller continue to use reasonable endeavours to achieve the desired result? In his opening address, Mr Morgan said that the obligation to use reasonable endeavours requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. You would simply be repeating yourself to go through the same matters again. I am prepared to accept this formulation, subject to the qualification that account must be taken of events as they unfold, including extraordinary events."*

Subject to one caveat, I would agree with this analysis. The caveat is that, where the contract actually specifies certain steps have to be taken (as here the provision of a direct covenant if so required) as part of the exercise of reasonable endeavours, those steps will have to be taken, even if that could on one view be said to involve the sacrificing of a party's commercial interests.

36. The second preliminary point is an argument raised by Mr Edwards-Stuart in opening submissions, although not pressed in closing. This was the argument that Huntsman was not contractually obliged to use its reasonable endeavours to procure a novation to HSSUK as opposed to a novation to Huntsman itself, which it was never asked to do. This argument fails as a matter of construction of the SPA. Clause 15.1.2 does not in fact specify to which entity within the Purchaser's Group the novation is to be made, so that the obligation is quite general. Furthermore, the argument ignores the second half of Clause 1.2.14

which makes it clear that where there was a Designated Purchaser as here with HSSUK, Huntsman remained responsible for the performance of all the obligations under the SPA. The effect of that provision was that, even if the novation was to be to the Designated Purchaser rather than to Huntsman itself, Huntsman was required to use its reasonable endeavours to obtain the consent of Cogen to that novation.

37. The main thrust of Rhodia's complaint that Huntsman failed to use its reasonable endeavours to obtain Cogen's consent to the novation concerns the failure to provide a parent company guarantee or some other form of "direct covenant" and a related failure to explore with Cogen what it was that it required in terms of comfort or security. This is scarcely surprising, since other than in that regard, it would be difficult to sustain a case that Huntsman did not use reasonable endeavours. After all, it was Huntsman, via its solicitors, which initiated the novation process through the production on 12 March 2001 of a draft novation agreement to cover the Restricted Contracts. This was notwithstanding that Cogen had written to Rhodia on 13 October 2000 about the requirement to give notice of intention to novate under Clause 24.5 of the Energy Supply Contract. This trial has not been concerned with the question whether Cogen could have refused to accept any novation because of Rhodia's breach of Clause 24.5, since that is a causation issue for another day. For the present it is sufficient to observe that any delay in sending draft novation agreements to Cogen was Rhodia's responsibility.

38. Similarly, I do not consider that Huntsman could be criticised for not providing financial information about HSSUK. The statutory accounts for the first year of trading were never going to be available until they had been audited, which was projected to be the end of June 2002. Although there was a slight delay in sending them to Cogen, this was of no real significance. Before the accounts were available, once Huntsman had been informed Cogen was seeking financial information, it promptly prepared and sent the Fact File.

39. It is the failure of Huntsman to provide a "direct covenant" if Cogen "so reasonably requires" upon which Rhodia has focused. Rhodia submitted that the "requirement" did not need to be in any particular form and indeed there

did not need to be an express request. If it was clear from the circumstances that Cogen wanted some security or comfort, a requirement or request could be inferred or implied. This seems to me to be correct, not least because Cogen was unaware of the terms of Clause 15.1.2 of the SPA to which it was not a party and so could hardly be expected to put forward a requirement or request in any particular form.

40. In any event, Rhodia contended that Cogen had expressly "so reasonably required" in its letter to Rhodia of 20 July 2001 and that this requirement was communicated to Huntsman in three different ways: (i) it was sent by Cogen to Huntsman as an attachment to an e-mail on 8 August 2001; (ii) it was Mr Beasley's unchallenged evidence that the requirement was drawn to the attention of Mr Butler of Huntsman by Mr Beasley's colleague, Mr Stuart Young; (iii) the requirement was quoted in Mr Beasley's letter to Mr Bunker of 5 October 2001.

41. Mr Edwards-Stuart sought to challenge this contention on a number of grounds. First he submitted that, since the reference to requiring a guarantee was in a letter to Rhodia, it was far from clear that this was necessarily a guarantee from Huntsman as opposed to from Rhodia. I reject that submission. It seems to me that in the context of a novation by Rhodia to HSSUK, which is what the letter was addressing, it would make no commercial sense for Rhodia to guarantee HSSUK's obligations. That was something which would naturally and obviously come from Huntsman as parent company of HSSUK and it is clearly that which Cogen had in mind. If there had been any ambiguity, the reasonable endeavours obligation required Huntsman at the least to enquire of Cogen what kind of guarantee it had in mind.

42. Next Mr Edwards-Stuart submitted that the e-mail of 8 August 2001 could not be interpreted as Cogen requiring or requesting a guarantee from Huntsman. I consider that is too narrow an interpretation. As I have already indicated above, it seems from the first line of the e-mail that there had already been some discussion between Mr Butler and Mr Ansell of the contents of the letter of 20 July 2001. In all probability, Mr Butler was already aware of the requirement for a guarantee. I consider that the reference to Mr Butler letting Mr Ansell know if

he required a formal letter relates to the possibility that Mr Butler might require a formal request from Cogen in relation to the matters referred to in the 20 July 2001 letter which were Huntsman's responsibility (including the provision of a guarantee) to show his superiors within Huntsman. However, even if Huntsman were right in its submission about this e-mail, the matter is put beyond doubt by Mr Beasley's letter of 5 October 2001, which makes it clear that whatever had been said about the backing of the Huntsman Group at the meeting on 24 September, Cogen required a guarantee from Huntsman.

43. It is no answer for Huntsman to say that the letter does not specify what form of guarantee would be acceptable to Cogen. It was incumbent on Huntsman (as part of its obligations under clause 15.1.2) to find out. It may be that Mr Beasley's assessment was correct that some form of letter of comfort would have satisfied Cogen, but if it did not and Cogen required a parent company guarantee, then Huntsman's obligation was to provide one: the relevant words in Clause 15.1.2 about providing a "direct covenant" if so reasonably required are mandatory not permissive. Accordingly, by early October 2001 at the latest, Huntsman knew that Cogen was requiring a guarantee from Huntsman. I leave out of account whether or not this was something specifically discussed between Mr Young and Mr Butler, about which I need not make any findings.

44. Equally, it is nothing to the point that Huntsman may have been reluctant as a matter of group policy to agree a parent company guarantee until it had exhausted every other possibility. On one view, that is what Mr Emerson was saying a few months later both internally and in the Fact File. However, the fact that to give such a guarantee might have involved Huntsman sacrificing its commercial interests is no answer where Huntsman had assumed an obligation in mandatory terms. If it was that reluctant, it should not have agreed that particular provision in Clause 15.1.2, but having done so, it had to comply if a guarantee was reasonably required by Cogen, as it was, even if that was against its own commercial interests. It follows, and I find, that Huntsman was in breach of Clause 15.1.2 of the SPA in not providing whatever form of guarantee was acceptable to Cogen from October 2001 onwards.

45. The matter does not end there. I agree with Mr Beazley that the requirement for a parent company guarantee was not withdrawn by Cogen, nor did Huntsman think it had been, as Mr Emerson's internal e-mail of 19 March 2002 makes clear. In particular, I do not consider that Mr Ansell's e-mail of 21 January 2002 bears the construction which Mr Edwards-Stuart sought to put upon it, that somehow Cogen were now just looking for financial information. The totality of the document makes it clear that Cogen was complaining about both the lack of financial information about HSSUK and the absence of a parent company guarantee or similar security. Whilst it is correct that the Fact File was a prompt response to the request for financial information, I accept Mr Beazley's submission that paragraph 8 was a categorical refusal to provide a parent company guarantee as required by Cogen. If Huntsman was not already in breach of Clause 15.1.2, it was clearly in breach at this point in late January 2002.

46. Furthermore, the requirement for a parent company guarantee or similar security if the novation were to go ahead at this stage was made clear by Cogen in its e-mail of 18 March 2002. Mr Edwards-Stuart sought to categorise this as giving Huntsman the option either to provide a guarantee now or to wait and see whether the published accounts would in due course satisfy Cogen as to the financial viability of HSSUK for the purposes of Clause 24.5 of the Energy Supply Contract. I do not consider that the e-mail can bear that construction. Rather it makes it clear that a parent company guarantee or similar security will be required if Cogen is to agree to a novation now. This is exactly how Mr Emerson understood it, as appears from his e-mail the following day.

47. However, Mr Edwards-Stuart argued very attractively that, since the other issues raised by Cogen of the lease and the Technical and Operating Agreement remained outstanding, and no novation would have in fact occurred until they were resolved, there was no urgency and it was perfectly legitimate for Huntsman to wait and see whether the statutory accounts would satisfy Cogen without a guarantee. Mr Edwards-Stuart found support for his argument in the evidence of Mr Beasley, who agreed in cross-examination that he would not criticise Huntsman for wanting to wait and see what Cogen's reaction was to the statutory accounts before offering a

guarantee. Mr Edwards-Stuart submitted that this was a significant indication as to what was reasonable in the circumstances.

48. Attractively though this argument was put, I am unable to accept it. I am extremely sceptical as to whether Huntsman was really intending to wait and see whether Cogen would be satisfied with the accounts. Mr Emerson's e-mail of 19 March 2002 demonstrates that Huntsman was well aware that the first statutory accounts of this start-up company would still show that it was not financially strong, and that in all probability a parent company guarantee would still be required. The real reason why Huntsman did not offer a guarantee at this stage may not have been because of any legitimate desire to "wait and see", as Mr Edwards-Stuart sought to suggest, but because Huntsman was already becoming reluctant to go ahead with this novation at all, given the possible financial burdens it would involve, a reluctance which one can glimpse as early as an internal e-mail from Mr Phil Roe to Mr Ziman and Mr Butler of 31 October 2001. Whilst it is true Mr Beasley accepted that he would not criticise Huntsman for a "wait and see" policy, he could not have known what Huntsman's internal attitude was and no one from Huntsman gave evidence. Ultimately, as Mr Edwards-Stuart accepted, the question whether Huntsman used reasonable endeavours is one for the Court. Notwithstanding Mr Beasley's evidence, I do not consider that Huntsman did.

49. This concept of an option or of "wait and see" is not consistent with the mandatory terms of the relevant sentence in Clause 15.1.2 of the SPA, the effect of which is to oblige Huntsman to put up such a guarantee if required. The argument that a novation might not have occurred until other matters were resolved may well go to the issue of causation, which is not for this trial, but those other matters are not a qualification of the obligation. Accordingly, I find that Huntsman was in breach of Clause 15.1.2 in not proffering a parent company guarantee or similar in response to Mr Ansell's e-mail of 18 March 2002.

50. Thereafter, matters seem to have stalled on the novation front whilst the statutory accounts were awaited. When the statutory accounts were produced,

they did indeed reveal that HSSUK was not financially strong. There was a loss before taxation for the 16-month period to 31 December 2001 of £84,000 and, although the balance sheet showed net assets of £8.2 million, there was inter-company debt of more than £23 million, £14 million of which was a loan secured on the assets of the business. This position was pointed out in the letter from Cogen to Huntsman of 31 January 2003 stating that it would not grant its consent to the novation.

51. Mr Edwards-Stuart sought to characterise the last paragraph of the letter as the sort of categorical refusal of consent which will relieve a party of its obligations to continue using reasonable endeavours. He relied upon a passage in the judgment of Dillon LJ in ***29 Equities Ltd. v Bank Leumi (UK) Ltd*** [1986] 1 WLR 1490 at 1496F-G:

> *"As Goff J pointed out in Lipmnas Wallpaper Ltd v Mason & Hodghton Ltd [1969] 1 Ch. 20, the vendor could not escape the clause by rescinding on the ground that consent was not obtainable without first using the vendor's best endeavours to get it; but that is not in question here. As Goff J equally pointed out, if the facts are that there has been a categorical refusal of consent by the landlord, then it is not incumbent on the vendor to make further or yet further attempts to persuade the landlord to change his mind or to give the purchaser an opportunity of trying his powers of persuasion on the landlord or taking various other steps which hypothetically might equally well, or might not, have any effect in persuading the landlord to change his mind. But the question is a simple question of fact to be decided in the light of common sense".*

52. I do not doubt the application of that principle in an appropriate case. Indeed it is essentially the same point as Mr Justice Lewison accepted in paragraph 123 of ***Yewbelle*** quoted above. However, I do not consider that the letter of 31 January 2003 is such a categorical refusal. In the absence of any evidence, I decline to conclude that, as Mr Edwards-Stuart sought to suggest, by this time the attitude of Cogen to Huntsman had hardened, so that Cogen would not have agreed to a novation, even if a parent company guarantee had been offered. It is simply not possible to say what the attitude of Cogen would have been if Huntsman had showed some willingness to co-operate by offering a parent company guarantee in December 2002 or January 2003.

53. Furthermore, one does not know to what extent Cogen's entire approach was coloured by a belief induced by the terms of paragraph 8 of the Fact File that

Huntsman never offered parent company guarantees (a statement which it is accepted was not entirely correct). It seems to me that, on the facts of this case and the evidence before me, Huntsman cannot simply rely upon the letter of 31 January 2003 as relieving it from any further obligation under Clause 15.1.2 of the SPA. Given the previous requirement for a parent company guarantee, it seems to me that it was incumbent upon Huntsman to respond to the letter by offering such a guarantee and in failing to do so, it remained in breach of Clause 15.1.2. This conclusion may prove academic in the light of the findings I have already made above that Huntsman was already in breach of its obligations under the Clause from October 2001 onwards, a breach which was not remedied.

54. In concluding that Huntsman was in breach of its reasonable endeavours obligations under Clause 15.1.2, I am not determining whether Cogen would in fact have agreed to a novation if a parent company guarantee had been offered or whether Cogen would have always have refused to agree a novation because of what it saw as a breach by Rhodia of Clause 24.5 of the Energy Supply Contract. Those are all issues of causation, which are for another trial.

Notice under Clause 15.1.4

55. Given my conclusion that Huntsman was in breach of its obligations to use its reasonable endeavours from October 2001 onwards, it follows that the proviso in the opening lines of Clause 15.1.4 was not satisfied and the notice purportedly given by the letter of 5 March 2004 was invalid. In these circumstances, it is not strictly necessary to decide the additional question argued before me as to whether if the notice were valid, the effect of it was to relieve Huntsman of any continuing obligation in relation to the Energy Supply Contract. However, since the point was argued before me, I will deal with it briefly.

56. Mr Beazley argued that the effect of the words *"unless the other party to such Restricted Contract has indicated to the Vendors in writing or to the Purchaser that it is not willing to consent to the assignment or the novation of the relevant Novated Contract principally because of the identity of the Purchaser or any other members of the Purchaser's*

Group," is to qualify the remainder of the Clause. In other words, he says that if the reason for the third party being unwilling to agree to a novation is the identity of the Purchaser or another company in its Group, then the final words of the Clause *"neither [the Second Claimant] nor the Purchaser shall have any further obligation to any other party to this [Sale and Purchase] Agreement in related to such Novated Contract and the provisions of Clause 15.1 shall cease to apply to such Novated Contract"* do not apply and, presumably, Huntsman remains liable under Clause 15.1.3, to which I refer in more detail below. He pointed out that it would be very odd commercially if, under an SPA the whole purpose of which was to transfer the business and the contracts relating to it to Huntsman, Rhodia remained responsible for performing the relevant contract.

57. Mr Edwards-Stuart on the other hand submitted that the words *"unless the other party to such Restricted Contract has indicated to the Vendors in writing or to the Purchaser that it is not willing to consent to the assignment or the novation of the relevant Novated Contract principally because of the identity of the Purchaser or any other members of the Purchaser's Group"* only qualify what immediately follows, namely the obligation of the Vendors to pay to the Purchaser the diminution in value of the surfactants operations caused by the fact that the relevant contract was not novated. In other words he says that if the reason for the third party refusing to novate is the identity of the Purchaser etc., there is no obligation on the Vendors to indemnify the Purchaser for the diminution in value. However, provided that the Purchaser has complied with its obligations to use reasonable endeavours under Clause 15.1.2, the effect of a valid notice will be to relieve Huntsman of any further obligations under the SPA in respect of the relevant Restricted Contract, whatever the reason for the third party's refusal to agree a novation.

58. This issue is finely balanced, but I prefer Mr Edwards-Stuart's argument. In relation to Restricted Contracts, the SPA imposes the reasonable endeavours obligations upon Huntsman under Clause 15.1.2. It seems to me in principle correct that, if Huntsman has complied with those obligations and serves a valid notice under Clause 15.1.4, it should be relieved of any further obligations in relation to the particular Restricted Contract, whatever the reason for the third party's refusal to novate. Given that, in situations where reasonable endeavours

have been exercised (including the proffering if required of a parent company guarantee) the reason for a refusal to novate by the third party is likely to be some reluctance to do business with the Purchaser or its group. Rhodia's argument on this point would thus seem to deprive the Clause of much of its commercial purpose. However, the issue is an academic one given my decision that Huntsman did not comply with its obligation to use reasonable endeavours under clause 15.1.2 and that the notice under clause 15.1.4 was invalid.

Huntsman's obligations under Clause 15.1.3

59. Clause 24.6 of the Energy Supply Contract provides as follows:

> *"Sub-contracting: either Party shall have the right to sub-contract or delegate the performance of any of its obligations or duties arising under this Contract with the prior consent of the other, such consent not to be unreasonably withheld. The sub-contracting by a Party of the performance of any of its obligations or duties under this Contract shall not relieve that Party from liability for performance of such obligations or duty."*

Mr Edwards-Stuart accepts that in practice, HSSUK was performing Rhodia's obligations under the Energy Supply Contract from Completion until March 2004. However, he points out that no prior consent to that occurring was obtained from Cogen. Accordingly, although Cogen no doubt acquiesced in what occurred, that is not the same thing as having given prior consent. He referred to the distinction between prior consent and waiver or forbearance drawn by the Court of Appeal in ***Hyde v Pimley*** [1952] 2 All ER 102 and ***Hendry v Chartsearch Limited*** (1998).

60. The significance of that distinction to the present case, so Mr Edwards-Stuart contends, comes when one looks at the provisions of Clause 15.1.3. His argument is that sub-clause (b) does not apply, because the relevant Restricted Contract does prohibit the performance by Huntsman of Rhodia's obligations under that Contract. Equally, he says that sub-clause (c) cannot apply because in fact, Rhodia has not continued performing its obligations under the Restricted Contract but has delegated them to Huntsman. Accordingly, Mr Edwards-Stuart contends, neither provision applies and Huntsman is under no obligation either to perform the obligations under the Restricted Contract or to indemnify Rhodia in respect of their performance.

61. Ingenious though this argument is, I consider that it is flawed. When sub-clauses (b) and (c) of Clause 15.1.3 talk about the Restricted Contract prohibiting performance by the Purchaser, they mean blanket prohibition, that is a Contract which does not permit sub-contracting or delegation under any circumstances whatsoever. The Energy Supply Contract was simply not such a contract; since it clearly did permit sub-contracting in certain circumstances. Furthermore, even if, on the basis that prior consent was not obtained, the strict terms of Clause 24.6 were not complied with, the fact is that over a period of years Cogen acquiesced in the performance of the obligations by Huntsman. As between Cogen and Rhodia it would have been impossible for Cogen to contend that such performance by Huntsman was prohibited. Any such contention would be met by a complete answer of waiver or estoppel.

62. In those circumstances, this is not a case where performance by Huntsman was prohibited under the Restricted Contract. Indeed quite the contrary, Huntsman has performed the obligations of Rhodia under the Energy Supply Contract. Clause 15.1.3 (b) applies and Huntsman remains liable under that provision. This construction of the Clause also seems to me to correspond with its commercial purpose. The provisions of Clause 15.1.3 are clearly intended to cover all situations and not to leave any lacuna pursuant to which Huntsman escapes any responsibility whatsoever.

Conclusion

63. It follows that the answers in relation to the three issues on liability are as follows:

(1) Huntsman was in breach of its obligations under Clause 15.1.2 of the SPA to use its reasonable endeavours to obtain the consent of Cogen to the novation of the Energy Supply Contract;

(2) The notice served by Huntsman on 5 March 2004 purporting to be a notice under Clause 15.1.4 of the SPA was invalid;

(3) Huntsman remained under the obligation on and after 5 March 2004, pursuant to Clause 15.1.3 (b) of the SPA, to perform Rhodia's obligations under the Energy Supply Contract.