EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

BRITISH VIRGIN ISLANDS
BVIHCV2007/0277
BETWEEN:

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS
Claimant
and

OCEAN CONVERSION (BVI) LIMITED
Defendant

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BRITISH VIRIGN ISLANDS
BVIHCV2008/0192
BETWEEN:

OCEAN CONVERSION (BVI) LIMITED
Claimant

and

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS
Defendant

Appearances:

Mr. Baba Aziz and Ms Karen Reid of the Attorney General's Chambers for the Attorney General Mr. Sydney A Bennett QC and Ms Anthea L Smith, both of J.S. Archibald & Co, for Ocean Conversions Limited

JUDGMENT

[2009: 23, 24 July; 17 September]

(Contract with BVI Government for production of fresh water by reverse osmosis technology – whether determined by election of BVI Government to purchase plant at end of first contractual term – whether continued for additional contractual term or month to month

– whether BVI Government entitled to ownership of the plant without payment at end of second contractual term – whether contractor a trespasser – whether contractor entitled to charge for supply of water to BVI Government after end of second contractual term – whether supply contravening Water Ordinance Cap 153 – illegality – whether contractor entitled to compensation for improvements and enlargements by way of equitable compensation)

[1] **Bannister J [ag]:** These proceedings are comprised within two separate actions which ought to have been dealt with by claim and counterclaim or, at the very least, to have been consolidated. They never were and the result has been quite unnecessary complication and added expense. I heard them together on 23 and 24 July 2009.

Introduction

[2] The disputes between the parties have their origin in a contract entered into on 9 May 2009 between the Government of the British Virgin Islands ('the Government') and a Massachusetts incorporated company called Reliable Water Company Inc ('RW Inc' 'the contract') The contract provided for the installation by RW Inc on land owned by the Government at Baughers Bay, Road Town, Tortola ('the site') of a plant for the production of potable water from seawater ('the plant'). RW Inc was to extract the seawater from boreholes adjacent to the site and turn it into fresh water using the reverse osmosis system (essentially a sophisticated method of high pressure filtration). The contract provided that RW Inc should deliver the potable water thus produced to a clearwell owned by the Government on the site. The water would then be pumped from the clearwell through a pipeline owned by the Government to a 275,000 Igal reservoir, also owned by the Government, at Fort Hill, Road Town. RW Inc was to be paid for the water delivered to the Government at the clearwell on monthly invoices calculated by means of a formula containing a basic price per 1,000 Igal, adjusted for inflation and electricity costs and with a penalty for any breaches of certain quality specifications.

[3] On 4 July 1990 RW Inc assigned its interest in the contract to a BVI incorporated company called Reliable Water (BVI) Ltd, which subsequently changed its name to Ocean Conversion (BVI) Limited ('OC').

[4] I shall have to consider the terms of the contract in detail later in this judgment. There are difficulties with some of the drafting, but it can be safely stated by way of introduction that the contract was structured to run for a seven year term from the 'Startup Date' (the date when the plant was certified to be capable of delivering water to the clearwell). If, eight months prior to expiration of the seven year term, the Government advised OC of its decision to purchase the plant, then the Government was to pay OC $1.125 million and OC was obliged to hand over the plant to the Government. If the Government did not so advise OC of its decision to purchase the plant, then the contract was automatically extended for a further seven year term, at the expiration of which the plant became the property of the Government 'without any further payment'. The commercial thinking underlying this arrangement is self evident: a fourteen year term must have been envisaged by the parties as sufficient to provide OC with a commercially acceptable return on its investment. It must further have been considered that that would not have been achieved by the end of a mere seven years of operation. Hence, it is to be inferred, the provision for the Government to make a payment to OC if the contract ran for the initial term only.

[5] The original seven year term was expressly extended by two supplemental agreements so that it ended on 31 May 1999. On 30 September 1998, precisely eight months before the expiry of the initial term, the acting permanent secretary at the Ministry of Communications and Works wrote to OC advising it that the Government was prepared to exercise what the letter described as the option to purchase the plant. No purchase money was ever paid by the Government to OC or requested from the Government by OC. OC continued delivering water to the Government and the Government continued to pay for it as if the terms of the contract governing price (which had been amended by the first supplemental agreement) continued to govern the position between the parties.

[6] On 31 May 2006 (the date when the second seven year term, on the assumption that the Government had not elected to purchase the plant upon the end of the original seven year term, would have expired) OC wrote to the Government asserting that the contract had expired on that day and asking for a meeting to discuss the way forward. OC asked for an 'extension' of the contract until the parties had reached agreement as to the way forward. There is a reference to, but no evidence about, a meeting between the parties on 15 August 2006. On 25 September 2006 the Ministry of Communications and Works served OC with what it called a 'Notice of Vesting'. That notice, which was signed by the Minister, stated that upon the expiration of the seven year extension of the contract on 31 May 2006 the plant 'hereby vests in the Government'.

[7] The Government continued to pay for water delivered to the clearwell by OC at the contract rate until 31 December 2006. Since then invoices totalling some $26,443,138 have been delivered by OC to the Government in respect of water delivered down to April 2009. There is no dispute that the Government has had the water and no suggestion that the amounts claimed in the invoices are not correctly calculated by reference to the pricing mechanism laid down in the contract. Instead, the Government says that it 'temporarily suspended' payment for water produced from the plant pending resolution of the dispute between the parties about the ownership of the plant. Subsequently, says the Government, it decided to pay for water delivered by OC since 1 January 2007 at the rate of $6.88 per thousand Igal, this being the amount which the Government claims is the cost to OC of producing the water. The resulting shortfall between the amounts invoiced by OC and the amounts paid to it by the Government as at April 2009 was some $13,773,950.

[8] On 21 November 2007, the Government started an action against OC claiming a declaration that the Government 'became vested' with an absolute proprietary interest in the plant with effect from 1 June 2006; possession; and a further declaration that it is entitled to 'all profits or benefits' that OC has had or may subsequently obtain from wrongfully operating the plant after 31 May 2006. I shall refer to this action as the possession claim. The position originally taken in the possession claim by the Government was that (despite the terms of its letter of 30 September 1998) it had not

elected to purchase the plant at the end of the initial seven year term, so that the contract had gone into its additional seven year term and expired by effluxion of time on 31 May 2006. OC attempted to stay the possession claim on the basis of an arbitration clause in the contract, but a stay was refused by Joseph-Olivetti J on 14 December 2007 and her decision was upheld by the Court of Appeal.

[9] Instead of counterclaiming in the possession claim, OC on 4 July 2008 brought a separate action against the Government for the difference between what it had invoiced and what it had been paid for water since 1 January 2007. I shall refer to this action as the payment claim.

Procedural events

[10] I have already mentioned the fact that these proceedings were never consolidated. I should also mention that on 12 May 2009 I heard an application by OC in the payment claim for judgment by way of preliminary issue. I refused that application, in large part on the grounds that I did not consider that it was prudent, in the light of the overlap with the pleaded issues in the possession claim, to determine the payment claim summarily and in isolation. Ultimately, the two claims were set down to be heard together in the week commencing 21 July 2009. Orders had been made for expert evidence to be adduced in the possession claim on the issue of the value of the extensions or improvements carried out by OC as summarized above and in the payment claim on the issue of what was the actual cost to OC of the production of potable water at the plant. Shortly before the claims were due to come on for trial, the Government's expert witness in the payment claim suffered a family crisis. It was agreed that the claims should proceed within the week commencing 21 July 2009, but with the expert evidence being stood over to be heard at a later date. The parties have also agreed that in delivering this judgment I should determine as many of the issues as I feel able to decide in the absence of expert evidence and to defer deciding only such issues, if any, as I consider turn upon the expert evidence.

The contractual documents

[11] With that brief introduction I can now turn to the contractual and other material documents and to the limited amount of admissible oral evidence of fact which was adduced by the parties.

[12] Clause 1 of the contract, the interpretation clause, is in the following terms:

Interpretation

In this Agreement, unless the context otherwise required:

- **Acceptance Date** means the date of execution of this Agreement;
- **Company** means Reliable Water Company, Inc. of 35 Dunham Road, Billerica, MA 01821, USA;
- **BVI** means the Government of the British Virgin Islands;
- **Igal** means an Imperial gallon of volumetric measure;
- **Site** means the site located in Baughers Bay, Road Town, Tortola as indicated in Attachment A hereto;
- **Plant** means all mechanical, electrical and other equipment and all civil engineering works or plant including appurtenances located on the Site, which are in the ownership of the Company and used by the Company to provide seawater, purify seawater and convey Water to the Clearwell, more particularly described in Section 3.3 herein;
- **Startup Date** means the date upon which the Plant is first capable of delivering Water to the Clearwell as certified by the independent consulting engineer knowledgeable about reverse osmosis;
- **Clearwell** means BVI's clearwell located adjacent to the Plant and which receives the Water from the Plant;
- **Pipeline** means BVI's pipeline from the Clearwell to the Reservoir;
- **Reservoir** means BVI's 275,000 Igal reservoir, located at Fort Hill, Road Town, Tortola;
- **Water** means water delivered to the Clearwell at the Site by the Plant;

- **Quantity** means the actual quantity of Water in any calendar month, expressed in Igal;
- **BVI Demand** means the actual quantity of Water that BVI is willing and capable of receiving in any calendar month.
- **Minimum Quantity** means 4,500,000 Igal per calendar month during the first six months after the Startup Date, increasing to 6,750,000 Igal thereafter.

The definition of 'plant' was further expanded by clause 3.3 of the contract:

3.3. Company's Scope of Supply

Other than as specifically set forth in Sections 3.5 and 6, the Company shall be responsible for all costs associated with the planning, design, construction, installation and startup of the Plant and for any and all associated costs.

The company shall provide and commission the Plant, with a design production capability of 300,000 Igal per day of Water per day, which shall consist of:

- Supply boreholes, including pumps of adequate capacity, to provide the Plant with sufficient seawater feed flow.
- Pretreatment equipment including cartridge filter vessels to adequately treat the seawater.
- Reverse osmosis train to separate the treated seawater into the design product flowrate and the brine stream, including:
    - Electrically driven high-pressure feed pump.
    - Second Electrically driven high-pressure feed pump or diesel-driven high-pressure feed pump, including fuel storage and transfer system.
    - Energy recovery system.
    - Three membrane banks.
- Cleaning system to allow cleaning of one membrane bank.
- Interconnecting piping, electrical wiring, conduits and supports.
- Instrumentation, valves, and motor controls.

- A computer-based control system required to operate the plant.
- An environmental control system to reduce corrosion within the Plant building.

- A compressed air system, with dryer, for actuation of all air-operated equipment.
- A system for washing the equipment and rinsing it with high-purity water.
- All civil engineering works, including pads, building, trenching.
- Any other works that the Company shall require to operate the Plant efficiently within the terms and conditions of this Agreement, including Hydrogen Sulfide scrubbing if required.

[13] Clause 2 granted OC the right to process and sell water:

2. Right to Process and Sell Water

Subject to the terms and conditions of this Agreement and in common with others who may from time to time be granted similar rights, the Company is hereby granted the right to:

- Install the Plant on the Site; and
- provide potable water from seawater extracted from boreholes below the depth of the freshwater lens and having a Total Dissolved Solids level of 25,000 mg/l or more; and
- Sell the potable water to BVI and deliver it to the Clearwell owned and operated by BVI.

[14] Clause 3.4 dealt with specification. For the purposes of these proceedings, its relevant parts are as follows:

3.4 Design Requirements

In the first six months after the Startup Date, the plant shall have a production capability of 200,000 Igal per day. During that time, one spare high pressure pump and driver shall be kept on site to ensure reliability of supply.

Starting six months after the Startup Date, the installation of all components of the plant shall be completed, such that the Plant shall have a design production capability of 300,000 Igal per day, and shall meet the following design requirements:-

…...

Clause 5.1 was in the following terms:

5.1 **Expansion of the Plant**

This Agreement is based upon a design capacity of 300,000 Igal per day. In the event that BVI requires an expansion of the plant to 600,000 Igal per day or installation of a second pass to improve the water quality, then the parties shall mutually agree to amend the terms, pricing, Minimum Quantity and other terms and conditions of this Agreement.

In this regard, I should mention the relevant portions of clause 4.1:

4.1 Operation of the Plant

The Company shall make every effort to satisfy the BVI Demand, to the limit of the design capacity of the Plant, taking due and reasonable allowance for maintenance time (approximately 10%) for the Plant, ensuring the programming of intended maintenance is notified to BVI, it being accepted that the Company shall wherever possible carry out maintenance of the Plant at a time convenient to BVI

……

BVI shall not be responsible for any additional and associated costs that may be incurred by the Company in meeting variations in the BVI Demand, within the limits of the Plant. BVI shall take all reasonable steps, where possible, to assist the Company in the efficient operation of the Plant, by limiting the frequency of Plant startup and shutdown, using the

capacity of the Reservoir to the fullest extent possible, and advising the Company as early as possible of variations in the BVI Demand.

[15] Price and invoicing were dealt with by clause 4.7, but since there is no issue as to those provisions, it is not necessary for me to set them out.

[16] Clause 4.2 defined the 'Term of Water Supply':

> 4.2 **Term of Water Supply**
>
> The duration of this Agreement shall, subject to the provisions for determination of extension contained here, be for a term of seven years from the Startup Date.

The critical provisions dealing with extension and purchase were contained in clause 5.2:

> **5.2 Extension of Agreement or Purchase of the Plant**
>
> Upon expiration of the term of this Agreement, per Section 4.2, this Agreement shall be extended for an additional seven (7) years, unless BVI advises the Company of its decision to purchase the plant eight (8) months prior to such expiration.
>
> On completion of the 7 year extension, the Plant shall become the property of BVI without any further payment. Spare parts, chemicals and supplies may be purchased by BVI at a price to be agreed between the parties.
>
> In the event that BVI elects to purchase the Plant upon expiration of the term of this Agreement, then the price shall be $1,125,000, which shall be paid to the Company and at such time the Company shall hand over the Plant to BVI. Spare parts, chemicals and supplies may be purchased by BVI at a price to be agreed between the parties.

[17] On 14 March 1991 a supplemental agreement was entered into between the Government, RW Inc and OC under its then name. It is unnecessary to set out any part of this supplemental agreement. It is sufficient to say that it provided for an increase in design capability from 300,000 Igal per day to 360,000 Igal per day as from 'Startup Date /2'. The effect of this was to substitute a later notional commencement date for the first seven year term. The supplemental agreement also raised the price chargeable in certain circumstances by OC to the Government. Thus, in return, as it were, for upgrading the plant to give it an additional capacity, OC obtained an extension of time in which to generate profit and the chance to charge higher prices for some of the water delivered. The costs of the upgrade had to be met by OC, but the supplemental agreement made an adjustment to the price payable by the Government under clause 5.2 of the contract from $1.125 million to $1.25 million.

[18] A further supplemental agreement was entered into on 24 January 1992, raising the design capacity to 510,000 Igal per day and deferring the notional commencement date of the first seven year term of the contract to 1 June 1992. There was no adjustment to the price chargeable by OC to the Government for water delivered, but the price payable by the Government under clause 5.2 of the contract was raised from the $1.25 million fixed by the first supplemental agreement to $1.42 million.

Subsequent events

[19] During the supervening period OC was under regular pressure from Government to increase the design capacity of the plant (it will be recalled that the contract required it to be capable of being upgraded to a maximum capacity of 600,000 Igal per day). Dr William Andrews, who was President of RW Inc at the time when the contract was negotiated and who remained as Vice President and CEO of OC until February 2003 gave evidence for OC. He said that when the OC team met ministers the approach taken by Government was 'why don't you just put in what is necessary and we would pay you, everything would work out'. This evidence is credible, was uncontradicted by evidence from the Government, and I accept it. Dr Andrews said that OC tabled proposals to provide for it to

be compensated if it took capacity over that figure, but that no agreement was ever reached for any further revisions to the contract over and above those contained in the second supplemental agreement. I accept that evidence also. Despite that, the capacity of the plant was increased at OC's expense to 660,000 Igal per day in 1993 and further increased to 710,000 Igal per day in May 1995.

[20] On 30 September 1998 the acting Permanent Secretary at the Ministry of Communications and Works wrote the letter to OC to which I referred earlier. I must now set it out in full:

> Dear Mr. Andrews:
>
> Pursuant to section 5.2 of the Agreement to produce potable water from seawater between the Government of the British Virgin Islands and Ocean Conversion (BVI) Ltd. and the several supplemental agreements thereto, I hereby advise you on behalf of the Government of the British Virgin Islands (BVI) that the said BVI is prepared to exercise the option to purchase the plant at Baughers Bay. However, we are amenable to meeting with Ocean Conversion (BVI) Ltd. to discuss the possibility of negotiating a new agreement, should you so desire. In this regard, we look forward to hearing from you soon, in order that a meeting may be scheduled accordingly.
>
> Yours sincerely,
>
> Julia Christopher
> Ag. Permanent Secretary

The letter has a manuscript note under the signature of Dr Andrews acknowledging receipt of the letter by OC on the same day.

[21] On 14 October 1998 OC by Dr Andrews wrote to the Ministry in the following terms:

> Dear Madam,
>
> We acknowledge receipt on 30th September, 1998, of your facsimile letter to myself of that date, on the above referenced subject.
>
> Ocean Conversion is interested in meeting with the Ministry to discuss the possibility of negotiating a new agreement to replace the existing Agreement, which will expire on 31st May, 1999.

> We are holding a meeting of our directors in Tortola on Thursday 22nd October. If it would be convenient, I would like to suggest that a meeting be held on the morning of the 22nd.
>
> Please advise if the suggested date would be convenient to the Ministry by calling or sending a fax to the numbers given below.
>
> Thank you for your attention to this matter.
> Yours sincerely,
>
> William T. Andrews
> Vice President & CEO

It will be noticed that Dr Andrews expressed interest in meeting the Minister to discuss the possibility of negotiating a new agreement to replace the existing agreement and that he expressed the view that the contract would come to an end on 31 May 1999. A meeting did in fact take place on 6 November 1998, but nothing of substance came of it. Indeed, it will shorten the narrative if I say at this point that no subsequent meetings or other communications between the parties resulted in any concluded agreement, whether as to detail or substance.

[22] On 5 January 1999 Dr Andrews wrote to the Ministry as follows:

> Dear Madam,
>
> Please find attached a draft "Heads of Agreement" with respect to possible replacement of the above referenced Agreement. We look forward to receiving a copy of the Government's draft on the same matter.
>
> We suggest that a meeting be held to discuss this matter on either 22nd January, or the 4th February, 1999, as either of these dates would allow attendance of Mr. James Gibbons.
>
> We look forward to hearing from you on this matter.
>
> Yours sincerely,
>
> William T. Andrews
> Vice President & CEO

Cc: Mr. Gary Penn, Water & Sewerage Dept.

The draft Heads of Agreement which OC sent with Dr Andrews' letter contained the following among the draft terms which it included:

"The following is intended an outline of the items that might be contained in a new agreement between the Water & Sewerage Department ("WSD") of the Government and Ocean Conversion ("OCL"), and results from the meeting with the Minister on 30th November, 1998.

Existing Baugher's Bay Plant

1. Plant Capacity – The capacity of the Plant would be expanded to a capacity of 960 klgpd by a pre-defined date. This is basically the maximum practical capacity of the Plant at this location, without significant works on the infrastructure. The current capacity of the plant is approximately 730 klgpd, whereas the current contractual capacity is 510 klgpd

. . . . .

7. Product Pipeline - The pipeline to Fort Hill reservoir presently has a transfer capacity of 780 klgpd. This would need to be expanded by WSD.

8. Reservoirs - The reservoirs at Fort Hill has a capacity of only 300klgal, which is not sufficient even for the existing plant capacity, resulting in water shortages after short periods of shutdown of the Plant. OCL believes that at least 2 MIG of storage should be constructed at the same elevation as the plant, whether funded by OCL or WSD. The additional storage would be operated by WSD, such that it is always at least 50% full, except during plant outages.

. . . . . .

11. Term - It is suggested that the term of the new agreement be 15 years, with the option to extend for a similar period under terms to be agreed prior to the expiration of this period."

[23] Dr Andrews says that some time after early January 1999 OC began work to increase the capacity of the plant to 960,000 Igal per day. OC does not suggest that this expansion was done at the request of or even at the prompting of the Government. Dr Andrews says that he was asked by

Mr. Gary Penn, the Chief Engineer for the Government Water and Sewerage Department ('Mr. Penn') for an estimate of the costs of this upgrade. Dr Andrews told Mr. Penn that some $2.45 million had been spent to date with a further estimated $320,000 to come.

[24] On 4 June 1999 the acting Permanent Secretary wrote to OC. I must set out the text of the letter in full:

> Dear Mr. Andrews:
>
> **Agreement to Produce Potable Water – Ocean Conversion**
>
> As you are aware, the Agreement to produce potable water from seawater between the Government of the British Virgin Islands and Ocean Conversion (BVI) Ltd. has expired. In this regard, I am hereby seeking approval for an extension of three months, in order to finalize the re-negotiation of the Agreement.
>
> Your cooperation would be very much appreciated.
>
> Yours sincerely,
>
> J.Guishard
> (for) Ag. Permanent Secretary
> Communications and Works

By a letter dated 30 June 1999, Dr Andrews wrote to the acting Permanent Secretary stating that on advice OC now took the view that the contract had not come to an end, as OC had previously asserted, but had been extended for a further seven years under clause 5.2. The full text of the letter is as follows:

Dear Madam,

Thank you for your letter CW/WS.22/052 of 4th June 1999 which stated that the Agreement had expired, and requested an extension for three months in order to finalise re-negotiation of the Agreement.

After careful review and advice from legal Counsel, we consider that the Agreement at the end of its seven years duration has been extended for an additional seven years as from 1st June 1999 under section 5.2 thereof.

However, without prejudice to our rights under the Agreement as so extended, we would be willing to continue our discussions for a re-negotiation of the extended Agreement.

Yours sincerely,

William T. Andrews
Vice President & CEO

[25] The Permanent Secretary replied on 28 January 2000:

Dear Mr. Andrews:

AGREEMENT TO PRODUCE POTABLE WATER

I refer to your letter dated 30th June, 1999, captioned as above, and wish to apologize for the late response.

In paragraph two of your letter you indicated that you considered that the Agreement at the end of its seven years duration has been extended for an additional seven years as from 1st June, 1999. I wish to draw your attention to my letter dated 30th September, 1998, in which you were advised that the BVI Government is prepared to exercise the option to purchase the plant, pursuant to section 5.2 of the Agreement, but would be amenable to negotiating a new contact.

The Government is still very interested in re-negotiating the contact and regards the current Agreement as being in force on a monthly basis only until negotiations between the Government and the Company are concluded.

Your coporation will be greatly appreciated.

Yours sincerely,

J.Guishard
(for) Permanent Secretary
Communications and Works

[26] At a meeting on 11 April 2000 between OC, the new Permanent Secretary and other Government officials, including Mr. Penn, the parties agreed to disagree about whether the contract had been determined or remained on foot and decided instead to work towards a new agreement.

[27] There was an important meeting between the parties on 1 December 2000. Dr Andrews says that the Government side stressed to OC at that meeting the need for additional water supply in Tortola and OC committed to complete the expansion to 960,000 Igal per day. On 4 April 2001 OC wrote to the Minister advising that the materials necessary to complete the expansion to 960,000 Igal per day were to hand and stating that OC had decided to add capacity for an additional 500,000 Igal per day, with the capability of going on to add a further 1 million Igal per day. I have to say that I do not find this letter easy to place in context, but there is no doubt that it contained statements to the effect which I have summarised. On 5 April 2001 there was a further meeting, at which OC explained that in the short term its plant was working at maximum capacity.

[28] On 4 May 2001 OC wrote to the Minister confirming that the expansion to 960,000 Igal per day had been completed that week and informing him that some newly available technology offered the prospect of adding further capacity of 400,000 Igals per day at a cost of some $900,000. The letter went on to say that in view of the urgent need OC's board had decided to proceed with this expansion and mentioned OC's intention to tender for a new desalination plant which OC believed that the Government was intending to put out to tender.

[29] In late March 2003 OC's board decided to proceed on the basis of a redesign which involved not only the addition of new plant but also the replacement of much of the original

systems which were no longer suitable for the redesigned plant. Mr McTaggart, who took over from Dr Andrews as CEO of OC in February 2003, told me that the expansion involved the replacement of many existing systems with newer, larger equipment, to the extent that after the expansion had been completed there was no identifiable element of the original plant. That remains the position today. The building housing the plant had to be enlarged by some 60%. In answer to questions from Mr Baba Aziz, who appeared, together with Ms Karen Reid, for the Attorney General, Mr McTaggart said that the expansion could be severed, but that it would be difficult to do and not cost effective. I find that the sum of this evidence was that the 2003 expansion fundamentally changed the physical identity of the plant and that the plant itself is, as might be expected, legally speaking in the nature of a fixture.

[30] The redesigned plant was operational with a capacity of 1,360,000 Igal per day by around January 2004. The evidence for OC, which I accept, was that the increase in capacity required the Government to alter the pipework in its distribution system in order to accommodate the increased flow rate. I should also mention the evidence that the successive increases in volume produced by the plant had meant that the Government had been obliged to replace the 275,000 Igal reservoir at Fort Hill with two reservoirs having a combined capacity of 600,000 Igal. This work had been carried out in about 2001. The successive expansions in capacity, in other words, could not be effected without co-operation from, and required complementary work to be executed by, the Government. I also accept evidence given on behalf of OC that there were repeated inquiries from either the Ministry or the Water and Sewage Department about the progress of the work, stressing the Government's pressing requirement for an increase in water supply throughout Tortola.

[31] OC's evidence was that its cost of the expansion of the plant's capacity beyond the 510,000 Igal per day figure agreed under the second supplemental agreement of 24 January 1992 had been some $4.7 million. It will be recalled that the first expansion after that envisaged by the second supplemental agreement was the expansion carried out in

September 1993, which took the capacity of the plant to a little over the 600,000 Igal per day stipulated for in clause 3.4 of the contract.

[32] As described in paragraph 6 above, on 31 May 2006, which would have been the final day of any additional seven year term of the contract, OC wrote to the Minister:

> Dear Sirs:
>
> **Re: Agreement No. 124 of 1990 between the Government of the British Virgin Islands and Ocean Conversion (BVI) Limited for the Sale and Purchase of Potable Water (as amended)**
>
> Reference is made to the captioned matter.
>
> Ocean Conversion (BVI) Limited ("OCL") is cognisant of the fact that the captioned Agreement expires on May 31st, 2006, and is desirous of meeting with the Ministry in order to discuss the terms and conditions pursuant to which OCL will continue to supply potable water to the BVI.
>
> OCL is available at the Ministry's convenience to meet to discuss this matter, but would be grateful if this opportunity could arise in a timely fashion, as OCL remains committed to its service to the BVI.
>
> In the interim, OCL hereby requests an extension of the captioned Agreement until such time as OCL and Government have reached and agreement in relation to the way forward.
>
> We look forward to hearing from you.
>
> Sincerely,
>
> Glenn Harrigan
> President

[33] The Government replied on 25 September 2006:

> Dear Mr. Harrigan,
>
> **Agreement No. 124 of 1990 between the Government of the British Virgin Islands and Ocean Conversion (BVI) Limited**

Further to your correspondence dated 31st May 2006, and our subsequent meeting on 15th August 2006, the Government of the British Virgin Islands hereby gives "**Notice of Vesting of the Plant in the Government British Virgin Islands",** which is attached.

The Government of the British Virgin Islands, further to Ocean Conversions expressed interest, invites Ocean Conversion to submit a proposal for their continued involvement in the supply of potable water, given Government's assumption of ownership of the plant.

We look forward to an amicable settlement and a timely closure of the outstanding matters relating to this contract.

Sincerely yours,

Rosalie Adams (Mrs)
Permanent Secretary
Ministry of Communications & Works

cc: Financial Secretary

The 'Notice of Vesting' which was sent under cover of the letter of 25 September 2006 was in the following terms:

Dear Mr. Harrigan,

Notice of Vesting of Plant in the Government of the British Virgin Islands

TAKE NOTICE THAT in accordance with clause 5.2 of the principal Agreement between the Government of the British Virgin Islands and Reliable Water Company Inc duly registered as No.124 of 1990 "the said Agreement" (as assigned to Ocean Conversion (BVI) Limited in the Assignment dated 4th July 1990) **AND** upon expiration of the seven year extension of the said Agreement on 31st May 2006, the "Plant" as defined in Section 1 of the said Agreement hereby vests in the Government of the British Virgin Islands and the Government hereby asserts and gives notice of its right to ownership of the plant.

Dated the 26th day of Sept, 2006

[34] I think that the only other facts which I need to mention are that on 22 March 2007 the Financial Secretary, in response to a written demand made on OC's behalf by its Counsel for payment of some $3.2 million unpaid charges claimed by OC for water delivered, wrote to OC saying that invoices to end 2006 would be paid, but that pending finalization of an agreement on pricing the Government would pay only $6.88 per 1,000 I gal, being a figure which the Government claimed was the actual cost of production. At the end of December 2007 the Government made a one off payment to OC of $3.5 million. On 3 January 2008 the Financial Secretary informed OC that this payment was (I paraphrase) without prejudice to the Government's position on pricing levels or the ownership of the plant.

The possession claim

[35] The possession proceedings, as I have said, were commenced on 21 November 2007. By its amended statement of claim the Government summarises the three written agreements; asserts that there have been no further consensual amendments to the contract; pleads the Permanent Secretary's letter of 30 September 1998; and asserts that the Government never exercised its option to purchase, with the consequence that the contract ran for a second term of seven years and the plant became the property of the Government on 1 June 2006 in accordance with clause 5.2 of the contract without any requirement upon the Government to pay for it.

[36] OC's original defence was that the Permanent Secretary's letter of 30 October 1998 ***did not*** amount to an election to purchase the plant; that by agreement the parties had proceeded on the mutual understanding that after 31 May 1999 the agreement 'continued' on a month to month basis; that on the basis of this understanding OC had incurred expenditure in expanding the plant and that it would be inequitable for the Government in consequence to 'resile from this understanding'. The defence specifically denied that the plant ever became the property of the Government. OC went on to counterclaim the $4.7

million spent on expansion of the plant after 1992 on the basis that the extension envisaged by clause 5.2 in the event of non-exercise of the option was predicated upon a plant with a design capacity of 510,000 Igal per day; that it was a term of the contract that it would be adjusted to compensate OC for its expenditure in taking the capacity over this level; alternatively, that the expenditure was made by OC in the expectation, encouraged by the Government, that OC would be compensated for this outlay. There was no trace in the defence of any reliance upon an interest of any sort entitling OC to remain in possession.

[37] On 3 June 2009 this defence was amended to plead that the Permanent Secretary's letter of 30 September 2008 ***did*** operate as an election to purchase the plant. Otherwise, the defence remained unchanged.

[38] When the case came on for hearing, I told Mr Bennett QC, who appeared, together with Ms Anthea L Smith, for OC, that I was unable from the amended defence to be sure precisely why OC claimed to be entitled to remain in occupation of the site in the face of the Government's claim for possession. I suggested that it would be a good idea if overnight he produced a further amended defence setting out OC's position in clear terms. Mr Aziz sensibly took no objection to this course. On the morning of 24 July 2009, the second day of the trial, Mr Bennett QC produced a further amended defence.

[39] In this further amended defence OC relies, as it did in the amended defence, upon the Permanent Secretary's letter of 30 September 1998 as having exercised the 'option to purchase' under clause 5.2 of the contract. So, OC now pleads, the contract determined on 31 May 1999 and was not extended to 31 May 2006. By exercising the option, the Government came under an obligation to pay the contractual purchase price of $1.42 million for the plant. By the terms of clause 5.2, it is said, OC's obligation to deliver up possession of the plant was conditional upon payment being made by the Government for the plant; that has never happened; therefore the Government is not entitled to possession.

[40] It will be seen that there is still no claim on the part of OC to any interest, legal or equitable, in the plant.

[41] OC's counterclaim remained broadly unchanged except that the prayer sought a declaration that instead of payment of the sum of $4.7 million by way of reimbursement of OC's expenditure, OC should be paid $3.35 million, being the difference between the $1.42 million 'purchase price' and an amount of $4.7 million which it claims is the enhancement in the value of the plant attributable to OC's post 1992 expenditure. OC's expert evidence in the possession claim is directed to this issue. OC does not counterclaim directly for payment of the $1.42 million payable by the Government as a result of the exercise of its right to elect under clause 5.2 of the contract.

[42] On 27 July 2009, after the close of the hearing I sought further submissions from the parties on certain issues upon which I felt I needed further assistance. Those submissions were made in writing on 31 July 2009 and both parties indicated that they were content for me to consider them for the purposes of my judgment without the need for further oral hearing.

[45] In order to consider the rival contentions it is critical to determine the meaning and effect of the provisions of the contract dealing with term and termination. It will probably be convenient if I set out them again at this point. Clause 4.2 and the material parts of clause 5.2 are in the following terms:

> 4.2. **Term of Water Supply**
>
> The duration of this Agreement shall, subject to the provisions for determination of extension contained here, be for a term of seven years from the Startup Date.
>
> 5.2. **Extension of Agreement or Purchase of the Plant**
>
> Upon expiration of the term of this Agreement, per Section 4.2, this Agreement shall be extended for an additional seven (7) years, unless [the Government]

advises [OC] of its decision to purchase the plant eight (8) months prior to such expiration.

. . . . . .

In the event that [the Government] elects to purchase the Plant upon expiration of the term of this Agreement, then the price shall be $[1.42 million], which shall be paid to [OC] and at such time [OC] shall hand over the Plant to [the Government].

The wording of clause 4.2 is awkward, but I treat the expression 'the provisions for determination of extension contained here' as meaning 'the provisions of this Agreement which determine whether or not the contract term is to be treated as extended'. In this way, the wording is retained as written and, in my judgment, given a commercially acceptable meaning.

[46] Clauses 4.2 and 5.2 have to be read together. The first paragraph of clause 5.2 provides for an automatic extension of the original seven year term unless the Government advises OC of its decision to purchase the plant in accordance with that paragraph. In effect, clause 5.2 offers the Government something similar to a break clause in a lease. That break clause is exercised by the Government advising OC, within the time stipulated (eight months prior to expiration of 'the term of this Agreement' – i.e. the seven year term provided for by clause 4.2), that it has decided to purchase the plant upon expiration of the term of this Agreement' – i.e. at the end of the seven year term provided for by clause 4.2. If the Government elects to purchase, then the Government must pay OC the 'price' of $1.42 million and OC must give vacant possession of the plant at the end of the first term.

[47] If the Government does not elect to purchase and the contract runs into an additional seven year term in consequence, then clause 5.2 provides that the plant becomes Government property at the end of the additional seven year period 'without any further payment'. The difficulty with these last words is that the contract will only reach a fourteen year expiration date if there has been no previous payment in respect of the plant, so that

the word 'further' is awkward. I think that it is to be ignored as surplusage and that this part of the clause is to be read as meaning no more than 'without any payment'.

[48] Having thus determined the true meaning of clauses 4.2 and 5.2 of the contract, I can now turn to consider their effect in the light of the events which happened.

[49] I have no doubt that the Permanent Secretary's letter of 30 September 1998 was a valid and effective election under clause 5.2 of the contract. The letter is expressed to be written 'pursuant to Section 5.2 of the Agreement'. The only conceivable intention on the part of the Government to be inferred by the recipient of the letter was that the Government intended to exercise its right to elect and I so find. It is true that the letter describes the Government as being 'prepared' to exercise the right rather than as having 'decided' (as the wording of clause 5.2 prescribes) to exercise it, but in my opinion that is a distinction without a difference. If a Government department, in a letter plainly intended to have contractual effect and written against a background where its decision is not dependent upon the acts of any third party or the happening of some supervening event, informs the recipient that it is 'prepared' to do some act, that is the same as informing the recipient that it has decided to do the act. A Government department cannot properly inform a counterparty in such circumstances that it is prepared to do something unless a decision has been taken to do it.

[50] The communication of an election or exercise of an option may, depending upon the terms of the contract, bring into being an executory contract (e.g. for the sale and purchase of a piece of land). I do not think that the communication in this case of the Government's election brought into being any executory contract of that sort. It seems to me that the primary contractual effect of the communication of an election by the Government is, on a proper construction of clause 5.2, to prevent an additional seven year term from arising. That means that OC's right to occupy would automatically determine at the end of the initial term. The secondary effect of the communication of the election was that the Government had to pay OC $1.42 million as the 'price' of the plant. But in my judgment and in the context of the present agreement and the background of fact against which it is

to be construed, that is merely a way of providing that OC was to receive compensation for not being permitted to operate the plant for a further seven years and thus having to forego the opportunity to make further returns in recoupment of its investment. From the evidence I received as to the physical nature of the plant it is clear that as a matter of real property law it simply accrued on installation to the Government as a landlord's fixture, or the equivalent. There were no provisions for severance. Thus, OC had no property in any chattels capable of forming the subject matter of a contract for sale and purchase of goods. In those circumstances, I construe the references to 'purchase' and 'price' not as being referable to a true executory contract to buy and sell goods (plant and machinery) but as a contractual device to compensate OC for not obtaining an additional seven year term. There was, in other words, no contract for the sale of specific goods in exchange for payment of the $1.42 million of which specific performance could be decreed. OC's entitlement to be paid $1.42 million was a simple contract debt that accrued due on 31 May 1999.

[51] However, OC's argument does not turn upon the coming into being of a specifically enforceable contract for the sale of goods, although it is consistent with the coming into being of such a contract. For OC's purposes it is sufficient if it can establish that it was a term of the contract that when the Government communicated its election OC became entitled to remain in occupation until it had received the price.

[52] OC bases such a submission upon the wording of the final paragraph of clause 5.2, which it construes as if the words 'and at such time [OC] shall hand over the Plant to [the Government]' refer back to the words 'the price shall be $[1.42 million], which shall be paid to [OC].' In my judgment, this is not the true construction of the paragraph. The only 'time' defined in the paragraph and to which the words 'and at such time' can refer back is 'upon expiration of the term of this Agreement'. The words 'the price shall be $[1.42 million], which shall be paid to [OC]' do not define a time, but an obligation and cannot, in my judgment, be what the words 'and at such time' are referring back to. In my judgment the final paragraph of clause 5.2 paragraph does no more than provide for payment to OC upon the expiration of the term of the agreement and for OC to hand over the plant not

'upon receipt of such payment' but 'at such time', i.e. upon the expiration of the term of the agreement. The paragraph does not, in other words, make vacation by OC of the site conditional upon its receipt of the price.

[53] I appreciate that the construction which I prefer is not felicitous as a matter of language, but it is internally consistent grammatically as well as being consistent with the other relevant terms of the contract. Clause 4.2 defines a clear termination date of seven years from startup. The construction for which OC contends is inconsistent with that and produces the potential for conflict. As for the stylistic point, this is not the only example of infelicitous language to be found in the contract.

[54] What has actually happened is that the parties have, since 1 June 1999 and until the Government announced its decision not to pay the price stipulated for by the contract for the water delivered from the plant, allowed their relationship to be governed for all practical purposes as if the contract had remained on foot. In those circumstances it is my view that after 31 May 1999 OC was simply holding over under a bare licence revocable by the Government upon the giving of reasonable notice to OC. The licence was not contractual in the sense in which that expression is used in authorities such as Honnslow LBC v. Twideenham G.DO. Ltd[1], to which I was referred by Mr. Bennett QC. OC simply stayed on with the implied consent, revocable on reasonable notice, of the Government.

[55] In case I am wrong in my construction of clause 5.2 of the contract, I now turn to consider the position if, as OC contends, OC remained entitled to occupy the premises after 31 May 1999 until it received payment of the $1.42 million price.

[56] If, contrary to my view, an executory contract for the sale and purchase of the plant did indeed arise when the Government exercised its right to elect, specific performance of that contract must have been long since barred by laches, or by the radical alterations to the plant subsequently carried out or by a combination of the two. A bare claim by OC to be paid the price, quite apart from limitation problems, has been overtaken by the fact that it

[1] [1971] 1 ch.233

was inherent in any claim to the price that OC would have ceased on or very shortly after 31 May 1999, to have had the facility of using the plant for its own profit. Payment of the price was intended to compensate it for being deprived of that facility. By 24 July 2009, when OC amended its defence to take this point, OC had already enjoyed the commercial benefit of a ***de facto*** additional seven year term. Thus OC wants both the benefit of the purchase price and to retain the benefit of its continued occupation of the site, which cannot, of course now be taken away from it. That, it seems to me, illustrates the commercial unreality of the defence as it now stands.

[57] At no stage has OC ever claimed payment of the price due to it following the Government's exercise of its right to elect. At no stage after 30 June 1999 (until it amended its defence on 24 June 2009) has OC ever maintained any stance other than that the contract remained on foot as having gone into an additional seven year term, a stance wholly inconsistent with the survival of any outstanding claim to be paid the price. The Government did not, in the earlier period after 31 May 1999, accept that this was the position, but in my judgment by the time when the additional term (if it had ever arisen) would have come to an end, the Government had received every indication from OC that its claim to be paid the $1.42 million had been long since abandoned and would never be enforced. Similarly, by that time OC had received every indication from the Government that it had long since abandoned any intention of tendering the price and demanding that OC vacate the premises in consequence. The correspondence to which I have referred earlier speaks for itself.

[58] On the basis of this evidence I find as a fact that if (contrary to my view on the true construction of clause 5.2) it was a term of the contract that OC was entitled to remain in occupation after 31 May 1999 until it had received payment of the price from the Government, then that term had been discharged by agreement to be inferred from the parties' conduct (or, if that is a better way of putting it on the facts, mutually abandoned) long before 31 May 2006. The parties' conduct only makes sense on the footing that each proceeded on that basis and that each intended that the other should so proceed.

[59] In my judgment, therefore, even on OC's case, the fact that it has never received the purchase price to which it became entitled when the Government exercised its right to elect in 1998 does not now afford it a defence to the possession claim. At all material times, therefore, and irrespective of the true construction of clause 5.2, OC has been in occupation of the site under a bare licence revocable by the Government on reasonable notice.

[60] I turn to the question whether OC's licence has been revoked.

[61] I have not seen any evidence that any notice revoking the licence has ever been given by the Government to OC. Certainly none is pleaded. The so called 'Notice of Vesting' of 25 September 2006 can have been of no effect, since it was based upon the assumption, which I have held to be unfounded, that the contract had run into a second seven year term and in any case purported only to assert (unnecessarily) the Government's ownership of the plant. It did not amount to notice to OC, reasonable or otherwise, to give up occupation. Furthermore, it was sent under cover of a letter from the Permanent Secretary at the Ministry of Communications and Works which stated that

> 'The Government of the British Virgin Islands, further to [OC]'s expressed interest, invites [OC] to submit a proposal for their continued involvement in the supply of potable water, given the Government's assumption of ownership of the plant.'

That passage is inconsistent with an intention to revoke OC's licence to occupy and in my judgment meant that the accompanying 'Notice of Vesting' could not reasonably have been read as having that effect. At best, these documents are equivocal and lack the expression of a clear requirement to vacate which is the essential characteristic of a notice revoking a licence to occupy.

[62] Mr Aziz relies in his supplementary written submissions for the Attorney General on a letter written by the Ministry of Communications and Works to OC on 3 January 2007, but in my judgment that letter, which I do not need to set out, does not amount to an unequivocal (or

any) communication of any revocation by the Government of OC's licence to occupy. The service of the possession claim was clearly sufficient to revoke OC's licence, but unless it could be said, which in my view it could not, that the licence was determinable ***instanter*** and without any period of grace to allow OC to make reasonable arrangements to vacate the site, then the claim was issued prematurely, because the Government had not yet become entitled to possession when it was issued. Classical doctrine would say that in those circumstances the claim must fail: ***Ministry of Health v Bellotti***[2]. I drew the attention of Counsel to this authority and invited their submissions upon it. In his submissions for OC Mr Bennett QC accepted that service of the possession claim operated to revoke the licence and submitted that revocation would become effective on the expiry of a reasonable 'packing up' period thereafter. I think that he was right to adopt this position. If it had been desired to take the point that the possession claim was premature when issued, the point should have been taken as soon as it was served. That would no doubt have resulted in the service of an unequivocal notice of revocation, followed by a short delay to allow for 'packing up', and the service of a further possession claim. Given that a year and eight months has elapsed since the possession claim was first served, there would have been little or no difference in practical effect.

[63] I also invited Counsel in their supplementary submissions to address me on the appropriate time that should be allowed for OC to quit the site after notice of revocation had been given. Mr Bennett QC submitted that eight months would be a reasonable period. This period is obviously taken by analogy from the first paragraph of clause 5.2 of the contract. The analogy is, in my judgment, false. The eight month period for giving notice of the Government's election was stipulated for in the context of OC being required in consequence to abandon the project half way, as it were. If the contract had run the full course of an additional term, OC would have been required to cease to occupy forthwith on 31 May 2006. Since OC has enjoyed the benefits of occupation for in excess of the seven year period which it would have enjoyed had the contract run for an additional term, it seems to me that it could reasonably expect no more than the shortest practicable time in which to hand over occupation of the site. I have considered the matters set out in

[2] [1944] KB 298 at 309

paragraph 3.4 of Mr. Bennett's supplemental submissions but in my view 28 days would be ample notice for that purpose. It follows that since 20 December 2007 OC has been in occupation of the plant as a trespasser. The Government has been entitled to possession since that date and is entitled to an order for immediate possession. Obviously, practical considerations of handover may mean that there will be some delay, but that will be a matter for the Government in its discretion. As a matter of law, the Government is entitled to possession forthwith.

[64] The next question is whether OC is entitled to any compensation for its expenditure in putting the plant into the position in which it now stands, as it counterclaims.

[65] I have already held that the plant has at all times become the property of the Government upon installation (or reinstallation, as the case may be). ***Prima facie***, therefore, OC has no basis for claiming to be compensated for the costs of installation or expansion.

[66] Mr. Bennett QC, however, argues that OC is entitled in equity to be compensated for its expenditure on expanding the plant to a greater capacity than that provided for in the contract. He says that the contract stipulated for a plant capable, if necessary by adaptation, of sustaining an output of 600,000 Igal per day and that OC has spent its own money at the request, express or implied and with the necessary practical involvement of the Government to raise its capacity to 1.36 million Igal per day. He says that that has involved OC in expenditure of somewhat over $4.7 million and that the expert evidence which he intends to rely upon will show that that has resulted in a plant whose value has been enhanced, by coincidence, by almost exactly the same amount of money. So, he says, OC should be compensated by an award of $4.7 million against which would have had to be offset the price payable on exercise by the Government of its option had I held that OC was entitled to be paid it. Since I have not, I proceed upon the assumption that, provided his valuation evidence is accepted, he claims an award of $4.7 million.

[67] Mr. Bennett QC puts this part of his claim on the basis of unjust enrichment. He says that express promises were on occasions made by high officials of the Government that OC

would be paid for its expenditure and says that the conduct of the Government in pressing for increased capacity and in actively participating in its provision carried with it the implied assurance that OC would be compensated. Mr. Bennett QC clearly does not rely upon any such promises as having had contractual effect, but argues that the issues fall within the area of law under which equity will in certain specific circumstances give effect to otherwise non-binding assurances and compensate parties for acts done in reliance upon the encouragement of expectations by words or conduct.

[68] First, Mr. Bennett QC relies upon the well known passage from the decision of Oliver J (as he then was) in ***Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd***[3]**:**

> 'Furthermore the more recent cases indicate, in my judgment, that the application of the Ramsden v. Dyson,L.R. 1 H.L. 129 principle – whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.'

[69] Mr. Bennett QC also relies heavily upon ***Plimmer v Mayor, etc, of Wellington***[4]**.** The facts in that case are very well known and I will not rehearse them. They bear a superficial resemblance to the facts in the present case. But they are also crucially different. The claimant in ***Plimmer*** had never had any contractual relationship whatsoever with the corporation of Wellington. In the present case, OC and the Government had been in a contractual relationship. Although I have held that that contract determined on 31 May 1999, the fact of its existence makes it less likely that either party would have expected that any compensation would become payable by the Government to OC in the absence of

[3] [1982] QB 133 at 151-133
[4] [1884] 9 App Cas 699

express agreement – as had been the case when the 'option' price had been raised under each of the two supplemental agreements.

[70] It also seems to me to be significant that in the modern case of ***Cobbe v Yeomans Row Management Ltd***[5] Lord Walker of Gestingthorpe (at paragraph [65]) commented that in ***Plimmer*** the Privy Council regarded it as an irresistible inference that Mr Plimmer thought that his compliance with the Government's request gave him **a *right*** (my emphasis) to security of tenure, even if the duration of that security was uncertain. Lord Walker went on to say that it is not enough to hope, or even to have a confident expectation, that the person who has given assurances will eventually do the proper thing.

[71] Whether or not that is what the Privy Council really thought or whether that is really what Mr Plimmer thought does not matter. What binds me is that this is an analysis of the ratio in ***Plimmer*** of the highest authority and which emphasises the principle that businessmen cannot repair their failure or omission to protect themselves by means of binding contractual arrangements by appeals to general principles of unfairness. There has to be more, although precisely what that more is will turn on the facts of particular cases. In Mr Plimmer's case, it was the fact that he thought that by complying with the demands of the Corporation of Wellington he would acquire security of tenure. There is no evidence in the present case that OC's board thought that the expenditure to which they committed OC in carrying out the expansions gave OC a right to reimbursement.

[72] In my opinion there is no element of unfairness or unconscionability in the present case. The expansion of the plant's capacity did not benefit the Government alone, upon whose land the plant stood. It benefited OC, which was able to generate additional profit by expanding its plant. If a customer of a manufacturer or processor demands more product and the manufacturer responds by purchasing more machinery or plant in order to be able to meet the increase in demand, the manufacturer does not expect without more that the customer will reimburse him for its cost. Expressions such as 'why don't you just put in what is necessary and we would pay you, everything would work out' seem to me to

[5] [2008] 1 WLR 1752

be highly ambiguous in the context of this case. They were obviously not made as expressions of contractual intent nor taken as such. The statements may have been references to the possibility of a beneficial new agreement or to the fact that increased capacity would in itself repay the outlay or been mere commercial bluster which a prudent businessman should have taken with a large pinch of salt. Mr. Aziz fairly pointed out that Mr. McTaggart accepted, as he had to, that OC expanded the plant in order to make money. Mr. Aziz put in some calculations, which were not challenged by Mr. Bennett QC and which showed as a matter of arithmetic that (presumably on the basis of the Attorney General's expert's estimate of the cost of production), OC's profit margin at a throughput of 1.36 million Igal per day was comfortably more than double its profit margin at 510,000 Igal per day. These figures were not formally in evidence and were untested and I do not rely upon them as fact, but elementary considerations show that OC must have been much better placed to make profits after the expansions which it carried out than before.

[73] In my judgment this case falls squarely within the ratio of ***Cobbe v Yeomans Row.*** OC may have hoped that the Government would reimburse it, but it had no good reason to manage its business on the assumption that it would, nor to contend that it acted to its detriment as a result of anything done or said by the Government or as a result of being allowed by the Government to conduct its business on the basis of false assumptions. The Government's conduct towards OC has not been unconscionable. OC's counterclaim therefore fails. The need to hear expert evidence on this aspect of the case falls away as a result.

The payment claim

[74] As I have said, this action was commenced by a separate claim form on 4 July 2008. OC's case is simplicity itself. It says that it has delivered specified volumes of water to the Government. The Government does not deny that it has had them. OC says that the Government must pay a reasonable price by the application of, or at any rate by analogy with, section 6 of the Sale of Goods Act (Cap 298) and that the best evidence of a reasonable price is a price calculated on the basis upon which the Government had been

prepared to pay under the contract and continued to be prepared to pay for seven years after the contract had come to an end.

[75] The Government has two answers going to the root of the claim and two (which in truth amount to different versions of the same answer) going to the question of quantum. First, it says that since 1 January 2007 at the latest, when the Government ceased to settle OC's invoices in full, OC has been a trespasser. For the reasons given above, I hold that OC was in occupation as a licensee until 20 December 2007, so that even if valid that defence could not operate for any earlier period. But for the period during which I have held that OC has been and continues to occupy the site as a trespasser, it seems to me that (subject to any set off which the Government might have had if it had made a claim against OC for mesne profits - something which it has declined to do), that fact would have made no difference to OC's entitlement to be paid a reasonable price for the water delivered to the Government, accepted by the Government and supplied by the Government to its customers. The Government's argument on this part of the case confuses OC's status as an occupier with its position as a manufacturer and seller of product. It is not the law that landowners who consume product made on their property by persons who occupy as trespassers can have the product for nothing.

[76] The Government's next defence to the claim as a whole is that ever since the plant's capacity was increased beyond the 510,000 Igal per day provided for by the second supplemental agreement – in other words, since about September 1993 - the water has been produced illegally. This submission is based on section 6(1) of the Water Supply Ordinance of 1956 (CAP 153) ('the Ordinance'), which is in the following terms:

> 6. (1) No person shall collect or distribute a supply of water for public or private use or purposes within an area of supply without having first obtained the approval of the Governor in Council, such approval not to be unreasonably withheld:

> Provided that nothing in this subsection shall in any way limit the right of any person to construct on premises owned or occupied by him installations to supply water to the said premises.

Down to 13 August 1992 the only 'area of supply' designated under the Ordinance was an area of Road Town which did not include Baughers Bay. With effect from 13 August 1992, however, the designated area was extended to the whole of Tortola and Virgin Gorda.

[77] The Government's argument runs as follows. OC is a collector or distributor of a supply of water for public or private use or purposes. OC therefore needs the approval of the Governor in Council to carry on this business. Such approval was obtained before the contract was entered into in 1990 and before each supplemental agreement was entered into in March 1991 and January 1992 respectively. But the latest such approval licensed only the collection and distribution of a supply of water up to a maximum daily capacity of 600,000 Igal. When that capacity was exceeded, beginning in September 1993, OC ceased to be licensed. Therefore, as I understand the argument, all purchases of water from OC by the Government (not merely purchases in excess of 600,000 Igal per day), have been unlicensed and illegal since September 1993 and so, in accordance with classical authority on contracts illegal in their performance, the express a, later, implied contract for delivery of water cannot be enforced by OC against the Government, which is thus not obliged to pay for it.

[78] This argument falls at the first hurdle. OC is not and never has been a person collecting or distributing a supply of water for public or private use. OC is and always has been a manufacturer of fresh from salt water and has delivered the fresh water so produced at premises owned by the Government (the clearwell at Baughers Bay). The fresh water thus delivered to the Government is collected by the Government at its reservoirs at Fort Hill and thence distributed by the Government to its customers, public and private. It is the Government as supplier within the meaning of section 6 which bills its customers for the supply of water so distributed, not OC. Section 6 does not bite on the activities carried out by OC at the plant.

[79] The argument would also fall if it got as far as the second hurdle. Mr Aziz accepts that the original contract and each of the two written supplemental agreements were sanctioned by the Governor in Council (although none of the minutes to which he referred me make any reference to the Water Ordinance). If, therefore, OC had been a collector and distributor of a supply of water, etc, for the purposes of the Water Ordinance, its activities were sanctioned. Indeed, the Government pleads as much in the possession claim. The sanction for the first supplemental agreement was expressed to be for the purposes of extending the supply of water to East End/Long Look and the second was for an extension to Sea Cows Bay. If OC did require sanction it had therefore already obtained it in advance in respect of those areas when they were brought within a designated area of supply on 13 August 1992. There was no evidence that water delivered to the Government by OC was ever distributed within any additional areas of supply.

[80] In fact, as I have already said, Mr. Aziz did not rely upon any extension in the areas within which water delivered by OC to the Government was distributed to end consumers. He relied merely upon the increase in volume delivered. But the Water Ordinance is directed at the identity of the supplier and the area of supply, not at the volume supplied. Mr. Aziz accepts that OC had the approval of the Governor in Council as supplier. In my judgment, if, contrary to my view, it required sanction under the Water Ordinance at all, it did not require further sanction merely because the volume produced was increased.

[81] Neither of these defences, therefore, can relieve the Government of the obligation to pay a reasonable sum for the water which it has accepted from OC.

[82] Turning to defences raised by the Government which go to quantum only, the Attorney General says first that for so long as OC has been in occupation as a trespasser it is obliged to account to the Government for all profits made by it as a result of supplying the water to the Government. Since there have since the end of December 2006 been no such profits, this is simply another way of saying that the Government is not obliged to pay

OC more than the costs of production. This argument is supposed to rest upon two distinct lines of authority.

[83] The first is contained in the line of cases to which ***Reading v Attorney General***[6] **and** ***Attorney General v Blake***[7] belong, where public servants or former public servants have, exceptionally, been made to disgorge profits made rather than merely to pay damages for breaches of their employment contracts or of other agreements entered into by them as in the course of their employment or former employment. These cases, besides turning on wholly exceptional backgrounds, have nothing whatsoever to do with the liability of a consumer of product to pay his supplier for it.

[84] The other line of authority upon which Mr. Aziz relies is exemplified by a decision of Thomas J in ***Pelle v Pelle***[8]. In that case, the defendants had wrongfully occupied certain business premises belonging to the claimants and run the claimants' business for their own benefit from those premises. Unsurprisingly, the defendants were made to account for the profits which they had made during their usurpation of the claimants' business, just as any person who wrongfully exploits another's business assets (whether confidential information, intellectual property, goodwill or customer connection) will be obliged to account for profits made as a consequence. OC has not usurped or appropriated any business assets of the Government. The Government has never been in the business of manufacturing potable water at Baughers Bay. The business carried on at the site has at all times been the business of OC. The conduct of OC in continuing to occupy the site and make use of the plant has not deprived the Government of any profits that would or might otherwise have accrued to it and no such case is pleaded. It is true that, had such a claim been brought, OC would have had no answer to a claim for mesne profits covering the period since it has been in occupation as a trespasser and that the quantum of an award of mesne profits would no doubt have reflected the ability of OC to make profit from the operation of the plant. But that is something entirely different from an award of an account of profits.

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[6] [1951] 1 All ER 617
[7] [2001] 1 AC 268
[8] [2007] ANUHCV 2004/0296

[85] It follows that the Government must pay a reasonable price for the water it has accepted. OC pleads that the invoices which it has delivered to the Government since 1 June 1999 were based upon the rate laid down by the contract and says that that fact, coupled with acceptance by the Government of the water and its willingness until January 2007 to pay for the water at that rate is the best evidence of reasonable price. The Government's only response to OC's pleaded claim that the contract rate represents a reasonable price is to deny it on the grounds that 'the allegation does not represent the true facts'.

[86] It seems to me that until the Government revoked OC's licence, which I have held that it did with effect from 20 December 2007, the contract rate must have applied between the parties, not because it was objectively speaking a reasonable rate, but because since 1 June 1999 OC had simply been holding over with the Government's consent. It is to be inferred, therefore, that while this situation obtained both sides were content to allow their relationship to be governed by the terms which had applied between them during the term of the contract. That inference is wholly consistent with the manner in which the parties conducted themselves during this period. Nothing happened on 31 December 2006 to displace this inference. The Government must therefore pay for the water it consumed between 1 January 2007 and 20 December 2007 at the contract rate.

[87] Once the Government had revoked OC's licence, however, the relationship of licensor and licensee had ceased to obtain between the parties. Because the Government continued to consume water manufactured by OC at the plant, it must, in my judgment, pay OC a reasonable price for it, but the terms under which the Government had previously paid for the water ceased to have any relevance after the licence was revoked. In point of law, the position was no different from what it would have been if a total stranger had commandeered the plant on 21 December 2007.

[88] I turn to the Attorney General's pleading on the question of how much the Government should pay if its primary defences fail. As I have already said, the Government's claim for an account of profits is another way of pleading that OC is not entitled to be paid more

than the cost of production and on that basis the Government's fall back position on its pleading is that if it has to pay for the water at all, it is not obliged to pay more than cost.

[89] I have therefore to decide as a matter of principle the basis upon which OC should be paid for the water consumed by the Government after the licence was revoked. In my judgment, OC should be paid the actual cost of production, together with an uplift giving an appropriate return for OC's time and trouble.

[90] I reach this conclusion by the following route. It seems to me to be an irresistible inference that even after OC's licence had been revoked, neither party intended that OC should continue to manufacture and deliver potable water to the Government gratis. There is therefore to be inferred a contract that the Government should pay an objectively reasonable price for the water. Such a price must at least cover the costs of production, otherwise the Government obtains an element of gift. In my judgment, it must also include a figure by way of remuneration or profit, otherwise the terms of the implied contract would be wholly uncommercial. No commercial contract for the supply of goods envisages that the supplier will work for nothing and I do not consider that the implied contract under which the parties have been operating since 27 December 2007 stands in any different position.

[91] As mentioned earlier, permission was given to both parties to adduce expert evidence as to the cost of production at the plant. For the reasons I have given, neither expert has yet attended for cross examination, but it may be helpful if at this stage I summarise the conclusions reached in the written reports. The report of Mr. Gandy, OC's expert, confirms the evidence in the witness statement of Mr. Ramjeet Jerrybandam, whose evidence I received and who was cross examined by Mr. Aziz, to the effect that the average cost to OC to produce a thousand Igal at the plant was $11.52 during 2008 and during the period from 1 January 2009 to 30 April 2009 $10.002. The report of the Government's expert, Dr Uri Horowitz, assesses the cost of production at the plant as $6.876 per thousand Igal. The difference between the two experts'calculations seems to be explained in part

because Dr Horowitz allows nothing for depreciation or insurance, whereas Mr. Jerrybandam, supported by

Mr. Gandy, includes figures for depreciation varying between $0.51 and $0.71 per thousand Igals and figures for insurance at around $0.30. That difference is not, however, sufficient to explain the gap between their conclusions. Dr Horowitz does, however, accept in his report (rightly, for the reasons which I have given above) that some allowance should be made for a profit element. He puts this element at 20% of his allowable costs, giving a figure, according to his calculations, of $1.375 per thousand Igal. Neither Mr. Jerrybandam nor Mr. Gandy produce any equivalent figure.

[92] The result is that judgment for the amount payable by the Government to OC for water delivered and consumed after 20 December 2007 must await the hearing of the expert evidence and I direct that that evidence be heard at the earliest available date, with an estimate of half a day. However, it seems to me that the submission of Dr Horowiitz' report involves an admission by the Government that OC is entitled by way of remuneration or profit to not less than $1.375 per thousand Igal over and above the $6.88 that has been paid to date, and (subject to one matter which I shall mention in a moment) I therefore make an interim award under CPR 17.6(1)(a) that the Government pay to OC $1.375 per thousand Igal delivered by OC to the Government after 20 December 2007. I should add that the parties were agreed, when the order adjourning the expert evidence was made, that if grounds existed and I thought fit, I could order an interim payment at this stage.

[93] The matter referred to above arises from the Government's one off payment of $3.5 million. I am unsure exactly how that sum of money has been treated in the accounting between the parties and in particular whether it has been offset by the Government against payments made to OC by the Government in purported reimbursement of the cost of production.

Conclusion

[94] There will therefore be judgment (other than for an account of profits) for the Government in the possession claim. OC's counterclaim in the possession claim is dismissed. Subject to any complications caused by the fact of the payment referred to in paragraph [93] above, the Government will pay OC the difference between $6.876 per thousand Igal and the contract rate of $21.73 for water delivered between 1 January 2007 and 20 December 2007. OC's claim for payment for water delivered after 20 December 2007 is stood over to await hearing of the expert evidence. Again subject to any complications caused by the accounting treatment of the $3.5 million payment, there will be an interim payment by the Government of $1.375 per thousand Igal for all water delivered and consumed after 20 December 2007. Unless terms of an order can be agreed, I will hear Counsel on the precise figures to be inserted in the order in the payment claim and on the question of costs.

Commercial Court Judge

17 September 2009