EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

(COMMERCIAL)

BRITISH VIRIGN ISLANDS
BVIHCV2008/0192
BETWEEN:

OCEAN CONVERSION (BVI) LIMITED

Claimant

and

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Defendant

Appearances:

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

JUDGMENT

[2009: 12, 16 October; 28 October]

[1] **Bannister J [ag]:** On 17 September 2009 I gave judgment in the claim by Ocean Conversion (BVI) Limited ('OC') to be paid for water produced by it and consumed by the Government of the British Virgin Islands ('the Government') after 1 January 2007. The reader should refer to that judgment for the background to and nature of the dispute between the parties. I ordered the Government to pay OC the difference between $6.876 per thousand Igal and the former contract rate of $21.73 for water delivered between 1 January 2007 and 20 December 2007. I stood over OC's claim for payment for water delivered after 20 December 2007 to await hearing of the expert evidence. Meanwhile, I ordered an interim payment by the Government of $1.375 per thousand Igal for all water delivered and consumed after 20 December 2007. The parties sensibly agreed upon the amount of an interim payment. The expert evidence was taken on 16 October 2009. I

now have to decide the basis upon which the Government is to pay for water consumed after 20 December 2007.

[2] In my earlier judgment I held that the Government must pay a reasonable sum. I also held that that sum should be made up of an amount to cover OC's costs of production, plus an additional element to provide OC with a reasonable profit. There has been no appeal against this conclusion.

[3] Because of difficulties with the witnesses' schedules, I heard the expert evidence for the Government on 12 October 2009. On 16 October 2009 I heard the expert evidence for OC and immediately afterwards I heard argument. Each side provided me with helpful written submission, which they expanded upon orally.

[4] OC's expert was Mr Paul Gandy. He has twenty five years experience in the field of water supply, treatment, storage and distribution, as well as in related industries. For the same period, he has been a licensed professional engineer. Since 1995 has been President of Globaltech, Inc, which is a design-build company specializing in the engineering and construction of such facilities. Mr Gandy has provided a full range of engineering and construction services for facilities employing reverse osmosis technology, including twenty projects in the US and fifteen in the Caribbean.

[5] Mr Gandy examined a number of financial data, including production quantities and invoice amounts for the Baughers Bay plant from 1 January 2007 to 30 April 2009; varying and average electricity supply rates for the same period; average unit costs for the period from 1 January 2007 to 30 April 2009; and a tabulated summary of costs incurred by OC for the same period as extracted from OC's audited financial statements for years ended 31 December 2007 and 31 December 2008 and from unaudited financial statements from 1 January 2009 to 31 April 2009. These latter are summarized in Appendix 2 to the witness statement of Mr Ramjeet Jerrybandam, whose evidence I heard during the trial. Briefly, they show a unit cost varying between $9.55 for the year ended 31 December 2007;

$11.52 for the year ended 31 December 2008; and $10.02 for the period from 1 January to 30 April 2009, giving an average unit costs over the period of $10.46 per thousand Igal

[6] Mr Gandy was challenged by Mr Aziz, who appeared, as before, together with Ms Karen Reid for the Attorney General on several of the items within Mr Jerrybandam's summaries. First, and relying on the views of the Government's expert, Mr Aziz challenged the inclusion within the summaries of an amount for depreciation. The basis for the challenge was that since the plant had 'vested' in the Government on 1 June 1999 there was no basis for any charge for depreciation. Mr Gandy said (in effect) that the identity of the owner of the plant was immaterial. To the extent that OC had paid for the capital equipment required to produce the water, that was a cost of production and it was correct to amortise it over the appropriate period. He said that the amortization costs were not spread only over the period in question, but covered as far back as he was able to see within the financial records. In answer to a question from the bench Mr Gandy said that the only alternative to allowing for depreciation as a cost would be for the Government to pay for capital equipment. This seemed to me to be a neat way of explaining why the inclusion of a figure for depreciation or amortization was appropriate in the present circumstances, regardless where ownership of the plant lay.

[7] Next, Mr Gandy was challenged over the labour costs. He admitted that for these he was reliant upon the summaries and that he had not seen the raw data. Be that as it may, Mr Aziz had had the opportunity to cross examine Mr Jerrybandam at the main hearing and no challenge was then made to this element of the stated costs.

[8] So far as administrative costs were concerned, Mr Gandy thought that these were higher than those he was accustomed to see and said he had queried their level. He was satisfied, however, on having had it explained to him what consultancy and other services were being provided by Consolidated Water Co. Inc, the indirect owner of 50% of OC's shares, in return for these administrative charges, that they were justified.

[9] Mr Gandy agreed with Mr Aziz that the contract had contained a formula governing electricity costs. Mr Gandy had, however, taken account of actual bills delivered and paid. Since the contractual formula has ceased to be of any relevance for the period in dispute, it did not seem to me that Mr Aziz' question bore on the problem. Mr Aziz complains in his skeleton argument that the monthly cost figures relied upon by Mr Gandy fluctuate too greatly from month to month, but this point was never put to Mr Gandy, so I ignore it. There could be any number of reasons for these fluctuations.

[10] The Government's expert was Dr Uri Horowitz. He is a distinguished scientist with qualifications in agronomy and agricultural economics from the Hebrew University of Jerusalem and a PhD in economics from Iowa Sate University (with industrial engineering as a minor field). He has an impressive record of advising governments and others on desalination and related projects worldwide.

[11] Early in 2007 Dr Horowitz had been asked to produce a report for the Government on each of the desalination plants then operating in the Territory. He produced his report in February 2007 ('the Talal report'). Mr. Horowitz said that he had inspected eight plants within a week. Certainly so far as the Baughers Bay plant was concerned, Dr Horowitz did not use actual data from the plant. Instead, he appears to have used his own professional opinions as to what ought to be, coupled with opinions on materials prices provided to him by an associate, a Mr Boaz Gazit, whose qualifications to provide such information were not explored. Mr Horowitz says that he met the manager of the plant, but that person did not give Dr Horowitz 'access to the plant's costs'. His 'projection', as he called it in cross examination, was based on actual data from many other plants and his own experience.

[12] Dr Horowitz conclusion in his expert report is that the cost to OC of producing water at Baughers Bay is US$6.876 per thousand Igal. This conclusion is exactly the same as that reached in the Talal report of February 2007. Thus, not only are Dr Horowitz' figures theoretical, or ideal, they were nearly two and a half years out of date when repeated in his expert report.

[13] Mr Bennett QC, who appeared, as before, together with Ms Anthea L Smith for OC, produced the minutes of a meeting convened on 27 March 2007 by Ms Rosalie Adams, Permanent Secretary at the Minister of Communications and Works for OC and Talal to discuss the cost structure of the Baughers Bay plant. The meeting was attended by representatives of Talal (including Dr Horowitz and Mr Gazit) and by representatives of OC. The OC representatives protested at the omission from the Talal report of a number of costs items (including, by way of example, the cost of running a standby generator).

[14] It seems to me that Dr Horowitz' report is of little or no value as an aid to deciding either the current actual costs of running the Baughers Bay plant or the costs between 20 December 2007 and the present day. I prefer the evidence of Mr Gandy and I accept the reasons given by him in cross examination for the inclusion of the various cost components as to which he was challenged.

[15] Mr Aziz complains that neither the evidence of Mr Jerrybandam nor the report of Mr Gandy exhibit the raw data upon which they rely. So, he submits, the costs which they evidence are insufficiently supported. He relies upon **Ashcroft v Curtin**[1]. That case concerned not absence of supporting documentation for the financial statements upon which the plaintiff relied, but impossibility of proving from them that any particular loss of profit had been suffered by reason of the plaintiff's accident. Mr Aziz also relied upon a decision of the Privy Council in **Deosaran v Barrow**[2] and of Hariprashad-Charles J in **Smith's Ferry Services Limited v BVI Ports Authority**[3]. The first of these concerned a total absence of any evidence to support the amended claim. In the second Hariprashad-Charles J declined to allow recovery of alleged overpayments in circumstances, where despite repeated requests from the defendant, the claimant had failed to produce the documents, which he claimed were in its possession, evidencing the fact of the overpayment. The evidence of overpayment was mere assertion.

[1] [1971] 3 All ER 1208
[2] [2006] UKPC 33
[3] BVIHCV2000/0071

[16] In the present case OC's evidence as to cost is available, intelligible and probative. I have no difficulty in accepting evidence given upon oath by witnesses which is unshaken in cross examination, even where that evidence does not include every possible item of available corroborative material. OC's witnesses confirm that they have studied audited and unaudited financial statements of OC and that the figures given are correctly derived from that source material. I would have agreed with Mr. Aziz had he made a submission that OC's disclosure in this case has been deficient – the financial statements, at least, should have been disclosed. But that does not mean that the evidence led is insufficiently probative. It seems to me that had Mr Aziz wished to demonstrate a discrepancy between the underlying documents and the figures which OC's witnesses have put before the Court in sworn testimony, it was for him to make an application for specific disclosure and to put to OC's witnesses either the financial statements or any underlying documents which he claimed diverged from the evidence given. An assertion on his part that the figures provided on behalf of OC do not support the conclusions in Mr Gandy's report is not evidence.

[17] I appreciate that the average cost computed from Mr Gandy's figures from 1 January 2008 to 30 April 2009 works out at US$10.77 per thousand Igal, but I have to decide on a cost down to the date when possession was ordered, i.e. 17 September 2009 and I have no figures for the final four and a half months. The figures, as has been observed, tend to fluctuate and rather than assume that the figure for the first four months of 2009 would turn out to be representative of the whole of the final period, I prefer to take an average from the totality of the period for which figures are available. I therefore accept Mr Gandy's evidence that the average historical unit cost for the time period is US$10.46 per thousand Igal and I find that OC is entitled to be paid that as the cost component of a reasonable price.

[18] Dr Horowitz report suggests a profit element of 20% is appropriate. If applied to the figure of US$10.46 that would result in a price of US$12.552 per thousand Igal. The evidence of Mr McTaggart in the main proceedings sets out in tabulated form the prices disclosed by the Government as being charged as of November 2007 for water for general public

consumption produced at five desalination plants on Tortola and Virgin Gorda. The prices paid by Government for water produced by these plants range from (a CPI adjustable) US$15.80 to the US$21.73 hitherto paid to OC at Baughers Bay. These figures suggest at first blush that a price of US$12.5 per thousand Igal would be so out of kilter with the generality of local charges as not to represent a reasonable price.

[19] As well as observing that these figures are nearly two years out of date, I have to bear in mind, that I have no evidence about the terms, as to duration of term or otherwise, upon which the suppliers mentioned in Mr McTaggart's table are operating. These desalination contracts are clearly individually negotiated, which makes the concept of a market price next to meaningless and which is why I have preferred to use a cost plus approach. Further, for all that I can tell, each of the contracts underlying the prices set out in Mr McTaggart's table is on foot and (if so) may well operating upon a basis calculated to provide, by a combination of length of term and price, for capital outlay to be recouped as well as providing for an operating profit. During the period for which I have to find a reasonable price, OC was operating the plant as a trespasser and quite outside of any contractual arrangements, express or implied.

[20] Taking all these considerations into account and doing the best I can on the limited material available to me, I think that a figure which includes a profit element equal to one third cost will provide reasonable recompense to OC for the water supplied after 20 December 2007. Accordingly I fix the price to be paid by the Government for water consumed after that date at US$13.91 per thousand Igal.

[21] Mr Aziz submits that OC should receive no payment by way of profit. He argues that despite the fact that no claim for mesne profits was made in the possession claim brought by the Attorney General, the prayer in the possession claim asked for 'further or other relief'. That, it is said, is wide enough to encompass a claim for mesne profits. He therefore submits that no award for profit over and above the US$1.375 which I have already included in my interim award should be allowed, on the assumption, presumably, that any award of mesne profits would be sufficient to offset any further profit component.

[22] Mr Aziz relies on three authorities. The first is **Stanford International Bank Limited v Lapps**[4]. In that case the Privy Council reduced an award made against the appellant for damages for trespass from $270,000 to $500. The appellant had pleaded, but had not pursued, its own claim for trespass in respect of the same piece of land as that in respect of which the award had been made against it. The Judicial Committee was plainly of the view that the dispute between the parties (which had been going on for eleven years), needed bringing to an end. So it ordered that the $500 dollar award be set off against the far larger trespass claim of the appellant.

[23] The next case relied upon by Mr Aziz was **Metrobus Nationwide Sdn Berhad v The Commercial Vehicles Licensing Board**[5], a decision of the High Court of Malaysia. He refers to paragraph 29 of the report, citing a passage from a decision of Fry J in **Cargill v Bower** (wrongly cited as contained in the Chancery Division reports for 1978). The referenced passage is neutral and does not assist Mr Aziz.

[24] The final authority cited by Mr Aziz on this part of his argument is **Yambou Development Company Limited v Kauser**, a decision of the Privy Council of 25 October 2000. The facts were complex, but the essential point is that the appellant (which was an assignee of the original claimants) was held not to be entitled to advance a new claim before the Judicial Committee in reliance merely upon the fact that in previous proceedings its assignor had included a claim for further or other relief. Lord Millett said at paragraph 24:

> "Their Lordships are not willing to entertain the claim in the absence of proper pleadings and evidence, without the benefit of the judgments of the local courts, and in circumstances in which counsel for the respondent has had insufficient opportunity to give proper consideration to the claim and presents argument upon it"

[4] [2006] UKPC 50
[5] [2001] Part 4 Case 15 [HCM]

[25] Of these authorities, the last is against the Attorney General, the second is neutral and only the first offers even the appearance of support. Even that turns out, upon examination, to be illusory. The critical distinction between **Lapps** and this case is that in **Lapps** the proceedings were still on foot when the Privy Council directed the set off. A claim for damages for trespass had been made by the appellant. It had not been abandoned. It was merely not renewed before the Judicial Committee. There was therefore a dormant claim available to support an order for set off. By contrast, the only proceedings which are before me are OC's claim for payment (**BVIHCV2008/0192**). The Attorney General makes no claim for further or other relief in this action, not least because she makes no counterclaim in it. The claim for further or other relief was made only in the possession claim. But that has been determined and this court is now *functus* so far as the possession claim is concerned. The claim for further or other relief in those proceedings is therefore no longer available to the Attorney General.

[26] Even if a less rigid view were to be taken and I were to treat the two separate proceedings as still running alongside each other for practical purposes (after all, I have previously said that they should have been consolidated), it would not be possible for me now to assess quantum of any claim for mesne profits without pleadings and, more importantly, expert evidence. It was easy for the Judicial Committee in **Lapps** to conclude without hearing evidence that the appellant's damages for having been wrongfully excluded from the land for a little short of six years would inevitably overtop the respondent's damages for having been excluded from exactly the same land for a matter of weeks. That, for the purposes of its decision, was the only assessment that needed to be made. I am in no position to assess the quantum of any mesne profits in respect of the land at Baughers Bay. Unless I can do that with precision, I do not have a sum to offset against an award to OC. In my judgment the present case is on all fours with **Kauser**: it would be quite wrong for me to attempt to assess any particular figure for mesne profits in the absence of pleadings and evidence, including, no doubt, expert evidence. In the interests of finality I am not prepared to permit a new investigation of that sort to be undertaken at this stage of the proceedings.

[27] There is the further complication that if OC were to be ordered to pay mesne profits, it would no doubt wish to argue that amounts so payable formed part of its cost base. Whether or not such an argument would succeed is beside the point. It simply further illustrates the importance of finality.

[28] Accordingly, I am not prepared to make any discount from the profit element of my award in favour of OC in respect of a notional claim on the part of the Attorney General for mesne profits. The Government must therefore pay to OC for water consumed after 20 December 2007 such sum as after taking into consideration the sums paid hitherto and the amount of the interim payment will provide OC with a recovery of US$13.91 per thousand Igal.

Commercial Court Judge

28 October 2009