THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

HCVAP 2009/019

BETWEEN:

OCEAN CONVERSION (BVI) LIMITED

Appellant

and

ATTORNEY GENERAL

Respondent

HCVAP 2009/020
BETWEEN:

ATTORNEY GENERAL

Appellant

and

OCEAN CONVERSION (BVI) LIMITED

Respondent

Before:

The Hon. Mde. Janice M. Pereira — Justice of Appeal
The Hon. Mr. Davidson K. Baptiste — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Sydney A. Bennett, QC, Ms. Anthea L. Smith with him, both of J. S. Archibald & Co. for Ocean Conversion (BVI) Limited
Mr. Baba Aziz, Attorney General [Ag.], Ms. Karen Reid and Ms. Maya Barry with him, for the Attorney General

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2011: September 30;
2012: April 18;
July 30. [Corrected and Re-issued]

Civil appeal – Contract – Construction of contracts – Exercise of option – Meaning of the words "prepared to exercise the option" - Failure to tender purchase price – Trade fixtures – Plant expanded beyond originally agreed size – Expenditure encouraged by one party – Expectation of compensation by other party – Estoppel – Unjust enrichment – Illegal contracts – Trial judge's primary findings of fact – Function of appellate court

A water desalinisation company entered into an agreement with Government intended to continue for two consecutive 7-year terms. The agreement was for the company to produce potable water up to a maximum quantity for public distribution by Government. The company would build and own the plant. Government had an option to purchase the plant for an agreed sum at the end of the first 7-year term. If the agreement was renewed for another 7 years, at the end of that period the plant would belong to Government without further payment. At the end of the first 7-year term, Government served a notice that it was "prepared to exercise the option" to purchase the plant.

The company accepted this as a valid exercise of the option by Government and countered by proposing to re-negotiate the agreement. Government offered the company a three-month extension to finalise the re-negotiations. This offer was not expressly accepted, and expired without any new agreement being concluded. Government did not tender any payment for the purchase of the plant nor did it demand possession of the property. The company remained in possession, continuing to produce and sell water to Government as before. The company subsequently took the position that the agreement had been extended for a further 7 years. Government responded to this suggestion that the agreement was in force only on a month to month basis until negotiations were concluded. The parties subsequently agreed to disagree on the question of whether the agreement had been terminated or renewed.

The company continued to produce and sell water to government as before. Government persuaded the company to increase water production beyond the originally agreed maximum. This necessitated constructing a new plant beyond that contemplated by the original agreement at a cost to the company of $4.765 million. A government minister promised the company that it would be compensated for the extra investment. Government agencies cooperated with the company in catering for the increased supply of water by engaging in major public works needed to handle the increased supply. At the end of the second 7-year term, Government served a notice on the company that ownership of the plant vested in the Government. Government thereby would appear to have reversed its position that the agreement had been terminated at the end of the first 7-year period and that the agreement had been renewed for a second 7-year period. Government now ceased paying for the water supplied and sued for possession.

The company sued for payment. Government refused to pay on the basis that the production of water beyond the maximum agreed was illegal under the Water Supply Ordinance and that no payment was due under an illegal contract. Government denied

that it had ever made any promise to pay for the increased capital expenditure on the plant, and demanded immediate possession and an accounting for profits made by the company while in possession of the government's plant. Government asserted that the company had, by its conduct, abandoned any claim to be paid for the plant on the exercise of the option.

Held: dismissing the company's appeal challenging the order of the trial judge giving Government immediate possession of the plant; allowing the company's appeal against the trial judge's dismissal of its counterclaim for compensation for the monies spent in replacing the old plant by a new one and directing an inquiry as to the value of the plant as at the date when the company gave up delivery to Government and further directing that the initial purchase price of $1.42 million be offset against that value as found; dismissing Government's appeal against the various findings of fact of the trial judge; and ordering that Government pay the company its costs in the High Court to be assessed if not agreed and two thirds of that amount in the Court of Appeal, that:

1. The construction of a disputed contract is a matter for the court and does not depend on the understanding of the parties. The test applied by the court in constructing a disputed contract is that of the reasonable man.

   Bahamas International Trust Company Limited and Another v Threadgold [1974] 3 All E.R. 881 applied; Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 All E.R. 98 applied.

2. An appellate court will not easily interfere with a trial judge's primary findings of fact, especially where such findings derived from seeing and hearing the witnesses. However, where a finding was an inference drawn from primary facts and depended on the value to be given to the evidence, the appellate court is as well placed to determine proper inferences to be drawn.

   Janice Reynolds-Greene v Community First Co-operative Credit Union Antigua and Barbuda HCVAP 2008/027 (delivered 25th October 2010, unreported) followed.

3. The desalinisation plant was not a landlord's fixture as found by the learned trial judge but a trade fixture. Furthermore, the agreement between the parties expressly stated that ownership of the plant was in the company until purchased or acquired by Government in accordance with the terms of the agreement. As such, it remained the property of the company as agreed until it was either paid for at the end of the first 7-year term or vested in government at the end of the second 7-year term.

4. The trial judge's finding that the words in Government's letter, "prepared to exercise" its option, was a valid exercise of the option was justified for the reasons he gave. The only reason government had to send the letter to the company was

to give notice of its election to purchase the plant. If Government wanted to do otherwise it would simply have done nothing and the plant would vest in the Government at the end of the second 7-year term without payment for it.

5. Government had exercised the option to purchase the plant at the end of the first 7-year term. By electing to purchase the plant, Government had foreclosed on the possibility of acquiring it by any means other than purchase.

6. The plant that was eventually turned over to Government more than 7 years after the exercise of the option, was not the original plant subject to the agreement. Government had requested the company to incur expense of $4.765 million in expanding the plant on Government's land for Government's benefit, to a size in excess of that contracted for. The old plant for which Government had agreed to pay the sum of $1.42 million was entirely replaced. The company's expectation for an extended tenure or for an allowance for the expenditure had been created or encouraged by Government. It could not have been the common intention of the parties that Government could demand immediate possession of the newly expanded plant without compensation: It would be inequitable for Government to expect ownership of the new plant to be transferred to it without compensation.

   Plimmer and Another v The Mayor, Councillors and Citizens of the City of Wellington [1884] 9 App. Cas. 699 (P.C.) applied; Cobbe v Yeoman's Row Management Limited and Another [2008] 1 W.L.R. 1752 cited.

7. It had always been the intention of the parties that the company would both make a profit on the sale of water and be paid for the capital investment unless the company was permitted to supply water for a sufficient period of time to compensate it for its capital investment. Government took possession of the new plant a few years after it had been completed. The profit made by the company in selling water to Government during the extended period did not amount to double dipping in the event Government was ordered to pay compensation.

8. Government's assertion that the production of water in excess of the quantity mentioned in the written agreement was illegal was misconceived. The company had been approved as a producer of water for supply to Government by the Governor in Council. The Water Supply Ordinance was directed to the identity of the supplier, not to the quantity of water manufactured.

9. The trial judge was right in finding that the company was not a trespasser operating an illegal water supply plant. The company had been encouraged at all times by Government to expand its plant and to remain in possession of the property until the filing of Government's claim finally brought the licence to occupy the property to an end.

JUDGMENT

[1] MITCHELL, J.A. [Ag.]: These are two appeals against judgments of Bannister J. of the Commercial Court in two separate cases concerning a dispute between a water desalinisation company and the Government of the Territory of the Virgin Islands, over a contract between the two parties for the production and sale of water, which he had ordered consolidated. The facts are complicated and, as the legal consequences depend on the facts, it will be necessary to set them out in some detail.

Chronology

[2] On 9th May 1990, the Government of the Territory of the Virgin Islands (hereinafter "Government") entered into a contract (hereinafter "the Agreement") with a Massachusetts company called Reliable Water Company to whose interest the appellant, Ocean Conversion (hereinafter together referred to as "Ocean"), succeeded. The main features of the Agreement were that Government would provide a parcel of land at Baugher's Bay in Tortola, and Ocean would build on it a plant having a production capacity of 300,000 Imperial gallons of water per day (hereinafter "Igpd"). Ocean would produce water of a specified quality from seawater and deliver it to a Government-owned clearwell. Government would pay for water so delivered at an agreed rate per 1,000 Imperial gallons (hereinafter "Igal"). If Government failed to meet any of its financial obligations, Ocean was entitled, without prejudice to its other remedies, to remove the plant from the Territory.

[3] The arrangement was intended to continue for two (2) consecutive terms of seven (7) years unless Government at the expiry of the first 7-year term elected to purchase the plant at the price and on the terms set out in the Agreement. If Government did not so elect to purchase the plant it could acquire ownership of the plant without further payment by causing the Agreement to be extended for a second 7-year term after expiration of the first 7-year term. Government could,

under the Agreement, require Ocean to improve the water quality or increase the plant production capacity to a maximum of 600,000 Igpd. If the production capacity of the plant was so expanded, the parties agreed to re-negotiate the terms of the Agreement to take account of the expansion.

[4] The clause of the Agreement which was to give the most difficulty was 5.2. This read:

> "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 [Government] advises [Ocean] 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 [Government] without any further payment. Spare parts, chemicals and supplies may be purchased by [Government] at a price to be agreed between the parties.
>
> In the event that [Government] 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 [Ocean] and at such time [Ocean] shall hand over the Plant to [Government]. Spare parts, chemicals and supplies may be purchased by [Government] at a price to be agreed between the parties."

[5] The Agreement commenced on 9th May 1990. Thus the initial 7-year term was slated to expire on 9th May 1997. Water shortages were endemic in Tortola. Government soon required expansion of the plant. On 14th March 1991, Ocean agreed to modify the Agreement by a First Supplemental Agreement. Productive capacity was expanded from 300,000 Igpd to 360,000 Igpd. The following adjustments were made to the contract pursuant to Clause 5.1:

(a) The initial 7-year term now commenced on 4th July 1991. It would thus expire on 4th July 1998.

(b) If Government, by notice delivered 8 months before that date, elected to purchase the plant on the date of expiry of that initial term, the purchase price was now to be $1,250,000.00.

(c) Water was to be delivered to Government-owned pumps instead of the Government-owned clearwell. This enabled Government to deliver the water purchased from Ocean to its own reservoirs for storage and distribution to its customers.

[6] The following year, Government required the production capacity of the plant to be increased from 360,000 Igpd to 510,000 Igpd. By a Second Supplemental Agreement dated 24th January 1992, the following adjustments were made to the Agreement pursuant to Clause 5.1:

(a) The initial 7-year term now commenced on 1st June 1992. It would accordingly expire on 31st May 1999.

(b) If Government, by notice delivered 8 months prior to that date, elected to purchase the plant, the purchase price would, upon expiration of that initial term, be $1,420,000.00.

[7] The plant, even with the increased capacity of 510,000 Igpd, could not satisfy existing demand for water. The Territory was plagued with water shortages. Under the Agreement, Government could not require Ocean to increase productive capacity beyond 600,000 Igpd. An increase of a further 90,000 Igpd would not be adequate to address the problem of water shortage. What Government did in those circumstances is set out in paragraph 19 of the trial judge's judgment:

> "[19] During the supervening period [Ocean] 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 [Igpd]). Dr William Andrews, who was President of [Ocean] at the time when the contract was negotiated and who remained as Vice President and CEO of [Ocean] until February 2003 gave evidence for [Ocean]. He said that when the [Ocean] 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 [Government], and I accept it. Dr Andrews said that [Ocean] 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 Ocean's expense to 660,000 [Igpd] in 1993 and further increased to 710,000 [Igpd] in May 1995."

[8] By letter dated 30th September 1998, eight months to the day prior to expiration of the initial term of the Agreement, Government advised Ocean that:

> "Pursuant to section 5.2 of the Agreement … between [Government] and [Ocean] … [Government] is prepared to exercise the option to purchase the plant at Baughers Bay. However, we are amenable to meeting with [Ocean] 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."

[9] On 14th October 1998, Ocean wrote Government acknowledging receipt of the letter of 30th September 1998, and continuing:

> "[Ocean] 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."

Ocean, having accepted that Government had effectively exercised the option and terminated the Agreement, responded positively on 21st October 1998 to Government's invitation to negotiate a new Agreement:

(a) It proposed a meeting with Government on 22nd October 1998.

(b) It attended at least one meeting with Government on 6th November 1998, from which nothing of substance resulted.

(c) It sent draft Heads of Agreement with a view to having that document serve as the basis for negotiation of a new agreement, and invited Government to do the same, the idea being that a new agreement would result from reconciliation of the two drafts. Nothing came from this as Government did not submit a corresponding draft.

[10] A meeting did in fact take place, but nothing of substance came of it. Although there were subsequent meetings and other communications between the parties, none of them resulted in any new concluded Agreement, whether as to detail or substance. Government, having initiated negotiations towards a new Agreement, did nothing to further them. It neither accepted nor rejected the terms put forward by Ocean, and produced no counter proposals.

[11] By 31st May 1999, the date on which the first 7-year term of the Agreement expired, the position remained unchanged. At that date, Government had neither responded to Ocean's proposals for a new Agreement nor had it made any payment on account of the purchase price of the plant. The legal position at that point, Ocean submitted, was that:

(a) Government had, by Notice delivered 8 months before, on 30th September 1998, communicated to Ocean its election to purchase the plant and terminate the Agreement, and had thereby crystallised the situation.

(b) The Agreement was accordingly terminated on 31st May 1999 and no new 7-year term had come into existence.

(c) Ocean was bound to deliver up possession of the plant and premises upon receiving payment (Clause 5.2: "... the price … shall be paid to [Ocean] and at such time [Ocean] shall hand over the Plant to [Government]. …")

(d) A sales/purchase agreement came into being whereby Government was obliged to purchase the plant for $1,420,000.00 as required by Clause 5.2. Ocean submitted that Government also came under an obligation in equity to pay a further sum to Ocean representing the amount expended by Ocean in expanding the plant beyond the contract capacity of 510,000 Igpd, as this had been done at the informal request of and with the encouragement and active participation of Government.

[12] Ocean submitted that what should have happened on 31st May 1999 was that Government should have paid Ocean $1,420,000.00 and such additional sum as was agreed between the parties as being due to Ocean on account of its expenditure in expanding the production capacity of the plant at Government's request. Ocean, in turn, upon receipt of the payment, should have vacated the premises and turned the plant over to Government.

[13] What in fact happened was that on 4th June 1999, some 4 days after expiry of the Agreement, the acting Permanent Secretary of the Ministry of Communications and Works wrote to Ocean in the following terms:

> "As you are aware, the Agreement to produce potable water from sea water, between [Government] and [Ocean] has expired. In this regard, I am hereby seeking approval for an extension of three months, in order to finalise the re-negotiation of the Agreement."

[14] Ocean responded by letter dated 30th June 1999. Ocean now took the view that the Agreement had not come to an end, as it had previously asserted, but had been extended for a further 7-year term under Clause 5.2. Its letter read in part:

> "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."

[15] Government for the time being maintained its view that the Agreement had come to an end and replied on 28th January 2000 to the following effect:

> "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 [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 contract.

> "[Government] is still very interested in re-negotiating the contract and regards the current Agreement as being in force on a monthly basis only until negotiations between [Government] and [Ocean] are concluded."

[16] Mr. Bennett, QC submitted on behalf of Ocean that the new position adopted by his client's 30th June 1999 letter was incorrect. The Agreement had indeed been effectively terminated by Government by notice given in its letter of 30th September 1998. He submitted that Government's 28h January 2000 letter had correctly indicated that the Agreement had been brought to an end by the letter of 30th September 1998, and that the parties were operating under the terms of the expired Agreement on a month to month basis pending the conclusion of negotiations for a new contract.

[17] Mr. Aziz submitted in reply that Government's letter of 28th January 2000 was incorrect and of no legal effect as the contract never provided for its continuation on a month to month basis. Clause 6.2 provided:

> "6.2 Entire Agreement and Binding Effect
>
> This Agreement shall be binding upon the parties and their respective successors and assigns and may be amended or modified only by a further writing signed by both of the parties. This Agreement sets forth the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether oral or written relating to the subject matter hereof."

Mr. Aziz submitted that Government's letter was not only incapable of altering the Agreement, it had been expressly rejected by Ocean, which had always insisted that the Agreement had been extended for a further 7 years.

[18] Ocean maintained its view that the Agreement had not come to an end, and continued to supply water and to bill as previously. At a meeting held on 11th April 2000, the parties "agreed to disagree" on the question of whether the Agreement had been terminated or had been renewed for a second 7-year term. They

decided to direct their efforts towards negotiation of a new contract. While this issue remained unresolved, an uncertain state of affairs persisted, namely:

(a) Government did not tender, and Ocean did not demand, payment of the purchase price of the plant;

(b) Government did not demand, nor did Ocean deliver up, possession of the plant to Government;

(c) Ocean continued to operate the plant and to supply water it produced to Government and Government in turn continued to accept delivery of all water produced at the plant and to pay for it at the previously agreed rates;

(d) Government continued to press for expansion of the production capacity of the plant.

[19] On 1st December 2000, an important meeting between the parties occurred. The judge's finding concerning this meeting is set out at his paragraph 27:

> "[27] ... the Government side stressed to [Ocean] at that meeting the need for additional water supply in Tortola and [Ocean] committed to complete the expansion to 960,000 [Igpd]. ..."

Subsequently, on 4th April 2001, Ocean wrote to the Minister advising that the materials necessary to complete the expansion were to hand and stating that Ocean had decided to add capacity for an additional 500,000 Igpd with the capability of going on to add a further 1 million Igpd. On 4th May 2001, Ocean wrote the Minister confirming that the expansion to 960,000 Igpd had been completed that week and informing him of some new technology that offered the prospect of adding further capacity of 400,000 Igpd at a cost of some $900,000.00. The letter went on to say that in view of the urgent need Ocean's board had decided to proceed with this expansion and mentioned Ocean's intention to tender for a new desalinisation plant which Ocean believed that Government was intending to put out to tender.

[20] In late March 2003, Ocean was still under pressure to increase production capacity. The judge described what happened next at his paragraphs 29 and 30:

> "[29] In late March 2003 [Ocean]'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 [Ocean] 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. ... 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 [Igpd] by around January 2004. The evidence for [Ocean], which I accept, was that the increase in capacity required [Government] to alter the pipework in its distribution system in order to accommodate the increased flow rate. ... 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. ... The successive expansions in capacity, in other words, could not be effected without co-operation from, and required complementary work to be executed by, [Government]. I also accept evidence given on behalf of [Ocean] 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."

As a result of this pressure, Ocean spent some $4,765,000.00 of its own money, and engaged its expertise and resources to effect the increase in production capacity to 1.3 million Igpd. The evidence shows that this money was expended by Ocean at the informal request, and with the active encouragement and co-operation of Government. Mr Bennett, QC submitted that this was expended in the expectation, encouraged by Government, that they would be compensated for it. There is no suggestion that this calculation of $4,765,000.00 was doubted.

[21] On 31st May 2006, which would have been the final day of any additional 7-year term of the Agreement, Ocean wrote Government in the following terms -

> "[Ocean] 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 [Ocean] will continue to supply potable water to the BVI.
>
> "[Ocean] 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 [Ocean] remains committed to its service to the BVI.
>
> "In the interim, [Ocean] hereby requests an extension of the captioned Agreement until such time as [Ocean] and Government have reached an agreement in relation to the way forward."

From this letter it is evident that Ocean was at this time still persisting in its view that the Agreement had not come to an end in 1999, but had been renewed, presumably by conduct of the parties, for a second 7-year term.

[22] Government's response to Ocean's 31st May 2006 letter did not come until 25th September 2006. On that date Government served Ocean with a document described as a "Notice of Vesting of Plant in the Government of the British Virgin Islands". It read -

> "TAKE NOTICE THAT in accordance with clause 5.2 of the principal Agreement between [Government] and [Ocean] ... 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 [Government] and [Government] hereby asserts and gives notice of its right to ownership of the plant."

[23] By this document Government would appear to have reversed its position that the Agreement had been terminated at the end of the first 7-year period on 31st May 1999 by the notice given on 30th September 1998. It now proceeded on the basis that a second 7-year term had come into effect after the expiration of the first 7-year term on 31st May 1999, and that ownership of the plant had become vested in Government upon the expiration of the second 7-year term on 31st May 2006 in

accordance with Clause 5.2 of the Agreement. Ocean in turn pointed out that it had invested $4.765 million in excess of its contractual obligations, and that this expenditure gave it "both a legal and equitable interest in the Plant". Ocean also demanded payment of some $3.2 million in unpaid invoices as of that point.

[24] By January 2007 Government had ceased making payments for water at the previously agreed rate but continued to accept delivery of water. Relations deteriorated. By a letter of 3rd January 2007, Government asserted absolute legal ownership of the plant but did not demand that Ocean vacate the premises. Instead, it invited Ocean to submit new proposals for operation of the plant. Ocean in turn questioned Government's claim to absolute legal ownership of the plant on the ground that Ocean had expanded the plant at a cost of US$4.765 million based on the demands by Government for increased capacity giving Ocean an equitable right in the plant.

[25] On 25th November 2007, Government filed a claim in the High Court for possession of the plant and for a declaration that Government was the owner of the plant. The learned trial judge refers to this as the Possession Claim. Government relied on the three written Agreements; asserted that there had been no further consensual amendments to the contract; pleaded the letter of 30th September 1998; asserted that Government had never exercised its option to purchase, with the consequence that the contract had run for a second term of 7 years; and the plant had become the property of the Government on 1st June 2006, in accordance with Clause 5.2 of the contract without any requirement upon Government to pay for it. Government claimed: a declaration that it had become vested with an absolute proprietary interest in the plant with effect from 1st June 2006; possession; and a further declaration that it is entitled to all profits and benefits that Ocean has had or may subsequently obtain from wrongfully operating the plant after 31st May 2006.

[26] Ocean's defence was that the letter of 30th September 1998 did operate as an election to purchase the plant; that by agreement the parties had proceeded on the mutual understanding that after 31st May 1999 the Agreement 'continued' on a month to month basis; that on the basis of this understanding Ocean had incurred expenditure in expanding the plant, and that it would be inequitable for Government in consequence "to resile from this understanding". Ocean denied that the plant had ever become the property of Government; and went on to counterclaim the sum of $3.35 million being the difference between the $1.42 million 'purchase price' and the amount of $4.765 million spent on expansion after 1992; that it was a term of the contract that it would be adjusted to compensate Ocean for its expenditure in taking the capacity over the level of 510,000 Igpd; alternatively, that the expenditure had been made by Ocean in the expectation, encouraged by Government, that Ocean would be compensated for this outlay.

[27] Instead of counterclaiming in Government's possession claim, Ocean on 4th July 2008 brought a separate action against Government for the difference between what it had invoiced and what it had been paid. The learned trial judge referred to this as the Payment Claim. By the time of the trial, invoices totalling some $32,773,954.28 had been delivered by Ocean to Government in respect of water delivered down to April 2009. Some of these invoices to a total of $18,439,942.49 had been paid, but there was a shortfall of some $13,773,950. Interest at 18% per annum amounted to $2,537,334.30 as of the date of the amended claim on 22nd April 2009.

[28] Government's defence to the Payment Claim was that Ocean's licence to supply water had come to an end on 31st May 2006; that the Agreement had not been in force on a month to month basis since 2000 since Ocean had expressly rejected this and insisted that the Agreement had been extended for a further 7 years; that Ocean was in wrongful occupation of the plant; that Government was contractually bound to pay for water only up to a maximum of 600,000 Igpd; that in March 2007 Government had expressly informed Ocean that it would only pay $6.68 per 1,000

Igal of water supplied pending resolution of the ownership dispute of the plant, and that Ocean had no right to continue to produce water and charge Government for water so produced after 31st May 2006 while they were in wrongful occupation of the plant; that by 1st January 2007 at the latest, when Government ceased to settle Ocean's invoices in full, Ocean had been a trespasser.

[29] Government's second defence was that the increase in capacity beyond the 600,000 Igpd was illegal. Government based this defence on section 6(1) of the Water Supply Ordinance[1] 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 ..."

Government's argument was that Ocean was a collector or distributor of a supply of water for public use and therefore needed the approval of the Governor in Council to carry on this business. Such approval had been obtained for the executed Agreement and Supplemental Agreements, but not for the subsequent expansions of 1993, 1995, 2001 or 2002. When the water production capacity mentioned in the last of the Supplemental Agreements had been exceeded, beginning in September 1993, Ocean had ceased to be licensed. These expansions had therefore been done in contravention of the Ordinance, were illegal, and could not found a claim in contract against government.

The Judgments

[30] There were three judgments, one on the Possession Claim and two on the Payment Claim. On Ocean's Payment Claim the learned trial judge, on 17th September 2009, gave a preliminary judgment for Ocean and ordered Government to pay Ocean the difference between $6.876 per thousand Igal and the former contract rate of $21.73 for water delivered between 1st January 2007

[1] Cap. 153, Revised Laws of the Virgin Islands 1991.

and 20th December 2007. After hearing expert evidence he delivered a second detailed and closely reasoned judgment on 28th October 2009, ordering Government to pay Ocean for water consumed after 20th December 2007 at a rate of $13.91 per thousand Igal in addition to the sums paid previously. He dismissed Government's claim for mesne profits. On Government's Possession Claim the learned trial judge ruled in favour of Government.

[31] Taking a summary of his decisions from the very helpful list provided by Mr. Aziz in his submissions, the learned trial judge decided, among other things, that:

(i) Ocean was not a person collecting or distributing a supply of water for public or private use and that section 6 of the Water Supply Ordinance as amended does not apply to the activities carried out by Ocean;

(ii) The plant was in the nature of a fixture and went with the land such that it belonged to Government;

(iii) Government was entitled to immediate possession of the plant;

(iv) Government's letter of 30th September 1998 was a valid and effective election under Clause 5.2 of the contract to purchase the plant;

(v) At the end of the initial term Ocean's right to occupy the plant would automatically determine and Government became obligated to pay Ocean $1.42 million as a simple contract debt;

(vi) After 1st June 1999, the parties carried on as if the contract remained on foot;

(vii) From that date Ocean was holding over as a bare licensee revocable at any time by Government giving reasonable notice;

(viii) Alternatively, payment of $1.42 million was meant to compensate Ocean from being deprived of the continuing use of the plant for profit after 31st May 1999. However, Ocean had already enjoyed the commercial benefit of a further 7 year term by the time it

amended its claim on 24th July 2009 to take the point for the first time. Ocean therefore wanted the benefit of the further term as well as the benefit of the purchase price;

(ix) Ocean had never claimed payment of the purchase price and at all times maintained that the contract had been extended for a further 7 years;

(x) If it was a term of the contract that Ocean would remain in possession until payment of the purchase price, that term had been discharged by agreement to be inferred from the parties' conduct long before 31st May 2006 that the term was mutually abandoned;

(xi) That Government's vesting order of 25th September 2006 was not effective to terminate Ocean's licence to occupy the premises as it lacked the clear requirement to vacate;

(xii) That Government's letter of 3rd January 2007 was also ineffective to terminate the licence as it was not an unequivocal revocation of the licence;

(xiii) The service of the possession claim was sufficient to revoke the licence;

(xiv) That from 20th December 2007 the company was in occupation of the plant as a trespasser;

(xv) There is no evidence that Ocean's Board thought that the expenditure it made to expand the plant would give Ocean a right to re-imbursement;

(xvi) There is no element of unconscionability in the present case as the expenditure also benefited Ocean by allowing it to generate greater profit;

(xvii) Ocean had no good reason to manage its business on the assumption that Government would reimburse its expenditure;

(xviii) Ocean is not entitled to payment for its expenditure to expand the plant.

(xix) Government must pay the contract price for water supplied until it revoked Ocean's licence to occupy the plant on 20th December 2007;

(xx) Government must pay Ocean a reasonable price for water supplied from 21st December 2007;

(xxi) The quantification of such sum to be determined when the expert evidence is led as to quantum.

[32] His reasons were that:

(a) Ocean had no claim to any interest, legal or equitable, in the plant;

(b) As a matter of real property law, ownership of the plant accrued to Government on installation as a landlord's fixture. Government thus owned the plant upon installation by virtue of its ownership of the land to which the plant was affixed;

(c) Ocean accordingly had no property which could form the subject of an agreement for sale;

(d) The words 'purchase' and 'price' notwithstanding, Clause 5.2 of the Agreement did not constitute a contract for sale of the plant for $1.42 million; rather, it was a contractual device which operated to compensate Ocean for not having been given a second 7-year term to operate the plant. Thus the $1.42 million, although described as the 'purchase price' of the plant was a simple contract debt which accrued on 31st May 1999;

(e) The words “the price shall be [$1.42 million], which shall be paid to [Ocean] and at such time [Ocean] shall hand over the Plant to [Government]” in Clause 5.2 did not mean that Ocean would be obligated to deliver up possession of the plant only on receipt of

the price. Rather it meant that Ocean was obliged to deliver up the plant at the date of expiry of the first term.

(f) If he was wrong, and Clause 5.2 of the Agreement had brought a contract for sale of the plant into existence, that contract was barred by laches or by radical alterations to the plant or by a combination of both; and

(g) Therefore even if Ocean had had a right to remain in possession of the plant until it received payment, that right had been discharged by mutual abandonment.

[33] On the money claim, the expert evidence was subsequently led, and on 28th October 2009 the learned trial judge gave judgment in which he held:

(xxii) Government must pay a reasonable sum for the supply of water, which was to include an amount to cover Ocean's cost of production as well as reasonable profit;

(xxiii) The court accepted the evidence that the average historical unit cost for the period was $10.46 per 1,000 Igal of water supplied;

(xxiv) A reasonable price for water, which included one third profit to the company, was $13.91 per 1,000 Igal of water supplied;

(xxv) No sum would be awarded to Government for Ocean's trespass, the court taking the view that it was *functus*;

(xxvi) No mesne profits would be awarded to be set off against the profits made by Ocean while it was a trespasser.

[34] On 1st December 2009, the learned trial judge delivered a further and final judgment in the Payment Claim. He held:

(xxvii) No award would be made to Ocean for interest for the period 1st January 2007 to 20th December 2007, Ocean failing to establish any specific interest owing;

(xxviii) The court had no power to award pre-judgment interest for the period after 20th December 2007 to judgment.

[35] The learned trial judge found Government's letter of 30th September 1998 to have been a valid and effective election to purchase the plant at the expiration of the first 7-year term for the price and upon the terms and conditions set out in Clause 5.2 of the Agreement. By the time of the trial, Ocean had accepted that the letter of 30th September had been a valid exercise of the option and served to prevent a second 7-year term from coming into acceptance. Government disputes this finding on the basis that the words "prepared to exercise the option to purchase" were not sufficiently unequivocal. The learned trial judge rejected this view for the following reasons:

(a) The only reason Government would have to send a letter to Ocean "pursuant to section 5.2" was to give notice of its election to purchase the plant and thus terminate the Agreement at the expiration of the first term. If Government wanted to do otherwise it would simply have done nothing, and the Agreement would automatically have been renewed for a further 7-year term at the end of which the plant would vest in Government without payment.

(b) The further statement in the letter that Government was "amenable to meeting with [Ocean] to discuss the possibility of negotiating a new agreement should you so desire" served to underscore the fact that Government did not intend to have the existing Agreement extended for a second 7-year term, but might consider negotiating a new contract to replace it.

(c) Ocean so understood the letter and treated it as having this effect. Thus, its letter in reply dated 21st October 1998 Ocean expressed the view that the Agreement would come to an end on 31st May 1999.

[36] Ocean filed an appeal in the Possession Claim challenging the order of the learned trial judge giving Government immediate possession of the plant and

denying Ocean's counterclaim for compensation for the monies spent expanding the plant beyond its contractual size. Government filed an appeal in the Payment Claim challenging the decisions of the learned trial judge that section 6 of the Water Supply Ordinance was inapplicable to Ocean's operations; that Government must pay Ocean the contract rate during the period 1st January 2007 to 20th December 2007; and that Government should pay Ocean for water produced while they were trespassers, including a figure by way of profit for the trespass. Government filed a counter notice of appeal in the Possession Claim challenging the decision of the learned trial judge that Government's letter of 30th September 1998 constituted a decision of Government to exercise the option to purchase the plant under the Agreement, the order denying Government the remedy of an account of profit for the period that Ocean was in occupation as a trespasser; and the failure of the learned trial judge to order user, occupation or operational fees for Ocean's trespass.

The Argument

[37] According to Mr. Bennett, QC's submissions, the central and fundamental error of the judge from which all other consequential errors flowed was his finding that property in the plant was originally vested in Government rather than in Ocean. He urged that the finding was wrong on several levels:

(a) It was based on an erroneous understanding and misapplication of real property law. Machinery and equipment affixed to rented premises for the purpose of trade and manufacture do not become the property of the landlord upon installation. A tenant is entitled to remove them from the premises unless there is an express provision to the contrary. His authority for this proposition is Halsbury's Laws of England.[2]

[2] Vol 27(1), 4th Edition Reissue, para 149.

(b) It ignored the intention of the parties which was clearly expressed in the Agreement.

(i) The basic premise of the Agreement was that Ocean would construct a plant at its own expense, and that ownership of the plant would remain vested in Ocean unless Government acquired ownership of it by the means provided for in the Agreement.

(ii) The very definition of "Plant" in Clause 1 of the Agreement was that it consisted of "all mechanical, electrical and other equipment and all civil engineering works … which are in the ownership of [Ocean]"

(iii) Consistent with this definition, the parties provided in Clause 6.9 that, in the event that Government failed to pay Ocean any sums due, Ocean could remove the plant from the Virgin Islands free of all taxes and charges and without prejudice to its other remedies.

(iv) Nothing in the Agreement suggested otherwise than that:

(a) Ocean was the owner of the plant, having installed it on Crown land at its sole expense pursuant to an agreement with Government;

(b) Ownership of the plant would remain vested in Ocean unless and until Government acquired ownership of it by the means provided in the Agreement; and

(c) Until ownership of the plant was acquired by Government, Ocean was entitled to deal with the plant as it chose and could remove it from the territory if there was any default by Government in its obligations.

[38] By this reasoning, Mr. Bennett, QC submitted, the learned trial judge avoided making a finding on the exercise of the option by Government. He found that the plant had vested in Government as a landlord's fixture from the moment of installation. Because of this erroneous premise the learned trial judge could not give Clause 5.2 of the Agreement its clear and obvious effect, i.e., that Government's election to exercise its purchase option brought into being an executory contract to purchase the plant, the terms of the contract being set out in Clause 5.2. Because he assumed that Ocean had no property which was capable of forming the subject of a contract for sale he was led to conclude that, notwithstanding the use of the words 'purchase' and 'price', Clause 5.2 did not embody a contract for sale of the plant but rather a contractual device to compensate Ocean for not having obtained an additional 7-year term. This position, counsel submitted, flew in the face of the actual wording of Clause 5.2. The meaning of the words 'purchase' and 'price' are universally understood and there was no reason to give those words an effect so at variance with that obvious and universally understood meaning.

[39] Mr. Bennett, QC submitted that, having concluded that the plant belonged to Government upon installation, and that Clause 5.2 did not contain an agreement whereby Government was to purchase it from Ocean, the learned trial judge now had to deal with the inconvenient fact that Clause 5.2 provided for Ocean to retain possession of the plant until it received payment of the purchase price. The leaned trial judge had dealt with the matter thus at paragraphs 51 and 52:

> "[51] ... For [Ocean]'s purposes it is sufficient if it can establish that it was a term of the contract that when [Government] communicated its election [Ocean] became entitled to remain in occupation until it had received the price.
>
> "[52] [Ocean] 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 [Ocean] shall hand over the Plant to [Government]' refer back to the words 'the price shall be [$1.42 million], which shall be paid to [Ocean]'. 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 [Ocean]' do not define a time, but an obligation and cannot, in my judgment, be what the words 'and at such time' are referring to. In my judgment the final paragraph of clause 5.2 … does no more than provide for payment to [Ocean] upon the expiration of the term of the agreement and for [Ocean] 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 [Ocean] of the site conditional upon its receipt of the price."

[40] Ocean has appealed the learned trial judge's rejection of its claim for compensation for the expenditure in expanding the plant at the request of Government. Mr. Bennett, QC submitted that the learned trial judge had made three errors in law in that: he had sought to distinguish the instant case from the New Zealand case of Plimmer and Another v The Mayor, Councillors and Citizens of the City of Wellington[3] in a way which had been invalid; he had abstracted from the case of Cobbe v Yeoman's Row Management Limited and Another[4] and applied to the instant case a principle which was inapplicable; and he had come to an erroneous conclusion as to whether Government's conduct was unconscionable in the circumstances.

[41] In Plimmer's case, Plimmer was a tenant at will on Crown land on which he had constructed a warehouse. He entered into an informal commercial arrangement with the provincial Government to expand the premises occupied by him so as to make those premises suitable for use as an immigration facility. He incurred a great amount of expenditure in carrying out the requested expansion. He obtained a return on his investment by charging the Government and others for the use of this facility. Government sought an order for eviction. The Privy Council held for Plimmer's successor in title on the basis that Plimmer's expenditure in expanding

[3] [1884] 9 App. Cas. 699 (P.C.).
[4] [2008] 1 W.L.R. 1752; [2008] UKHL 55.

the facilities on the land had given rise to a reasonable expectation on his part that he would have greater security of tenure on the land than he had had as the holder of a revocable licence. His reasonable expectation was deduced from the fact that he had incurred great expenditure at the request of the Government and it was obvious that he could recover and profit from this large outlay only if its occupation of the land was undisturbed for a sufficient period for him to recover his expenditure and gain a decent return on it. The Government, in asking Plimmer to expend money on the facilities which were to be for Government's benefit, could not be taken to have done so while reserving the power to inflict a financial loss on him by exercise of its legal right to revoke his tenancy at will. It must have been the common understanding of both that Government would not have retained the right to act in so unjust a manner. Sir Arthur Hobhouse, in giving the opinion of the Board, stated:[5]

> "In the present case, the equity is not claimed because the landowner has stood by in silence while his tenant has spent money on his land. This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing-places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing-place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible.
>
> "… Their Lordships will not be the first to hold … that after such a landowner has requested such a tenant to incur expense on his land for his benefit, he can without more and at his own will take away the property so improved. Their Lordships consider that this case falls within the principle state by Lord Kingsdown as to expectations created or encouraged by the landlord, with the addition that in this case the landlord

[5] At pp. 712-713.

did more than encourage the expenditure, for he took the initiative in requesting it."

[42] In Cobbe's case, a property developer had an oral understanding with a company, through its sole director, to purchase a block of flats for £12 million if he could secure planning permission for a proposed redevelopment of the same into six townhouses. The developer was to keep the profits but any gross proceeds over £24 million were to be shared equally. Acting on a belief, encouraged by the director, that the property would be sold to him for £12 million the developer spent the next eighteen months pursuing an application for planning permission, engaging architects and other professionals in the process. After considerable exertion and expense planning permission was granted but the director reneged on the oral agreement and demanded £20 million as the sale price. In the absence of writing there could of course be no legally enforceable contract for the sale of land. Moreover, both parties regarded the agreement as being one in principle only and not legally enforceable; they expected that a legally enforceable contract of sale would come into being only after planning permission had been granted and a formal agreement drawn up by lawyers. The details of that intended agreement for sale were intended to be negotiated between the parties and incorporated into the written contract. The Court of Appeal held that the developer was entitled to relief based on the principle of proprietary estoppel and granted him an interest in the land. This decision was reversed by the House of Lords. The House held that the elements of proprietary estoppel were not present and no such estoppel had arisen. The developer merely had an oral promise to enter into a written contract the terms of which had not been finalised. He was not entitled to a remedy based on constructive trust or an imputed proprietary interest in the property.

[43] What Lord Walker of Gestingthorpe rejected in Cobbe's case was not Cobbe's entitlement to any relief at all, but his claim, on the basis of proprietary estoppel, to a beneficial interest in the property because of the defendant's unconscionable

behaviour. Simply put, if the landowner had kept her promise, Cobbe would merely have had the right to negotiate an agreement for the sale of the land to him. This fell short of an enforceable agreement on which a proprietary claim could be based because "an expectation dependent upon the conclusion of a successful negotiation is not an expectation of [a certain] interest."[6] In Lord Walker's analysis[7] of Plimmer he was pointing out that Plimmer's entitlement to a proprietary interest in the subject property was grounded in the fact that 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 to security of tenure, even if the duration of that security was uncertain."

[44] Having dismissed the proprietorship claim, however, Lord Walker went on[8] to direct an inquiry with a view to reimbursing Mr. Cobbe on a generous scale not only for his out of pocket expenditure in seeking and obtaining planning permission but also for his time and trouble in doing so. He concurred in the position that the grant of planning permission, obtained at Cobbe's expense and through the deployment of his expertise had increased the value of the property so the defendant company had been enriched at his expense; that this enrichment was unjust because the defendant company had gained by repudiating the unenforceable oral agreement on which he had been relying; and that since there was no question that his services had been performed gratuitously but no fee had been agreed he was entitled to compensation on the basis of quantum meruit.

[45] In analysing the case of Plimmer the learned trial judge posited that:

> "[70] It also seems to me to be significant that in the modern case of *Cobbe v Yeomans Row Management Ltd* 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,

[6] Per Lord Scott of Foscote at para. 18.
[7] At para. 65 of the judgment.
[8] At para. 93 of the judgment.

> 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"

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 Ocean's board thought that the expenditure to which they committed Ocean in carrying out the expansion gave Ocean a right to reimbursement.

[46] Mr. Bennett, QC submitted that the learned trial judge was wrong in finding there was no evidence that Ocean's Board thought that it would be entitled to reimbursement for its expenditure on expansion of the plant. There was provision in the expired Agreement to compensate Ocean for its expenses in expansion. This compensation had been spelled out in the two Supplemental Agreements. The principle had been established in them that Ocean was entitled to compensation for any expenditure that it incurred in the expansion of the plant. It cannot be inferred that the parties intended that any expenditure incurred by Ocean in expansion of the plant beyond the contractually agreed 600,000 Igpd, at the request of Government, was to be uncompensated. The judge accepted that Ocean had tabled proposals for it to be compensated if it took capacity over the agreed figure, but that no agreement had been reached for any further revisions of the contract. This indicates not that Ocean did not expect to be compensated but rather that the parties, despite negotiations, had not arrived at an agreement as to the manner and quantum of compensation. The judge accepted that sometime after Ocean began work on increasing the capacity to 960,000 Igpd he was asked

by Government's Chief Engineer for an estimate of the costs of the upgrade. He had been informed that some $2.45 million had been spent to date with a further estimated $320,000 to come. Why, Mr Bennett asked, would the Chief Engineer have asked for the estimate of the costs if Government had not accepted any responsibility for them. There was the approach by the Minister with the words, "why don't you just put in what is necessary and we would pay you, everything would work out." This, Mr. Bennett, QC urged, was an express assurance of compensation to Ocean which must have given rise to the inference that Ocean expected compensation for its expenditure. At issue, Mr. Bennett, QC submitted, was whether this was conduct on the part of Government which would give rise to an expectation on the part of Ocean that its expenditure would be compensated.

[47] In response, Mr. Aziz submitted, in accordance with classical authority on contracts illegal in their performance, that the contract for delivery of water could not be enforced by Ocean against Government. Mr. Aziz placed great reliance on the Water Supply Ordinance, the Road Town Water Supply Area Order[9] and the Water Supply Area Order, 1992.[10] Section 6 of the Ordinance made it an offence for any person to collect or distribute a supply of water for public or private use without having first obtained the approval of the Governor in Council, i.e., Cabinet, such approval not to be unreasonably withheld. The consequence of Ocean acceding to Government's request to increase the water supply beyond that provided for in the written Agreement, he submitted, was to breach the provisions of the Water Supply Ordinance, and was an act of illegality.

[48] To arrive at this conclusion, Mr. Aziz relied on National Transport Co-operative Society Limited v The Attorney General of Jamaica.[11] In this case, Government acting through the Minister of Public Utilities and Transport had entered into franchise agreements with the Society whereby the Society was

[9] S.R.O. 3/1958, Cap. 153, Subsidiary Legislation, Revised Laws of the Virgin Islands 1991.
[10] S.I. 1992 No. 11, Laws of the Virgin Islands.
[11] [2009] Privy Council Appeal No. 0017 of 2009 (delivered 26th November 2009, unreported).

permitted and required to provide public transportation services through a specified number of buses of different capacities along identified routes within defined areas in and around Kingstown for ten years at fare rates set out in a table. Government had unilaterally determined the agreements and given the franchise to another company owned by itself. In the arbitration agreed to by the parties, Government took the preliminary point that under the relevant Act the Minister had acted unlawfully in issuing the exclusive licence. The arbitrators dismissed this argument and went ahead to hear and determine the claim. They awarded the Society damages of J$4,544,764,113.00 representing losses suffered by the Society on the termination by Government of bus franchise agreements. Government applied to the court to set aside the award. The first issue before the courts was whether the agreements were enforceable at all. Government contended that they had been purportedly entered into pursuant to legislation with which they did not comply. They were therefore ineffective and their operation would have been illegal by virtue of other legislation.

[49] Brooks J., at the start of his judgment in the National Transport case, described Government's position on this issue as “truly remarkable”. He noted that although the Minister on behalf of Government had entered into a franchise agreement with the Society, and although the parties had expended tens of millions of dollars each pursuant to the said agreement, and although the parties had entered into a second agreement which recognised the existence of the franchise agreement, and although, upon the Minister seeking to unilaterally terminate the franchise agreement, the parties had agreed to have their differences settled by arbitrators, and although all of this had been conducted in the glare of public scrutiny, nonetheless, said the lawyers for the Attorney-General, the franchise agreement was illegal and of no effect as the Minister had no legal authority to contract as he did. However distasteful he found the Government's argument, he felt constrained by the law to uphold Government's argument and to set aside the award. Both the

Court of Appeal and the Privy Council upheld the decision of Brooks J. setting aside the award by the arbitrators.

[50] Mr. Aziz relied also on the Privy Council decision from Canada in The King v Vancouver Lumber Co.[12] In that case, pursuant to statute a lease of Crown land had been approved by a necessary Order in Council. The statute required that any sale or lease of Crown land not needed for a public purpose be authorised by a Canadian Order in Council. A duly authorised lease had been entered into between a minister acting on behalf of the Crown and the company. Approximately one year later, the parties agreed to amend the lease terms. The amended lease was subsequently executed both by the company and the minister. There was no Order in Council approving the amended lease. The Privy Council upheld the decision of the Supreme Court of Canada that the amendments were required to be similarly approved by an Order in Council and setting aside the amended lease as a nullity.

[51] Mr. Aziz submitted that as in the National Transport case and the Vancouver Lumber case there had not been the requisite approval by the Governor in Council of the four subsequent expansions of the plant, and they had therefore been illegal.

[52] Any additional 7-year term expired on 31st May 2006. Mr. Aziz's submission is that up to that date but not after that date Ocean was an unpaid seller with a right under section 40 of the Sale of Goods Act[13] to retain the plant until Government paid the price. He denies, however, that gave Ocean any right to operate the plant whether for a short time or *ad infinitum*. The purpose of the lien was to recoup the purchase price and no more. After that date Ocean was a trespasser.

[12] (1919) 50 D.L.R. 6.
[13] Cap 298, Revised Laws of the Virgin Islands 1991.

[53] Mr. Aziz relies on Armour and Another v Thyssen Edelstahlwerke AG,[14] a case in Scottish law, where Lord Jauncey of Tullichettle described the nature of a security such as a lien in the following terms:

> "A right in security is a right over property given by a debtor to a creditor whereby the latter in the event of the debtor's failure, acquires priority over the property against the general body of creditors of the debtor. It is of the essence of a right in security that the debtor possesses in relation to the property a right which he can transfer to the creditor, which right must be retransferred to him on payment of the debt."

[54] Mr. Aziz submitted that by staying in occupation of the plant after 31st May 2006, Ocean did more than that: it acted in a way inconsistent with the lien and derived substantial benefits over and above the purchase price of the plant which it was not entitled to keep. He relies on Winter Garden Theatre (London), Limited v Millenium Productions Limited,[15] where Lord MacDermott said the following about licensees:

> "… one who remains on the land of another after his licence to use it has terminated will not be considered a trespasser before he has had a reasonable time in which to vacate the premises. … Its purpose [that is the reasonable time or period of grace] is to enable the former licensee to adjust himself to the new situation by vacating the premises. Measured reasonably and fairly it will often provide sufficiently for the consequences of the licensor's change of will. But, its object is not to prolong the user sanctioned by the licence merely for the benefit and convenience of the licensee for, ex hypothesi, the licence has ceased ..."

[55] Mr. Aziz had an alternative argument. If the court disagreed with his interpretation of the non-exercise of the option and on the construction of Clause 5.2 then he submitted that the conduct of the parties particularly after 31st May 1999, i.e.: the continuous assertion by Ocean that the Agreement had been extended by an additional 7 years; the absence of any demand for the original sum of $1.42 million or of any claim for damages; the absence of any claim that they remained in possession until they were paid the $1.42 million; the absence of any

[14] [1990] 3 All E.R. 481 at 486.
[15] [1948] A.C. 173 at 204-205.

communication regarding negotiations for any new Agreement and the parties continuing to conduct themselves by the terms of the Agreement; were all indicators of abandonment of the claim for compensation. He relied on Allied Marine Transport Ltd. v Vale do Rio Doce Navegacao SA (The Leonidas D).[16]

[56] In the Allied Marine Transport case, ship charterers let five years pass without any action on a reference to arbitration of a dispute between themselves and ship owners. The ship owners did nothing that might have provoked or galvanised the charterers to advance the proceedings. Shortly before six years had elapsed the charterers took steps to advance the proceedings, and the ship owners contended that those proceedings had been abandoned by mutual agreement to be inferred from the previous inactivity of the parties. The courts held that in order to prove an agreement for mutual abandonment of the reference, the charterers' conduct must be shown to have amounted to an unequivocal offer to abandon the reference. That offer must have been so understood, and have been accepted on that basis by the owners. Mere inactivity on the part of the charterers was not enough for an offer to be inferred, because such inactivity might be explained by circumstances other than an offer to abandon their rights to have the dispute determined by arbitration. Thus:[17]

> "… to entitle one party (A) to rely on abandonment, he must show that the other party (O) so conducted himself as to entitle A to assume, and that A did assume, that the contract was agreed to be abandoned sub silentio. As we interpret that statement of principle, it is not enough that O should appear to have given up pursuing his claim in the reference, and that A assumed that he had given up the pursuit of his claim, because there could be a number of reasons why O should not be pursuing it, eg forgetfulness, or culpable delay by his solicitors. What has to be shown is that O appeared to be offering to agree that the reference should be abandoned and that A, having so understood O's offer, by his conduct accepted O's offer. As we read Lord Brightman's statement of principle, it is entirely consistent with the long-accepted principles of offer and acceptance as creating a binding agreement."

[16] [1985] 2 All E.R. 796.
[17] Per Robert Goff L.J. at 807g.

[57] Mr. Aziz's further submission was that given the clear choice of either receiving the $1.42 million on 31st May 1999 or of continuing to produce water for an additional 7 years, Ocean chose the more profitable route: they elected to provide water for the additional 7 years. It would be unjust for them to succeed in a claim for the benefit of an additional 7 years and at the same time in a claim for the cost of installing the plant. This would amount to double dipping. They were estopped from pursuing this claim.

[58] Mr. Aziz relied on the Privy Council case from Jamaica of Blue Haven Enterprises Limited v Dulcie Ermine Tully and Another[18] as authority for his submission that the claim of unjust enrichment has been extinguished. In that case Lord Scott of Foscote cited the two foundation stones of the estoppel principal, viz, Ramsden v Dyson and Another[19] and Willmott v Barber.[20] Both were cases in which a claimant sought to establish a proprietary interest in someone else's property on the ground that he, the claimant, had spent money on the property in the belief that it was his and that that belief had been encouraged by the true owner passively standing by without intervening.

[59] In Ramsden v Dyson Lord Cranworth famously said:[21]

> "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

[18] [2006] UKPC 17.
[19] (1866) L.R. 1 H.L. 129.
[20] (1880) L.R. 15 Ch. D. 96.
[21] At pp. 140-141.

[60] In Willmott v Barber Fry J. equally famously stated the five so-called *probanda* that a claimant should endeavour to establish. He said:[22]

> "A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

[61] As Lord Scott of Foscote points out in the Blue Haven case, subsequent case law has reduced the rigidity of Fry J.'s apparent insistence that each of the five *probanda* be established to the letter. So, in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.,[23] Oliver J. (as he then was) said:

> "… the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* … 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."

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[22] At pp. 105-106.
[23] [1982] Q.B. 133 at 151G.

In Blue Haven, the Privy Council approved Oliver J's concentration on unconscionable behaviour on the part of the defendant rather than on the Willmott v Barber five *probanda.* Fry J.'s five *probanda* remain a highly convenient and authoritative yardstick for identifying the presence, or absence, of unconscionable behaviour on the part of a defendant sufficient to require an equitable remedy, but they are not necessarily determinative.

[62] In Blue Haven, Lord Scott refers to another old case, that of The Master or Keeper, Fellows and Scholars of Clare Hall v Harding,[24] where the Vice-Chancellor said:[25]

> "If a party in possession of an estate, knowing that another claims the property, will, with his eyes open, spend money upon it, I know of no case in which it has been held that he can, in the absence of special circumstances, keep the lawful owner out of possession, unless he will reimburse the party in possession the expenditure he has made … I speak, of course, of those cases in which the claim of the party out of possession has been distinctly made. Here Henry Harding made claim to the entirety of the property in question from the commencement of the correspondence I have referred to … It was said, indeed, that Henry Harding, seeing the expenditure going on, ought in fairness to have reasserted his claim, but that as a question of law I cannot accede to."

[63] There is a fundamental difference between the parties on the issue of unjust enrichment. Mr. Bennett, QC submitted that Ocean satisfied the three criteria for a claim for unjust enrichment. First, Government had benefited or been enriched by taking possession of the recently renovated plant. Second, the enrichment was at the expense of Ocean. Third, the enrichment was unjust. He relied on Banque Financière de la Cité v Parc (Battersea) Ltd. and Others.[26] Government had benefitted or been enriched in that it had acquired a plant that had been completely rebuilt at an expenditure of $4.657 million some two years prior to its proposed acquisition, and was not 14 years old as originally envisaged by the

[24] (1848) 6 Hare 273.
[25] At pp. 296-297.
[26] [1999] 1 A.C. 221.

Agreement. Its production capacity had been increased from the original 510,000 Igpd to 1.3 million Igpd. The entire expense for the building had been borne by Ocean. The only remaining question is was the enrichment unjust? That question is answered[27] by determining whether the person benefitting from the improvement had by words or conduct, either directly or by omission, knowingly or unknowingly, created or encouraged an expectation in the person incurring the expense that his expenditure would be compensated. The learned trial judge did not doubt that the expenditure incurred on the expansion of the plant to more than twice its originally contracted capacity was made at the request of Government. Government constantly requested, i.e., exerted regular pressure, on Ocean and strongly encouraged Ocean to expend money on the expansion of the plant. It closely followed the progress of the expansion, and co-operated with Ocean in carrying out complementary works on its own facilities to enable it to take advantage of Ocean's successive expansions. It would be unconscionable in those circumstances, he submitted, for Government to deny that it was liable to compensate Ocean for that expenditure.

[64] Mr. Aziz's response was that Ocean had received legal advice at the conclusion of the first term of 7 years and had acted at all times on the basis that there had been a 7-year extension and that the Agreement would come to an end on 31st May 2006. Ocean knew that at the end of the extended period, unless the Agreement as amended was varied in writing, the plant would, without more and without further payment, vest in Government. Despite this knowledge, he submitted, they undertook the expansion anyway. From the documentary evidence the only representation made to Ocean was that there was a need for more water and that Government would buy more water if they produced. The evidence does not bear out an agreement to pay for the investment in order to produce more water. Ocean elected to carry out the expansion in order to produce and to sell more

[27] Applying the principles in Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. (supra note 23) and Blue Haven Enterprises Limited v Dulcie Ermine Tully and Another (supra note 18).

water. Government cannot, he submitted, be made in equity to compensate them for their financial investment.

[65] Mr. Aziz relied on the House of Lords decision in Cobbe's case, previously referred to.[28] There, Lord Scott of Foscote explained that in Ramsden v Dyson[29] what was required was for there to be an agreement that the person undertaking the expenditure would have done so in the expectation that he would have some interest in the land. In the instant case this does not apply, Mr. Aziz submitted, since it was never intended at any stage that Ocean would have an interest in the plant. It was always intended that at the end of the term the plant would become the property of Government without payment. The case of Taylors Fashions v Liverpool[30] requires the person to have acted to his detriment. In this case, Ocean acted to their commercial and pecuniary advantage. Lord Walker of Gestingthorpe in Cobbe's case[31] examined the case of Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd.[32] as follows:[33]

> "60. The last authority that calls for close examination is *Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114. It was concerned with protracted (and ultimately abortive) negotiations for an exchange of valuable property between the Government of Hong Kong (which was to acquire a block of flats to house senior civil servants) and a large property developer (which was to take a Crown lease of Queen's Gardens in order to develop it, together with other land already owned by the developer). An agreement in principle had been reached in discussions recorded in lengthy written correspondence, which unsurprisingly referred to the agreement in principle as being "subject to contract". Experienced lawyers were acting on both sides, and they and their clients were well aware that an enforceable contract would come into existence only on exchange of contracts as finally agreed between the lawyers.
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> "61. Despite that, both sides incurred expenditure in the expectation that a contract would eventually be entered into. The Government took

[28] See para. 42 above.
[29] See para. 59 above.
[30] See para. 61 above.
[31] See para. 42 above.
[32] [1987] A.C. 114.
[33] At paras. 60 and 61.

possession of the flats and spent money on them; the developer entered Queen's Gardens and carried out work at its expense. But each side was acting at its own risk, because each knew perfectly well that it had no enforceable rights against the other. The Government's main witness, Mr Ward, was a surveyor who accepted that he was not a party to the negotiations under which the Government moved into the flats and that he had no authority to take decisions. The parties' knowledge that neither had any enforceable rights was fatal to the Government's claim to rely on equitable estoppel. Lord Templeman, delivering the opinion of the Board summarised the position, at p.124:

> 'Their Lordships accept that the Government acted to their detriment and to the knowledge of HKL in the hope that HKL would not withdraw from the agreement in principle. But in order to found an estoppel the Government must go further. First the Government must show that HKL created or encouraged a belief or expectation on the part of the Government that HKL would not withdraw from the agreement in principle. Secondly the Government must show that the Government relied on that belief or expectation. Their Lordships agree with the courts of Hong Kong that the Government fail on both counts.'"

[66] Lord Walker[34] drew the distinction between commercial cases and family cases thus:

> "65. In *Plimmer's* case ... 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 to security of tenure, even if the duration of that security was uncertain. 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.
>
> "66. The point that hopes by themselves are not enough is made most clearly in cases with a commercial context, of which *Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* ... is the most striking example. It does not appear so often in cases with more of a domestic or family flavour …"

The instant case is, of course, a commercial case.

[34] At paras. 65 and 66.

[67] Finally, at paragraph 91 of the judgment in Cobbe's case Lord Walker decided the matter thus:

> "91. When examined in that way, Mr Cobbe's case seems to me to fail on the simple but fundamental point that, as persons experienced in the property world, both parties knew that there was no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability – that is, liability in equity as well as at law, to echo the words of Lord Cranworth LC in *Ramsden v Dyson* ... quoted in para 53 above. Mr Cobbe was therefore running a risk, but he stood to make a handsome profit if the deal went ahead, and the market stayed favourable. He may have thought that any attempt to get Mrs Lisle-Mainwaring to enter into a written contract before the grant of planning permission would be counter-productive. Whatever his reasons for doing so, the fact is that he ran a commercial risk, with his eyes open, and the outcome has proved unfortunate for him. It is true that he did not expressly state, at the time, that he was relying solely on Mrs Lisle-Mainwaring's sense of honour, but to draw that sort of distinction in a commercial context would be as unrealistic, in my opinion, as to draw a firm distinction depending on whether the formula "subject to contract" had or had not actually been used."

[68] It was Mr. Aziz's submission that in a commercial context in which both parties have legal advice and know the bounds of their commercial agreement, the court ought more readily to draw an inference that parties will have acted at their own risk. He submitted that Ocean knew all along that in order to vary the Agreement it must be done in writing signed by both parties. Ocean knew that if it wished to be paid for its investment it would have to vary the Agreement to that effect. Ocean's allegation of reliance on a bare statement by a Minister "Why don't you just put in what is necessary and we would pay you, everything would work out" was not sufficient. It could not vary the Agreement. Ocean had taken a commercial risk, with its eyes wide open, that at the end of the further term on 31st May 2006, it would have no rights in the plant. This was especially so as the statement was allegedly made prior to 1999, which would not affect the expansions that took place after that date when the Government changed twice between the time those statements were allegedly uttered and the expiration of the contract in 2006 and so could not bind different administrations. Indeed, Ocean's correspondence of 4th

April 2001 shows that it was a unilateral decision of Ocean's board to expand the plant, while its correspondence of 27th October 2006 demonstrated that its expansion of the plant was voluntary.

[69] Mr. Aziz submitted that Ocean's claim to be granted both the full benefit of an extended contract term coupled with a claim to be paid for the price of the expansion of the plant ignores the enormous financial advantage gained from the expansion by the company. He relied on the Privy Council case from Saint Lucia of Theresa Henry and Another v Calixtus Henry,[35] where Sir Jonathan Parker in delivering the opinion of the Board said

> "52. In *Campbell v Griffin* (2001) 82 P. & C. R. DG23, Lord Walker (Robert Walker LJ, as he then was), when considering the issue as to how the equity which had been found to have arisen in that case should be satisfied, described the court's approach to that issue as a cautious one. The court had to look at all the circumstances in order to achieve the minimum equity to do justice to the claimant. … Lord Walker then went on to weigh the disadvantages which the claimant had suffered by reason of his reliance on the defendant's assurances against the countervailing advantages which he had enjoyed by reason of that reliance (including, in that case, rent-free occupation of the property in issue). Lord Walker concluded that the claimants' rent-free occupation of the property had not extinguished his equity, but that in all the circumstances the grant of a life-interest in the property would be disproportionate to his legal and moral claims over the property. In the result, exercising the wide discretion to which he had earlier referred, he concluded that the appropriate form of relief was an award of a fixed monetary sum charged on the property.
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> 53. In the instant case the judge should have undertaken a similar weighing process to that undertaken by Lord Walker in *Campbell v Griffin*; that is to say, he should have weighed any disadvantages which Calixtus Henry had suffered by reason of his reliance on Geraldine Pierre's promises against any countervailing advantages which he had enjoyed by reason of that reliance."

Conclusion

[35] [2010] UKPC 3 at para. 52.

[70] Construction of contracts: The exact nature of the relationship between the two parties from 31st May 1999, the date on which the first 7-year term expired, to 17th September 2009, the date of the learned trial judge's judgment, was in dispute. Neither party was consistent in its posture, both changed their view of their legal position during the period. All this made it difficult for the two parties to be sure of their legal rights during and after the contract period.

[71] The construction of a contract is a matter for the court and does not depend on the understanding of the parties. As Lord Diplock noted in Bahamas International Trust Company Limited and Another v Threadgold,[36]

> "In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim for rectification, cannot be bound by any concession made by any of the parties as to what its language means. This is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of that court is brought. The reason is that the construction of a written document is a question of law."

It is for the judge to decide for himself what is the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and market in which the parties are operating. When one speaks of intention of the parties to the contract, one is speaking objectively; the parties cannot themselves give direct evidence of what their intention was, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

[72] And, as Lord Hoffmann said in Investors Compensation Scheme Ltd. v West Bromwich Building Society,[37]

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[36] [1974] 3 All E.R. 881 at 884d.
[37] [1998] 1 All E.R. 98 at 115a.

> "… the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean …"

[73] The terms of a contract in the event of a dispute between the parties are to be determined not only by looking for a written contract, but may be deduced from the conduct of the parties, particularly where they have a previous course of dealings with each other based on clear terms, whether written or not, from which may be seen the basis on which they had agreed or must from the viewpoint of the objective onlooker be deemed to have agreed.

[74] Overturning findings of fact: An appellate court will not easily interfere with a trial judge's primary findings of fact. The advantage which the trial judge derived from seeing and hearing the witnesses must be respected by the appellate court. Where however a trial judge's decision on an issue of fact was an inference drawn from primary facts as found by him and depended on the evidential value that the judge gave to witnesses' evidence and not on their credibility and demeanour, the appellate court is just as well placed as the trial judge to determine the proper inference to be drawn and is entitled to form its own opinion.[38]

[75] Landlord's fixtures: The learned trial judge in this case fell into error when he failed to infer that the plant was not a landlord's fixture but was a trade fixture[39] which by the Agreement remained vested in Ocean until either it was paid for at the end of the first 7-year period or vested in Government at the end of the second 7-year term. That is the only reasonable interpretation of Clauses 1 and 6.9 of the Agreement. The plant did not become the property of Government upon installation. It belonged to Ocean at all times until and unless the Agreement was satisfied.

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[38] Per Edwards J.A. in Janice Reynolds-Greene v Community First Co-operative Credit Union, Antigua and Barbuda HCVAP 2008/027 (delivered 25th October 2010, unreported).
[39] See Vol. 27(1) of Halsbury's Laws of England, 4th Edition Reissue, para. 149 under the rubric "Trade Fixtures".

[76] Property in the plant: The learned trial judge's conclusion that the use of the words "purchase" and "price" in Clause 5.2 was merely a contractual device to compensate Ocean for not having obtained an additional 7 years was without basis. The parties acted on the basis that property in the plant was to remain in Ocean until it relinquished ownership after a period which the parties agreed to be sufficiently long for it to obtain a satisfactory return on its outlay or until the plant was sooner purchased from it by Government. By electing to purchase the plant by its 30th September letter, Government in fact exercised the option and thereby foreclosed on the possibility of acquiring the plant by any means other than purchase.

[77] The learned trial judge interpreted the words "the price shall be [$1.42 million], which shall be paid to [Ocean] and at such time [Ocean] shall hand over the Plant to [Government]" to mean, not that Ocean would have the right to remain in occupation until it had received the purchase price, but rather to oblige Ocean to hand over the plant when the Agreement expired on 31st May 1999. It is most unlikely that persons in the position of the parties at the time of entry into the contract would have understood those words to have that meaning. Under the Agreement Ocean owned the plant until it was paid, either the agreed price or a fair price once Ocean had been persuaded to replace and increase the size of the plant in the absence of an agreed price in the event of early termination. It had a concurrent right to remain in possession of the premises until payment was made. There is no reason to believe that Ocean at any time abandoned that position. It had never given up possession of the plant and premises pending payment. If by reason of laches the parties lost their respective equitable rights to specific performance against each other, Ocean's legal right under Clause 5.2 still remained in place. If the radical alterations made to the plant by Ocean might entitle Government as intended purchaser to refuse to acquire the plant as altered, they could not possibly entitle Government to acquire the altered plant without

payment of any price. I accept Mr. Bennett QC's submission that the learned trial judge's interpretation was a highly technical and artificial one.

[78] The intention of the parties is to be found in the words of the Agreement. It was that, if Government exercised the option within the permitted time frame and the plant remained as agreed, then payment would be due to Ocean. In the event, on exercising its option, Government failed to tender the purchase price, Ocean did not demand it, and both parties were content to continue the business relationship from month to month (as asserted by Government by its letter of 28th January 2000 and as conceded by Mr. Bennett, QC)[40] pending the execution of a new Agreement. Government, having repeatedly in the following years persuaded Ocean to rebuild at great expense the plant in question, now seeks to acquire the plant without payment for the improvements on the assumption that the Agreement had been renewed for a second 7-year term, one consequence of which was that the plant would vest in Government without further payment. There was ample evidence for the learned trial judge to have found that Government had persuaded Ocean to replace and extend the plant at great expense to itself on a promise to pay a fair price for the new and improved plant. The option having been exercised at the end of the first 7-year period, payment is due to Ocean not of the originally agreed price for the old equipment but of a fair price for the new equipment based on its value as at the time of delivery up by Ocean of possession.

[79] What the parties intended by their contract was that until payment of the purchase price Ocean had a right to retain the plant and a contractual licence to remain in the premises to which the plant was affixed. Ocean would only cease to have use of the facility after receiving payment. Ideally, payment should have taken place on or shortly after the expiration of the first term on 31st May 1999. Ultimately, it lay within the power of Government to choose the date on which it took possession

[40] See paras. 15 and 16 above.

of the plant. It could have done so at any time by tendering payment of the agreed price. In the circumstances, it could have no one but itself to blame if the result of its failure to make timely payment was that Ocean remained in possession past the date of expiry of the term. That Ocean remained in possession after the date on which a second 7-year term would have expired was the inevitable consequence of the failure of Government to follow through on its election. The consequence of Government having failed to follow through on its election to purchase the plant was not that it would acquire property in the plant after a lapse of time, but the property in the plant would continue to vest in the intended vendor until purchase.

[80] Abandonment: There is in the law of contracts no room for a concept of unilateral abandonment. Abandonment must be by a new contract supported by consideration in the form of mutual promises. Accordingly, there must be established, if only by inference, a fresh contract by the application of ordinary principles of the law of contracts. The principles to be applied by the courts in determining whether it ought to be inferred from the conduct of the parties that a contract had been mutually abandoned are summarised by Lord Brightman in the case of Paal Wilson & Co. A/S v Partenreederei (The Hannah Blumenthal),[41] where he said:

> "The basis of 'tacit abandonment by both parties', to use the phraseology of the sellers' case, is that the primary facts are such that it ought to be inferred that the contract to arbitrate the particular dispute was rescinded by the mutual agreement of the parties. To entitle the sellers to rely on abandonment, they must show that the buyers so conducted themselves as to entitle the sellers to assume, *and that the sellers did assume*, that the contract was agreed to be abandoned sub silentio. The evidence which is relevant to that inquiry will consist of or include: (1) what the buyers did or omitted to do *to the knowledge of the sellers*. Excluded from consideration will be the acts of the buyers of which the sellers were ignorant, because those acts will have signalled nothing to the sellers and cannot have founded or fortified any assumption on the part of the sellers; (2) what the sellers did or omitted to do, *whether or not to the knowledge*

[41] [1983] 1 All E.R. 34 at 55g.

> *of the buyers*. These facts evidence the state of mind of the sellers, and therefore the validity of the assertion by the sellers that they assumed that the contract was agreed to be abandoned. The state of mind of the buyers is irrelevant to a consideration of what the sellers were entitled to assume. The state of mind of the sellers is vital to what the sellers in fact assumed."

[81] In the instant case, if the conduct of Ocean had been such that, objectively considered, it could reasonably have been understood by Government to be an offer to agree to abandon Clause 5.2 of the Agreement on a reciprocal basis (insofar as it provided for payment of the purchase price of the plant, and for Ocean to retain possession of the plant and premises pending such payment); and if Government had in fact understood Ocean's conduct as constituting such an offer, and had in turn so conducted itself as to justify an inference that it had accepted that offer in those terms, then an agreement to mutually abandon Clause 5.2 could legitimately be inferred. For an offer in those terms to be inferred from Ocean's conduct, that conduct must be explainable on no hypothesis other than that it was an offer in the above terms to agree to abandon the applicable portion of Clause 5.2 on a reciprocal basis.

[82] The Allied Marine Transport case[42] does not help Mr. Aziz's argument. The acts and omissions relied on by the learned trial judge as justifying an inference that Ocean had by its conduct offered to abandon the applicable portion of Clause 5.2 was that "At no stage has [Ocean] ever claimed payment of the price due to it following [Government]'s exercise of its right to elect."[43] Such conduct falls short of that which could be understood only as an unequivocal offer by Ocean to abandon its right to the purchase price and to retain possession of the plant pending payment. For one thing, Ocean acted on the assumption that the Agreement remained on foot as having gone into an additional 7-year term. If a party acts or omits to act on the basis of an assumption on his part that he was not

[42] At para 56 above.
[43] At para. 57 of the judgment.

entitled to exercise a particular contractual right, his conduct in failing to exercise that right cannot reasonably be understood as being an offer to forego or to abandon that right.[44]

[83] In the instant case, Government knew that Ocean was acting on the assumption, which it maintained in meetings between them, that the Agreement had been renewed for a second 7-year term after 31st May 1999. On that view, the requirement for payment of the purchase price did not arise. Government did not share that assumption. It maintained that the Agreement had determined after the first 7-year term, and that thereafter Ocean was occupying the premises under an ad hoc arrangement. In those circumstances, Government could not reasonably understand Ocean's failure to demand payment of the price as constituting an offer to abandon its rights under Clause 5.2 which Ocean, to Government's certain knowledge, did not believe itself to be entitled to exercise at the time.

[84] More importantly, it was not asserted on Government's behalf that Government had understood Ocean's conduct as constituting an offer to abandon its right under Clause 5.2. There is no finding either that Government had altered its position to its detriment on the faith of any belief that Ocean had offered to mutually abandon its rights under Clause 5.2 on a reciprocal basis, or that Government had acted to its detriment at all. Government's acceptance of the supposed offer is not to be inferred from any conduct explainable only as a response to the inferred offer. The only conduct identified by the court was Government's failure to tender the agreed purchase price or to take action to recover the plant. That conduct may have been due to Government, having invited Ocean to discuss the possibility of negotiating a new contract, choosing to defer further action under Clause 5.2 pending the outcome of the anticipated negotiations. It is not possible to infer from such conduct the acceptance by Government of an offer by Ocean to mutually abandon the rights and obligations provided for by Clause 5.2.

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[44] Collin v Duke of Westminster and Others [1985] 2 W.L.R. 553.

[85] The actual communications between the parties disprove any conclusion as to mutual abandonment. The parties had specifically addressed their minds to the question of the legal position obtaining in respect of Clause 5.2 after 31st May 1999. They were aware that there were irreconcilable differences in their respective conclusions. At their meeting of 11th April 2000 they had "agreed to disagree about whether the contract had been determined or remained on foot and decided instead to work towards a new agreement."[45] It was in the interest of neither party to disturb the status quo. At the time, water was being produced, delivered, and paid for, while negotiations were ongoing towards a new agreement which was expected to address and resolve all outstanding issues between them. After 31st May 1999 neither party found it convenient at the time to actively pursue their rights under Clause 5.2. That is not enough for it to be inferred that a contract has been abandoned.

[86] Compensation: On the question of the compensation claimed by Ocean for the cost of the new plant, the evidence before the learned trial judge was that the plant that was eventually turned over to Government was not the original plant or the expanded plant that had been the subject of the written Agreement. It was an entirely new plant that Government had encouraged Ocean to install on the understanding that Ocean would be compensated in due course. I do not accept Mr. Aziz's submission that the correspondence showed that Ocean offered to install the new plant at its own cost. Nor was there any evidence that Ocean had abused its security position over the plant and had acted in a way inconsistent with the lien and had derived substantial benefits over and above the purchase price of the plant which it was not entitled to keep, but for which it should account to Government. It would be inequitable for Government to expect ownership in the new plant to be transferred to it at the end of the second 7-year period (which would have applied to the old plant) without compensation for the cost of building

[45] See paras. 24, 25, and 26 of the judgment.

the new plant in accordance with the provision in the original Agreement for the turning over of the original plant at the end of the first 7-year period. The manner in which the learned trial judge avoided dealing with the issue did not do justice to the legitimate expectation of Ocean to be compensated as it had been promised it would by various officials of Government during the period after the first 7-year period had expired. Some compensation was due to Ocean. Ocean recognised that it could not obtain the total of $4.765 million as it had had the use of the plant for some years after installing it. Ocean amended its counterclaim and claimed $3.345 million being the difference between the sums of $4.765 million and $1.42 million.

[87] In dismissing Ocean's claim for compensation for the outlay in expanding the plant the learned trial judge took into account the notion that Ocean had stood to gain from the increased sales of water to Government. Undue emphasis has been place on this factor. On each occasion upon which the parties had agreed to compensate Ocean for prior expansions of the plant they had agreed to such compensation on the basis of an increased capital value reflected in the increased purchase price of the plant and a longer term for Ocean to operate the plant to enable it to obtain a reasonable return on its investment. In Plimmer's case, though he charged Government for the use of the expanded premises, that consideration did not prevent the Privy Council from granting equitable relief to his successors in title. There was no evidence for the finding by the learned trial judge that the increased profits made by Ocean from increasing the production of water was sufficient to cover not only the cost of increased production but the capital cost expended on the expansion of the facilities. Under the original Agreement in respect of the much smaller outlay that had been required to produce an increase on the original 300,000 Igpd the parties had agreed to a period of fourteen years as being the time necessary for Ocean to obtain a reasonable return on its investment. The outlay of $4.765 million in the expansion of the plant was much larger. By retaking possession of the plant from Ocean

without compensation, Government was inflicting a capital loss on Ocean and placing it in the same position as if its property had been expropriated without compensation.

[88] The position of Ocean is indistinguishable from that of the plaintiffs in Plimmer's case. While Plimmer's occupation of the land was an informal arrangement, Ocean occupied the land under a contractual licence. That was not a "crucial" difference as found by the learned trial judge. Both had a commercial relationship with the Government landowner albeit Plimmer's arrangement was informal. In Plimmer's case there was no specific agreement with Government as to any change in the estate or interest that he would hold as a result of his acceding to the authorities' request that he expend money in expanding his facility. In Ocean's case, the Agreement between itself and Government permitted Government to require Ocean to increase the productive capacity of the facility up to a maximum of 600,000 Igpd, and for Ocean to be compensated in the event that the plant was so expanded. Any expansion beyond that capacity would have been carried out under arrangements outside the scope of the formal contract; not only did the Agreement limit expansion to 600,000 Igpd but it expired prior to the time that the greater part of the expansion was required. In this regard Ocean's position as regards increase in capacity was not materially different from Plimmer. Nothing in Plimmer's dealings with the Government expressly concerned his status as a tenant at will on the land. His 'reasonable expectation' was deduced form the fact that he had incurred great expenditure at the request of the Government and it was obvious that he could recover and profit from this outlay only if his occupation of the land was undisturbed for a sufficient period. The Government, in asking Plimmer to expend money on the facilities which were to be for the Government's benefit, could not be taken to have done so while reserving the power to inflict a tremendous financial loss on him by exercise of its legal right to revoke his tenancy at will. It must have been the common understanding of both that the Government would not have retained the right to act in so unjust a manner. The

question, Mr. Bennett, QC submitted, was whether Ocean's hope or expectation for an extended tenure or for an allowance for the expenditure incurred had been created or encouraged by Government. Ocean's expectation of compensation for that expenditure is clear from the facts accepted by the learned trial judge and set out in paragraphs 19, 27, 29 and 30 of his judgment quoted above.

[89] As in Plimmer's case, it would be unconscionable for Government, having requested Ocean to incur expenses on the land, for its benefit, to continue to reserve the power to revoke its possession at will. If, as it claims, Government is entitled without payment to ownership of the plant, its refusal to compensate Ocean for monies expended on the expansion of the plant at Government's request and with its encouragement must for the same reasons as in Plimmer amount to unconscionable behaviour. Implicit in the express though vague promises of compensation from high Government officials and the other conduct on the part of Government,[46] accepted as true by the learned trial judge, was the assurance, which must be taken to have been the common understanding of both parties, that if Ocean acceded to Government's request to lay out its money in the expansion of the plant beyond the capacity contracted for, Government would not act in a way which would punish Ocean's compliance with that request by retaking immediate possession of the land so improved without compensation.

[90] The learned trial judge applied Cobbe's case in a way that was not justified by his finding of the facts. A person whose reasonable expectations have been disappointed by unconscionable behaviour on the part of the person on whom he has conferred a benefit will obtain relief from the court. What is at issue is the nature of the relief to which he is entitled. In the absence of a claim based on the expectation of a proprietary interest in the subject of the claim, Ocean was limited to an *in personam* remedy such as an award for unjust enrichment, quantum meruit or some other remedy of a restitutionary character. The claim for a

[46] See para. 46 above.

proprietary remedy in Plimmer's case was supported on the basis of Plimmer's inferred expectation of a proprietary interest in the subject property while the claim in Cobbe's case could not. Plimmer had been held to have a reasonable expectation of a right of security of tenure because his expenditure had been at the request and with the encouragement of Government. Had he volunteered to carry out the improvements without any encouragement or cooperation from Government he would have done so with a mere hope that Government would nonetheless do the right thing and grant him some extended tenure; that would not have given rise to an enforceable claim in equity. Ocean does not seek a proprietary remedy in respect of the land to which the plant is attached. Its claim is purely restitutionary, and made on the basis of unjust enrichment. There is nothing in Cobbe which precludes Ocean from obtaining such a remedy. In fact, the *in personam* remedies of restitution based on unjust enrichment and on *quantum meruit* constituted relief to which Cobbe was unanimously held to be entitled in that case.[47] In dismissing Ocean's claim for compensation on the basis that "this case falls squarely within the ratio of *Cobbe v Yeoman's Row*" the learned trial judge used the reasons given by the House of Lords for rejecting Cobbe's proprietary claim as the basis for rejecting Ocean's claim to the same restitutionary relief to which Cobbe had been held to be entitled.

[91] It is difficult to see how Henry v Henry[48] from Saint Lucia assists Government's defence against Ocean's claim for payment of compensation. Ocean has not spent money on Government's water plant 'with its eyes open', and with no encouragement by Government. There is no reason to fault the learned trial judge's conclusion that Ocean rebuilt the plant at Government's pleading to increase capacity and Government's express promise that Ocean would be compensated for the expenditure. The fact that a profit was made by the production and sale of water did not prevent Government under the original

[47] See Lord Hoffmann at para. 1, Lord Scott at paras. 40-42, Lord Walker at para. 93, Lord Brown of Eaton-Under-Heywood at para. 94, and Lord Mance at para. 96.
[48] See para. 69 above.

Agreement from being obligated to pay compensation for the capital cost. The original Agreement had provided that after the plant was 14 years old it would pass to Government free from any payment. In this case, the plant had been entirely rebuilt and enlarged in the circumstances previously described. Only a few years had passed since the plant had been substantially rebuilt. Neither Bryan Clarke v Alton Swaby[49] on the discretion to fashion a remedy nor Sledmore v Dalby[50] on the need for proportionality, both also relied on by learned counsel for Government, add anything. Ocean operated the plant fully up to the time that it gave up possession. At trial, Ocean accepted that if the trial judge was with it on the compensation point then the plant would have to be valued and that an inquiry on this point would have to be directed. Ocean is entitled to payment of an amount of the value of the plant as at the date when it gave up delivery to Government less the initial purchase price of $1.42 million.

[92] Additional profits: Government's argument that the Agreement was structured in such a way as would enable Ocean to make further profit on its investment during the extended period as a *quid pro quo* for the stipulated price which Ocean would forgo when the Agreement was so extended is without merit. While it is certainly true that it was not the intention of the parties that Government would both pay in full for the plant and grant a second term to Ocean to enable it to make additional profits, the intention was that Government would pay Ocean a reasonable price for the enlarged and expanded plant if the option was exercised.

[93] Compensating Ocean for the installation of the new and enlarged plant in addition to allowing it profits for the second 7-year period, in contravention of the contractual terms that the plant was to pass to Government with no further payment, does not amount to double dipping by Ocean. Without paying such compensation Government would unjustly acquire a capital benefit of a plant with increased capacity. In each of the written Agreements, Government had agreed

[49] [2007] UKPC 1 at para. 18.
[50] (1996) 72 P. & C.R. 196; [1996] EWCA Civ 1305.

on an increase in the capital sum regardless of the increased profit which it had also paid. That was the principle they had established by their dealings. I do not accept that Ocean was a bare licensee of the plant after the end of the second 7 year period and as such obliged to depart from the premises without demanding to be compensated. The plant had been extended and increased at the request of Government and it would be inequitable to permit Government to become unjustly enriched by accepting this interpretation of the Agreement. It had always been the intention of the parties that Ocean would both make a profit on the sale of water and be compensated for the cost of its investment unless Ocean was permitted to use the plant for a sufficient period of time to recoup its capital investment.

[94] Illegality: Government's assertion that the production of water in excess of the quantity mentioned in the written Agreements was illegal is misconceived. I do not see how either of the authorities relied on by Mr. Aziz can assist Government in this matter. First, Ocean was not in the terms of the Water Supply Ordinance in the business of collecting or distributing a supply of water for public or private use. Instead, Ocean was manufacturing potable water from sea water and supplying it to its only customer, Government. It was Government that collected the water and distributed it to the public through its holding reservoirs and pipe distribution system. Second, and in any event, Ocean had been approved by the Governor in Council as a manufacturer of water for supply to Government. The Water Supply Ordinance is directed at the identity of the supplier, not to the quantity of water manufactured. There was nothing that Ocean did that required further licensing nor was there anything illegal about the resulting agreement between Government and Ocean. I would dismiss Government's appeal against the finding that section 6 of the Water Supply Ordinance was inapplicable to Ocean's operations.

[95] The exercise of the option: Mr. Aziz further submitted on linguistic grounds that Government had not exercised the option to purchase. Government's letter to Ocean had indicated that Government was "prepared to exercise" its option. This language, he submitted, lacked the quality of finality or decisiveness which was an

essential quality for the exercise of an option. It was no more than a preliminary step towards an act of purchase. He submitted that flowing from that, if the Court accepted that Government had not exercised its option, it would follow that the contract had been extended for an additional period of 7 years which terminated on 31st May 2006. This had been recognised by Government's letter of 3rd January 2007. For the legal effect of an option clause he relied on the cases of United Scientific Holdings Ltd. v Burnley Borough Council,[51] Sudbrook Trading Estate Ltd. v Eggleton and Others,[52] and Simmers v Innes.[53] I have read the judgments in question and cannot find any support for Mr. Aziz's submissions to the effect that the learned trial judge was wrong to have come to the conclusion, for the reasons he gives, that Government had validly exercised the option by its letter to Ocean of 30th September 1998. While it would have been preferable if Government had used the more standard language, "Government hereby exercises its option ...", the reasons given by the learned trial judge and set out at paragraph 35 above for concluding that Government's intention had been to exercise the option, and Ocean's acceptance that Government had validly exercised its option, are unchallengeable. I would dismiss Government's appeal against this finding.

[96] The trespasser point: I do not agree with Mr. Aziz on his trespasser argument. The learned trial judge was right in finding that Ocean was not a trespasser operating an illegal water supply plant. Ocean had been encouraged at all times by Government to expand its plant beyond the size originally agreed and had been permitted by Government to remain in possession and occupation of the property throughout the full period of 14 years between 1st June 1992 and 31st May 2006 until Government had given it notice of the vesting of the plant on the last date. Even after that date, Government had encouraged Ocean to remain in possession under a hope that Government would entertain new proposals for the operation of

[51] [1978] A.C. 904 at 962A-H.
[52] [1983] 1 A.C. 444 at 478A-H.
[53] [2008] UKHL 24 at paras. 25-27.

the plant. It was only the filing of Government's claim on 25th November 2007 that finally brought Ocean's licence to occupy the property to an end.

[97] Mesne profits: Government claimed against Ocean for an account of profits over the trespass period. However, the learned trial judge refused to grant the relief sought, considering it not an appropriate relief. Mr. Aziz urged that once the trespass had been proved, the remedy of an account of profits was appropriate. The power of the court to grant a restitutionary relief, whether for a full account of the wrongdoer's profits or otherwise, is not in doubt.[54] Mr. Aziz urged that alternatively, Government was entitled to either mesne profits, user fees or damages. Such a claim for mesne profits or user fees would normally require not just a particularised claim but to be based on evidence, of which there was none for the assistance of the trial judge. When the trial judge was asked for mesne profits he said he was *functus*. He declined to pluck a figure out of the air. The Court of Appeal is in no better position. In any event, for the reasons given I find that Ocean was not a trespasser. I would dismiss this ground of appeal against the finding of the learned trial judge.

Order

[98] For the reasons given above I would:

(a) dismiss Ocean's appeal challenging the order of the trial judge giving Government immediate possession of the plant;

(b) allow Ocean's appeal against the trial judge's dismissal of its counterclaim for compensation for the monies spent in replacing the old plant by a new one and I would direct an inquiry as to the value of the plant as at the date when Ocean gave up delivery to

[54] Attorney General v Blake and Another [2000] UKHL 45; Tang Man Sit v Capacious Investments Ltd. [1995] UKPC 54; and Sempra Metals Ltd. (formally Metallgesellschaft Ltd) v Inland Revenue Commissioners [2007] UKHL 34.

Government and I would further direct that the initial purchase price of $1.42 million be offset against that value as found;

(c) dismiss Government's appeal against the various findings of fact of the trial judge; and

(d) order Government to pay Ocean its costs in the High Court to be assessed if not agreed and two thirds of that amount in the Court of Appeal.

[Sgd.] D. Mitchell

Don Mitchell
Justice of Appeal [Ag]

[Sgd.] J.M. Pereira

I concur.

Janice M. Pereira
Justice of Appeal

[Sgd.] D.K. Baptiste

I concur.

Davidson K. Baptiste
Justice of Appeal