EASTERN CARRIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0007

BETWEEN:

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Appellant

and

GLOBAL WATER ASSOCIATES LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Douglas Mendes SC — Justice of Appeal [Ag.]

Appearances:

Ms. Giselle Jackman-Lumy and Ms. Maya Barry for the Appellant
Mr. Benjamin Strong, QC for the Respondent

2017: February 2;
2018: February 13.

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*Commercial appeal – Interpretation of written agreements – Implied terms – Breach of written agreements – Remoteness of damage – Arbitration - Arbitration Ordinance No. 7 of 1976 of the British Virgin Islands – Power of court to remit or set aside arbitration award – Meaning of "error of law which appears on the face of the award" – Whether court can remit or set aside arbitration award on the basis of a breach of a term not pleaded before arbitrator*s

The Government of the Virgin Islands and the respondent, Global Water Associates Limited, entered into a written agreement on 19th September 2006 for the design, construction and installation by the respondent of a 250,000 United States gallons water reclamation treatment plant at Paraquita Bay, Tortola (the "DBA"). On the same day, the parties executed another written agreement for the management, operation and maintenance by the respondent of a treatment plant (the "MOMA"). The treatment plant

referred to in the MOMA was described in identical terms and located in the same place as the treatment plant to be built under the DBA. However, the DBA did not give the respondent the exclusive right to build the plant which was to be provided for the purposes of the MOMA and the MOMA did not provide that the plant which was to be provided was to be built in accordance with the DBA.

In breach of an express term of the DBA, the Government failed to provide the respondent with a prepared site on which the plant was to be built entitling the respondent to terminate the DBA. A plant was in fact never built so that the MOMA never commenced. The respondent invoked the arbitration clauses contained in both agreements.

Before the arbitrators, the respondent contended that there was an implied term in the MOMA that the Government would provide a prepared site on which the treatment plant could be built, and that the Government's failure to do so constituted a breach of the MOMA. The respondent claimed as damages for breach of that term the profits which it would have made under the MOMA. The respondent further contended that it was entitled to those profits as damages for breach of the DBA also occasioned by the Government's failure to provide the prepared site. The arbitrators rejected both contentions. They held that a term requiring the Government to perform its obligation under the DBA to provide a prepared site could not be implied into the MOMA and that damages for the loss of profits which would have been earned under the MOMA, although caused by the breach of the DBA, were too remote and therefore not recoverable for breach of the DBA.

The respondent appealed to the High Court. The respondent contended that the arbitrators made errors of law which appeared on the face of the award in failing to find that the MOMA was subject to the implied term canvassed before them and in finding that the loss of profits under the MOMA was too remote to be recoverable.

The learned judge held that there was to be implied into the MOMA a term that the Government would provide the respondent a treatment plant for it to manage, operate and maintain, or would not act in a manner that would prevent there being the treatment plant that the respondent could manage, operate and maintain under the MOMA, or would not act in a manner that would prevent the occurrence of the commencement date under the MOMA. He referred to them as alternative articulations of the implied term. Without such an implied term, the MOMA would make no commercial sense. The Government's failure to provide the prepared site breached the implied term and the respondent was entitled to damages for the breach measured by the loss of profits it would have earned. The learned judge found further that the loss of profits was a naturally arising and notionally contemplated consequence of the breach of the DBA. The learned judge therefore ordered that the arbitration award be set aside and the case be remitted to the arbitrators to assess damages.

The appellant appealed against the decision of the learned judge arguing, inter alia, that: (i) the MOMA did not become effective because the plant was never built and since the MOMA never commenced, no viable action for breach of the MOMA could be sustained; (ii) the arbitrators were correct in finding that a term obliging the Government to comply

with its obligations under the DBA could not be implied into the MOMA; (iii) no error of law appeared on the face of the award; (iv) the implied term that the respondent contended for in the court below and which the learned judge upheld was not the same as the implied term relied on before the arbitrators; and (v) that the arbitrators were correct in finding that the loss of profits were too remote to be recoverable for breach of the DBA.

In turn, the respondent argued, inter alia, that the Government's obligation to provide a prepared site was a subset of a larger implied obligation not to prevent the occurrence of the commencement date of the MOMA. There was therefore an error of law on the face of the award because the arbitrators failed to so find. In the alternative, it was submitted that the court could set aside the award on the basis of the implied term as re-formulated even though not pleaded since the relevant facts to support a breach of the implied term were already established. Further, the loss of profits under the MOMA was a natural consequence of the breach of the DBA since the parties would have contemplated as reasonably foreseeable that a breach of the DBA would result in the MOMA not being commenced and profits not earned.

Held: allowing the appeal; restoring the arbitrators' award, and ordering that the respondent pay the appellant's costs of the appeal and in the court below, to be assessed in default of agreement:

1. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. No term will be implied if the contract is effective without it. It is in this sense that the concept of necessity is used. The test is not one of absolute necessity. A term can only be implied if, without the term, the contract would lack commercial or practical coherence. The question whether a term is implied is to be judged at the date the contract is made and must logically be answered only after the process of construing the contract is completed.

   Ali v Petroleum Company of Trinidad and Tobago [2017] ICR 531 applied; **Marks and Spencer Plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd** [2016] AC 742 applied; **BP Refinery (Westernport) Pty v President, Councillors and Ratepayers of the Shire of Hastings** (1977) 52 ALJR 20 applied; **Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd** [1995] EMLR 472 applied; **CEL Group Limited v Nedlloyd UK Ltd** [2014] 1 Lloyd's Law Reports 381 applied; **Braganza v BP Shipping** [2015] 1 WLR 1661 applied.

2. The arbitrators were correct in refusing to imply a term in the MOMA that the Government would provide a prepared site. There was to be implied in the MOMA a term requiring the Government to provide the respondent with a treatment plant for it to manage but there was no term in the MOMA which stipulated that the treatment plant it was to manage had to be built by the respondent in accordance with the terms of the DBA or in accordance with a term which required the Government to provide a prepared site. The MOMA was commercially efficacious without the implication of such a term. It would only be necessary to imply such a term as a subsidiary obligation to the broader implied term to provide the treatment plant, if the failure to provide the prepared site to the respondent made it impossible for the Government to fulfil its broader obligation to provide the plant so that the MOMA could commence. However, this was not the case.

3. A type of loss is not too remote if at the time of the contract it was reasonably foreseeable by the parties as not unlikely to result from the breach in question or there was a serious possibility or real danger that the particular loss would result from the breach. The arbitrators found that one consequence of the breach of the DBA was that the respondent lost the profits it expected to earn under the MOMA. However, although the loss of profits was held to have been caused by the breach, the respondent's entitlement to recover depended upon a finding that the test of remoteness set out in **Hadley v Baxendale** had been satisfied. The arbitrators were correct in finding that the respondent had failed to satisfy the test of remoteness. This is because the loss of the profits the respondent would make from operating the treatment plant was not the natural and usual consequence of the Government's breach of the DBA. This could only have been the case if the DBA gave the respondent the exclusive right to build the treatment plant, such that if it was prevented from doing so no plant could have been built at all, or if the MOMA provided that the plant which was to be provided for the respondent to manage and operate was one built by the respondent itself. But there was no such term in either agreement.

   Hadley v Baxendale (1854) 9 Exch 341 applied; **Koufos v C. Czarnikow Ltd.** [1969] 1 AC 350 applied; **Transfield Shipping Inc. v Mercator Shipping Inc.** [2009] 1 AC 61 applied; **John Grimes Partnership Limited v Gubbins Partnership Limited** [2013] EWCA Civ 37 applied; **Victoria Laundry (Windsor) Limited v Newman Industries Limited** [1949] 2 KB 524 distinguished.

4. The High Court has long exercised a common law jurisdiction independent of the **Arbitration Ordinance** to set aside the award of an arbitrator for error of law appearing on the face of the award. But, in order to exercise this jurisdiction there must be found in the award some legal proposition which is the basis of the award and which you can say is erroneous. This would include a note stating the reasons for the award. Absent an allegation of misconduct on the part of an arbitrator in failing to answer a question specifically referred for resolution, the absence from an award of a determination on a question of law not referred, cannot by definition amount to an error on the face of the award. The arbitrators were asked to

determine whether the Government's failure to provide the respondent with a prepared site so that it could build the treatment plant breached an implied term of the MOMA. They answered that question correctly. They were not asked to determine whether the Government's failure to provide the respondent with a treatment plant breached an implied term of the MOMA that the Government would not prevent the commencement of that agreement by failing to provide the plant. The failure to make that determination did not invalidate the award, however much it might appear on the facts which the arbitrators found that the answer is obvious.

Racecourse Betting Control Board v Secretary of State for Air [1944] 1 All ER 60; **Rees v Waters** (1847) 16 M&W 263, 269-270 applied; **Cottonex Anstalt v Patriot Spinning Mills Limited** [2014] 1 Lloyd's L.R. 615 distinguished.

JUDGMENT

[1] **MENDES JA [AG.]**: On 19th September 2006, the Government of the Virgin Islands, represented in these proceedings by the appellant, entered into a written agreement with the respondent (the "Design Build Agreement" or the "DBA") for the design, construction and installation by the respondent of a 250,000 United States gallons water reclamation treatment plant at Paraquita Bay in Tortola. On the same day, the same parties executed another written agreement (the "Management Agreement" or the "MOMA") for the management, operation and maintenance by the respondent of a treatment plant described in identical terms and located in the same place as the treatment plant to be built under the Design Build Agreement. The intention no doubt was that the plant which the respondent had agreed to build and install under the Design Build Agreement would be the same plant it would manage, operate and maintain under the Management Agreement, although that intention is not spelt out in either agreement.

[2] It transpired that the Government failed in its obligation under the Design Build Agreement to provide the respondent with a prepared site on which the plant was to be built, entitling the respondent to terminate that agreement. It also transpired, it appears, that a plant was never provided to the respondent to manage under the Management Agreement. Both agreements contained arbitration clauses which

the respondent eventually invoked. The parties appointed a two-member arbitration panel comprising Denys Barrow, SC and E. Anthony Ross, QC. The respondent claimed that there was an implied term in the Management Agreement that the Government would provide a prepared site on which the plant could be built, even though there was an express obligation to that effect in the Design Build Agreement, and claimed as damages for breach of that term, the profits which it would have made under the Management Agreement. It also claimed that it was entitled to those profits as damages for breach of the Design Build Agreement occasioned by the Government's failure to provide the prepared site.

[3] The arbitrators rejected both claims. In short, they held that a term requiring the Government to perform its obligation under the Design Build Agreement to provide a prepared site could not be implied into the Management Agreement and that damages for the loss of profits which would have been earned under the Management Agreement, although caused by the breach of the Design Build Agreement, were too remote and therefore not recoverable.

[4] The respondent appealed to the High Court pursuant to sections 24 and 25 of the **Arbitration Ordinance**,[1] or pursuant to the inherent jurisdiction of the court, contending that the arbitrators made errors of law which appeared on the face of the award in failing to find that the Management Agreement was subject to the implied term canvassed before them and in finding that the loss of profits were too remote. Leon J, before whom the claim was tried, agreed and ordered that the award be set aside and the case be remitted to the arbitrators to assess damages. This is the appeal against Leon J's judgment.

[5] It is necessary now to set out in greater detail the factual background to the arbitrators' findings, along with their reasoning and that of the learned judge.

[1] Cap. 6, Laws of the Virgin Islands 1976.

The Design Build Agreement

[6] In the preamble to the Design Build Agreement, the Government expressed itself as being "desirous" that the respondent should design, build and install the treatment plant for the sum of US$2,608,846.00. For its part, the respondent declared its acceptance of the Government's offer. The design, construction and instalment of the plant (referred to in the agreement as the "Works") was to commence on a date to be fixed in a Notice to Proceed which the Government was to issue within 14 days of the execution of the agreement. The respondent agreed to complete the Works not later than 180 days from the date of the Notice to Proceed. The completion time was expressed to be based on the assumption that all of the requirements of the project that were to be provided by the Government and others were provided in a timely manner.

[7] In particular, the assumption was that the respondent would be provided with the identity of the treatment facility location by means of a boundary survey within 30 days of the date of the Notice to Proceed; the Government would provide the prepared site, a topographical survey thereof, and a soils/geotechnical report of the completed prepared site with 90 days of the date of the Notice; and the Government would provide the influent and effluent transmission lines to the site within 170 days of the date of the Notice. The completion time was to be extended by any period of delay in the performance of the Government's undertakings. These undertakings were concretised in clause 6 of the agreement by which the Government, inter alia, agreed to provide a prepared project site for the installation of the Water Reclamation Facility, to include paved parking, fencing, lighting, landscaping and excavations (clause 6.1(1)).

[8] The treatment plant was described in detail in clause 5.1 and the treatment process to be used at the plant, defined as "an Aerobic/Anoxic Biological Nutrient Reduction (BNR) treatment process with an upflow clarifier", was described in detail in clause 5.2.

[9] The contract sum covered the design, construction and instalment of the plant and the remedying of any defects which may be discovered within a year of completion (the “Defects Liability Period"). 50% of the contract sum was payable within 14 days of execution of the agreement and contemporaneously with the issuance of the Notice to Proceed; 20% was payable at the time of completion and submission of the Design/Engineering Plans; a further 20% was payable at the time of shipment of the plant from the United States of America; 10% was payable at the time of substantial completion of the treatment plant and the issuance of a Taking Over Certificate; and the final 10% was payable upon expiry of the Defects Liability Period.

[10] The Taking Over Certificate was to be issued by the Government when the respondent had “completed the installation of the Treatment Plant, including the testing and commissioning thereof, such that it may be used for the purposes for which it is intended ….”. The Taking Over Certificate was to have the effect of transferring ownership of the plant to the Government. Within 10 days of the issuance of the Taking Over Certificate, the respondent was to issue a ""Commencement Notice” … indicating the commencement of the management, operation and maintenance phase of the Treatment Plant”.

[11] The Defects Liability Period was to last one year from the issuance of the Commencement Notice. During that period, the respondent was to “execute all works required to remedy defects or damage as may be notified by the Government on or before the expiry date of the defects notification period”. The respondent was required to remedy defects attributable to “any design, construction or other works for which the (respondent) is responsible …; materials or workmanship not being in accordance with the contract (especially the specification therein) …” and “failure by the (respondent) to comply with any other obligation under this Agreement”. At the end of the Defects Liability Period, the respondent was required to “demobilize all equipment brought on site for the performance of the Works and render the site in a clean and tidy state”,

whereupon the Government was to execute and deliver "a Certificate of Discharge stating that the Works have been performed and completed in accordance with the Design Build documents and the obligations of this Agreement and in all other matters and respects is accepted by the Government". Having done that, the remaining 10% of the contract price was to be paid to the respondent.

[12] Either party was entitled to terminate the agreement for the breach of any representation or warranty or the failure to perform any obligation or covenant under the agreement. To do so, the innocent party was required to serve a written notice calling upon the defaulting party to remedy the default within a 30 day period given in the notice. The innocent party was entitled to terminate the agreement upon the expiry of the notice period if the defaulting party failed to commence remedial steps within that period.

[13] The agreement contained the usual "entire agreement" clause declaring that: "[t]his Agreement constitutes the entire Agreement between the parties hereto concerning the matters addressed herein and no other documents or oral representations or assurances shall be a part hereof".

[14] Although the agreement for the management, operation and maintenance of a treatment plant by the respondent was executed simultaneously, and although the Defects Liability Period would most likely have overlapped the commencement of the operation and management of the plant, there is no suggestion of any sort in the Design Build Agreement that the respondent would itself be managing, operating and maintaining the treatment plant.

The Management Agreement

[15] In the preamble to the Management Agreement, the Government expressed its desire that the respondent manage, operate and maintain the "Water Reclamation Treatment Plant, more particularly described in clause 5.2 of the Agreement, at Paraquita Bay". In the operative part of the agreement, the respondent agreed "in

consideration of the material promises, covenants and conditions set forth herein, and the monies to be paid hereunder, … to manage, operate and maintain a 250,000 US gallons Treatment Plant and support facilitation at Paraquita Bay in the British Virgin Islands, with the capacity to process Influent and deliver Effluent …". The term "treatment plant" was defined in clause 4 as meaning all mechanical, electrical and other equipment or installed items located on the site as described in clause 5.2 of this agreement, and the "site" was defined as meaning "the designated Treatment Plant site located in Paraquita Bay and marked "A"". The description of the treatment plant in clause 5.2 is identical to the description of the Treatment Plant under the Design Build Agreement.

[16] Clause 9 of the agreement set out the prices agreed to be paid based upon the volume of influent entering the plant, and the procedure to be followed to obtain and effect such payment.

[17] By clause 3.1, the agreement was declared to be "for a period of twelve (12) years effective from the commencement date as defined in this Agreement, unless the agreement is determined, by either party, in accordance with clause 15 herein, or extended in accordance with the provisions of clause 10 herein". The "Commencement Date" was defined as meaning "the date on which the Treatment Plant is first capable of processing 250,000 US gallons per day of Influent for transfer to the Effluent Transfer Point, such date to be agreed in writing between the Government and the [respondent] and shall become an integral part of this Agreement". The "transfer point" was defined as "the point at which transfer of ownership of the Influent or Effluent occurs".

[18] By clause 8.1, the Government represented that "it is the owner of the Treatment Plant" and promised "at all times during the terms of this Agreement (to) grant the [respondent] access to and egress from the Treatment Plant…".

[19] The agreement also contained an “entire agreement” clause identical to the one included in the Design Build Agreement, but by clause 2 three documents were “deemed to be part of and shall be construed as part of this Agreement”, namely, the respondent’s ""Paraquita Bay Waste Water Treatment Facility Proposal" dated September 2006 and approved by the Government’s Representative” and “two letters from Purestream ES respectively dated September 1st 2006". There is no other reference in the body of the agreement to the two letters or the proposal. Further, in clause 5.1, the respondent undertook “to meet the guaranteed quality and quantity as specified in Volume 1 of the annexed Design Build Documents”.

[20] There is no suggestion in the Management Agreement that the plant which the respondent had agreed to manage, operate and maintain was the treatment plant which it had contracted to design, build and install under the Design Build Agreement. Although reference is made in the Management Agreement to the Design Build Documents, they were not included in the record of appeal and neither party has made any submission in relation to them in this regard. Indeed, both Ms Jackman-Lumy and Mr Strong, QC, who appeared for the appellant and the respondent respectively, conceded that the plant which the respondent was to manage under the Management Agreement was not defined as the treatment plant which was to be built under the Design Build Agreement.

The Arbitrators' Award

[21] By September 2008, some two years after the execution of the agreements, the Government had not yet provided the respondent with the prepared site as required by clause 6.1(1) of the Design Build Agreement, among other defaults. Accordingly, by letter dated 19th September 2008, the respondent issued a notice requiring the Government to remedy its defaults within thirty days (the “Notice of Default"). There having been no response from the Government, the respondent terminated the Design Build Agreement on 27th October 2008.

[22] As the arbitrators found, there was no evidence of any response by the Government to the respondent's Notice of Default or of any reaction by the Government to it or that anyone took any action to remedy the breaches. The arbitrators found it remarkable that in a letter dated 1st October 2008, written to the Permanent Secretary in the Premier's office, the Acting Permanent Secretary in the Ministry of Communications and Works, who had ultimate responsibility for the project, had only heard rumours that the project was in jeopardy, but had not seen or been told of the notice.

[23] The case presented on behalf of the Government was that in another letter dated 1st October 2008 from the Acting Permanent Secretary to the respondent, some of the matters which were raised in the Notice of Default were addressed. But, as the arbitrators observed, that letter was not in response to the Notice of Default but to another letter dated 25th August 2008 written by the respondent, which had enclosed a letter from the respondent's engineer detailing what was required by way of site preparation. The arbitrators found that this did not constitute a response to the Notice of Default and the Government "did not either take or state that it had taken, was taking or intended to take any steps by way of remedying the breach and the obligation to deliver a prepared site to Global". Furthermore, in the Government's pleaded case, there was no averment disputing the respondent's claim that the Government had taken no steps to remedy its failure to deliver a prepared site. In fact, the respondent had submitted a request for information requiring the Government to admit that it had not done so and to state what remedial steps it had taken before the expiry of the Notice of Default, but the Government did not provide the information requested.

[24] Nevertheless, the Government insisted that it had remedied some breaches and accordingly the respondent was precluded from terminating the contract. The arbitrators disagreed:

> "In our respectful view the failure to deliver a prepared site, which had operated for just about two years and to which Government simply did not speak in its letter dated 1st October 2008 or otherwise, was a major breach. It is clear that no remedying of that breach had commenced during the 30 day period for which the Notice provided. It could hardly be the meaning of clause 15 that remedying other, minor breaches should be treated as remedial of a particular, major breach."

[25] The arbitrators accordingly held that Global was entitled to terminate the Design Build Agreement when it eventually did so on 27th October 2008.

The Claims Pursued Before the Arbitrators

[26] As previously noted, the respondent claimed damages for the loss of profits it would have earned under the Management Agreement and made two separate references to arbitration, each under the Design Build Agreement and the Management Agreement. Specifically, the respondent pleaded that it was an implied term of the Management Agreement that "the Government would perform its obligations under clause 6.1 of the DBA …. (which included the obligation to provided a prepared project site) to enable the Claimant to construct and install a (Waste Water Treatment Facility) capable of processing 250,000 US gallons per day of influent" and that the Government's failure to perform its obligations under clause 6.1 of the Design Build Agreement constituted a breach of the Management Agreement. It pleaded further that the Government's failure to provide the prepared site was also in breach of the Design Build Agreement. For both breaches, the respondent claimed as damages the income it would have earned from managing, operating and maintaining a treatment plant for twelve years.

The Claim Under the Management Agreement

[27] The arbitrators declined the respondent's invitation to imply a term in the Management Agreement that the Government would comply with its obligation under the Design Build Agreement to provide the respondent with a prepared site. It was significant, the tribunal thought, that the parties had chosen deliberately to

structure the arrangements between them by entering into two separate agreements on the same day. As they noted:

> "It must have been as clear as daylight to the parties themselves that the MOMA could only commence and be performed if the DBA was performed, (as appears from the fact that the MOMA defines 'commencement date' as being the day when the facility becomes capable of a specified level of processing). Performance of the MOMA was manifestly conditional upon the completion of the DBA. And in the face of that vital interconnection between the two the parties decided to separate and not to tie or link the two."

[28] The deliberate separation of the two agreements was further underscored by the fact that the parties had expressly deemed the proposal made by the respondent in September 2006 and the two letters dated 1st September 2006 to be part of the Management Agreement. The parties could just as easily "have incorporated into the MOMA the prepared site term from the DBA", but they did not. Noting Lord Hoffman's observations in **Attorney General of Belize v Belize Telecom Limited**[2] that the most usual inference from the fact that an "instrument does not expressly provide for what is to happen when some event occurs", is that "nothing is to happen", and that "if the parties had intended something to happen, the instrument would have said so", the arbitrators concluded that if the parties had intended that the failure to perform an obligation under the Design Build Agreement would amount to a breach of the Management Agreement, they would have said so. They continued:

> "Indeed, they needed to have said so because a natural reading of the situation and the contracts themselves is that the breach of an express performance term of contract 1 (the DBA) would result in consequences under that contract – the DBA. There is nothing in contract 2, the MOMA, to suggest it meant to regard breach of contract 1 as a breach also of contract 2. In short, on that analysis, there is no need to imply a term that would make a breach of contract 1 also a breach of contract 2."

In short, one of the problems with the respondent's case was that "it calls for the incorporation by implication into the MOMA of a term as to the consequence of failure to perform an express term of an altogether separate agreement".

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[2] [2009] 1 WLR 1985 at para 17.

[29] Further, there was no need to imply into the Management Agreement a term as to performance under the Design Build Agreement to give it efficacy "because that term is an express term in the DBA, which is the contract in which it belongs". In the circumstances, to seek to imply it into the Management Agreement would not merely spell out what the agreement means, but would be an impermissible addition or improvement to it, however desirable such an improvement might be or however much the parties as reasonable actors would have adopted it if it had been suggested to them.

[30] Lastly, the "entire agreement clause" in the Management Agreement precluded the implication of a term forming part of the Design Build Agreement. While accepting that the entire agreement clause did not absolutely preclude the implication of terms, it did preclude reference to another document or source to add to the terms already contained in the Management Agreement, and that was exactly what the respondent was asking the arbitrators to do. As they explained:

> "Without in any way departing from the principle that an entire agreement clause cannot operate to exclude implication of a term we note the entire agreement clause does have the effect of eliminating any implied notion that there was a collateral promise in the MOMA to deliver a prepared site. We further note that the entire agreement clause strengthens the significance of the fact that the parties deliberately kept the two agreements separate and did not provide further terms in one to be imported into the other. This makes it all the more difficult, as a matter of background facts, to imply into the MOMA a term that is expressed in the DBA and that is operationally confined to the DBA. To put it another way, the term contained in the DBA, now sought to be incorporated by implication of language into the MOMA, was by the action of the parties, not extended to the MOMA because structural and operational separation of the two agreements, which the parties freely choose to create, prevented that from happening."

[31] Having therefore rejected the respondent's claim that the obligation to provide a prepared site was by implication a term of the Management Agreement, the tribunal rejected the respondent's claim for damages for breach of the Management Agreement.

The Claim Under the Design Build Agreement

[32] In determining whether the respondent was entitled to the loss of profits under the Management Agreement as damages for breach of the Design Build Agreement, the arbitrators were guided by the classic statement of the principle governing the remoteness of damages as set out in the judgment of Alderson B in **Hadley v Baxendale**.[3] I will set out the relevant passages later on in this judgment. In applying the **Hadley v Baxendale** test, and in particular in seeking to determine what was in the contemplation of the parties, the arbitrators appreciated that special circumstances known to the parties at the time they made the contract had to be taken into account.

[33] The arbitrators noted that under the Design Build Agreement the total contract price of $2,680,846.00 was to be paid in six instalments and that three instalments amounting to 70% of the contract price had been paid. They noted further that the natural and direct consequence of a breach by the Government of the Design Build Agreement would be the loss of any payment properly due under that contract. But no claim was made by the respondent for such payments, the claim for breach of the Design Build Agreement being limited to the loss of profits under the Management Agreement.

[34] In that regard, the arbitrators first held that the loss of profits which the respondent expected to earn under the Management Agreement "is not the naturally arising or naturally contemplated consequence of a breach of the DBA". The respondent's entitlement under the Design Build Agreement was "to the payment of money for designing and building a facility; there is no entitlement under the DBA to the profits that were expected under the MOMA".

[35] The question was whether "damages by way of loss of profits under the MOMA may reasonably be supposed to have been in the contemplation of both parties as

[3] (1854) 9 Exch 341 at p.354.

the probable result of the breach of the DBA at the time they made the DBA". In that regard, the arbitrators accepted that they had to take into account that "the parties had at the same time they made the DBA made the MOMA and were aware of the profits (the respondent) would make under the MOMA". Nevertheless, they held that the profits which the respondent would have earned under the Management Agreement were not recoverable because they were "too remote in law". In so concluding, the tribunal distinguished the case of **Victoria Laundry (Windsor) Limited v Newman Industries Limited**,[4] on which the respondent primarily relied. It is best to set out the tribunal's conclusions in full:

> "It is true, as Global argues, that one consequence of the breach of the DBA was that Global lost the profits it expected from the MOMA. However, as was said long ago, consequences may be infinite with consequence upon consequence and there is no limit to the extent they may go, so the law places limits on the extent to which it will regard a consequence as flowing from a breach of contract. Hence the rule in Hadley v Baxendale, discussed above.
>
> In the present situation the loss of profit that could have been made under the MOMA was a loss of profits from a separate contract than the DBA, which latter is the contract under which the claim is now being made. To that observation Global would naturally respond by saying that the lost profits in the Victoria Laundry case were those to be earned from the performance of separate contracts from the contract under which the claim for damages was made by the launderers and upheld.
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> The difference as we see it, however, is that if the DBA had been performed and the facility had been built Global would have made no income or profit from the fact of its completion. Unlike the position of the launderers in the Victoria Laundry case, in the present case there was no right whatever for Global, as part of its business, to use the facility to make an operational profit. That facility would have been owned by Government, not by Global.
>
> In Victoria laundry the boiler would have been owned by the launderers. Failure to supply the boiler rendered the launderers unable to operate their plant, to carry on their business and earn the profits from their business. In the present case Global had no right under the DBA or of its own to operate the facility and earn a profit. Breach of the DBA did not prevent Global from conducting its business or fulfilling contracts with third

[4] [1949] 2 KB 524.

parties. Breach of the DBA prevented the fulfilment of a condition precedent to the performance of a distinct and separate contract, it prevented the MOMA from commencing. But there was no promise in the DBA to satisfy the requirement for commencement of the MOMA.

Without the MOMA commencing Global did not have the opportunity or any right to make a profit. It could have these only under the MOMA. Damages for loss of profit from the MOMA would flow from breach of the MOMA. They did not flow from breach of the DBA."

The Appeal to the High Court

[36] The respondent applied to the High Court for an order that the arbitration award be remitted for the reconsideration of the arbitrators or alternatively set aside, on the ground that there were errors of law on the face of the award which were identified in its "Grounds of Appeal" as being:

(i) that an award of damages for breach of the Design Build Agreement is not confined to sums due and payable for performance of the works under the Design Build Agreement and extends to profits that would have been made from operating the facility under the Management Agreement; and

(ii) that there was an implied term of the Management Agreement that the Government would not prevent the occurrence of the commencement date of the Management Agreement, including failing to deliver a prepared site to Global on which to build the facility and preventing the building of the facility.

[37] It should be observed immediately that the implied term contended for in the grounds of appeal is broader in scope than the implied term which the arbitrators considered and rejected.

[38] To Leon J's thinking the primary error of law on the face of the award which was pivotal to the outcome of the arbitration was the arbitrators' finding that the Management Agreement did not exist until the commencement date. He appears

to have been referring to the statement by the arbitrators that "breach of the DBA prevented the fulfilment of a condition precedent to the performance of a distinct and separate contract; it prevented the MOMA from commencing". As noted, the arbitrators had also stated earlier in their award that:

> "It must have been as clear as daylight to the parties themselves that the MOMA could only commence and be performed if the DBA was performed, (as appears from the fact that the MOMA defines 'commencement date' as being the day when the facility becomes capable of a specified level of processing). Performance of the MOMA was manifestly conditional upon the completion of the DBA."

In Leon J's view "the MOMA was a live contract from its execution. There was no condition precedent to its existence". The arbitrators' erroneous finding that the MOMA did not exist until the commencement date, he held, led it into further error in rejecting the respondent's claim.

[39] It is appropriate to interrupt the recounting of Leon's J's judgment to point out that he was of course right to find that the Management Agreement came into existence from the date it was executed. On that date, the parties agreed the period for which the agreement would run and the date on which it would become effective. The effective date was the date on which the parties agreed the treatment plant had become capable of processing 250,000 US gallons of influent per day. But he was wrong in his reading of the award as recording any finding on the part of the arbitrators that the Management Agreement did not exist. What they did find is that the Management Agreement could only commence and be performed when a treatment plant of the stipulated capacity had come into existence.

[40] It was clear to the learned judge that under the Management Agreement the Government was obliged to make a treatment plant available to the respondent which was capable of processing the requisite volume of influent. It was clear to him as well that the Government's failure to do so was a breach of the Management Agreement giving the respondent the right to damages inclusive of

the profits it would have made under the Management Agreement. He referred to the following hypothetical scenarios and asked, rhetorically, whether the Government could simply fail to bring a treatment plant into existence and not be bound to compensate the respondent for its losses:

> "Could either party, and in particular the BVI Government, have decided the day before the Treatment Plant would have been first capable of processing the specified volume of Influent that it did not want to go ahead – was it free to walk away leaving the other party in the lurch?...
>
> Or if the Treatment Plant was built and was almost at the point of being first capable of processing the specified volume of Influent, could the BVI Government have intentionally done something at the Treatment Plant so that it would not be able to reach the specified volume, and then said to Global Water that it is out of luck and the MOMA will not come into existence?...
>
> (S)uppose Global Water had taken a large array of steps, and made a large number of financial and other commitments, to gear up to perform – hiring and training staff, including possibly relocating people to Tortola, along with their families, from other parts of the world; purchasing supplies and operating equipment and tools; entering into long term supply contracts; opening bank and supplier accounts; purchasing the insurance it was required to carry under the MOMA (general liability insurance and workmen's compensation insurance); turning down other operating contracts as it would not have sufficient resources for them as well as the MOMA; and so on – could it really be the case that it would have no remedy; that it was expected to do all of those things 'on spec', in the hope that the MOMA would morph into a legally binding contract?"

[41] These considerations led the learned judge to conclude that the Management Agreement contained an implied term that the Government "would provide Global Water with the Treatment Plant for it to manage, operate and maintain under the MOMA, ... would not act in a manner that would prevent there from being the Treatment Plant that Global Water could manage, operate and maintain under the MOMA, or would not act in a manner that would prevent the occurrence of the Commencement Date under the MOMA". He referred to them as alternative articulations of the implied term. Without such an implied term, the Management Agreement would make no sense. As he said, "the Treatment Plant needed to

exist for performance of Global Water's main obligation under the MOMA to be performed." Or, as he asked rhetorically once again:

> "Can one party to a contract conduct itself (whether by commission or omission) so as to effectively preclude the other party from being able to perform the contract and earn revenues and profits it otherwise would have earned under that contract?"

[42] Leon J recognised that the respondent had not framed the implied term which it claimed the Government had breached in exactly the way he had articulated it. However, the learned judge did not think there was any material difference between his articulations of the implied term and the one pleaded by the respondent and rejected by the arbitrators. As he said:

> "Again, as night follows day, the failure to provide the prepared site meant that the Treatment Plant could be not built and as noted above, there would be no Treatment Plant for Global Water to manage, operate and maintain under the MOMA and from which it could earn revenues and profits under the MOMA."

[43] Moreover, he did not see how "a different articulation of the implied term could have led the arbitrators to any different conclusion". He concluded:

> "[70] The Alternative Articulations of the Implied Term are materially the same as each other, and in the context of these two contracts, the overall factual matrix and the combined arbitrations, are materially the same as the articulation of the implied term as that the BVI Government would provide a prepared site to Global Water on which to build the Treatment Plant under the DBA.
>
> [71] The MOMA was founded on, and the parties contemplated in the MOMA, that the BVI Government would provide Global Water with the Treatment Plant that it could manage, operate and maintain, and from which it would earn revenues and profits for a period of 12 years. The fundamental failure of the BVI to do so, as it happens by its early stage unexplained and apparently intentional inaction in not providing a prepared site that in turn prevented the Treatment Plant from being built, was a breach by the BVI Government of a fundamental implied obligation on it in the MOMA."

[44] He accordingly held that the arbitrators erred in law in rejecting the implied term.

[45] With regard to the respondent's claim that it was entitled to the profits it would have earned under the Management Agreement as damages for breach of the Design Build Agreement, Leon J found that the loss of profits was a "naturally arising and notionally contemplated consequence of breach of the DBA". Elaborating, he said:

> "The MOMA and the revenues and profits that Global Water could have earned under the MOMA were clearly known to both parties when they entered into the MOMA, and it must have been clear to them that if the BVI Government made it impossible for there to be a Treatment Plant for Global Water to manage, operate and maintain, Global Water would not receive the revenues and profits under the MOMA."

Or, as he later put it, applying the principles established in **Hadley v Baxendale** and **Victoria Laundry (Windsor) Limited v Newman Industries Limited**:

> "when the BVI Government entered into the DBA, it could not have been more aware of the special losses Global Water would suffer under the MOMA if the BVI Government breached the DBA, as it has been found to have done, thereby depriving Global Water of a Treatment Plant to operate under the MOMA and in turn depriving Global Water of its revenues and profits under the MOMA."

[46] If the parties wised to exclude from recovery for breach of the Design Build Agreement damages for the loss of the revenues and profits that the respondent would have earned under the Management Agreement, he said, the parties could easily have included such a provision in the Design Build Agreement, but they did not.

[47] He found further that the arbitrators were wrong to distinguish **Victoria Laundry** on the ground that the respondent did not own the treatment plant and had no right under the Design Build Agreement to operate the facility and earn a profit. He said:

> "It matters not who owned the Treatment Plant. Global Water was in the business of managing, operating and maintaining the Treatment Plant – it just needed the Treatment Plant to be built (as it happens by itself under the DBA), brought to the specified operational capacity, and made available to it under the MOMA. The Tribunal was wrong to say that

Global Water had no right to use and operate the Treatment Plant to make an operational profit. It had that right under the MOMA."

The Arguments on Appeal
The Appellant's Case

[48] In relation to the respondent's claim for damages for breach of an implied term of the Management Agreement, Ms. Jackman-Lumy first pointed out that in accordance with clause 3.1, the Management Agreement did not become effective because the plant was never built. Since the Management Agreement never commenced, she submitted, "no viable action for breach of the MOMA could be sustained". Clause 3.1 created a condition precedent which was not fulfilled such that "the ability to sue or be sued in relation to the breach for non-performance of the MOMA was stymied until the requisite condition was fulfilled". Another way of putting the argument, I imagine, would be that since the agreement had not become effective, any term which could otherwise properly be implied had also not become effective.

[49] Secondly, Ms. Jackman-Lumy submitted that the arbitrators were right to find that a term obliging the Government to comply with its obligations under the Design Build Agreement to provide a prepared site could not be implied into the Management Agreement, for the reasons which they gave. Further, the arbitrators were right to find that the entire agreement clause, while not precluding the implication of terms, did manifest "an anti-incorporation climate" and precluded the incorporation of the terms of an entirely separate agreement.

[50] Thirdly, since the trial judge had accepted that the arbitrators had applied the correct principle of law in determining whether a term could be properly implied, no error of law appeared on the face of the award. A distinction was to be made between the wrong statement of the principle of law, which would constitute an error of law on the face of the award, and the wrong application of those principles, which would not.

[51] Fourthly, the appellant argued that the implied term that the respondent contended for in the court below, and which the learned judge accepted, was not the implied term relied on before the arbitrators. The failure of the arbitrators to uphold an implied term which was not an issue in dispute in the case, and therefore was not considered by them, could not by definition constitute an error of law on the face of the award. It would also be unfair and prejudicial to the Government to require it to answer a case which was not pursued in the arbitration. In this regard, the appellant says that the learned judge was wrong to find that the implied term actually canvassed before the arbitrators was just a different way of expressing the implied term he formulated and applied.

[52] Lastly, Ms. Jackman-Lumy submitted that a term that the Government would not do anything to prevent the commencement date from coming into being could not be implied because it was not necessary and was inconsistent with clause 3.1 of the agreement. As it was put in the written submissions: "If the parties wished the MOMA to be effective and thus permit exposure to liability for non-performance from its inception, as the implied term strives to achieve, clause 3.1 would not have been inserted".

[53] Despite relying strongly on clause 3.1 as precluding the implication of any term which was actionable before the agreement became effective, Ms. Jackman-Lumy noted that the arbitrators did not rely on clause 3.1 in rejecting the implication of a term. To the extent, therefore, that the learned judge held that the arbitrators' pronouncement on the effect of clause 3.1 was an error on the face of the award, which in turn meant that its findings on the implied term were similarly impeachable, he was plainly wrong.

[54] On the question of the recovery of the loss of profits under the Management Agreement as damages for breach of the Design Build Agreement, Ms Jackman-Lumy submitted first of all that the arbitrators' findings could only be disturbed if it made an error of law which appeared on the face of the award. But since it had

been held in **Monarch Steamship Co Limited v Karlsamms Olje – Fabriker**[5] and later endorsed in **Mehmet Dogan Bey v GG Abdenid Co. Ltd**.[6] that whether loss is too remote is a finding of fact, not law, Leon J had no jurisdiction to interfere, particularly since he found that the arbitrators had made no error in their identification of the principle of law deriving from **Hadley v Baxendle** which was to be applied. Otherwise, the appellant relied on the arbitrators' reasons and submitted that they made no error of law in finding that the loss of profits under the Management Agreement was too remote.

[55] In response to the learned judge's point that the parties failed to limit the damages recoverable for breach of the Design Build Agreement by the inclusion of an express term to that effect, Ms Jackman-Lumy submitted that they had in fact done so and relied on clause 14 of the agreement which provides that:

> "Neither party shall be responsible to the other for any consequential or incidental damages arising out of or related to any event or occurrence giving rise to an indemnification obligation of such party under this agreement; provided however, that this shall not prevent a party from recovering direct damages for breach of this Agreement".

The Respondent's Case

[56] Mr. Strong, QC provided a neat and self-contained answer to the appellant's various points on the implication of a term. The implied term contended for, Mr. Strong said, is that the Government would not prevent the occurrence of the commencement date of the Management Agreement. That term was breached when the Government failed to provide the prepared site, which prevented the respondent from building the plant, which in turn prevented the commencement of the Management Agreement and deprived the respondent of the profits it would have made. There were a number of ways in which the implied term could be breached but the respondent had pleaded only one of those ways. Put differently, the obligation to provide a prepared site is a subset of the larger obligation not to

[5] [1949] AC 196 at p.231.
[6] [1951] 2 All ER 162 at pp.165-167.

prevent the occurrence of the commencement date. There was therefore an error of law on the face of the award because the arbitrators failed to so find.

[57] Framed broadly as an obligation not to prevent the occurrence of the commencement date, Mr. Strong continued, the presence of clause 3.1 equating the commencement date with the existence of a treatment plant could not logically preclude the implied term which necessarily pre-dated commencement. In essence, the obligation not to prevent the occurrence of the commencement date bound the Government not to do anything to prevent the plant from coming into being and thereby preventing clause 3.1 from taking effect. The implied term as framed therefore complimented and enabled rather than contradicted clause 3.1.

[58] Furthermore, the term was to be implied in order to give business efficacy to the agreement. Without it, the agreement would be tantamount to a mere option on the part of the Government to engage the respondent to manage the plant in its discretion. In its absence, the Government would be free to decide not to build the plant at all, or not to achieve the required capacity to trigger clause 3.1, or otherwise to stymie the effectuation of the agreement. In that case, the agreement would be "commercially nonsensical," and would be devoid of "all commercial reality". Mr. Strong accepted that the implied term as formulated overlaps with an express term of the Design Build Agreement. However, he said, "the implied term would be part of the MOMA even if the DBA had not been entered into or if the building contract was with a third party".

[59] In answer to the appellant's objection that the respondent raised an entirely new case before the High Court and now on appeal, Mr. Strong submitted firstly, that on the facts of the case the term contended for is properly to be implied in the agreement with the result that "the Award is bad in law whether or not Global put its case in the same way before the Arbitrators".

[60] Secondly, the respondent is not advancing a new case because, as Leon J found, there is no material difference between the term canvassed before the arbitrators and the term now canvassed. The implied term addressed before the arbitrators was just one of the ways of putting the formulation now preferred.

[61] Thirdly, as the transcript of the proceedings shows, the respondent did submit in opening its case that "it was implicit in the MOMA that the Government would not do anything which prevented the commencement of the MOMA". The appellant did not then object to that formulation of the implied term.

[62] Lastly, even if the implied term contended for constituted a new case that would not preclude raising it on appeal. The implication of a term in a contract is a point of law and new points of law can be raised on appeal provided that all potentially relevant findings of fact have been made. Mr. Strong cited **Cottonex Anstalt v Patriot Spinning Mills Limited**[7] in support.

[63] On the question of remoteness, Mr. Strong relied on the arbitrators' findings that at the time the Design Build Agreement was concluded both the Government and the respondent were aware of the profits that the respondent would make under the Management Agreement once the treatment plant was provided, and that "it must have been clear as daylight to the parties themselves that the MOMA could only commence and be performed if the DBA was performed". However, even without relying on those findings, Mr. Strong submitted that the **Hadley v Baxendale** test had been satisfied. As he put it in his written submissions:

> "Given that the Respondent's business included acting as the operator of the facility when built, the natural and usual consequence of preventing the prospective operator of a facility from building it is that the party will lose the profits it would have made from operating the facility."

[64] The **Victoria Laundry** case was not distinguishable, he submitted, because the very purpose of the Design Build Agreement was to construct a facility which the

[7] [2014] 1 Lloyd's L.R. 615.

respondent would operate under the Management Agreement. Just as Newman knew that Victoria Laundry required the boiler for its laundry business, so too did the Government know that the respondent was building the facility to operate it. Furthermore, Victoria Laundry's right to claim damages did not depend upon ownership of the boiler, but on its ability to operate the boiler for its customers. The result would not have been different if Victoria Laundry had acquired the boiler on hire purchase terms.

[65] Mr. Strong argued further that clause 14 only exempted consequential and incidental damages which arose out of events giving rise to an indemnification obligation but that indemnification obligation only arose under clause 14 in respect of claims in connection with bodily injury or property damage and the respondent's claim for loss of profits under the Management Agreement was not such a claim.

[66] Finally, he submitted, the determination of whether a particular head of damage is too remote is a determination whether the claimant has a legal right to damages and is therefore a question of law. An error in the application of the **Hadley v Baxendale** test of remoteness is "in truth, a failure to apply the test at all".

Discussion
The Implied Term

[67] The circumstances under which a court may property imply a term into a contract were recently summarised by Lord Hughes in **Ali v Petroleum Company of Trinidad and Tobago**.[8] After noting that the learning on the implication of terms was authoritatively restated by the Supreme Court in **Marks and Spencer Plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd**,[9] he said (at paragraph 7):

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the

[8] [2017] ICR 531.
[9] [2016] AC 742.

> agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

[68] Five additional points need to be made for the purposes of this appeal. Firstly, as Lord Simon emphasised in **BP Refinery (Westernport) Pty v President, Councillors and Ratepayers of the Shire of Hastings**,[10] "no term will be implied if the contract is effective without it." It is in this sense that the concept of necessity is used. Secondly, as Lord Neuberger pointed out in **Marks and Spencer** at paragraph 21, the test is not one of absolute necessity. A more helpful way of putting it is that "a term can only be implied if, without the term, the contract would lack commercial or practical coherence". Thirdly, the precise content of the term to be implied "must be capable of clear expression" (per Lord Simon in **BP Refinery**[11]) and "must be tailored to the necessity of the particular case" (per Lord Hughes in **Ali**, at paragraph 9). Fourthly, "the question whether a term is implied is to be judged at the date the contract is made "(per Lord Neuberger in **Marks and Spencer**, at paragraph 23). Fifthly, while the exercise of construing the words in a contract and the implication of terms into a contract involve determining the scope and meaning of the contract, the two are nevertheless "different processes governed by different rules" (per Lord Neuberger in **Marks and Spencer**, at paragraph 26). As Sir Thomas Bingham said in **Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd**:[12]

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[10] (1977) 52 ALJR 20 at p.26.
[11] Supra, note 10 at p.26.
[12] [1995] EMLR 472 at p.481.

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."

[69] Lastly, the process of implying a term into a contract must logically occur only after the process of construing the contract is completed. As Lord Neuberger observed in **Marks and Spencer** at paragraph 28, "given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied". Similarly, it is frequently only after the rights and obligations of the parties under the contract are determined after construction that it is possible to determine whether it is necessary to imply a term to give effect to those rights or to enable the performance of those obligations. In **CEL Group Limited v Nedlloyd UK Ltd**,[13] for example, it was only after it was determined that on a proper construction of the contract CEL enjoyed the exclusive right to provide all the haulage requirements arising in the ordinary course of Nedlloyd's business, as opposed to, simply, Nedlloyd promising not to go elsewhere for their haulage requirements, that the court implied a term that Nedlloyd would do nothing of their own motion to bring to an end their own requirements for road haulage services.

[70] It is plain that the respondent could not begin to enjoy the benefits of the Management Agreement until the Government provided it with a treatment plant to manage and operate. It is equally plain that the plant which had to be provided so as to trigger the commencement of the Management Agreement was one capable of processing 250,000 US gallons of influent per day. The actual date on which

[13] [2004] 1 Lloyd's Law Reports 381.

the agreement was to commence was the date on which the parties agreed that the plant had achieved the stated capacity. In order to reap the benefits of the Management Agreement, therefore, the respondent was dependent not merely on the cooperation of the Government in agreeing the commencement date, but also on the continued commitment of the Government to build or cause to be built a plant of the requisite capacity.

[71] The respondent accordingly and understandably sought refuge in the principle stated long ago by Cockburn CJ in **Stirling v Maitland**:[14]

> "I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."

[72] In a different context, in **Mackay v Dick**,[15] Lord Blackburn stated the principle as follows:

> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on the circumstances."

[73] The principle in **Stirling v Maitland** was approved by the House of Lords in **Southern Foundaries (1926) Ltd v Shirlaw**[16] but Lord Atkin was inclined to base it "not so much … on an implied term, as on a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself "of his own motion" bringing about the impossibility of performance is in itself a breach".

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[14] (1864) 5 B&S 840 at p.852.
[15] (1861) 6 App Cas 251 at p.263.
[16] [1940] AC 701.

[74] Mr. Strong also relied on the judgment of Mason J in **Secured Income Real Estate (Australia) Ltd v St. Martins Investments Pty Ltd**[17] who held that the rule derived from **Mackay v Dick** was not "confined to the imposition of an obligation on one contracting party to cooperate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract" but indeed extended to doing "all such things as are necessary on his part to enable the other party to have the benefit of the contract".

[75] In this case, it was agreed that the Management Agreement would become effective on such date as the parties agreed the treatment plant had been brought up to the stipulated capacity. The agreement accordingly necessarily envisaged that both parties would address their minds to the subject matter on which they were to express their agreement, namely whether the plant had indeed reached the processing capacity needed to trigger commencement, and of necessity, to engage separately and with each other on the existence of the state of affairs on which the effectuation of the agreement depended. Furthermore, if in fact the plant had reached the requisite capacity, both parties were implicitly under an obligation not to withhold their agreement to the date on which that event had occurred in bad faith, or irrationally or arbitrarily. In **Braganza v BP Shipping**,[18] the UK Supreme Court held that contractual discretions were subject to an implied term that the decision-making process be lawful and rational in the public law sense, such that a contractual discretion may be overturned if the decision-maker took into account an irrelevant consideration or failed to take account of all relevant considerations, or reached a decision which no rational decision-maker would reach. As Lady Hale pointed out:[19]

> "Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making

[17] (1979) 144 CLR 596.
[18] [2015] 1 WLR 1661.
[19] Supra note 17 at paragraph 18.

> decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."

[76] Both Lady Hale[20] and Lord Neuberger[21] endorsed the following summary of the law given by Rix LJ in **Socimer International Bank Ltd v Standard Bank London Ltd**:[22]

> "It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria … Laws LJ in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the Wednesbury rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself."

[77] The process of addressing their minds in good faith to the question whether the plant had reached the necessary capacity and fixing the date on which that occurred must necessarily take place before the date on which the agreement was to become effective. To give the agreement any business efficacy, an implied term that the parties would so conduct themselves must logically exist before they make the decision which would make the agreement effective. For this reason

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[20] Supra note 17 at paragraph 22.
[21] Supra note 17 at paragraph 102.
[22] [2008] Bus LR 1304 at para 66.

alone, I would reject the appellant's submission that no term could be implied into the agreement at any time before that date.

[78] It seems to me as well that the agreement was premised upon the Government's continuing preparedness to build a plant of the requisite capacity and to provide it to the respondent to manage. The agreement could not become effective unless the appellant provided the plant and permitted the respondent entry thereon to manage it and earn the profits which both parties envisaged the respondent would make. The agreement was subject to the condition precedent that a plant of the requisite capacity was brought into being and provided to be managed. It was therefore implicit that the Government would do all that was necessary to achieve that milestone and to ensure that the condition was fulfilled.

[79] In this regard, the implied obligation is no different from the obligation imposed on any party to a contract which is to take effect at some time in the future not to repudiate the contract in anticipation of its commencement. For example, should the Government have built the plant but decided not to permit the respondent to manage and operate it that would constitute a repudiation which, if accepted by the respondent, would entitle it to damages for breach of contract. To this extent therefore there is some attractiveness to the respondent's contention that in order to give business efficacy to the contract it is necessary to imply a term that the appellant would not do anything to prevent the commencement date from occurring. But given that the only obvious ways in which the Government could prevent the commencement date from occurring was by not providing a plant or by, in bad faith or irrationally, not agreeing to a commencement date, it seems to me that it is not necessary to go any further than to imply a term that the appellant would provide the respondent with a plant of the requisite capacity for it to manage.

[80] However widely the term may be formulated, I do not agree it encompasses an implied obligation on the part of the Government to provide the respondent with a

prepared site in accordance with its obligations under the Design Build Agreement. There is no provision in the Management Agreement which requires the Government to provide a plant which is built in accordance with the terms of the Design Build Agreement. The treatment plant which is to be managed under the Management Agreement is defined in the agreement itself, but it is not described as a plant built by the respondent or in accordance with any particular contract. Thus, had the Government decided to terminate the Design Build Agreement, for whatever reason, and to contract someone else to build and install a plant which met the description of the treatment plant under the Management Agreement, and then to provide that plant to the respondent to manage, the Government would have fulfilled its obligations under the Management Agreement. The respondent's only claim in those circumstances would be for breach of the Design Build Agreement.

[81] It would make no difference that the plant provided to the respondent was built under a contract with a third party which relieved the Government of the responsibility of providing a prepared site, as long as the Government then made that plant available to the respondent to manage. If on the other hand the Government failed to provide any plant at all, it would have acted in breach of the implied term to provide a plant for the respondent to manage. The Management Agreement was accordingly perfectly, commercially efficacious without the implication of a term requiring the Government to provide a prepared site. Had the notional officious bystander asked the parties, when they were making the contract, whether under the Management Agreement the Government was implicitly bound to provide the respondent with a prepared site to build the plant they would most likely have rounded off on him or her with a joint refrain that that obligation was already provided for under the Design Build Agreement and that the respondent was already adequately protected by an implied term that the Government would provide the plant. The arbitrators were accordingly right to refuse to imply the term contended for.

[82] Whereas Leon J was correct to imply a term that the Government would provide the respondent with a treatment plant for it to manage, or even more broadly, would not act in a manner that would prevent the coming into being of the treatment plant that the respondent could manage, he erred in assuming that the implied terms so formulated could only be fulfilled by providing a plant built in accordance with the Government's obligations under the Design Build Agreement, when there is no obligation under the Management Agreement to that effect. He also erred in finding that there was no material difference between the implied term for which the respondent contended before the arbitrators and the different “articulations" of the implied term which he favoured. The fundamental error he made was in assuming that "as night follows day, the failure to provide the prepared site meant that the Treatment Plant could be not built". There was nothing in either agreement which prevented the Government from engaging a third party to build the treatment plant under a contract which imposed the obligation to provide the prepared site on the third party itself or even on someone else. No doubt the learned judge would have been correct to conclude that the failure to provide the prepared site, and then to begin to remedy the breach within the 30 day notice period, prevented the respondent from building the plant and left it no choice but to terminate the agreement. But it is quite another thing to conclude that the failure to provide the prepared site prevented the treatment plant from being built at all, even by the Government itself directly or through a third party contracted for that purpose.

[83] It may very well be in this case that the failure to provide the prepared site, and then the subsequent termination of the Design Build Agreement, triggered a chain of events, the result of which was that the treatment plant was not built at all. But the exercise which the arbitrators and Leon J were mandated to carry out was to determine whether, on the date the agreement was concluded, a term could be implied that the Government would provide a prepared site. It would only be necessary to imply such a term as a subsidiary obligation to the broader implied term to provide the treatment plant, if the failure to provide the prepared site to the

respondent made it impossible for the Government to fulfil its broader obligation to provide the plant so that the Management Agreement could commence. But that was decidedly not so.

[84] Similarly, the error which Mr. Strong made is in assuming, as he put it, that the obligation under the Design Build Agreement to provide a prepared site was a subset of the obligation not to prevent the occurrence of the commencement date. That proposition is likewise based on the false assumption that the treatment plant which the Government was obliged to provide under the Management Agreement was one which was built on a site prepared and provided by the Government. There is no such requirement anywhere in the Management Agreement. The implied term is not to do anything to prevent the occurrence of the commencement date, namely the existence of a treatment plant of the specified capacity. The implied term is not to refrain from doing anything to prevent the coming into being of a treatment plant built by the respondent in accordance with the terms of the Design Build Agreement.

Remoteness

[85] The arbitrators found that one consequence of the breach of the Design Build Agreement was that the respondent lost the profits it expected to earn under the Management Agreement. However, although the loss of profits was held to have been caused by the breach, the respondent's entitlement to recover depended upon a finding that the test of remoteness set out in **Hadley v Baxendale** had been satisfied. In that case, Alderson B said at pages 354-355:

> "Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to

> both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

[86] The **Hadley v Baxendale** test was approved by the House of Lords in **Koufos v C. Czarnikow Ltd**[23] but their Lordships differed on the degree of likelihood of a particular consequence occurring which was required in order to support a finding as to what the parties ought reasonably to have contemplated, at the time of making the contract, would result from a breach of the contract. In Lord Reid's understanding of the test, if at the time of the making of the contract the particular loss was reasonably foreseeable by the parties as not unlikely to result from the breach, that particular loss was not too remote.[24] For Lord Pearce, Lord Morris and Lord Upjohn, satisfaction of the test of remoteness depended upon whether the parties would have reasonably appreciated that there was a "serious possibility" or "a real danger" that the particular loss would result from a breach.

[87] Traditionally, the **Hadley v Baxendale** test has been treated as consisting of two limbs, the first being satisfied if the type of loss arose naturally from the breach of contract itself, while the second is satisfied if, having regard to the knowledge of the parties at the time the contract was concluded, the type of loss may reasonably be supposed to have been in the parties' contemplation as the probable result of the breach. However, the modern application of the rule is to

[23] [1969] 1 AC 350.
[24] Supra note 22 at para. 388.

treat it as a single principle given that even under the first limb some degree of knowledge concerning "the usual course of things" or as to the nature of their business relationship is attributed to the parties at the time the contract was made.[25] The consolidated principle, as it were, is that a type or kind of loss is not too remote if at the time of the contract it was reasonably foreseeable by the parties as not unlikely to result from the breach in question or there was a "serious possibility" or "real danger" that the particular loss would result from the breach.[26]

[88] By the Design Build Agreement, the Government and the respondent agreed that the respondent would design, build and install a treatment plant of a specific description and capacity at a specific location. The respondent would have discharged its obligation once the Government had issued the Taking Over Certificate transferring ownership of the treatment plant to itself and the respondent had issued the commencement notice signalling the commence of the management, operation and maintenance phase of the treatment plant. The Design Build Agreement was silent on whether the Government would operate and manage the plant itself once it had assumed ownership, or would contract someone else to do so.

[89] However, simultaneous with the conclusion of the Design Build Agreement, the parties executed the Management Agreement under which the respondent was entitled to earn revenue from the management and operation of a treatment plant identically described and located as the one it was contracting to build. It must be taken as given that the parties would have contemplated at the time the Design Build Agreement was concluded that if a treatment plant was never built, the respondent would be deprived of the opportunity to reap the profits expected to be derived from the fulfilment of its obligations under the Management Agreement. But that is a different scenario from the one which the arbitrators were called upon

[25] See dictum of Lord Walker in Transfield Shipping Inc. v Mercator Shipping Inc. [2009] 1 AC 61 at para 67.
[26] See John Grimes Partnership Limited v Gubbins Partnership Limited [2013] EWCA Civ 37 at para 17; Chitty on Contracts, 32nd ed., para 26-111 et seq.

to consider. The question which was remitted to them was whether the loss of profits under the Management Agreement was reasonably foreseeable by the Government and the respondent at the time the contract was concluded as not unlikely to result from an un-remedied breach of the Design Build Agreement, or whether they reasonably foresaw that there was a serious possibility or a real danger that the loss would result therefrom. They were not called upon to determine whether the loss of profits under the Management Agreement was reasonably foreseeable by the Government and the respondent at the time the contract was concluded as not unlikely to result from a failure to provide the plant to the respondent to manage.

[90] It is clear to me that it was not unlikely that the respondent would respond to an un-remedied breach by terminating the agreement and the parties must be taken reasonably to have had that response in contemplation when the contract was made. Whether the parties would reasonably foresee in the not unlikely event that the respondent terminated the agreement in response to an un-remedied breach and that it was also not unlikely that the respondent would lose the opportunity to earn revenue under the agreement, depends upon some assessment of the likelihood that the termination of the Design Build Agreement would result in the treatment plant not being built at all, or not built to the required specifications to trigger the commencement of the Management Agreement or, if built and to the required specifications, not provided by the Government to the respondent to operate and manage under the Management Agreement. Given that these questions are notionally to be asked at the time the Design Build Agreement was concluded, the actual terms of the Design Build and the Management Agreements, which the parties must be taken to have been aware of, would have to be taken into account.

[91] At the time the agreements were concluded, the parties would have appreciated that the Design Build Agreement did not contain any clause which gave an exclusive right to the respondent to build the treatment plant. Therefore, upon

breach and termination of the Design Build Agreement, the Government would have been free to contract someone else to build the plant. The parties would have appreciated this. Likewise, the parties would have understood that there was no term in the Management Agreement which required that the treatment plant, which was to be provided by the Government for the respondent to manage, had to be built in accordance with the Design Build Agreement. The parties would accordingly have had in mind that, the termination of the Design Build Agreement following upon an un-remedied breach by the Government would not inevitably result in the non-commencement of the Management Agreement and the consequential loss of profits thereunder. That eventuality, they would have understood, would only have occurred if the Government then decided not to build the plant at all, or not to build one with the requisite capacity, or not to provide the plant once built to specification to the respondent to manage and operate.

[92] Given that there is no other information to be attributed to the parties, there is no basis upon which they could reasonably foresee a breach of the Design Build Agreement would ordinarily or even normally result in the non-commencement of the Management Agreement. It accordingly cannot be said that it would have been in their reasonable contemplation that loss of profits was not unlikely to result from a breach of the Design Build Agreement. That may have been the result of the breach in this case as things transpired, but the assessment of reasonable foreseeability is to be made at the date the agreement was concluded and is not to be determined in hindsight with the benefit of the actual conduct of the parties and the actual consequences of the termination of the Design Build Agreement.

[93] I pause here to note that the arbitrators stated categorically that the parties must have been aware that the Management Agreement "could only commence and be performed if the Design Build Agreement was performed". Given the context in which this statement was made, I rather think they intended merely to emphasise that the Management Agreement could not commence unless a plant was built and provided. If on the other hand they meant that on a proper construction of the

agreement a breach of the Design Build Agreement which resulted in its lawful termination automatically meant that the Management Agreement could not commence, they were plainly wrong in law for the reasons already given.

[94] The respondent urged upon us the decision of the English Court of Appeal in the **Victoria Laundry** case as pointing this way to a favourable result, and the Leon J agreed. Victoria Laundry had contracted with Newman to purchase a boiler which Newman was to deliver on 5th June. Delivery was delayed until 8th November resulting in the loss of business profits. Newman was aware of the nature of Victoria Laundry's business and that Victoria Laundry intended to put the boiler to use in its business in the shortest possible space of time. The court held that Victoria Laundry was entitled to recover the profits it could have earned during the period of delay. Reasonable persons in the shoes of Newman, the court held, must be taken to foresee that a laundry which ordered a boiler which it intended to put into use immediately, would be likely to suffer loss of business by the delay in delivering the boiler. "No commercial concern," Asquith LJ said at page 541:

> "commonly purchases for the purposes of its business a very large and expensive structure like this – a boiler 19 feet high and costing over 2,000 L. – with any other motive, and no supplier, let alone an engineering company, which has promised delivery of such an article by a particular date, with knowledge that it was to be put into use immediately on delivery, can reasonably contend that it could not foresee that loss of business … would be liable to result to the purchaser from a long delay in the delivery thereof."

In other words, loss of business arose naturally, that is to say, according to the usual course of things, from the delay in delivery of the boiler.

[95] In my judgment, the **Victoria Laundry** cause is distinguishable but not exactly for the reasons given by the arbitrators. In **Victoria Laundry**, the defendant's contractual obligation was to deliver a profit making item to the plaintiff for immediate use in its business. The equivalent obligation on the part of the Government of the British Virgin Islands was to provide a treatment plant for the

respondent to manage. But that obligation arose under the Management Agreement, albeit as an implied term, not under the Design Build Agreement. Put differently, what fell for consideration in the **Victoria Laundry** case was the remoteness of the loss of profits resulting from the breach of an obligation to deliver an item on which the making of profit depended. There is no comparable obligation imposed on the Government under the Design Build Agreement. Rather, it was the respondent who was obliged thereunder to build, install and deliver the treatment plant to the Government. The obligation on the Government to deliver the treatment plant to the respondent for use in its business of managing and operating a plant of that sort arose under the Management Agreement and breach of that obligation would entitle the respondent to claim damages for profits lost as a result.

[96] Contrary to Mr. Strong's submissions, the natural and usual consequence of preventing the respondent from building the treatment plant was not that the respondent would lose the profits it would make from operating the facility. That could only have been the natural and usual consequence if either the Design Build Agreement gave the respondent the exclusive right to build the treatment plant, such that if it was prevented from doing so no plant could have been built at all, or if the Management Agreement provided that the plant which was to be provided for the respondent to operate was one built by the respondent itself. But there was no such term in either agreement.

[97] The false assumption that the failure to provide a prepared site would inevitably lead to the failure to provide a treatment plant at all so that the Management Agreement could commence, also infected the learned judge's findings on the question of remoteness. As appears from the extracts of his judgment quoted above, he assumed that a breach of the Design Build Agreement would automatically deprive the respondent of a treatment plant to manage and operate. As I have sought to demonstrate, there was no contractual reason why that was so.

[98] Because I have come to the conclusion that the loss of profits was too remote, it is strictly not necessary to rule on the appellant's point that the arbitrator's findings on remoteness was an error of fact, if an error at all, not reviewable by the High Court. As such, I can deal with the point briefly. It is apparent from the extract of the award quoted above that the arbitrators proceeded on the basis that the respondent had no right of its own to operate the plant and to make a profit under the Management Agreement until the Management Agreement commenced with the provision of a treatment plant to manage. But in so finding, the arbitrators failed to take into account the implied obligation imposed on the Government under the Management Agreement to provide a plant which the respondent could manage. The reasons it gave for holding that the loss of profits was too remote accordingly revealed as an error of law on the face of the award which entitled the High Court to make a determination on remoteness of its own.

[99] I can also deal with the appellant's reliance on clause 14 briefly. Clause 14 exempts the Government from responsibility to the respondent for any consequential or incidental damages arising out of or related to any event or occurrence giving rise to an indemnification obligation of the Government under the agreement. An indemnification obligation under clause 14 is defined as one arising out of or resulting from acts or omissions of the Government "in connection with any bodily injury or property damage as a result of or in connection with the Site, the Government's performance of its obligations under this agreement, or the Government's operations at the Site". The respondent's claim in this case was not for bodily injury or property damage.

Breach of the Term Not Pleaded

[100] It seems clear from the terms of the award, from the submissions made by the parties before us and the answers to our questions that the treatment plant was in

fact never built and as a consequence the Management Agreement never commenced. Early in their award, the arbitrators noted that "[b]ecause no facility was built the MOMA did not commence". The respondent was accordingly deprived of the opportunity to earn profits under that agreement. I certainly understand Leon J's anxiety to ensure that there was a remedy available to the respondent in the circumstances. It is with some regret that I find myself unable to agree with him that that remedy resides in the implication of a term in the Management Agreement that the Government would perform its obligations under the Design Build Agreement or in a claim for damages for breach of the Design Build Agreement. As I have indicated, the respondent's remedy, if any, is for breach of the implied term in the Management Agreement that the Government would provide a treatment plant for the respondent to manage. Unfortunately, that is not the implied term the respondent advanced before the arbitrators. The question is whether we can now set aside the award and remit the case on the basis of a breach of that term, as Mr. Strong has submitted.

[101] In its notice to the Government issued pursuant to the dispute resolution clauses in the agreements, requiring the Government to appoint its arbitrator, the respondent declared its intention to refer to arbitration:

> "all disputes between the Parties which concern, relate to, arise from or are in any way connected with (a) the Government's express and implied obligations under the Management, Operation and Maintenance Agreement, (b) the Government's failure to perform the said obligations and/or (c) the matters referred to in this Notice".

It then described its case against the Government as including, but not being limited to, the breach of "an express and/or implied term of the Management, Operations and Maintenance Agreement that the Government should, in accordance with the Design Build Agreement, provide a prepared site for the Water Treatment facility". As already noted, in its points of claim submitted to the arbitrator, the respondent contended for an implied term that the Government would perform its obligations under clause 6.1 of the Design Build Agreement. It

did not plead that there was to be implied in the agreement a term that the Government would not behave in such a way as to prevent the commencement of the agreement, nor did it plead more specifically that the Government was impliedly obliged to provide a treatment plant which the respondent could manage. Moreover, the only conduct on the part of the Government which the respondent relied on as constituting the breach of the implied term was the failure to provide the prepared site. It cannot be gainsaid that the arbitrators addressed their minds to the question posed to them and answered it in the negative.

[102] By section 18 of the **Arbitration Ordinance**, every arbitration agreement is deemed "to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively", unless a contrary intention is expressed in the agreement. There is no contrary intention expressed in the Management Agreement. However, section 25(2) of the Ordinance empowers the High Court to set aside an award "where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured".

[103] Section 24(1) also empowers the High Court to "remit the matters referred, or any of them to the reconsideration of the arbitrator or umpire," without specifying the grounds upon which such remission may be made. Despite the seemingly narrow basis upon which the High Court's power to review an award is expressed, the High Court has long exercised a common law jurisdiction independent of the **Arbitration Ordinance** to set aside the award of an arbitrator for error of law appearing on the face of the award. But, in order to exercise this jurisdiction there must actually be found in the award, which would include a note stating the reasons for the award, "some legal proposition which is the basis of the award and which you can say is erroneous".[27] Even so, a distinction is made between an award in relation to a specific question of law referred to arbitration, with which the

[27]Champsey Bhara & Co. v Jivraj Balloo Spinning and Weaving Co. [1923] AC 480 at p. 487.

High Court will not interfere even if it was thought that the arbitrator gave an incorrect answer, and an award in which the arbitrator answers a question of law which arises for determination in the course of a general reference. The law is correctly stated in the following extract from **Russell on Arbitration**:[28]

"The rule that an error of law, if it appears on the face of the award, is a ground for remitting it or setting it aside, is an exception to the general rule that an award is final as to both fact and law, and will not be applied where the parties have specifically referred a question of law to arbitration. In such cases an award will stand, notwithstanding that it is erroneous unless "it appears by the award that the arbitrator has proceeded illegally, for instance, that he has decided on evidence which in law was not admissible, or on principles of construction which the law does not countenance, then there is error in law, which may be ground for setting aside the award; but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose...

It is necessary here to distinguish between the cases in which a question of law is specifically referred, and cases in which a question of law merely arises (though necessarily so) in the course of a reference. The question is whether what is referred to the arbitrator is "the general question, whether involving fact or law: or "only some specific question of law in express terms as the separate question submitted." Or in other words whether there is "a reference in which the questions of construction arise as being material in the decision of the matter which has been referred to arbitration" or "a reference in which a specific question of law was referred to the decision of the arbitrator as the sole tribunal." Only in the latter case will an apparent error in law be left unquestioned."

[104] Since the court's common law power is limited in any event to errors on the face of the award, it follows that where an arbitrator makes an error of law but it does not appear on the face of the award, the award will not be remitted or set aside. According to **Russell on Arbitration**:[29]

> "The general rule is that, as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon law or the facts."

[105] As the last passage suggests, the limited circumstances under which the court will intervene where an arbitrator has made an error of law are thought to be derived from the intention of the parties expressed in the arbitration agreement or

[28] Rusell on Arbitration (19th ed.), pp 440-441.
[29] Russell on Arbitration (19th ed.), pp 447-448.

presumed to be so expressed by operation of section 18 of the **Arbitration Ordinance**, to abide by any award made by their arbitrator of choice. It is a common law rule which has survived even though on the application of it, it is known or suspected that justice would not in fact be done. MacKinnon LJ expressed these thoughts in the following passage from his judgment in **Racecourse Betting Control Board v Secretary of State for Air**:[30]

> "The proposition that an award of an arbitrator can be set aside for error of law appearing on the face of it is, I think, a rule peculiar to arbitration... Prima facie, if parties have contracted to refer a dispute to an arbitrator, they are bound by their contract, and the award of the arbitrator is final and binding. It is significant that, if by their contract they have agreed to leave to him the decision of a question of law, they are bound by his decision, and any attempt to set it aside even on the ground of manifest error of law on his part will fail... If, however, their contract does not expressly or by necessary inference refer questions of law as well as of fact to the arbitrator, then it may well be that there is an implied term in their contract that he shall decide the dispute by the proper application of the law involved. If it is apparent on the face of his award that he has failed to do so, either party may contend that by the contract he is not bound to submit to this award since he has not so agreed. This, I believe, is probably the origin of the rule about setting aside an award for error of law on the face of it, though I confess I have been unable to discover as a matter of history the origin of it. It is, however, the only exception to the rule that an award by an arbitrator is final and binding for all purposes, and WILLIAMS, J., in his exposition of the matter in Hodgkinson v. Ferrie ... not only says it is the only exception, but adds that it is possibly an unfortunate one, though too well settled to be doubted."

[106] The corollary to the rule that an award on a specific question of law referred to arbitration is unimpeachable, must be that the failure to rule upon a question of law not referred in likewise unimpeachable. To put it differently, absent an allegation of misconduct on the part of an arbitrator in failing to answer a question specifically referred for resolution, the absence from an award of a determination on a question of law not referred cannot by definition amount to an error on the face of the award. In **Rees v Waters**,[31] Pollock CB said:

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[30] [1944] 1 All ER 60, 64 B-F.
[31](1847) 16 M&W 263, 269-270.

> "I am of opinion that a reference of "all matters in difference" does not mean a reference of all possible matters, but of all matters which are brought before the arbitrator. And if the parties omit to solicit his attention to a matter not being one of the questions in the proceedings themselves, no objection can be made to the award for not adjudicating on it."

Or, as it is put in **Russell on Arbitration**, at page 337:

> "No objection can be made to the award if the arbitrator determines all questions brought before his notice, though there are other matters within the scope of the submission to which his attention has not been drawn. In order to invalidate the award for not deciding a particular question, the point must have been specifically raised."[32]

[107] The arbitrators were asked to determine whether the Government's failure to provide the respondent with a prepared site so that it could build the treatment plant breached an implied term of the Management Agreement that the Government would comply with clause 6 of the Design Build Agreement. They answered that question correctly. They were not asked to determine whether the Government's failure to provide the respondent with a treatment plant breached an implied term of the Management Agreement that the Government would not prevent the commencement of that agreement by failing to provide the plant. The failure to make that determination does not invalidate the award, however much it might appear on the facts which they found that the answer is obvious.

[108] Mr. Strong attempted to persuade us that the award could be set aside even if the implied term the respondent now relies on was not the one pursued before the arbitrators. He says that the implication of a term in a contract is a question of law and as long as all potentially relevant factual findings have been made, nothing prevents it and it is not unfair for a court to entertain a new point of law on appeal. He relied on the following passage from the judgment of Hamblen J in **Cottonex Anstalt v Patriot Spinning Mills Limited**:[33]

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[32] See also Halsbury's Laws of England, 3rd ed., Vol. 2, para 97*;* Hawksworth v Brammall (1980) 5 My & Cr. 281.

[33] [2014] 1 Lloyd's L.R. 615 at para. 35.

> "In CTI v Transclear [2007] EWHC 2340 (Comm), Field J stated at [13] that where a respondent seeks to uphold an award on grounds not expressed in the award, those grounds must be based on a point or points of law. As Eder J observed in The "Mahakam" at [18], there may in addition be cases where "a respondent wishes to say that a particular fact finding contained in an award is of itself sufficient to persuade the Court to uphold the award regardless of the point of law sought to be raised on appeal by the applicant". What, however, is generally impermissible is to raise a new point of law which requires consideration of factual materials and in relation to which material findings might have been sought and made had the point been raised at the arbitration. Both the appellant and the respondent are confined to the findings made in the award. The respondent can argue new points of law based on those findings. If, however, the failure to argue the point which the respondent wishes to raise has the result that not all potentially relevant findings have been made then it should not be open to it."

[109] I think Ms. Jackman-Lumy was right to point out that **Cottenex** was concerned with **supporting** an award on a point of law either not considered by the arbitrator or decided by the arbitrator against the respondent, whereas in this case we are concerned with **setting aside** an award on a point of law not canvassed before the arbitrators and therefore not considered by them. In this context, it is significant that by section 69 of the English **Arbitration Act**, under which **Cottenex** was decided, an award may be set aside on a question of law arising out of the award, provided that the question is one which the arbitrator was asked to determine.[34] Under the English Act, therefore, it is not permissible to challenge an award on a question of law not canvassed in the arbitration and accordingly **Cottonex** cannot be taken as deciding that an award may be set aside on such a question of law, even if the relevant factual findings have been made.

[110] It is with some regret therefore that I must decline Mr. Strong's invitation to uphold the learned trial judge's judgment on the basis of the implied term that the Government would provide the respondent with a treatment plant.

[34] See English Arbitration Act, section 69(3)(b).

Conclusion

[111] In all of the above premises, I would allow the appeal, restore the arbitrators' award, and order that the respondent pay the appellant's costs of the appeal and in the court below, to be assessed in default of agreement.

Apologia

[112] This appeal was heard on 2nd February 2017 and judgment is being delivered more than one year later. The Chief Registrar has already apologised to the parties for the late delivery of the judgment and I repeat that apology. The respondent has quite properly asked for an explanation for the delay. The reason for the delay is attributable in part to the complexity and difficulty of the issues we have been called upon to resolve and other circumstances beyond my control.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar