Trinity Term
[2020] UKPC 18
Privy Council Appeal No 0107 of 2018

JUDGMENT

Attorney General of the Virgin Islands (Respondent) *v* Global Water Associates Ltd (Appellant) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Hodge
Lord Wilson
Lord Lloyd-Jones
Lady Arden
Lord Sales

JUDGMENT GIVEN ON

13 July 2020

Heard on 12 March 2020

Appellant	*Respondent*
Benjamin Strong QC	Giselle Jackman-Lumy, Principal Crown Counsel
	Maya Barry, Crown Counsel
(Instructed by Sinclair Gibson LLP)	(Instructed by Charles Russell Speechlys LLP (London))

LORD HODGE:

1. This appeal raises a question of remoteness of damage in contract law and a question of whether there was an error of law in an arbitral award.

2. The Government of the British Virgin Islands ("the Government") entered into two contracts with Global Water Associates Ltd ("GWA") on 19 September 2006 relating to a proposed water reclamation treatment plant at Paraquita Bay in Tortola ("the site"). The first contract is a Design Build Agreement ("the DBA") under which GWA agreed to design and build a 250,000 US gallons per day water reclamation treatment plant ("the Plant") at the site. The second contract is a Management, Operation and Maintenance Agreement ("the MOMA") by which the Government engaged GWA to manage, operate and maintain the Plant at the site. Clause 3.1 of the MOMA provides that the agreement is for a period of 12 years from the commencement date, which, as is discussed below, is the date when the Plant is first capable of achieving the level of water processing for which the Government contracted in the DBA.

3. As the Board explains below, the dispute between the parties arises out of a breach of contract by the Government, which failed to provide a prepared project site at the site to enable the installation of the Plant as it was required to do under the DBA. This had the consequence that the Plant was not built. As a result of this breach of the DBA, GWA was not able to earn the profits which it would have made from managing, operating and maintaining the Plant during the 12-year term of the MOMA. GWA validly terminated the DBA after giving the Government contractual notice to remedy its default, to which the Government failed to respond. GWA then referred to arbitration its claim for damages for breach of the DBA. It also claimed a breach of an implied term of the MOMA to the effect that the Government would perform its obligation under the DBA to provide a prepared site.

The legal proceedings

4. On 18 August 2014 the arbitrators delivered their award in which they rejected GWA's claim. The arbitrators found (i) that the Government had breached clause 6.1 of the DBA in failing to provide a prepared site but that the damages claimed for that breach, namely the profits which would have been earned under the MOMA, were too remote to be recoverable, and (ii) that there was no implied term of the MOMA that the Government would deliver a prepared site to GWA on which to build the Plant.

5. GWA applied to the High Court on the ground that there were errors of law on the face of the award, seeking an order to remit the award to the arbitrators or to set it aside, in terms of sections 24 and 25 respectively of the Arbitration Ordinance No 7 of 1976 ("the Ordinance"). GWA contended that an award of damages for breach of the DBA was not confined to sums payable for the performance of works under the DBA, as the arbitrators had found, but extended to the profits which it would have earned under the MOMA. Alternatively, GWA contended that the Government had breached an implied term of the MOMA that it would perform its obligation under the DBA to deliver a prepared site to GWA on which to build the Plant. In a judgment dated 1 February 2016 Leon J upheld both of GWA's contentions. In relation to the claim of an implied term in the MOMA, Leon J held that the Government was contractually committed to make available to GWA a plant with the requisite capacity. He remitted the award to the arbitrators for the assessment of damages.

6. The Government appealed to the Court of Appeal. In a judgment delivered on 13 February 2018, the Court of Appeal (Baptiste and Thom JJA and Mendes JA (Ag)) allowed the Government's appeal.

7. The Court rejected the claim under the DBA, holding that the damages claimed were too remote in law. The Court held that if GWA terminated the DBA because of the Government's breach, the Government could have had a treatment plant built by a third party which it could then have offered to GWA to operate. As a result, the parties could not reasonably have foreseen that the breach of the DBA would have the result that the operation of the plant under the MOMA would not commence.

8. The Court also rejected GWA's claim of the implied term under the MOMA. It held that there was no implied obligation under the MOMA to provide GWA with a prepared site in accordance with its obligations under the DBA. The Court of Appeal reached this conclusion in part because it considered that the Government could have had a third party build the Plant so that it could be made available to GWA to operate under the MOMA. It was also because the Court held that the term to be implied in the MOMA was that the Government would not do anything to prevent the occurrence of the commencement date of the MOMA and that that term obliged the Government to provide GWA with a plant of the requisite capacity to manage. The Court considered that the Government may have been in breach of that implied term but that, as GWA had not asked the arbitrators to determine whether the Government's failure to provide a treatment plant was a breach of that implied term of the MOMA, a failure by the arbitrators so to find did not invalidate the award.

9. GWA now appeals to the Board with final leave of the Court of Appeal.

The parties and the contractual provisions

10. GWA was the exclusive manufacturer's representative for the British Virgin Islands ("BVI") of the United States company, Purestream ES LLC ("Purestream"). Purestream was to manufacture and provide the plant to GWA for performance of the DBA.

11. The DBA and the MOMA were entered into on the same date and were signed on behalf of the same parties by the same persons, namely Dr Orlando Smith, the Chief Minister on behalf of the Government and Mr Charles Peterson on behalf of GWA.

12. The DBA provided for the design, building and installation of the Plant at the site. In clause 2 it incorporated into the agreement what it described as "Design Build Documents" which were (i) GWA's proposal for the Plant which the Government's representative had approved and (ii) two letters from Purestream which confirmed GWA's status as its representative and that it would work with GWA to provide the Plant. Clause 4 defines "commencement date" in an identical way to the definition of the term in the MOMA. It states:

> "'Commencement Date' means 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 Company and shall become an integral part of this Agreement."

Although, strangely, the term, "Commencement Date" was not used in the DBA as signed, it is clear that it must have been envisaged that the "commencement notice" which GWA was to issue after the Government took ownership of the Plant following substantial completion and which is otherwise undefined would be consistent with that definition.

13. Clause 9, which deals with substantial completion of the Plant, states:

> "When the Company has 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 ('Substantial Completion') the Government shall issue a Taking over Certificate transferring ownership of the Treatment Plant to the Government. Thereafter, the Company [GWA] shall issue a 'Commencement Notice' no later than ten days after receipt of the Taking Over Certificate, <u>indicating the commencement of the</u>

> management, operation and maintenance phase of the Treatment Plant." (Emphasis added)

14. The clause of the DBA which the Government breached (clause 6) stated that the Government would provide GWA with:

> "(1) A prepared project site suitable for installation of Water Reclamation Facility to include paved parking, fencing, lighting, landscaping and excavation.
>
> (2) A boundary and topographic survey of the property. …"

The clause also obliged the Government to provide a paved access drive / roadway to the project site and to facilitate the provision of a temporary construction telephone and electrical supply within 60 days of the notice to proceed.

15. The MOMA in clause 2 deemed the same Design Build Documents as were incorporated into the DBA to be incorporated into and construed as part of the MOMA, using materially identical wording in describing the documents as the parties used in clause 2 of the DBA. The MOMA thus included the letters from Purestream to which the Board has referred in para 12 above. Within the definitions in clause 4 "commencement date" was, as the Board has said, defined in the same way as in the DBA and "Treatment Process" was stated to mean "the process being proposed for use for the Design Build Project". The treatment plant to be operated under the MOMA was described in clause 5.2(ii) as being "capable of accomplishing the Treatment Process".

16. In clause 7.2 of the MOMA the Government granted GWA full and exclusive use of the site. It represented itself as owner of the Plant and granted GWA, its subcontractors and agents

> "for the purposes set forth in this Agreement, the right to use, occupy and have access to the Treatment Plant at all times during the performance of this Agreement, all without cost or charge to the Company, its subcontractors or agents." (clause 8.1)

No rights of ownership of the Plant were given to GWA (clause 8.1).

17. Both the DBA (clause 16) and the MOMA (clause 14) contained dispute resolution clauses referring their disputes to arbitration under the Ordinance.

Discussion

18. The Board addresses first the question of remoteness of damage which arises on GWA's claim based on the Government's admitted breach of the DBA.

19. The arbitrators, while accepting that "[p]erformance of the MOMA was manifestly conditional upon completion of the DBA" and that there was a "vital interconnection" between the two contracts (para 17), held that the claim for loss of profits on the operation of the MOMA was too remote. The arbitrators referred to the classic cases of *Hadley v Baxendale* (1854) 9 Exch 341 and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 for the general principles on remoteness of damage in contract and also to a judgment of the Singapore Court of Appeal in *Burgundy Global Exploration Corpn v Transocean Offshore International Ventures Ltd* [2014] SGCA 24, which the Board discusses below. They purported to apply the reasoning in the *Burgundy* case to the facts of this case, emphasising that the parties had chosen to enter into two separate contracts. They held that the natural and direct consequence of a breach by the Government of the DBA was that GWA would lose such monies (if any) as it was entitled to receive under the DBA. The arbitrators sought to distinguish the *Victoria Laundry* case on the basis that the claimant in that case was to be the owner of the boiler which it had contracted to purchase and which it would use to earn profits. By contrast, the Government were to own the Plant and GWA had no right, except under the MOMA, to operate the Plant. The arbitrators held (paras 42-44):

> "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 [GWA] 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.
>
> It is, therefore, our conclusion that the loss of profits resulting from the failure to commence the MOMA, although the indirect consequence of the breach of the DBA, may not be recovered by way of an award of damages for breach of the DBA. They are too remote in law."

20. In the Board's judgment, this reasoning demonstrates an error of law on the face of the award. To explain that conclusion it is necessary to look more closely at the principles of remoteness of damage in contract which the common law has established.

21. In *Hadley v Baxendale*, as is well known, the owners of a flour mill in Gloucestershire sent a broken iron shaft of the mill to engineers in Greenwich for use as a template in the manufacture of a new shaft. The defendants, trading as Pickford & Co, who transported the shaft, knew, at the time when the contract of carriage was made, that they were transporting a broken shaft and that their customers were the owners of a mill. The delivery of the shaft to the engineers was delayed and the mill owners were not able to operate their mill until they received a new shaft. They claimed as damages for breach of contract the losses which they suffered as a result of the stoppage of their mill during the period of delay. Alderson B gave the judgment of the Court holding that the claim for loss of profits was too remote because the circumstances that the shaft was being transported to be a model for the manufacture of a new shaft and that the mill could not operate until the new shaft was delivered had not been communicated to the carriers. Famously, he stated the principle in these terms (p 354):

> "[T]he 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 <u>either</u> arising naturally, ie, according to the usual course of things, from such breach of contract itself, <u>or</u> 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." (Emphasis added)

The Board has emphasised the words "either" and "or" as the markers of what has long become known as the first and second limbs of the rule in *Hadley v Baxendale*. In relation to the second limb, which is relevant in this appeal, Alderson B continued (pp 354-355):

> "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."

Alderson B contrasted that with the operation of the first limb, in the absence of any communication that the shaft to be transported was a model for a new one and that the mill could not operate until the new shaft was delivered, when he went on to say (p 356):

> "But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstance were here never communicated by the plaintiffs to the defendants." (Emphasis added)

In the Board's view, the underlined words gave further specification of the idea in the first limb of loss arising according to the usual course of things.

22. In an age when cases of this nature were determined by juries who did not have to give reasons for their decisions, Alderson B's formulations gave judges a clear basis for their legal directions which the juries were then to apply to the facts. But when such cases came to be determined by judges who have to give reasoned judgments, the formulations were subjected to closer scrutiny and some expansion.

23. In *Victoria Laundry* (above) launderers and dyers who wished to extend their business by taking on profitable dyeing contracts purchased a large second-hand boiler from the defendants, who were engineers, with an agreed date of delivery. At the time of the contract, the defendants knew that the purchasers were launderers and dyers and that they wanted the boiler for use in their business. In the negotiations for the purchase, the purchasers had explained in a letter that they intended to put the boiler into use "in the shortest possible space of time". When third parties, under a contract with the defendants, were dismantling the boiler for transportation, it fell on its side and was damaged. The purchasers refused to take delivery of the damaged boiler and took delivery of it only after the defendants had arranged for its repair, which involved a delay of five months. The purchasers claimed damages for breach of contract, including for loss of profits during the period of delay. The claim included the loss of profits on particularly profitable dyeing contracts which the purchasers wished to take on, the existence and details of which had not been communicated to the sellers. The Court of Appeal upheld the purchasers' claim to the extent that it held that they were not precluded from recovering "some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected" (p 543).

24. In delivering the judgment of the Court of Appeal Asquith LJ set out six principles or propositions which the Court derived from the case law but the House of

Lords later reviewed them in the speeches in *Koufos v C Czarnikow Ltd ("The Heron II")* [1969] 1 AC 350.

25. In that case, Czarnikow chartered the Heron II to carry a cargo of sugar to Basrah, or at their option to Jeddah. In breach of contract the ship made deviations which caused a delay of nine days. The shipowner was aware that there was a sugar market at Basrah but did not know that Czarnikow planned to sell the sugar promptly on its arrival. Czarnikow claimed damages for the breach of contract measured by the difference between the price of the sugar at its destination when it should have been delivered and the lower price when the sugar was delivered. The House of Lords dismissed the shipowner's appeal, holding that the charterers were entitled to recover damages on that basis.

26. The Board is not concerned in this appeal with the recoverability of damages caused by unusual volatility in the market or questions of market understanding, which the House of Lords addressed in *Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas")* [2008] UKHL 48; [2009] AC 61, and in which Lord Hoffmann and Lord Hope of Craighead sought to bring into play the concept of assumption of responsibility as a further limitation on contractual damages. It suffices in this appeal to consider what the House of Lords in *The Heron II* stated more generally about the principles governing remoteness of damage.

27. In *The Heron II* the House of Lords considered Asquith LJ's six principles in *Victoria Laundry* and in general endorsed them. The principal focus of the debate in the House of Lords was on his sixth principle which was concerned with the likelihood of the result. Asquith LJ stated in his sixth principle (p 540) that it was not necessary that the defendant could as a reasonable person "foresee that a breach must necessarily result in that loss". It was sufficient that he could foresee that it was likely so to result and he favoured the expression that the loss was "liable" to result. In reaching this view Asquith LJ referred to the language of Lord Du Parcq in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker A/B* [1949] AC 196 and borrowed from him expressions such as "serious possibility" and a "real danger". He referred also to the colloquialism "on the cards". Lord Reid (p 383) preferred the words "not unlikely", which denoted "a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable". Lord Morris of Borth-y-Gest re-affirmed the role of *Hadley v Baxendale* as enshrining the guiding rules on remoteness of damage in contract (p 393). He hoped that undue emphasis would not be placed upon any one word or phrase in applying that guidance and stated that under the first limb of the rule in *Hadley v Baxendale* it is "very largely a question of fact as to whether in any particular case a loss can 'fairly and reasonably' be considered as arising in the normal course of things" (pp 396-397). Lord Hodson stated that he could not improve on the phrase "liable to result" and thought that the repeated use of the expression "in the great multitude of cases" in *Hadley v Baxendale* gave guidance as to meaning (pp 410-411). Lord Pearce emphasised the voluntary nature of the contractual obligations which parties undertook

and saw the role of the court as being to determine what the parties reasonably contemplated as the scope of their liability if it was not expressly stated or implied into their contract. He was content with each of the expressions used in *Victoria Laundry* except the phrase “on the cards” (pp 414-415). Lord Upjohn (pp 424-425) agreed that *Victoria Laundry* had not altered the law set out in *Hadley v Baxendale* and was content to adopt the test of a “real danger” or a “serious possibility”.

28. In the common law tradition the phrases and expressions used by judges do not have and should not be accorded the status of the words of a statute. In the Board’s view it is more important to identify what it is that judges have been trying to encapsulate in their choice of language. And that is whether as a question of fact the parties to a contract, or at least the defendant, reasonably contemplated, if they applied their minds to the possibility of breach when formulating the terms of the contract, that breach might cause a particular type of loss. In the context of contractual liability, the court is not concerned solely with the percentage chance of such an event occurring, although that is not irrelevant. Thus Lord Reid in *The Heron II* considered that the 51:1 chance of drawing the nine of diamonds from the top of a well-shuffled pack of cards was too low to meet his “not unlikely” test (p 390) and Lord Upjohn rejected as too unlikely the chance of winning a prize on a premium bond on any given drawing (p 425), both rejecting the expression “on the cards” for that reason. Lord Pearce (pp 416-417) in his discussion of the first limb of the rule in *Hadley v Baxendale* gave the example of a contractor employed to repair the ceiling in a courtroom who carried out the job without due care with the result that the roof fell on the heads of people in the room. Taking account of nights, weekends and court vacations, he estimated that the chance of the roof falling when the court was occupied was almost 10:1 but it was a natural and obvious result of the breach of contract. That is clearly correct. Lord Walker of Gestingthorpe in *The Achilleas* (para 78) stated that their Lordships in *Victoria Laundry* had well in mind that it was not simply a question of probability. He continued:

> “It is also a question of what the contracting parties must be taken to have had in mind, having regard to the nature and object of their business transaction. If a manufacturer of lightning conductors sells a defective conductor and the customer’s house burns down as a result, the manufacturer will not escape liability by proving that only one in a hundred of his customers’ buildings had actually been struck by lightning. …
>
> Arguably a vague expression (such as ‘real possibility’) is actually preferable, because it is more flexible, once it is understood that what is most important is the common expectation, objectively assessed, on the basis of which the parties are entering into their contract.”

29. More recently, Professor Andrew Burrows (now Lord Burrows) in "A Restatement of the English Law of Contract" (2016), in which he was assisted by an advisory board of academics, judges and practitioners, described the general rule on remoteness of damage in contract in these terms (p 20):

> "The general rule is that loss is too remote if that type of loss could not reasonably have been contemplated by the defendant as a serious possibility at the time the contract was made assuming that, at that time, the defendant had thought about the breach." (Emphasis added)

Drawing on *The Achilleas*, the text went on to state a further restriction on recoverability based on whether the defendant had assumed responsibility for the loss. But, as the Board has stated, the question of such a restriction does not arise on this appeal.

30. From this brief review of the main authorities, the position may be summarised as follows.

31. First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.

32. But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.

33. Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.

34. Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.

35. Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one.

36. Applying those principles to the facts of the case, it is clear that the losses resulting from an inability to earn profits under the MOMA were within the reasonable contemplation of the parties to the DBA when they made that contract. First, the contracts were entered into between the same parties on the same day and they both related to the same Plant on the same site, giving rise to special knowledge under the second limb of the rule in *Hadley v Baxendale*. Secondly, the Government when it entered into the DBA knew and intended that the performance of each party's obligations under the DBA would lead to the commencement of the MOMA as clause 9 of the DBA (para 13 above) envisaged the commencement of the "management, operation and maintenance phase" of the Plant. Thirdly, the Design Build Documents which were incorporated into the DBA were the same documents as were incorporated into the MOMA, identifying Purestream as the manufacturer of the Plant and GWA as its exclusive representative in the BVI (para 12 above). Fourthly, there is no express term in the DBA which limits the Government's liability in damages to GWA's loss of earnings under the DBA and no finding by the arbitrators that such a term was to be implied into the DBA.

37. The arbitrators in para 17 of the reasons for the award stated 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" and that performance of the MOMA "was manifestly conditional upon the completion of the DBA". In para 29 they stated that the parties when they made the DBA would have been aware of the profits which GWA would make from the MOMA. In para 42 they stated:

> "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."

38. The arbitrators, while recognising the vital interconnection between the DBA and the MOMA, relied on the *Burgundy* case (above) to hold that damages for loss of profit on the MOMA flowed only from the MOMA. This is untenable because, as Leon J found, the circumstances in *Burgundy* are clearly distinguishable. In that case Burgundy entered into a drilling contract with Transocean under which Transocean would provide a drilling rig and drilling services to Burgundy. The parties also entered into an escrow agreement which obliged Burgundy to place funds in an escrow account to provide security for payment of the sums which would be due to Transocean under the drilling contract. It was a condition precedent of the drilling contract that the parties would enter into the escrow agreement and the escrow agreement provided that a breach of its terms would entitle Transocean to terminate the drilling contract. Burgundy failed to make the initial deposit of funds and Transocean terminated the drilling contract. The Singapore Court of Appeal held (para 45) that the damage caused by Burgundy's breach of the escrow agreement was the loss of the security. Transocean's loss of profit from the drilling contract was the result of its decision not to proceed with that contract in the absence of the security which the separate escrow contract would have provided.

Because Transocean could have performed the drilling contract without the security it had to show that there was a breach of the drilling contract itself. By contrast, in this case the failure to perform the DBA prevented GWA from obtaining profit from its performance of the MOMA.

39. The arbitrators in this case made no finding as to why GWA and the Government created two separate contracts for the two phases of their arrangement. There may have been several reasons for splitting the arrangement into the two contracts, not least that the obligations under the DBA would be spent after the commencement notice on the expiry of the defects liability period and the payment of the 10% retention under clause 12. In any event the existence of two contracts cannot by itself support the view that the DBA contains an implicit contractual limitation on liability for breach of contract.

40. There is also no tenable basis for distinguishing the *Victoria Laundry* case on the basis that GWA would not have owned the Plant when operating it under the MOMA.

41. It follows that, in agreement with Leon J, the Board finds that there is an error of law on the face of the award in relation to GWA's claim for damages for breach of the DBA.

42. The Court of Appeal upheld the arbitrators' award but for different reasons from those of the arbitrators. In the leading judgment Mendes JA stated (para 89):

> "It must be taken as given that the parties would have contemplated at the time the Design and Build Agreement was concluded that if a treatment plant was never built, the respondent [GWA] would be deprived of the opportunity to reap the profits expected to be derived from the fulfilment of its obligations under the Management Agreement."

Nonetheless, the Court of Appeal held that the claim for loss of profits from the MOMA was too remote because the Government could have employed another contractor to build the Plant. The Board is unable to accept this reasoning. When one has regard to the incorporation of the same Design Build Documents into both the DBA and the MOMA (para 12 above) it is clear as a matter of law that the Government had contracted in the MOMA for GWA to manage, operate and maintain the Plant which it had designed and constructed, using Purestream as manufacturers. It is also clear from clause 9 of the DBA (para 13 above) when read alongside the definition of "Commencement Date" in both contracts that the parties envisaged the completion of the DBA to lead seamlessly into the operation of the MOMA. Contrary to the view of the Court of Appeal, the Board is satisfied that there was no error of law in the findings

of the arbitrators in para 17 of the award (para 37 above) that the MOMA could only commence if the DBA was performed.

43. The appeal therefore must succeed.

44. It is, therefore, not necessary for the Board to consider the alternative case that there was an implied term in the MOMA which would have entitled GWA to succeed. It is sufficient to say that GWA now argues for an implied term which is different from that which it had pleaded before the arbitrators: see paras 5 and 8 above. Accordingly, the arbitrators did not err in law in failing to uphold an argument which was not pleaded before them.

Conclusion

45. The Board will humbly advise Her Majesty that the appeal should be allowed.