

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHC (Com) 2014/115

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ORDINANCE,
CAP. 6**

BETWEEN:

GLOBAL WATER ASSOCIATES LIMITED

Claimant/Appellant

and

ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Defendant/Respondent

Appearances on 14 April 2015:

Benjamin Strong QC, Michael Pringle, Dan Mitchell and Charles Peterson
for the Appellant

Giselle Jackman Lumy and Maya Barry for the Respondent

Appearances on 7 May 2015:

Benjamin Strong QC (by telephone) and Charlotte Bunn for the Appellant
Giselle Jackman Lumy and Maya Barry for the Respondent

2015: April 14
May 7
2016: February 1

JUDGMENT

Appeal from arbitration award pursuant to Arbitration Ordinance (Cap. 6, 1976) of the Virgin Islands and CPR 60 – Appellant and Respondent entered into two contracts concurrently, one for Appellant to build a waste water treatment plant for the Respondent, and one for Appellant to operate the plant for Respondent commencing once it was built and operational.

Appellant commenced arbitrations under arbitration clauses in both contracts which proceeded together – Arbitral tribunal found that Respondent breached contract to build the plant by not delivering prepared site to Appellant – In assessing Appellant's damages, tribunal declined to include Appellant's operating contract losses – Losses were suffered because Appellant was not able to operate the treatment plant as contemplated.

Tribunal made fundamental and serious error of law on the face of the record by concluding that the operating agreement did not exist as a 'live' operative contract but was subject to a condition precedent - In turn this led tribunal to make other fundamental and serious errors of law on the face of the record by not awarding to Appellant its losses under the operating contract either as damages for breach of the contract to build the plant or as damages for breach of the operating contract – Operating contract was in effect and not subject to a condition precedent to its existence – Term implied into operating agreement – Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another [2015] UKSC 72 applied – Under Implied term in operating agreement, Respondent was obligated to make the treatment plant available to Appellant to operate for Respondent – Respondent's breach of contract to build led to its breach of the operating contract as well.

Award remitted to tribunal with directions to assess damages under both contracts having regard to Appellant's losses in relation to the operating contract.

- [1] **LEON J [Ag.]:** This is an appeal, pursuant to the Arbitration Ordinance (Cap. 6, 1976) of the Virgin Islands ("**Ordinance**") and CPR 60, by Global Water Associated Limited ("**Global Water**") from Final Award dated 18 August 2014 ("**Award**"), and in particular respecting certain damages claimed by but not

awarded to Global Water by an arbitral tribunal consisting of Denys Barrow SC and E. Anthony Ross QC ("**Tribunal**"). The Tribunal issued **Reasons for Award** that are annexed to the Award.

- [2] The background to the dispute giving rise to the arbitration is as follows.
- [3] Global Water and the Government of the Territory of the Virgin Islands (in these proceedings by its representative, the Defendant/Respondent¹) ("**BVI Government**") entered into two contracts concurrently on 19 September 2006, one for Global Water to design and build a waste water treatment plant ("**Treatment Plant**") for the BVI Government (Design Build Agreement ("**DBA**")), and one for Global Water to manage, operate and maintain the Treatment Plant for the BVI Government (Management Operation and Maintenance Agreement ("**MOMA**")) commencing on a date when the Treatment Plant would be capable of processing a specified daily volume of "Influent" (as defined) ("**Commencement Date**", as defined in the MOMA²). The Treatment Plant was to be built within 180 days (from the giving of a notice to proceed) and pursuant to the MOMA, Global Water was to operate the Treatment Plant for a period of 12 years (unless determined or extended under provisions of the MOMA) effective from the Commencement Date.
- [4] The DBA and the MOMA contained identical arbitration clauses³ which provided for the arbitration to be governed by and be in accordance with the Ordinance, and contained identical governing law clauses providing that "The Contract shall be governed by the laws of the British Virgin Islands."⁴ Other relevant contractual

¹ Crown Proceedings Ordinance (Cap. 21, 1956), section 13(2).

² Clause 4, top of page 3, of the MOMA.

³ DBA, clause 16; MOMA, clause 14.2.

⁴ DBA, clause 22; MOMA, clause 20.

provisions are discussed below in this Judgment. Global Water commenced two arbitrations against the BVI Government which proceeded together and resulted in the single Award.

- [5] The Tribunal found that the BVI Government breached the DBA (portions of which findings, as set out in the Award and in the Reasons for Award, are set out below) but it assessed damages without regard to Global Water's losses in relation to the MOMA. Global Water was never able to earn revenues under the MOMA because the Treatment Plant was never built⁵, and hence not made available to Global Water to maintain, operate and manage, all due to the BVI Government's breach of the DBA.
- [6] The issue on this appeal is whether the Tribunal committed one or more errors of law on the face of the record by not awarding to Global Water its losses under the MOMA such that under the Ordinance or this Court's inherent jurisdiction, the Award should be remitted to the Tribunal or set aside.⁶
- [7] This Court agrees with the submission of the BVI Government that this Court should be deferential to and supportive of the Tribunal and the arbitral process. However, this arbitration is under the Ordinance, which has its own public policy and grounds for setting aside or remitting. As Global Water pointed out, if the Award contains an error of law on its face, the Court may grant a remedy.
- [8] The relevant paragraphs of the Award are as follows:

⁵ Reasons for Award, paragraph 3.

⁶ Arbitration Ordinance, Section 24 [enables the Court to remit an arbitral award to the tribunal for reconsideration] and Section 25 [enables the Court to set aside an arbitral award on the ground of misconduct].

1. We find that the DBA was breached by the [BVI Government] in failing to provide a prepared site to [Global Water] on which to build the Facility and [Global Water] lawfully terminated this Agreement in accordance with clause 15 thereof.
2. We find that there was no implied term of the MOMA that the [BVI Government] was to deliver a prepared site to [Global Water] on which to build the Facility and there was no breach of this Agreement.
3. We find that an award of damages for breach of the DBA, in the circumstances of these agreements, would be confined to sums due and payable for performance of the works under the DBA⁷ and would not extend to profits that would have been made for operating the Facility under the MOMA.

The Record

[9] There was a difference between the parties throughout this appeal regarding the contents of the record that was before this Court or that should have been before this Court given that the issue is whether there are errors of law on the face of the record.

[10] While it appears that Global Water is correct that the BVI Government is not entitled to rely on “extraneous material” to defeat Global Water’s argument that the Award contains errors of law on the face of the record, the issue does not need to be determined as there is nothing in what the BVI Government sought to put before the Court that would lead it to any different conclusions than the

⁷ Award, paragraph 4, states: “We find that the Claimant has made no claim for any sum as due and payable for performance of the works under the DBA and, accordingly, we award no sum by way of damages.” By paragraph 5 each party was directed to bear its own costs and by paragraph 6 each of the parties was directed to pay and bear one half of the costs of “this our award, which we settle at US \$254, 130.64, along with the costs of the arbitrators’ accommodation, the venue and court reporters’ services.”

conclusions in this Judgment on whether there are errors of law on the face of the record.

Tribunal's Findings of Breach of DBA by BVI Government

- [11] The Tribunal found in its Reasons for Award the following facts that describe how the BVI Government, for no explicable reason, breached the DBA, and as a result made it impossible for Global Water to commence to maintain, operate and manage the Treatment Plant, and earn revenues, under the MOMA.
- [12] The DBA had not been performed two years after it was made because of delays caused by the BVI Government.⁸
- [13] Global Water sent to the BVI Government a Notice of Default dated 19 September 2008 pursuant to a provision in the DBA⁹ entitling a party to terminate the DBA upon 30 days' written notice calling upon the defaulting party to remedy (effectively, to commence to remedy) its default within the 30 day period.¹⁰
- [14] The BVI Government did not send a response to the Notice¹¹ and "did not either take or state that it had taken, was taking or intended to take any steps by way of remedying the breach of the obligation to deliver a prepared site to Global."¹²

⁸ Reasons for Award, paragraph 5.

⁹ DBA, clause 15.

¹⁰ Reasons for Award, paragraphs 5 and 6.

¹¹ Reasons for Award, paragraph 7. The Tribunal continued: "It is remarkable that, as disclosed in a letter he wrote on 1st October 2008 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, seemed to have heard only rumours of the jeopardy facing the project but had not seen or been told of the Notice of Default and its demand that Government must remedy specific matters." And in paragraph 8: "There is no evidence that there was any reaction by Government to the Notice. There is no indication that anyone took any action after receipt of the Notice, in reaction to that notice, to remedy the breaches complained of." Specifically, paragraph 11.

¹² Reasons for Award, paragraph 11.

[15] The Tribunal found as follows:

13. ... 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 of 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.

14. As a matter of appreciation the failure to deliver a prepared site may well have been both easily and quickly remedied. We make no finding in this regard. Whatever might have been the possibility, the fact remains that Government failed to take the required remedial step to remedy the breach of obligation to deliver a prepared site within the specified 30 day period and Global [Water] was entitled to terminate the DBA when it did so on 27th October 2008.¹³

Two Bases for Damages Encompassing Global Water's MOMA Losses

[16] Global Water advanced two bases upon which it claimed as damages its losses in relation to the MOMA. The Tribunal considered and rejected both bases.

[17] The first basis for its damages including its losses in relation to the MOMA was that "there should be implied into the MOMA a term that Government promised to perform its obligation to deliver a prepared site to Global – which was an express term of the DBA"¹⁴ and that the term was breached by the BVI Government, giving Global Water a claim to its losses in relation to the MOMA.

¹³ Reasons for Award, paragraphs 13 and 14.

¹⁴ Reasons for Award, paragraph 15.

[18] The second basis of Global Water's claim for its losses in relation to the MOMA is that its damages for the BVI Government's breach of the DBA include Global Water's losses in relation to the MOMA.

[19] This Court disagrees with the Tribunal's negative conclusion on both bases.

[20] For reasons explained below, both bases were rejected by the Tribunal because it appears the Tribunal considered that the MOMA did not exist until the Commencement Date. In its view, at that time the Treatment Plan would have been built and operational at the specified capacity, a condition precedent to the existence of the MOMA would have been fulfilled, and the MOMA would have commenced. The Tribunal proceeded on the basis that there was a condition precedent to the existence of the MOMA. The Tribunal stated:

“Breach of the DBA prevented the fulfillment of a condition precedent to the performance of a distinct and separate contract; it prevented the MOMA from commencing”.¹⁵

[21] This Court is of the view that the MOMA was a live contract from its execution. There was no condition precedent to its existence. Performance of the major obligations under the MOMA was simply awaiting the BVI Government making available to Global Water a Treatment Plant that could operate at the specified capacity so that performance of the major contractual roles of Global Water, and its earning of revenues and profits, under the MOMA could commence. As it happens, Global Water was the contractor to design and build the Treatment Plant.

¹⁵ Reasons for Award, paragraph 42.

[22] This difference respecting the MOMA accounts for the different conclusions on both bases of damages in this Judgment from the conclusions of the Tribunal in its Reasons for Award.

[23] The Tribunal's most fundamental and serious error of law on the face of the record was its conclusion that the MOMA did not exist until the Commencement Date, which in turn led it to make fundamental and serious errors of in law on the face of the record by rejecting Global Water's claims (a) for damages under the DBA for lost profits under the MOMA, and (b) for damages under the MOMA. In doing so it made other errors of law on the face of the record which are noted in this Judgment.

MOMA Existed from Date of its Execution

[24] It is not the case that the MOMA did not exist, was not in force, was awaiting fulfillment of a condition precedent before it became a live contract, or existed in some form of state of suspended animation, until there would be a Treatment Plant with the specified capacity, as set out in the MOMA definition of Commencement Date.

[25] The Commencement Date simply – and importantly – marked the date on which the 12-year term of Global Water's management, operation and maintenance of the Treatment Plant would commence, and Global Water's right to earn revenue and profits, and the BVI Government's obligation to pay, would commence.

[26] The MOMA came into existence when it was signed by the BVI Government and Global Water on 19 September 2006, and then was lodged "for record at the Registrar's Office, Road Town, Tortola" on 22 September 2006.

[27] There are at least six provisions of the MOMA that assist to demonstrate it was an existing agreement under which the parties had live rights and obligations, and for performance of the management, operational and maintenance obligations to begin was just a question of the Treatment Plant being made available to Global Water and the parties agreeing¹⁶ when the specified Treatment Plant capacity had been attained. In that regard,

- a. the Commencement Date provision¹⁷ required the BVI Government and Global Water to agree on the date the Treatment Plant would be first capable of processing the specified Influent volume – both parties had an existing contractual right and obligation to assess that capacity and then agree;
- b. the BVI Government represented¹⁸, in the present tense, that “it is the owner of the Treatment Plant”, which on the date of execution meant whatever was on the “Site” [defined as “the designated Treatment Plant site located in Paraquita Bay and which appears on the diagram annexed hereto marked “A””] and as construction of the Treatment Plant progressed would have included “all mechanical, electrical and other equipment or installed items located on the Site”;
- c. the BVI Government agreed to provide Global Water “during the term” with “access to and egress from the Treatment Plant, including such real property, buildings and improvements on which the Treatment Plant is located ... such that [Global Water] may perform its obligations and exercise its rights under this Agreement”¹⁹, which it would need (in its capacity as the contracting party under the MOMA) to be able to assess

¹⁶ This was not a so-called “agreement to agree” in the contractual sense. The word “agreeing” really meant “recognizing” an objectively determinable situation. All material terms, indeed all terms, of the MOMA were agreed. If for any reason, the parties could not “agree” on when the required capacity was met, the dispute resolution provision in the MOMA would have been the means to obtain a conclusive determination of that factual matter.

¹⁷ Clause 4, top of page 3, of the MOMA, definition of “Commencement Date”.

¹⁸ Clauses 8.1 and 4 [definitions of “Treatment Plant” and “Site”].

¹⁹ Clause 8.1 of the MOMA.

and agree when the Treatment Plant would be first capable of processing the specified Influent for the purposes to the Commencement Date;

- d. the parties had termination rights²⁰ in the event of the other party's breach of any representation or warranty or failure to perform any of its obligations or covenants;
- e. the parties agreed on how to resolve disputes (although the arbitration clause would legally be an independent contract under the concept of separability)²¹; and
- f. the BVI Government had a right to assign the MOMA and Global Water had no right to assign, transfer, charge, etc.²².

[28] Further, the MOMA does not provide that 'all bets are off' if no Treatment Plant of the specified capacity is built – it could have said that but it did not. A clause could have provided that the BVI Government has no obligation to make a Treatment Plant of the specified capacity available to Global Water, no obligation to make any efforts to cause such a Treatment Plant to become available, and indeed no obligation not to take steps that would prevent such a Treatment Plant from coming into existence.

[29] There is no such clause in the MOMA.

[30] Indeed, a Force Majeure clause²³ in the MOMA provides for a suspension of the duty of Global Water to perform in the event of circumstances "over which the parties have no control and which causes a cessation or a substantial interference with the performance" by Global Water until such circumstances cease to exist,

²⁰ Clause 13 of the MOMA.

²¹ Clause 14 of the MOMA.

²² Clause 16 of the MOMA.

²³ Clause 15 of the MOMA.

and that the BVI Government is not liable to make any payment in respect of the period of suspension. The parties put their minds to fundamental impediments but in doing so did not make any provision to relieve the BVI Government from any responsibility, or make clear that it would have no responsibility, in the event the BVI Government was unable or unwilling to provide a Treatment Plant.

[31] Considering hypothetical circumstances may assist to make clear that there was a contract in existence with rights and obligations both ways. So for example:

- 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?

Surely the answer to these questions and other such questions would be ‘no’.

[32] One other hypothetical situation makes the point even more forcefully. In the above types of eleventh hour decision by the BVI Government not to proceed, or not to proceed with Global Water as its operator, suppose 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)²⁴; 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? Surely the answer again is 'no'.

- [33] The BVI Government made contractual commitments to Global Water at the time of its entering into the MOMA in September 2006 – it was contractually committed to make available to Global Water under the MOMA a Treatment Plant capable of processing the requisite volume of Influent. Its failure to do so was a breach of the MOMA, giving Global Water the right to damages for its losses, including its lost profits under the MOMA.

Damages for Breach of the DBA

- [34] As a result of concluding that the MOMA was an existing contract not subject to any condition precedent to its existence, this Court disagrees with the Tribunal's conclusion with respect to the damages suffered by Global Water because of the BVI Government's breach of the DBA.

- [35] With its incorrect view of the MOMA in mind, the Tribunal focused on the fact that the parties chose to enter into two separate contracts, and concluded that this structure precluded Global Water from recovering the losses it would otherwise be able to recover.

- [36] The Tribunal stated as follows:

²⁴ MOMA, clause 11.

“In this case it is a factor of considerable significance that the way the parties decided to structure the arrangement between them was to enter into two separate contracts. They entered into two separate contracts on the same day so there can be not the slightest doubt that the separation was a deliberate decision rather than a consequence of the evolution of dealings between the parties or random circumstances. 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 appear 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 tie or link the two”.²⁵

- [37] There may have been various commercial and/or legal reasons for the parties having two separate but connected contractual commitments in separate contracts given that the obligations of the parties and the risks under the two agreements were very different. Under the DBA, Global Water was required to design and build a physical facility, the Treatment Plant, whereas under the MOMA, Global Water was required to manage, operate and maintain the Treatment Plant. The nature and financing of those two different business roles may have been a reason for separate contracts. The risks inherent in the two contracts would have been different. The insurance needs under the two contracts would have been different. The parties may have wanted to maintain the design and construction obligations separate from the operation obligations so that liability for the construction and performance capabilities of the Treatment Plant was defined, confined and limited in the DBA, and likewise, liability for operational matters was defined, confined and limited in the MOMA.

²⁵ Reasons for Award, paragraph 17.

[38] Focusing on the DBA and the measure of Global Water's damages for a breach by the BVI Government of the DBA, if the parties intended to limit the damages recoverable for a breach of the DBA to exclude damages to Global Water from losing the revenues and profits that it would have earned under the MOMA, it would have been easy for the parties to include such a provision in the DBA. They did not.

[39] 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.

[40] The principle of damages is compensation.

[41] This Court's view of the MOMA and the cases considered by the Tribunal leads this Court to a different conclusion than the Tribunal on the extent of recoverable damages for the BVI Government's breach of the DBA.

[42] Under the principles in two of the foundational cases in English contract law, *Hadley v Baxendale*²⁶ and *Victoria Laundry (Windsor) Limited v Newman Industries Limited ("Victoria Laundry")*²⁷, 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

²⁶ (1854) 9 Exch 341

²⁷ [1949] 2 KB 528

operate under the MOMA and in turn depriving Global Water of its revenues and profits under the MOMA.

[43] The Tribunal set out the relevant principles correctly.

[44] Regarding the recoverability of damages, *Hadley v Baxendale* held (which the Tribunal quoted)²⁸:

“Where two parties have made a contract which one of them has broken the damages which the other party ought to receive ... should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach itself, or such as may be 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”.

[45] The Tribunal went on to state correctly:

“The other limb of that principle is that consideration of the damages that may be fairly be supposed to have been in the contemplation of the parties may be affected by special circumstances known to the parties at the time of making the contract”.²⁹

[46] In *Victoria Laundry*, as Global Water submitted to the Tribunal³⁰:

“a knowledgeable seller [of laundry machines] agreed and failed to provide a launderer with machinery on which the launder was depending to perform laundry services to others. The legal principle in that case was that the seller was liable to compensate the launderer for the monies lost from the launderer’s inability to provide services to customers as a result of the seller’s failure to supply the machinery in time. Although the income would have accrued to the launderer under contracts with others and not under the contract with the seller, it was within the contemplation of the

²⁸ Reasons for Award, paragraph 28.

²⁹ Reasons for Award, paragraph 28.

³⁰ Reasons for Award, paragraph 33.

parties that the launderer would lose that sort of income if the launderer was unable to perform the contracts”.

[47] In light of its view of the MOMA, the Tribunal wrongly distinguished Victoria Laundry, as follows:

41. The difference as we see it, however, is that if the DBA has 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.

42. In Victoria Laundry the boiler would have been owned by the launderers. Failure to supply the boiler rendered the launders 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 parties. Breach of the DBA prevented the fulfillment of a condition precedent to the performance of a distinct and separate contract; it prevents the MOMA from commencing. But there was no promise in the DBA to satisfy the requirement for commencement of the MOMA.

[48] The situation here is no different than in Victoria Laundry in any relevant or material manner. 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.

[49] The Tribunal had considerable regard to the Singapore Court of Appeal judgment in *Burgundy Global Explorations Corp v Transocean Offshore International Ventures Ltd and anor ("Burgundy")*³¹, which arose in relation to a 'two contract' relationship.³² The Tribunal set out the facts of Burgundy as follows³³:

"Transocean and Burgundy entered into a drilling contract where Transocean agreed to supply a drilling rig and provide offshore drilling serviced to Burgundy. It was a condition precedent of the Drilling Contract that the parties should enter into an escrow agreement under which Burgundy was to deposit certain amounts into an escrow account following a specified timeline. The Escrow Agreement provided that a breach of its terms would give Transocean the right to terminated the Drilling Contract. Burgundy failed to make the initial deposit ... Transocean thus exercised its right under the Escrow Agreement to terminate the Drilling Contract. Transocean also regarded Burgundy's failure as a repudiatory breach of the Escrow Agreement which it accepted as terminating the Escrow Agreement. The Drilling Contract was governed by an arbitration agreement while the Escrow Agreement was governed by a jurisdiction clause in favour of the Singapore courts".

[50] The Singapore Court of Appeal rejected Transocean's argument that it could recover its Drilling Contract losses in its action for breach of the Escrow Agreement. In a paragraph quoted by the Tribunal, the Court held:

"45. Therefore, the true damages caused by Burgundy's breach of the Escrow Agreement was its loss of its security, and not the loss of profits under the Drilling Contract. The latter loss was in fact the result of Transocean's decision not to perform the Drilling Contract without security, and however reasonable a decision that might appear to be, the proper cause of action for recovering those losses must be a claim under the Drilling Contract. Having deliberately chosen to carve out the security

³¹ [2014] SGCA 24

³² Reasons for Award, paragraphs 34 – 37.

³³ Reasons for Award, paragraph 34.

aspect of the parties' business relationship and deal with it in a separate contract, Transocean cannot now seek to vindicate its performance interest in the Drilling Contract by bring a claim founded on a breach of the Escrow Agreement.”³⁴

[51] After noting that “[i]t was said to be a matter of some significance that in that case each contract had unique features including distinct dispute resolution mechanisms”, the Tribunal held as follows:

“That leaves for consideration only the question whether the breach of the DBA should attract as an award of damages compensation for loss of profit that would have been earned under the MOMA The reasoning that was applied in the Burgundy case is also applicable in these arbitrations. The loss of profits from the MOMA is not the naturally arising or notionally contemplated consequence of breach of the DBA”.³⁵

[52] If Burgundy was rightly decided on its facts, it is distinguishable from the present situation. One important distinction is that Transocean could have gone ahead with the Drilling Contract without the security under the Escrow Agreement. It may have made a sensible commercial decision, as the Singapore Court of Appeal suggests it did, but it had a choice. Had things gone well under the Drilling Contract, Transocean would have earned (and hopefully been paid) its Drilling Contract profits. Global Water had no such option here. It could not have earned revenues and profits by performing its major obligations under the MOMA because the BVI Government did not provide the Treatment Plant for Global Water to manage, operate and maintain.

[53] This Court disagrees with the Tribunal's conclusion quoted above that “[t]he reasoning that was applied in the Burgundy case is also applicable in these

³⁴ Reasons for Award, paragraph 35.

³⁵ Reasons for Award, paragraph 38.

arbitrations. The loss of profits from the MOMA is not the naturally arising or notionally contemplated consequence of breach of the DBA.” To the contrary, the loss of profits from the MOMA is a naturally arising and notionally contemplated consequence of breach of the DBA.

- [54] Damages for the breach of the DBA should include Global Water’s losses under the MOMA.

Breach of the MOMA by BVI Government

- [55] The BVI Government’s intentional non-performance under the DBA, like night follows day, meant that there would be no Treatment Plant built and hence no Treatment Plant for Global Water to manage, operate and maintain under the MOMA.

- [56] Before the Tribunal, Global Water’s approach to the articulation of this fundamental failing of the BVI Government under the MOMA was to focus on the root cause of the failure of the BVI Government to provide a Treatment Plant for Global Water to manage, operate and maintain under the MOMA.

- [57] The failure of the BVI Government to provide its DBA contractor (which of course was known to both parties to be Global Water) with a prepared site prevented the DBA contractor from building the Treatment Plant (which, as the DBA contractor, was in Global Water’s hands to ensure would occur once it had the prepared site), and then the natural consequences followed: the absence of a prepared site and the inability to construct the Treatment Plant in turn prevented the occurrence of the Commencement Date in the MOMA that in turn would have enabled Global

Water to manage, operate and maintain the Treatment Plant, and in turn would have resulted in Global Water earning revenues and profits under the MOMA.

[58] In a different situation, particularly where Global Water was not the contractor under the DBA and there were not two arbitrations being heard together, Global Water might have been inclined to say all of that more directly, namely that there was an implied term that the BVI 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.

In substance these three alternative articulations (“**Alternative Articulations of the Implied Term**”) are comparable. However the implied term was articulated would not change the BVI Government’s fundamental commitment that the implied term would recognize and, as it turned out, the BVI Government’s fundamental failing under the MOMA.

[59] Without such a fundamental commitment by the BVI Government, the MOMA would make no sense: the Treatment Plant needed to exist for performance of Global Water’s main obligations under the MOMA to be performed.

[60] In its Statement of Case, Global Water did not expressly assert an implied term in the MOMA in any of the Alternative Articulations of the Implied Term but asserted

the implied term in the same way as the express term of the DBA was asserted – and found by the Tribunal – as the basis of a breach by the BVI Government of the DBA, namely the BVI Government’s obligation to provide a prepared site to Global Water on which to build the Treatment Plant. Given that the two arbitrations were being heard together, it is quite understandable why the articulation occurred in this manner.

[61] There could be no prejudice to the BVI Government from the chosen articulation – clearly both parties were focused on the same fundamental obligation and the same fundamental failing of the BVI Government.

[62] 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.

[63] The BVI Government took issue on this appeal, including in its supplementary written submissions referred to below, with the implied term being articulated as that the BVI Government would not prevent the occurrence of the Commencement Date and submitted that such articulation is “materially different” than how the implied term was put before the Tribunal. Specifically, the BVI Government submitted as follows:

“In the current claim, the Appellant now argues that the term to be implied is that the Government should not prevent the commencement date. This is materially different from the argument advanced before the Arbitrators and is not the question to which the Arbitrators were asked to address their minds. We contend that such material deviation ought not to be condoned by the Honourable Court and in the circumstances the

Arbitrators cannot be properly said to have committed any error of law in this regard. [emphasis in original]”.

[64] While the words may be different, as explained above, in substance there is no material difference among the two articulations, and as already stated, there is no prejudice to the BVI Government.

[65] In fact, the Tribunal actually appears to have viewed the proposed implied term more expansively than simply the provision of a prepared site.

[66] The Reasons for Award demonstrate that it viewed the term that Global Water sought to have implied as being either that a breach of the DBA would be a breach of the MOMA, or that the BVI Government was required to build the Treatment Plant, both of which are not that different from Global Water’s proffered articulation to this Court or the other Alternative Articulations of the Implied Term discussed in this Judgment. In particular, in its discussion of the implied term, the Tribunal stated:

“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.

For Global to persuade this tribunal to imply such a term, they would need to persuade us that the MOMA intended something more. They would need to persuade us that the only meaning of the MOMA consistent with the other provisions of the instrument, read against the relevant background, was that if through the fault of the Government the DBA was not performed and the facility not built then that would be a breach of the MOMA.³⁶”

³⁶ Reasons for Award, paragraphs 19 and 20.

- [67] Also, having regard to the manner in which the Tribunal determined the implied term issue, the difference in wording seems irrelevant to its decision-making on this issue and to the errors of law which this Court has found the Tribunal made.
- [68] As discussed above, the Tribunal's decision-making was based on its view that the MOMA had not commenced, the fact the parties embodied their arrangements in two separate contracts, the entire agreement clause in the MOMA and importantly the Tribunal's conclusion as follows:
- “The authorities are clear that we are confined to consider whether the true meaning of the MOMA was that Government promised, in that contract, to perform its prior contract. We are of the view that this was not the meaning of the MOMA.”³⁷
- [69] Having regarding to the Tribunal's reasoning in its Reasons for Decision, this Court cannot see how a different articulation of the implied term could have led the Tribunal to any different conclusion.
- [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

³⁷ Reasons for Award, paragraph 23.

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.

- [72] 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? By not delivering the site under the DBA, that is what the BVI Government did in relation to Global Water's ability to perform the MOMA and earn revenues and profits under it. It prevented the construction of the Treatment Plant and hence prevented the occurrence of the Commencement Date.
- [73] If the fundamental obligation to provide the Treatment Plant did not exist without implying a term in the MOMA (a matter that was not argued by the parties), this is very much a situation for implying a term. Doing so meets the test for implying a contractual term recently clarified by the UK Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* and another ("**Marks and Spencer**")³⁸ (which may be a stricter test than may be the case on at least one reading of the test in *Attorney General of Belize v Belize Telecom Ltd.*³⁹ upon which Global Water relied).
- [74] Counsel for the parties provided the Court with written submissions about *Marks and Spencer* after it was handed down, including on the term sought to be implied, as discussed above, and whether the facts of *Marks and Spencer* are analogous to the facts in this dispute.

³⁸ [2015] UKSC 72

³⁹ [2009] 1 WLR 1988 (PC)

[75] The majority of the Supreme Court in *Marks and Spencer* (Lord Neuberger, with whom Lord Sumption and Lord Hodge agreed) started with the classic statements in the 19th century and early 20th century cases as to the requirements which have to be satisfied before the court can imply a term into a commercial contract, which were summarised as follows in the Privy Council in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*⁴⁰:

“[F]or a term to be implied, the following conditions (which may overlap) must be satisfied:

- (1) it must be reasonable and equitable;
- (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (3) it must be so obvious that 'it goes without saying';
- (4) it must be capable of clear expression;
- (5) it must not contradict any express term of the contract.”

[76] Lord Neuberger said these observations represent a clear, consistent and principled approach and it could be dangerous to reformulate the principles. However, he added six comments:

1. The implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract;
2. A term should not be implied into a detailed commercial contract merely because it appears fair or because the court considers that the parties would have agreed it if it had been suggested to them;
3. A requirement that a term is reasonable and equitable will not usually, if ever, add anything – if a term satisfies the other requirements, it is likely that it will be reasonable and equitable;
4. Business efficacy and obviousness can be alternatives in that only one of them needs to be satisfied, although in practice it would be rare for only one of these requirements to be satisfied;

⁴⁰ (1977) 52 ALJR 20

5. If approaching the implication of a term by reference to the officious bystander requirement, it is "vital to formulate the question to be posed by [him] with the utmost care";
6. Necessity for business efficacy involves a value judgment. The test is not one of "absolute necessity". A more helpful way of putting the requirement may be that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

[77] Expressed in any one of the alternative ways discussed above, and having regard to Lord Neuberger's six comments, the five conditions in Marks and Spencer (which may overlap), are met – the term to be implied:

1. is reasonable and equitable ;
2. is necessary to give business efficacy to the MOMA – the contract is not effective without it ;
3. is so obvious that 'it goes without saying' ;
4. is capable of clear expression ; and
5. does not contradict any express term of the MOMA.

[78] Marks and Spencer makes clear that a term cannot be implied simply to achieve fairness. Global Water did not put its case for an implied term on the basis of fairness and this Court does not find that there was an implied term on the basis of fairness.

[79] In Marks and Spencer, the Supreme Court concluded that a term should not be implied. The situation, while similar in some material respects, was very different in other material respects from the situation here.

[80] In terms of similarities, the Supreme Court observed that the lease before it, and into which it was sought to imply a term, was a "very full and detailed document"⁴¹; "a very detailed document which had been entered into between two substantial

⁴¹ Marks and Spencer, paragraph 7.

and experienced parties, and had been negotiated and drafted by expert solicitors [and] makes provision for a large number of contingencies⁴²; and “a very full and carefully considered contract”⁴³.

[81] Little would be gained by debating whether the MOMA could be described like the lease in Marks and Spencer and accordingly this Court assumes, without deciding, that the contractual documents, and the parties and their solicitors, could be similarly described.

[82] However, there are two major differences here from the Marks and Spencer situation.

[83] First, the term sought to be implied in Marks and Spencer was opposite to a long settled common law position on the point and “would lie somewhat uneasily with” “express obligations of the same nature as the implied term, namely financial liabilities in connection with the tenant’s right to break” the lease.⁴⁴

[84] That is not the case in the MOMA. The term sought to be implied into the MOMA under any of the articulations is a critical and fundamental term: in essence that the BVI Government would provide (or not act so as to prevent there being) a Treatment Plant for Global Water to manage, operate and maintain. It does not lie uneasy with express terms; indeed, it is the foundation of important express terms. And certainly it cannot be said that there is a long settled common law position on the point that differs.

[85] A second material difference is that in Marks and Spencer it was sought to imply a term for a contingency for which an express provision had not been made despite

⁴² Marks and Spencer, paragraph 38.

⁴³ Marks and Spencer, paragraph 49.

⁴⁴ Marks and Spencer, paragraphs 43 – 50.

express provision having been made for a large number of other contingencies. In the MOMA, there simply is no parallel. The term sought to be implied into the MOMA is a critical and fundamental term: in essence that the BVI Government would provide (or not act so as to prevent there being) a Treatment Plant for Global Water to manage, operate and maintain. Without such an implied term, the MOMA becomes nonsensical.

[86] It was further submitted by the BVI Government that the entire agreement clause in the MOMA⁴⁵ precludes the implication of a term. It does not. The Tribunal was wrong in holding that it did.⁴⁶ This is because, as Global Water put it, “such terms are intrinsic to the agreement itself”.⁴⁷ It is not a matter of the DBA being (in the words of the entire agreement clause) a document or oral representation or assurance that is sought to be made part of the MOMA. The DBA is not being implied into the MOMA or made a part of it. Rather, a term is being implied directly into the MOMA – a term that in substance is that the BVI Government would provide the Treatment Plant for Global Water to manage, operate and maintain.

[87] It was incumbent upon the BVI Government under the MOMA to make the Treatment Plant available to Global Water. Its failure to do so was a breach of the MOMA.

[88] As noted above, the BVI Government’s position on this appeal was that there were two intentionally separate contracts, and it sought to use that to its advantage with respect to the calculation of damages for breach of the DBA by the BVI Government. While this Court does not agree with that view of damages under the

⁴⁵ MOMA, clause 18.

⁴⁶ Reasons for Award, paragraphs 24 – 26.

⁴⁷ AXA Sun Life Services plc v Campbell Martin Ltd [2011] 2 Lloyd’s Rep 1 at [41].

DBA, it does agree that the MOMA imposed a free-standing obligation on the BVI Government to provide the Treatment Plant.

[89] If, for example, the failure to provide a Treatment Plant had been due to a breach by Global Water of its responsibilities under the DBA, the BVI Government could have raised that Global Water's damages in relation to the MOMA were caused by Global Water 'with its DBA hat on', and Global Water was responsible for them. If the BVI Government could not have raised it directly, it could have raised it by way of a claim over against Global Water 'with its DBA hat on'.

[90] If the DBA had been with a third party rather than Global Water, the BVI Government could not say in defence to Global Water's claim under the MOMA, "sorry, we don't have a 'Treatment Plant for you to manage, operate and maintain'. Instead, it would assert a claim over against the party with whom it had a contract to design and build the Treatment Plant, saying that it is responsible for any damages suffered by Global Water by reason of there not being a Treatment Plant for Global Water to manage, operate or maintain under the MOMA.

[91] The BVI Government made contractual commitments to Global Water by entering into the MOMA in September 2006 – it was contractually committed to make available to Global Water under the MOMA the Treatment Plant (by definition, capable of processing the requisite volume of Influent). The BVI Government's failure to do so was a breach of the MOMA, giving Global Water the right to damages for its losses, including its lost profits under the MOMA.

[92] As set out above, the Tribunal made fundamental and serious errors of law on the face of the record. To repeat and summarize, the Tribunal's most fundamental and serious error of law on the face of the record was its conclusion that the MOMA did

not exist until the Commencement Date, which in turn led it to make fundamental and serious errors of in law on the face of the record by rejecting Global Water's claims (a) for damages under the DBA that would include lost profits under the MOMA, and (b) for damages under the MOMA. In doing so it made other errors of law on the face of the record which are noted in this Judgment.

Remedy

[93] This Court is of the view that the remedy that is most efficient, satisfactory, appropriate and sensible is to remit the Award back to the Tribunal, in effect for a "second phase" of the arbitration (as if the arbitration had been bifurcated between liability and damages), to assess Global Water's damages on both bases (breach of DBA and breach of MOMA) having regard to this Court's judgment and directions. There is no reason to set aside the Award, which to a significant degree deals with the breach of the DBA, or to require a new arbitral tribunal to assess damages.⁴⁸

[94] The members of the Tribunal should have no difficulty proceeding to assess damages despite the difference of view on the MOMA taken by this Court with the view taken by the Tribunal. The members of the Tribunal should be well aware of their ethical and professional obligations as arbitrators. There is no appearance of bias, impartiality or lack of independence. If a Tribunal member considers that he may not be impartial and independent, he is at liberty to raise the matter. Otherwise, on the material before this Court, this Court does not see any basis to set aside the Award rather than remit to the Tribunal to assess Global Water's

⁴⁸ For that reason, this Court sees no reason to delve into the question of whether errors of law on the face of the record in this case constitute "misconduct" within the meaning of section 25 of the Ordinance – this Court would not set aside the award even if those errors of law amounted to "misconduct". Remitting is a less intrusive remedy where the tribunal, as set out in the body of this Judgment, is not unable to continue to hear the arbitration.

MOMA damages on both bases. In the event a member of the Tribunal is unable or unwilling to proceed, the approach should be that of the replacement of that member of a Tribunal. At this juncture, it would be quite manageable.

Assessment of Damages

[95] The Tribunal did not assess Global Water's damages in its Award and Reasons for Award under either basis of its claim for its MOMA losses.

[96] In the BVI Government's "Written Submissions of the Defendant/Respondent" dated 6 March 2015 for this appeal, the BVI Government raised an argument that as the business of Global Water under the MOMA never came into existence, it cannot recover lost profits, as they would be hypothetical profits of a hypothetical business, and that damages should be assessed by reference to a valuation of the business as at the date of the breach. It also asserted that the evidence on MOMA damages before the Tribunal was unsatisfactory.⁴⁹

[97] Global Water objected as these issues and submissions did not arise from the Award and Reasons for Award.

[98] This Court agrees that it cannot determine these issues because they do not arise from the Award and Reasons for Award.

[99] It would in any event not be appropriate for this Court to determine damages. The parties agreed to arbitration and it is in that process that damages should be assessed.

⁴⁹ "Written Submissions of the Defendant/Respondent", 6 March 2015, paragraphs 48 – 59.

- [100] This Court's only observations are that the businesses in the cases cited by the BVI Government appear distinguishable from Global Water's business which this Court does not consider to have been a 'hypothetical business' in the sense of the cases cited.
- [101] Further, one wonders if the value of the business and the lost profits damages assessment would differ much, if at all, as the major if not only asset of the business appears to have been the MOMA such that the business' value may well be the discounted profits under the MOMA, a figure that may be comparable if not identical to the lost profits as damages calculation. However, those matters will need to be determined on the factual and expert evidence and submissions that will be presented to the Tribunal at the further hearing.
- [102] The Tribunal should proceed afresh with the assessment of the MOMA damages on both bases in what effectively will be a second phase of the arbitration.
- [103] In saying that, obviously there should be no double recovery but presumably Global Water is entitled to the higher of the two assessments if for any reason there is a difference (although the Court cannot see any reason as to why there would be a difference, it leaves open the possibility).
- [104] It appears that the evidentiary base for damages may not have been adequately dealt with thus far in the arbitration by either party. In that regard, on the damages hearing the Tribunal may utilize the damage evidence taken thus far, if it determines it would be appropriate and efficient to do so after hearing the parties' submissions in that regard. However, the Tribunal may also wish to consider a

process whereby Global Water advances its MOMA damages claims, and the BVI Government responds, in both cases with such evidence (fact and expert) and submissions as each party considers appropriate in light of the Award and Reasons for Award, and this Judgment.

[105] Given that it did not assess damages, the Tribunal accordingly did not consider any reduction in damages that is legally required to account for Global Water's mitigation obligations, if any, in respect of its MOMA damages.

[106] This Court is not determining if any such mitigation obligations existed in the circumstances, and if any such obligations existed, what mitigation was possible or in fact occurred. So for example, if Global Water was able to take on an alternative contract that it otherwise would not have been able to take on (due to a lack of resources on its part, for example), it will be necessary to determine whether its damages are to be reduced, and if so, to what extent. These are matters for the Tribunal to determine.

Costs of the Arbitrations

[107] With respect to costs of the parties and the arbitrators in the arbitrations, as awarded in paragraphs 5 and 6 of the Award, the Tribunal should have the ability to reconsider its Award in that regard in light of the overall outcome of the arbitrations following the Tribunal's assessment the damages of Global Water, both from the BVI Government's breach of the DBA and from the BVI Government's breach of the MOMA, as provided in this Judgment, and this Court's Order will so provide.

Orders

[108] There will be Orders in the following terms:

1. The appeal is allowed.
2. The arbitration is remitted to the Tribunal to proceed afresh, in a second phase of the arbitration, to assess the damages of Global Water, both from the BVI Government's breach of the DBA and from the BVI Government's breach of the MOMA, and all issues in relation thereto (including, to reconsider in light of the overall outcome, the award in respect of the costs of the parties and of the arbitrators in paragraph 5 and 6 of the Award), in line with the determinations in this Court's Judgment on the appeal.
3. The BVI Government shall pay Global Water's costs of the appeal, to be assessed if not agreed.

Commercial Court Judge

1 February 2016