# *Commercial: Attorney General of the Virgin Islands v Global Water Associates Ltd (British Virgin Islands) [2020] UKPC 18*

Dominic Bright

What is the test for remoteness following breach of contract?

*Facts*

Global Water Associates Ltd ("Global") entered into two contracts with the Government of the British Virgin Islands ("the Government"). First, to design and build a water reclamation plant ("the design and build contract"). Secondly, to manage, operate and maintain that plant for 12 years ("the manage and maintain contract").

The Government breached the design and build contract by failing to provide a site. As a result, the plant was not built. Global was not able to earn profits from the manage and maintain contract.

*Procedural history*

An arbitral award rejected a claim by Global. The Government was found to have breached the design and build contract. The damages claimed by Global in the form of loss of profits for that breach, however, were found to be too remote.

Global successfully appealed to the High Court. The Government then successfully appealed to the Court of Appeal. Finally, Global appealed to the Judicial Committee of the Privy Council.

*Remoteness*

Lord Hodge succinctly summarised the authorities on remoteness 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.
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> 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, …
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> 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.
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> 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.
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> 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."

*Discussion*

When the design and build contract was formed, losses resulting from the inability to earn profits under the manage and maintain contract were within the reasonable contemplation of the parties for four reasons.

First, both contracts were entered into by the parties on the same day, related to the same plant, and so gave rise to special knowledge. Secondly, when the Government entered into the design and build contract, it knew and intended that each party's performance under this contract would lead to the start of the maintain and manage contract.

Thirdly, the documents incorporated into the design and build contract were the same as those incorporated into the maintain and manage contract. Fourthly, there was no express or implied term in the design and build contract limiting the Government's liability in damages to Global's loss of earnings under that contract.

*Disposal*

The Board advised the Queen that the appeal should be allowed.