Trinity Term
[2019] UKPC 27
Privy Council Appeals No 0023 and 0025 of 2017

JUDGMENT

The State of Mauritius and another (Appellants) *v* The (Mauritius) CT Power Ltd and others (Respondents) (Mauritius)

The State of Mauritius and another (Appellants) *v* The (Mauritius) CT Power Ltd and others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Reed
Lord Kerr
Lady Black
Lord Briggs
Lord Sales

JUDGMENT GIVEN ON

10 June 2019

Heard on 4 April 2019

Appellants

James Guthrie QC
Carol Green-Jokhoo

(Instructed by Royds Withy King)

Respondent
(via video link)
Desiré Basset SC
Nandraj Patten
Heetesh Dhanjee
(Instructed by Blake Morgan LLP)

5th Co-Respondent
Ravindra Chetty SC
Yashley Reesaul
(Instructed by Sheridans)

LORD SALES:

1. This appeal raises issues regarding the interaction of private law and public law in relation to the negotiation of a commercial contract for the implementation of a project for the construction of a new electricity generating plant for Mauritius at Pointe aux Caves in the districts of Black River and Port Louis ("the project").

The background to the dispute

2. Since 2006 the respondent ("CT Power") has been working to develop plans and to obtain regulatory approval and financing for the project. CT Power proposed that it should build and run the plant. The customer for the electricity it would produce was to be the Central Electricity Board ("the CEB"). The details of the project have changed over time. The original proposal was for construction of a 3 x 50 MW coal power plant, but that was changed in late 2006 to a proposal for construction of a 2 x 55 MW coal power plant. CT Power was to pay for the construction of the plant by a combination of debt finance and equity finance.

3. In 2007 there was public consultation in relation to the project and Environmental Impact Assessment ("EIA") reports were prepared for CT Power with a view to it applying for an EIA licence to be issued pursuant to the Environment Protection Act 2002 ("the EPA 2002"). Section 15(2)(b) of that Act, read with Part B of the Fifth Schedule to the Act, prohibits commencing a project for construction of a power generating plant without an EIA licence. Section 15(2)(c) prohibits commencement of a project "more than 3 years after the issue of an EIA licence … unless the Minister, in circumstances beyond the control of the proponent, otherwise determines …". The effect of this is that an EIA licence, if granted, allows a relevant project to be commenced at any time within three years after the date of the licence. Section 23 provides that the relevant Minister may approve the issue of an EIA licence subject to terms and conditions. Where the Minister refuses to issue an EIA licence, an appeal lies to the Environment Appeal Tribunal.

4. In December 2008 CT Power and the CEB entered into a suite of agreements, comprising a Coal Supply Agreement, an Interconnection Facilities Design and Build Agreement and a Power Purchase Agreement. It was a condition of the Power Purchase Agreement that before coming into effect there would need to be in place what was termed an "Implementation Agreement" between the Government of Mauritius and CT Power, which would include a guarantee by the Government to ensure payment of the price due from the CEB to CT Power for supplies of electricity to be made under the Power Purchase Agreement. The guarantee which it was proposed the Government

should give under the Implementation Agreement was an important commercial feature of the arrangements for the project, since it was likely that the ability of CT Power to secure financing to implement the project would depend upon its being able to demonstrate that once built the plant would generate a secure income stream.

5. Negotiations between the Government and CT Power regarding the detailed terms of the Implementation Agreement commenced in about January 2009. However, no final version of the Implementation Agreement was signed by those parties.

6. Further work was done to produce an updated and expanded Environmental Impact Assessment. In 2010 this was submitted by CT Power to the Minister of the Environment in support of its application for an EIA licence in relation to the project. By a decision dated 18 January 2011 the Minister of the Environment rejected CT Power's application.

7. CT Power appealed to the Environment Appeal Tribunal. By a decision dated 16 July 2012 the Tribunal allowed the appeal and ruled that an EIA licence should be issued for the project. The Tribunal directed that the EIA licence to be issued should be subject to certain conditions identified by itself and that the Department of the Environment should also have the opportunity to consider whether to add other conditions. CT Power had to re-design the project to comply with the conditions imposed by the Tribunal.

8. Pursuant to the ruling of the Environment Appeal Tribunal, on 23 January 2013 the Department of the Environment issued the necessary EIA licence for the project ("the EIA licence"). As noted above, by virtue of section 15 of the EPA 2002 the EIA licence had effect for three years from that date. The EIA licence was made subject to various conditions. Condition 15 of the EIA licence ("Condition 15") stated as follows:

> "The proponent [ie CT Power] shall undertake to provide proof of its financial capabilities for the duration of the project to the satisfaction of the Ministry of Finance and Economic Development."

9. It is common ground that Condition 15 is a valid and proper condition in the EIA licence, which sufficiently relates to the environmental protection objects of the EPA 2002 and cannot be regarded as *ultra vires* that Act. In the Board's view, Condition 15 plainly serves a valid environmental objective: there needed to be assurance that CT Power would be able to implement the project effectively, including satisfying all the conditions in the EIA licence, and would not be liable to become insolvent part way through at a time when substantial harm might have been done to the environment without any of the hoped for public benefits from the scheme being realised and harm-mitigation measures being put in place. It made sense for Condition 15 to designate the

Ministry of Finance and Economic Development ("the Ministry of Finance") as the department to evaluate the proof of financial capabilities to be provided by CT Power, in view of its expertise in relation to matters of finance.

10. As well as being concerned for environmental protection reasons to ensure that CT Power was financially robust, the Government also had a commercial concern in that regard. The guarantee which the Government was being asked to give under the Implementation Agreement was an onerous contractual commitment in respect of the price to be paid for electricity supplies extending many years into the future and it is unsurprising that the Government should wish to confirm that CT Power, as its contractual counterparty, would be reliable and in good financial order before making such a commitment.

11. On 25 March 2014 the then Minister of Finance made a statement in the National Assembly in which he said, "as far as checking the financial capability, the financial standing and the quality of the people who would invest in the project, obviously we need to know who will be the final shareholders and who will be the final financiers." On 11 July 2014 the then Deputy Prime Minister and Minister of Energy and Public Utilities stated in the National Assembly that an important issue remained outstanding before the Implementation Agreement could be finalised, namely that CT Power should provide proof of funds for its equity contribution to the project.

12. On 18 July 2014 there was a discussion between representatives of CT Power and representatives of the Minister of Energy and Public Utilities ("the Minister of Energy"), for the Government, in respect of the Implementation Agreement. On 21 July 2014 lawyers acting for CT Power sent the Minister of Energy a draft of the Implementation Agreement marked with comments which reflected those discussions ("the draft Implementation Agreement"). It is clear from the face of the draft Implementation Agreement that it had not been agreed and that in various material respects it contained draft terms which CT Power wished the Minister of Energy to consider.

13. Clause 7 of the draft Implementation Agreement was in these terms and had appended to it the following note:

> "7. Condition
>
> 7.1 The [Government] and [CT Power] hereby acknowledge and accept that this Agreement is subject to [CT Power] providing proof of its financial capabilities for the duration of the Project to the satisfaction of the Ministry of Finance and Economic

development within nine (9) months from the date of this Agreement.

7.2 For the avoidance of doubt, [CT Power] shall be deemed to have satisfied the Condition and as stipulated in Condition 15 of the EIA Licence by achieving Financial Close [ie confirmation to the CEB that CT Power had satisfied the relevant conditions precedent to enable it to draw on its credit and other facilities under agreements with its financiers].

7.3 In the event the condition set out in clause 7.1 is not met within nine (9) months from the date of this Agreement, the Parties agree that this Agreement and the guarantee created hereunder shall lapse and be of no further effect and thereafter, the Parties will have no claims of any kind whatsoever against each other with respect to matters arising out of or in connection with this Agreement.

NOTE: This Condition has been included at the request of the Ministry of Finance and Economic Development who have confirmed that if Condition 15 of the EIA Licence is included in the Implementation Agreement with a nine month time frame, the proposed amendments to the Implementation Agreement as per our earlier draft dated 4.7.2014 are acceptable to them. This is to impose a time frame in line with the Longstop Date under the [Power Purchasing Agreement] to achieve Financial Close. In line with this request and to avoid any further ambiguity on this condition and to also prevent further delays on the Project itself, we have inserted the provisions of clause 7.2 to clearly stipulate that once we have executed all our Financing Documents showing preparedness to drawdown and commence construction we would be deemed to have satisfied this condition. We hope this is in line with the expectations of [the Government]."

14. Clause 7, had it been agreed, would have made the provision of proof of CT Power's financial capabilities and satisfaction of Condition 15 into a condition subsequent, taking effect after the Government and CT Power had entered into the Implementation Agreement and become bound by its terms, rather than something to be sorted out to the Government's satisfaction before it signed the Implementation Agreement, as the Deputy Prime Minister had indicated on 11 July 2014.

15. Clause 12.7 of the Implementation Agreement set out a waiver of sovereign immunity to be given by the Government, on the basis of an acknowledgement by the Government "that the execution, delivery and performance by it of this Agreement constitute private and commercial acts rather than public or governmental acts …".

16. The final terms of the Implementation Agreement were not agreed and it was never signed.

17. CT Power provided to the Government a joint letter of comfort dated 10 October 2014 from Bank of America and Bank of India in relation to provision of loans to CT Power of up to US$280m if the project went ahead. This letter appears to have been satisfactory to the Ministry of Finance so far as the debt element of the funding of the project was concerned.

18. By letter dated 5 December 2014 sent on behalf of CT Power to the Minister of Energy, copied to the Minister of Finance, CT Power asked the Government to expedite matters and to sign the Implementation Agreement by 23 December. The Government did not do so.

19. On 10 December 2014 there was a general election, leading to a change of Government.

20. On 27 December 2014 the new Minister of Energy was reported in the press as saying that the financial aspect of the project remained outstanding as an issue and that the Attorney General had been asked to provide his advice.

21. On 15 January 2015 there was a meeting between the Minister of Energy, with officials, and representatives of CT Power. There is some dispute in the evidence about what transpired, but it is not necessary to examine this further because it is common ground that the Implementation Agreement was not signed and that matters were to be debated further at meetings on 15 and 16 January 2015 attended by representatives of the Ministry of Finance, a representative from the Attorney General's office and representatives of CT Power.

22. At those meetings, the representatives of the Ministry of Finance stated that a letter of comfort was required in relation to the equity financing for the project and a draft of that letter was agreed. Again, there is some dispute in the evidence. According to the affidavit evidence of Babita Jowaheer filed by CT Power, the draft of the required letter of comfort was agreed "subject to the caveat that the issuer of the comfort letter could vary, amend or modify the terms discussed in order to comply with applicable regulations and legal advice". The deponent for the Ministry of Finance, Visanaden

Soondram, denies that there was any such caveat. For reasons given below, it is not necessary to resolve this dispute of fact.

23. The draft of the comfort letter which was agreed was headed "Bank Comfort Letter", referred to the project and stated as follows:

> "This is to confirm that we have reviewed the project documentation including the financing structure of the Mauritius CT Power Project. Our appraisal also covers the financial strengths of CT Power Holdings Ltd, which would contribute 58% of the equity in [CT Power].
>
> In light of our review, we confirm that CT Power Holdings Ltd has the financial capabilities to meet its equity contribution as follows:
>
> Year 1
>
> (a) USD (…) million has been spent as at (date) based on audited accounts;
>
> Year 2
>
> (b) Up to USD (…) million on or before the expiry of two years after issuance of the Notice to Proceed to construct the Plant; and
>
> Year 3
>
> (c) Up to USD (…) million on or before the expiry of three years after issuance of the Notice to Proceed to construct the Plant.
>
> Funds in respect of items (b) and (c) above shall not originate from activities contravening Anti-Money Laundering Legislation or from any other illicit activities.

> This letter is not to be construed as a commitment by us to provide funding or guarantee the payment obligations of CT Power Holdings Ltd as equity contribution.
>
> This letter of comfort was duly authorized by a resolution of the Bank dated …, a copy of which is annexed.
>
> Yours truly,
>
> Signed
>
> …
>
> Seal of the Bank."

24. In the copy of this document exhibited to Ms Jowaheer's affidavit the final sentence has been crossed out and the words "Two signatories" written instead in manuscript. Again, to the extent that there may be a dispute in the evidence as to whether that change was agreed or not, it is unnecessary to resolve it for the purposes of determining this appeal.

25. It appears from a statement made later in the National Assembly by the Minister of Energy, on 3 March 2015, that on 6 February 2015 the Government decided that CT Power should state its source of funding "within a reasonable delay" (ie within a reasonable time), failing which the project would not be implemented. However, CT Power was not informed about this decision at the time.

26. Despite not being informed about the decision of 6 February, on about 27 February 2015 CT Power provided the Government with a letter of that date from Avendus Capital UK (Private) Ltd ("Avendus") addressed to the Minister of Finance ("the Avendus letter").

27. The Avendus letter referred to the project and continued in relevant part as follows:

> "We have been requested by CT Power Holdings Ltd (the 'Company') to write to you in connection with the Company's proposed investment in the Project by way of an equity

contribution into [CT Power] (the 'Project Company') (the 'Transaction').

This letter is provided to you, with the consent of the Company, for information only in relation to your due diligence, and for no other purpose. …

In connection with the Transaction we have carried out a high level review of the Subscription and Shareholders' Agreement in relation to the Project Company dated 11 April 2014 and other relevant project documents including the financing arrangements for the Project reflected in the same, listed in a letter of even date from us to the Company (together, the 'Documents').

Subject to the qualifications set out below, we confirm that, to the best of our knowledge and belief, the Company has the financial capabilities and/or legal rights to allow it to meet the following equity contributions in the Project Company:

> Year 1
>
> (a) USD 13m on or before the expiry of one year after issuance of the notice to proceed to construct the Project;
>
> Year 2
>
> (b) Up to USD 31m (including the USD 13m referred to above) on or before the expiry of two years after issuance of the notice to proceed to construct the Project; and
>
> Year 3
>
> (c) Up to USD 41m (including the USD 31m referred to above) on or before the expiry of three years after issuance of the notice to proceed to construct the Project."

The figures stated above are cumulative figures setting out the total equity injections which are to be met by the Company for the specific periods set out above.

Our confirmation is based on the following assumptions:

- All of the Documents are duly executed by persons with the requisite authority and capacity and constitute legal, valid, binding and enforceable obligations of all the parties to them under all applicable laws; and

- The Company assumes no additional material obligations other than under the Transaction.

Our confirmation is qualified by the following:

- The scope of this letter does not extend to legal, tax related or other matters as to which the Company is being separately advised; and

- This letter is not to be construed as a commitment by us to provide funding or guarantee the payment obligations of the Company in respect of its equity contribution.

We have acted for the Company and for no one else in connection with the Transaction. On your instructions we have provided this letter for information purposes only and, accordingly, we accept no legal liability to you or any other person in relation to the confirmations set out above. This letter is not a substitute for persons interested in the Transaction performing their own due diligence in respect of, and reaching their own conclusions with regard to, the Company, the Transaction and the Documents.

We are authorised and regulated by, and are subject to the applicable rules of conduct of business (including the applicable anti-money laundering rules) of the Financial Conduct Authority of the UK.

This letter and any non-contractual obligations connected with it are governed by, and construed in accordance with, English law and are subject to the exclusive jurisdiction of the English courts."

The letter was not stamped and bore only one signature on behalf of Avendus, of Mr Gaurav Deepak, "Director".

28. CT Power maintains that the Avendus letter satisfied the requirements of the Ministry of Finance for a bank letter of comfort as set out at the meetings on 15 and 16 January referred to above. The Government contends that, on the contrary, the Avendus letter plainly did not meet those requirements.

29. On 3 March 2015 the Minister of Energy stated in the National Assembly that CT Power had not satisfied Condition 15 of the EIA licence and that the Ministry of Energy proposed to recommend to the Cabinet that the Government should not proceed with the project, ie that it should not sign the Implementation Agreement. On 5 March the Minister of Energy made a further statement in the National Assembly, to the effect that he had consulted with the Minister of Finance who agreed that the Avendus letter did not constitute a letter of comfort as required by the Government. The Ministry of Finance confirmed its view to the Ministry of Energy on 9 March.

30. In the view of the Ministry of Finance, the Avendus letter did not comply with the Government's requirements as regards the letter of comfort as explained at the meetings on 15 and 16 January because (a) there was no banking licence number for Avendus on the face of its letter to indicate that it was a licensed bank; (b) the Avendus letter did not contain any assurance that the equity contribution would not originate from funds in breach of anti-money laundering legislation and would not be of a tainted origin; (c) the Avendus letter was not authorised by a resolution of Avendus (assuming it was a bank) and its seal did not appear on the letter, which meant that in the view of the Ministry of Finance it failed to provide assurance that the matter had been considered at the highest level and authorised by the bank; (d) the Avendus letter absolved Avendus from any legal liability to the Government in relation to the confirmation it purported to give in relation to CT Power and CT Power Holdings Ltd; and (e) the Avendus letter required any person interested in the financing transaction to perform its own due diligence and reach its own conclusion, and as such did not provide the required comfort to the satisfaction of the Government.

31. In relation to point (a), Avendus is in fact regulated by the UK Financial Conduct Authority. In relation to point (c) the Board notes that even if it had been agreed that a resolution of the relevant bank was not required, but that the letter of comfort should be signed by two signatories instead, as might be suggested by the evidence adduced for CT Power referred to above, the Avendus letter did not comply with that requirement either.

32. On 13 March 2015 the website of the Prime Minister's Office reported that the Cabinet had decided not to proceed with the project, referring in particular to "the failure of the promoters of the project to submit evidence of their financial capacity or the sources of funding." The website stated that the Government would consider other feasible options, "with necessary transparency and clarity", to meet Mauritius's future electricity needs. The information about the Cabinet's decision was repeated by the

Minister of Energy in the National Assembly on 1 April and again on 2 April. He confirmed that the Government would not sign the Implementation Agreement because CT Power could not establish its financial capabilities to the satisfaction of the Government.

33. CT Power was not informed directly about the Cabinet's decision. However, it learned of the decision at about the time these announcements were made.

34. On 8 April 2015 CT Power served notices *mise-en-demeure* (that is to say, formal demands before action). On 25 May it commenced these proceedings by applying for leave to apply for judicial review against the Ministry of Finance and the Ministry of Energy, seeking a declaration that it had complied with Condition 15 and an order of mandamus directing the Ministry of Energy to sign the Implementation Agreement on behalf of the Government (this was later amended to a claim for declaratory relief). The CEB was joined as an interested party. The Supreme Court granted leave on 16 July 2015. The case proceeded to a full hearing in the Supreme Court in early 2016. At the hearing, the Ministry of Energy, supported by the CEB, submitted that the decision not to sign the Implementation Agreement was not amenable to judicial review because it was a purely private and commercial act. In this regard, Mr Chetty SC for the CEB relied in particular on the waiver of sovereign immunity in clause 12.7 in the draft Implementation Agreement. Counsel for the Ministry of Energy further submitted that entering into the Implementation Agreement did not fall within the statutory functions of the Ministry and the Minister.

35. On 7 July 2016 the Supreme Court gave judgment in favour of CT Power:

(i) The court reviewed English, Privy Council and Mauritian authorities and concluded that the decision not to enter into the Implementation Agreement was amenable to judicial review; clause 12.7 in the draft Implementation Agreement was concerned only with waiver of sovereign immunity and did not have the effect of ousting the judicial review jurisdiction of the court; and in deciding whether or not to cause the Government to enter into the Implementation Agreement the Minister of Energy was exercising his responsibility for the conduct of the business of Government and his Ministry as assigned under section 62 of the Constitution of Mauritius: paras 25-43;

(ii) As regards the claim for judicial review of the decision not to sign the Implementation Agreement, the court held that CT Power enjoyed a legitimate expectation founded on what was set out in clause 7 of the draft Implementation Agreement that it would have nine months *after* that agreement was signed in which to provide proof of its financial capabilities, so that it was unreasonable, unfair and against legitimate expectation for the Minister to refuse to sign the

Implementation Agreement on the basis that no such proof had been provided in advance of signing; also, the court did not accept that CT Power had been informed in meetings after 5 December 2014 that the signing of the Implementation Agreement would be subject to the submission of a letter of comfort, so the legitimate expectation flowing from clause 7 continued to have effect and the refusal of the Ministry of Energy to sign the Implementation Agreement was "unreasonable, unfair and against the legitimate expectation of CT Power": paras 44-48;

(iii) In relation to the claim for judicial review of the decision of the Ministry of Finance not to confirm that CT Power had complied with Condition 15 of the EIA licence, the court referred to leading authorities on legitimate expectation; noted that it was only in the exchange of affidavits in the judicial review proceedings that CT Power was informed of the reasons of the Ministry of Finance for rejecting the Avendus letter as a satisfactory letter of comfort and had not been given an opportunity to make representations why it was satisfactory; and held that, assuming that the draft letter of comfort proposed at the meetings on 15 and 16 January 2015 was in final form (as maintained in the affidavit evidence for the Ministry of Finance: see above), nonetheless CT Power had a legitimate expectation to be consulted and given an opportunity to make representations before the Avendus letter was rejected, and fairness would require that CT Power be informed why the Avendus letter did not satisfy the Ministry's requirements and be given an opportunity to explain why in its view it did so: paras 49-57;

(iv) The court made two declarations to reflect the reasoning in its judgment: (a) that the reasons invoked by the Ministry of Finance in its affidavits to decide that Condition 15 had not been satisfied were "unreasonable, irrational and in breach of the legitimate expectation of CT Power"; and (b) that the reasons invoked by the Ministry of Energy for not signing the Implementation Agreement were "misconceived, unreasonable and irrational and in breach of the legitimate expectation of [CT Power]".

36. In March 2017, CT Power issued a civil claim for damages ("the damages claim") in respect of its treatment by various agents (or préposés) of the State of Mauritius, including the Ministry of Energy and the Ministry of Finance, in relation to the failure to sign the Implementation Agreement and to confirm that Condition 15 had been satisfied. CT Power claims that the acts of the préposés amount to "faute lourde" (serious fault) under the law of Mauritius for which the State of Mauritius is liable in tort as "commettant". CT Power claims compensation amounting to a sum equivalent to about £77.5m in respect of its wasted costs in relation to the project and for loss of profits.

37. The Ministry of Finance and the Ministry of Energy, supported by the CEB, now appeal to the Board against the decision of the Supreme Court.

Discussion

Abuse of process

38. At the outset, Mr James Guthrie QC for the appellants submitted that the Board should rule that the judicial review proceedings against the Ministry of Finance and the Ministry of Energy were an abuse of process, because they were in reality merely a prelude to CT Power's damages claim and all the issues arising between the parties in the judicial review proceedings ought to have been postponed to be dealt with exclusively in the context of the damages claim. The Board does not accept this submission.

39. There was no abuse of process involved in bringing the judicial review proceedings. Judicial review claims are supposed to be brought promptly, and CT Power would have been at risk of having its judicial review proceedings dismissed if it had delayed. There is nothing to indicate that CT Power brought the judicial review proceedings for any reason other than to vindicate its claims for public law relief in those proceedings (it is entirely possible that it only decided to bring its damages claim after it had considered the judgment of the Supreme Court in those proceedings and now under appeal). Even if it had had some other reason in mind, that would not have made it an abuse of process for it to bring those proceedings. It had properly arguable claims which it was fully entitled to bring before the court for it to rule upon them. It may have been quicker and cheaper to proceed by way of judicial review to obtain determination of the issues in those proceedings, even if they might have been thought to be issues relevant to a possible claim for damages, and there would be nothing abusive in taking advantage of the judicial review procedure in that way. In situations (not this case) where a judicial review claim is brought at the same time as a damages claim, the way in which those claims are handled, perhaps by staying one or the other, will be a matter for case management by the local courts: compare *Panday v The Judicial and Legal Service Commission* [2008] UKPC 52, para 22, and *Emtel (Mauritius) Ltd v The Ministry of Telecommunication* [2000] UKPC 36, para 44. The Board notes that the practice of the courts in Mauritius would appear to make it difficult to hear such claims together (see *Emtel Ltd v The Telecommunication Authority* 2002 SCJ 130); nonetheless, that might be a further case management option which could be explored in an appropriate case if it were clearly in the interests of justice that this be done.

40. In any event, in the present case there is no precise overlap between CT Power's judicial review claim and its damages claim. The judicial review claim depends upon

whether the Ministry of Finance and the Ministry of Energy acted lawfully, as required by the usual rules of public law. No distinct standard of fault is in issue. By contrast, the "faute lourde" standard on which the damages claim is based involves an examination of whether public officials were at fault in acting with serious disregard for their public law duties: see the discussion in *Mario Alain Chung Ching Ah Sue v The State of Mauritius* 2015 SCJ 110. The judicial review claims and the damages claim give rise to different remedies, and CT Power will have to prove serious fault in the damages claim which it does not have to prove in its judicial review claims. There would be nothing abusive in CT Power wishing to contend for relief to which it may be entitled as a matter of public law, whether or not it might also wish to bring a claim for damages based on a more demanding legal test.

The ambit of the court's judicial review jurisdiction

41. The next submission made by Mr Guthrie was that the Supreme Court was in error in holding that the refusal by the Ministry of Finance to confirm that CT Power had satisfied Condition 15 and the refusal of the Ministry of Energy to cause the Government to enter into the Implementation Agreement were amenable to judicial review. Mr Guthrie contends that, as a matter of principle, both decisions lie outside the scope of the judicial review jurisdiction of the court, because they both involve matters of commercial judgment and are decisions of a purely private nature having nothing to do with public law. The Board disagrees.

42. Dealing first with the decision of the Ministry of Finance in relation to Condition 15, in the Board's view that was plainly a matter falling within the scope of public law and the court's judicial review jurisdiction. Condition 15 was a condition in a regulatory instrument, the EIA licence, issued pursuant to the EPA 2002. By that condition, the Ministry of Finance was given a function to perform in the public interest as part of the operational mechanisms to ensure the proper fulfilment of the public interest objectives of the EIA licence and the EPA 2002. In deciding whether or not to accept that Condition 15 had been satisfied, the Ministry of Finance was required to act in accordance with usual standards of public law and in the usual way could be subject to judicial review if it did not. It is a separate question, to which the Board returns below, whether the Ministry of Finance did anything unlawful in taking the decision it did.

43. The Board also considers that the decision of the Ministry of Energy to refuse to sign the Implementation Agreement is in principle within the scope of the court's judicial review jurisdiction. It is true that a decision whether or not to enter into a contract involves deciding whether to accept obligations sounding in the private law of contract. However, a contract is made between legal persons, and where the person who is a proposed party to a contract is a public authority the way in which it may behave is subject to rules of public law; and whether the public authority has acted lawfully in accordance with those rules is a matter which may be subject to judicial review. The

Board would add that the same point about the relevance of rules of public law can be made regarding a decision by a public authority whether and how to exercise rights sounding in private law conferred by a contract into which it has entered: see *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521 (PC), in particular at p 526A-D (decision to give notice to terminate a commercial contract for the bulk supply of electricity). Again, it is a separate question what public law standards apply and whether the Ministry of Energy did anything unlawful in terms of those standards in taking the decision it did: see below.

44. The Board agrees with the ruling of the Supreme Court at para 42 of its judgment that clause 12.7 of the Implementation Agreement cannot oust the judicial review jurisdiction of the court. In the Board's view, that is for three reasons: (i) the Implementation Agreement was not signed and never came into effect; (ii) in any event, clause 12.7 is irrelevant to the issue of the availability of judicial review: it is a provision which is concerned with a quite different topic, namely to ensure that the Government would not attempt to rely on the principle of sovereign immunity to deny the enforceability of the Implementation Agreement if that agreement were signed; and in addition (iii) a contract between a public authority and a private party cannot remove the judicial review jurisdiction of the court, which exists to safeguard the public interest.

45. The Board therefore turns to consider whether the Ministry of Finance or the Ministry of Energy acted unlawfully according to public law standards in making their respective decisions to refuse to confirm that Condition 15 had been satisfied and to refuse to sign the Implementation Agreement. It will address the decisions in that order.

The decision of the Ministry of Finance in relation to Condition 15

46. In the Board's view, the Ministry of Finance acted lawfully in taking its decision. The Supreme Court fell into error in holding otherwise.

47. Condition 15 of the EIA licence laid down a requirement that CT Power provide proof of its financial capabilities for the duration of the project "to the satisfaction of the Ministry of Finance …". The question whether this requirement was satisfied was thus a matter which depended upon the opinion of the Ministry of Finance, and moreover was one involving complex assessment regarding the financing structure for the project and the likely robustness of that structure for years into the future. These features mean that in deciding whether Condition 15 had been satisfied the Ministry of Finance had a wide margin of appreciation in making the complex evaluative judgment required. The Supreme Court did not suggest otherwise.

48. There is, rightly, no suggestion that the Ministry of Finance acted in bad faith or in any way irrationally or improperly in laying down any of the requirements it set out

in the draft letter of comfort agreed at the meetings on 15 and 16 January 2015. The Ministry of Finance was therefore lawfully entitled to look to see whether the Avendus letter, which was proffered by CT Power in purported compliance with what it had been told was required, met those requirements.

49. In the Board's view, the Ministry of Finance was well entitled to conclude, as it did, that the Avendus letter failed to meet the requirements which had been properly set by it and agreed by CT Power, by reason of points (a) to (e) identified in the affidavit filed for the Ministry, referred to at para 30 above. Point (a) (absence of a banking licence number from the face of the Avendus letter) is not the weightiest reason, but was a legitimate factor for the Ministry to take into account: it had made it clear that it required a comfort letter from a bank, and there is no reason why the burden should have been on the Ministry to undertake inquiries whether Avendus was or was not a bank when that was not apparent from the face of its letter. Point (b) (assurance that CT Power's sources of funding did not offend against anti-money laundering legislation) was correct: the Avendus letter failed to provide any comfort on this question, referring instead to the fact that *Avendus* was subject to the UK's anti-money laundering rules, which plainly failed to meet the Ministry's concerns since it was not suggested that Avendus was providing the finance for CT Power. Point (c) (the Avendus letter was not authorised by resolution and did not bear the seal of a bank) was correct and the Ministry was entitled to regard this as weakening the level of assurance the letter provided should anything go wrong with the financing arrangements (and this would be so even if it had been agreed at the meetings on 15 and 16 January 2015, as suggested in the evidence for CT Power, that the comfort letter should bear two signatures on behalf of the bank instead of being accompanied by a resolution of the bank, since the Avendus letter bore only one signature). Point (d) (the Avendus letter absolved Avendus from any legal liability) and point (e) (the letter required recipients to conduct their own due diligence) were both correct and on any view constituted a major deficiency. Contrary to the terms of the draft letter which had been agreed, the Avendus letter stated in terms, "we accept no legal liability to you" in respect of the confirmation purportedly given regarding CT Power's ability to finance the required equity investment and stated that it was up to persons interested in the transaction (such as the Government) to perform their own due diligence to check on CT Power's financial capacities. As a result, if it turned out that there was in fact a problem with the financing of the project, the Avendus letter provided no comfort that the Government could have legal recourse against Avendus for negligence in its examination of the financing arrangements and in giving such confirmation. The absence of legal obligation on the part of Avendus also tended to undermine the assurance the Government could derive from it about CT Power's financing capabilities, since Avendus might not have investigated these matters with full care and attention.

50. Even if the evidence adduced by CT Power to the effect that it was agreed that there could be some limited modification of the terms of the draft comfort letter were accepted (a matter left open by the Supreme Court, albeit that at para 56 it was prepared to assume in the Government's favour that the draft comfort letter agreed on 15 and 16

January 2015 was in final form), these important points of divergence between the draft letter agreed and the Avendus letter as tendered by CT Power could not be regarded as falling within the limited scope for modification of those terms as is referred to in that evidence: see above. The Ministry of Finance was lawfully entitled to conclude that the Avendus letter did not comply with the requirements which it had properly and lawfully set out in the terms of the draft bank comfort letter agreed at the meetings on 15 and 16 January 2015. Hence, so far as the substance of the matter is concerned, the Ministry of Finance was entitled to take the view that the Avendus letter did not constitute satisfactory proof of CT Power's financial capabilities for the duration of the project such as would satisfy Condition 15.

51. There is a further and more fundamental reason why the Ministry of Finance was entitled to take the view in February/March 2015 that there was no satisfactory proof of CT Power's financial capabilities with respect to the project. As noted by the Supreme Court at para 45, CT Power's own case was that the signing of the Implementation Agreement was critical to provide assurance to those providing funding for CT Power for the project by way of debt and equity. If the Government lawfully chose not to sign the Implementation Agreement, there was no suggestion by CT Power that it could be said to be able to satisfy Condition 15 in the early part of 2015. (Of course, for the reasons set out above, the EIA licence continued to exist for the benefit of CT Power until January 2016 and it was open to it to submit to the Ministry of Finance, at any time up to the expiry of the licence, details of any improved financing arrangements which it might be able to put in place, with a view to persuading the Ministry that Condition 15 could be regarded as fulfilled: however, this did not occur).

52. Therefore, in the Board's judgment, quite apart from the failure of the Avendus letter to meet the requirements of the Ministry of Finance as set out in the draft bank comfort letter which had been agreed, CT Power's judicial review claim against the Ministry of Finance cannot succeed as a matter of substance unless CT Power's separate judicial review claim against the Ministry of Energy in respect of its refusal to sign the Implementation Agreement succeeds. However, for the reasons given below, that claim fails.

53. The basis for the Supreme Court's ruling in the judicial review claim against the Ministry of Finance with respect to Condition 15 was that it considered that the Ministry had acted in breach of a legitimate expectation of procedural fairness, citing *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, at para 57, and *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. According to the Court, CT Power had a legitimate expectation to be consulted before the outright rejection of the Avendus letter as a suitable letter of comfort and to be given the opportunity to refute the reasons relied upon by the Ministry of Finance for rejecting it; this legitimate expectation arose by reason of the meetings between CT Power and the Ministry of Energy and the Ministry of Finance in January 2015, in which both

Ministries represented that they were in the process of resolving how best Condition 15 would be satisfied by CT Power: para 56.

54. To this procedural aspect of the case the Board now turns. In doing so, the Board observes that at those meetings both Ministries appear to have treated the question of satisfaction of Condition 15 as related to the question whether the Government could be satisfied that CT Power was a financially robust and credible counterparty for the project and the Implementation Agreement. Therefore, it is appropriate to treat this procedural aspect of the case as relevant both to CT Power's claim against the Ministry of Finance and to its claim against the Ministry of Energy with respect to the signing of the Implementation Agreement, considered below.

55. Mr Basset SC, for CT Power, accepts that in order to show that a legitimate expectation has arisen it is necessary to identify a promise or assurance by the relevant decision-maker which is "clear, unambiguous and devoid of relevant qualification" (per Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569; approved in *R (Gaines-Cooper) v Inland Revenue Comrs* [2011] UKSC 47; [2011] 1 WLR 2625, paras 28-29).

56. For present purposes the Board is prepared to proceed on the basis that at the meetings on 15 and 16 January 2015 the Ministry of Finance led CT Power to expect that if it could provide the Ministry with a bank comfort letter in the terms agreed at those meetings, that would satisfy the Ministry so far as Condition 15 was concerned. However, as explained above, it was also recognised that CT Power's financing would be dependent on the Government entering into the Implementation Agreement containing the guarantee of due payment for the electricity to be supplied by the project. Therefore, any assurance given by the Ministry of Finance regarding the acceptability of a bank comfort letter in the terms of the draft agreed was known to be subject to the qualification that the Ministry of Energy would need to sign or be prepared to sign the Implementation Agreement.

57. As regards the Implementation Agreement, in early 2015 the latest draft version (from July 2014) was far from being in final form (it was replete with drafting suggestions proposed by CT Power but not yet accepted by the Ministry of Energy) and was in any event known to be subject to contract and without legal effect until it came to be signed by the parties. The Ministry of Energy gave no assurance to CT Power that it would sign any particular version of the Implementation Agreement if CT Power provided a bank comfort letter in the form of the draft agreed. Indeed, according to the terms of clause 7 of the draft Implementation Agreement which CT Power was seeking to persuade the Ministry of Energy to accept, CT Power was proposing that the Implementation Agreement should be signed before it had to provide proof of its financial capabilities to satisfy Condition 15 in the EIA licence.

58. It may be that the assurance given by the Ministry of Finance referred to above created a procedural legitimate expectation that the Ministry would consider whether any bank comfort letter submitted by CT Power was in the form of the draft bank comfort letter agreed at the meetings on 15 and 16 January 2015. The Ministry did consider whether the Avendus letter was in the form of the draft bank comfort letter; accordingly, it complied with such a procedural legitimate expectation, if there was one. However, there could be no question of the Ministry being subject to any substantive legitimate expectation arising out of what was said at the meetings on 15 and 16 January 2015 that it would confirm that Condition 15 was satisfied when it received the Avendus letter, both because the Ministry rationally and lawfully concluded that that letter was not in the form of the draft which had been agreed and also because the Ministry of Energy was not prepared to sign the Implementation Agreement (whether in the draft then proposed by CT Power or in any other version).

59. CT Power enjoyed no legitimate expectation to the kind relied upon by the Supreme Court in its judgment. In the *Attorney General of Hong Kong* case, the Board stated the relevant principle in relation to procedural legitimate expectations as follows, at [1983] 2 AC 629, 638:

> "… when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct."

60. In the present case, however, neither the Ministry of Finance nor the Ministry of Energy made any promise or gave any assurance that if CT Power submitted a bank comfort letter which was not in the form agreed at the meetings on 15 and 16 January it would be afforded an opportunity to make representations as to why, notwithstanding its non-conformity with the agreed draft, it should nonetheless be accepted by them.

61. Further, contrary to the view of the Supreme Court (also at para 56 of its judgment), fairness did not require that CT Power should be informed why the Avendus letter did not comply with the agreed draft and "given an opportunity to justify why in its view it did so". The Ministry of Finance had already discharged its obligation to treat CT Power fairly by inviting it to the meetings on 15 and 16 January and giving it an opportunity to learn about the Ministry's requirements, to make representations itself and to agree the form of the bank comfort letter to be provided. From this engagement, CT Power knew precisely what form of bank comfort letter was required. Yet it failed

to provide one which complied with the terms agreed. There was no doubt about the non-compliance of the Avendus letter with the agreed draft. The Ministry of Finance was not subject to any obligation to give CT Power a second chance to debate what form of comfort letter should be provided, nor to give CT Power an opportunity to seek to persuade it that the non-compliant Avendus letter ought to be enough.

The decision of the Ministry of Energy in relation to the Implementation Agreement

62. The Supreme Court identified the power of the Minister of Energy to negotiate and enter into the Implementation Agreement as being derived from section 62 of the Constitution of Mauritius, which permits the assignment to a Minister of "responsibility for the conduct (subject to this Constitution and any other law) of any business of the Government, including responsibility for the administration of any department of Government". Although Mr Guthrie disputed this, he did not identify any other source for the Minister's power to make a commercial contract on behalf of the Government. The Board sees no reason to question this part of the Supreme Court's analysis.

63. The power of the Minister of Energy to undertake negotiations with CT Power as part of the conduct of the business of the Government is a wide one, conferring on the Minister a very wide discretion as to how best to proceed. The implication is that the Minister is permitted to participate in the commercial market in the usual way, ie through the exercise of the full bargaining power available to the Government in order to secure the best commercial deal possible and thereby promote the public interest. With that end in view, a court should be astute to ensure that application of public law standards in relation to the Minister does not cut down or undermine that bargaining power. Nor should public law standards be applied in such a way as to give a potential contracting counterparty a negotiating advantage which has not been bargained for.

64. In negotiating a commercial contract on behalf of the Government, the Minister, as a public authority, is not entirely free from constraints arising under public law. He is obliged to comply with basic public law standards which ensure that he properly seeks to promote the public interest. Accordingly, his decision-making as to how to conduct negotiations before a contract is entered into might be brought into question if, by way of purely hypothetical example, he acted out of personal spite or because he had been bribed. As a result, the potential counterparty is not exposed to what, if they were negotiating with another private party, might be the pure capriciousness of that private party in deciding whether to enter into the contract and on what terms.

65. However, when conducting negotiations, the Minister is entitled to have regard to a wide range of considerations, including political considerations, which would not typically play a role in negotiations between two private commercial parties. In the present case, for example, entering into the Implementation Agreement would involve

a commitment potentially requiring substantial payments of public money. There is inevitably a possible political dimension to such questions which it would be legitimate to take into account. In the present case it appears that the incoming government after the general election in December 2014 may have been less convinced than the former government that the project was a good idea and that the commitment to be given in the Implementation Agreement was justified.

66. For these reasons, in the present context the Board takes the opportunity to reaffirm the guidance given by it in the *Mercury Energy* case, at [1994] 1 WLR 521, 529A-B:

> "It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith."

The limited scope for a judicial review challenge as indicated in this passage reflects the width of the relevant discretion enjoyed by a state enterprise (or, in the present case, the Minister of Energy) when exercising its powers to negotiate a commercial contract or how to use its rights under such a contract.

67. There is no question in the present case of the decision of the Minister of Energy not to finalise and sign the Implementation Agreement being affected by fraud, corruption or bad faith. In the Board's judgment, particularly in light of the unsatisfactory nature of the Avendus letter, the Minister was entitled simply to take the view that, all things considered, CT Power did not appear to be a satisfactory contractual counterparty and that it was undesirable for the Implementation Agreement to be entered into.

68. The Board does not exclude the possibility that judicial review of the Minister of Energy's decision might be appropriate if his conduct had given rise to a legitimate expectation on the part of CT Power as to how he would proceed in relation to the Implementation Agreement. However, in the Board's view no such legitimate expectation arose.

69. The Supreme Court held (para 46) that there was a legitimate expectation that the Minister of Energy would adhere to clause 7 in the draft Implementation Agreement, meaning that the Minister would sign the Implementation Agreement first and allow CT Power to provide proof of its financial capabilities within nine months thereafter. The Board disagrees. It is not possible to spell out of clause 7 any promise or assurance by the Minister which is "clear, unambiguous and devoid of relevant qualification", as would be required in order to give rise to a legitimate expectation. That is both because

(i) the text of clause 7 in the draft Implementation Agreement was accompanied by the Note set out above which made it clear that it was being put forward by CT Power in the "hope this is in line with the expectations of the [Government]", so it was not a promise or representation by the Minister at all; and in any event, (ii) clause 7 was contained in a draft agreement which was yet to be signed and hence was recognised by the parties as being subject to contract, so it could not be regarded as a promise or assurance which was "devoid of relevant qualification" (on the contrary, clause 7 was clearly a statement made subject to a relevant qualification, namely that it would not be binding until the Implementation Agreement was signed). In argument, Mr Basset SC accepted that this was so.

70. In the face of this difficulty, Mr Basset sought to argue that a relevant promise or assurance by the Government could be spelled out of the Note which accompanied the text of clause 7. However, this submission cannot be sustained. The terms of the Note make it clear that it is written by the representatives of CT Power and does not proceed from the Government at all. The Note does not purport to set out any promise or assurance.

71. Mr Basset submitted that the first sentence of the Note set out an assurance by the Ministry of Finance, on behalf of the Government, that it wished to have clause 7 included in the final version of the Implementation Agreement. But in the Board's view the sentence cannot be read as reflecting any clear promise of the Ministry of Finance "devoid of relevant qualification", because (i) it is expressed in conditional terms (the sentence simply recorded that the Ministry had said what should happen "if Condition 15 … is included in the Implementation Agreement", but it was an open question whether that would be agreed, rather than Condition 15 being treated as setting out a requirement which had to be satisfied before the Implementation Agreement was signed); and, again, (ii) clause 7 and the Note appeared in the text of an agreement which was all subject to contract.

Conclusion

72. For the reasons given above, the Board allows the appeal and quashes the order made by the Supreme Court.