

IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 199

**BELLA VISTA DEVELOPMENT CO. LTD. CLAIMANTS
LOPEZ EQUIPMENT LTD.**

BETWEEN AND

**THE ATTORNEY GENERAL
NOEL HARVEY**

DEFENDANTS

Hearings

2009

16th June

19th June

20th July

Mr. Godfrey Smith for the claimants

Mr. Phillip J. Palacio for the defendants

LEGALL J.

JUDGMENT

The Contract

1. The Government of Belize secured a loan from the Government

of Taiwan to construct a new sporting complex building named the Belize Sports Center (B.S.C.) to be located on the grounds of the Marion Jones Sporting Complex, situate at Princess Margaret Drive, Belize City, Belize. For the purpose of constructing the B.S.C., the Government of Belize published in local newspapers on 17th May, 2007 invitations to contractors to submit sealed bids for the construction of the B.S.C. Several bids were received by the Government, including bids by the claimants. Having considered the bids from the contractors who applied, and having found that the claimants had the lowest bid, the Government agreed to award the contract to construct the B.S.C. to the claimants.

2. By written agreement dated 19th December, 2007 between the Government of Belize and the claimants, and signed by both parties, the claimants were awarded the contract to build the Belize Sports Center on the grounds of the said Marion Jones Sporting Complex, at a contract price of \$16,985.500 Belize dollars. The contract contained terms in relation to specifications and requirements for the construction of the B.S.C. Among the terms of the contract agreed by the parties, was the following clause:

“59.4 Notwithstanding the above, the Contracting Agency may terminate the contract for convenience at anytime.”

(The Convenience Clause)

3. In clause 1 (q) of the contract, the Contracting Agency is the party who employed the contractor to carry out the construction of the B.S.C., in this case, the Government of Belize. Another clause of the contract that is important to this case is Clause 61.2 which provides as follows:-

61.2 If the Contract is terminated for the Contracting Agency's convenience or because of a fundamental breach of Contract by the Contracting Agency, the Project Manager shall issue a certificate for the value of the work done, materials ordered, the reasonable cost of removal of equipment, repatriation of the Contractor's foreign personnel employed solely on the Works, and the Contractor's costs of protecting and securing the Works, and less advance payments received up to date of the certificate. The portion of the payment due to the Contractor for materials ordered shall only be made after the receipt of such materials. (Emphasis Mine) (The Compensation Clause).

4. There is another clause of the contract, Clause 51 which deals with advance payments to the contractor. Clauses 51(1)(2) and (3) state as follows:

51.1 “The Contracting Agency shall make advance payment to the contractor

51.2 The Contractor is to use the advance payment only to pay for Equipment, Plant, Materials, and mobilization expenses required specifically for execution of the Contract. The Contractor shall demonstrate that advance payment has been used in this way by supplying copies of invoices or other documents to the Project Consultant.”

51.3 The advance payment shall be repaid over a period of 12 months, by deducting equal amounts from payments otherwise due to the Contractor, commencing at the issue of Interim Certificate No 2.” (The Advance Clauses).

5. The Government made in accordance with the Advance Clauses an advance payment to the claimants of \$2,000,000. According to the claimants, they commenced work on the B.S.C. in December, 2007, the same month the contract was signed. According to the defendants, the works under the contract began on 6th February, 2008.

6. In February, 2008, there were general elections in Belize. The political party that formed the Government – The People’s United Party – which signed the agreement with the claimants, lost the general elections; and another political party – The United Democratic Party – formed the new Government in February, 2008. On 7th March, 2008, Mr. Dwayne Thurton, representing the new Government, sent a letter to the claimants as follows:

**“PROPOSED BELIZE SPORTS CENTER
MARION JONES SPORTS COMPLEX**

STOP ORDER

Dear Mr. Lopez,

**Further to our meeting of
yesterday, we have been
advised that the Government
of Belize is currently
reviewing the construction
contract for the above
captioned project. We have
subsequently been instructed**

**to issue a stop order for
the works. With the above,
you are hereby instructed to
cease works immediately
until further advised
.....” (emphasis mine)**

Sincerely

**Sgd: Dwayne A. Thurton
Director/Engineer**

7. Upon receipt of the above letter, the claimants ceased all construction works with respect to the project; and by letter dated 14th March, 2008 the claimants lawyer, on behalf of the claimants, wrote the officer who had signed the stop order letter, asking for the reasons for the issuing of the stop order; but did not get a response to his query. By letter dated 11th March, 2008, the second named defendant, representing the government, wrote to the claimants as follows:

Dear Mr. Lopez,

**Re: Belize Sports Center Construction Project
Contract**

**You are hereby notified that the Belize Sports
Center Construction Project Contract is
terminated completely for Government’s
convenience under clause 59.4. The termination**

is effective immediately upon receipt of this notice”

Yours faithfully,

Sgd: Noel Harvey

Contracting Agent for
and on behalf of the
Government of Belize

8. This letter was received by the claimants on 14th March, 2008. By further letters by attorneys for and on behalf of the claimants, dated 18th and 20th March, 2008, the attorneys wrote to the defendants urging that the termination of the contract was unlawful, and requested that the termination be withdrawn. The claimants got no response from the defendants. On 1st April, 2008 the claimants brought an action against the defendants in which they claimed the following: –

- (1) **A Declaration that the “Stop Order” issued to the Claimants by the fourth-named Defendant on March 7th 2008, for and on behalf of the Defendants was in breach of the claimants contract with the Government of Belize.**
- (2) **A Declaration that the letter dated March 11th written to the Claimants purporting**

to terminate the Claimants contract with the Government of Belize for convenience under clause 59.4 of the contract amounts to a breach of contract.

- (3) Alternatively, a Declaration that the letter dated March 11th 2008 written to the Claimants purporting to terminate the Claimants contract with the Government of Belize for convenience under clause 59.4 of the contract amounted to an unlawful termination of the contract.**
- (4) A Declaration that the Claimants are entitled to be compensated for their losses, including loss of profit and overheads contribution on the balance of the work upon the Government having terminated their contract for convenience under clause 59.4 of the contract.**
- (5) A Declaration that, to the extent that clause 59.4 is interpreted as entitling the Defendants to terminate for convenience without compensating the Claimant for their losses, it is unconscionable and unenforceable.**
- (6) A Declaration that the Defendants**

are not entitled to use clause 59.4 of the contract as providing a shield against their own wrongful termination or repudiation of the contract.

- (7) An order that the Government of Belize pays to the Claimants the sum of BZ \$2,547,825.00 representing the loss of profit on a building contract valued at BZ\$16,985,500.00.**
- (8) General damages for breach of a Contract or unlawful termination of a contract signed on the 19th day of December 2008, between the Claimants and the Minister of Sports for and on behalf of the Government of Belize, together with interest thereon.**
- (9) Exemplary Damages**
- (10) Costs**
- (11) Any other such relief which the Court thinks fit.**

9. In June, 2008 notices appeared in newspapers in Belize, that invited bids for the contract to construct the same sports center at the said Marion Jones Sports Stadium.

The Convenience Clause: Limitations

10. The main issue for decision in this case is this: Did the defendants breach the contract when they terminated the contract under the convenience clause? The defendants submitted that the convenience clause authorized them to terminate the contract at any time and that they could do that with or without cause, and that the clause prevented a claim for wrongful termination.

11. The defendants submitted that the meaning of the clause was clear and unambiguous, and it stated that the defendant could terminate the contract at any time. Therefore, the courts should give effect to the clear and unambiguous language of the convenience clause and hold that the government had the right to terminate at any time with or without cause. The defendants further submitted that the contract in this case was not subject to the “doctrine of good faith.”

12. The defendants rely on several United States authorities such as *Roof Systems Inc v Johns Manville Corporation 2004 Texas Appeals* and *TSI Energy v Stewart Operations 1998 U.S. Dist New York, 4N International v. Metropolitan Transit Authority 56 S.W. 3d 860; AJ Temple Marble v Long Island Rail Road 172 Misc. 659 NYS 412*. In Roof Systems, the termination for convenience clause states that the party “reserves the right to terminate this agreement for its convenience, upon written notice” to the other party. The Court of Appeal of Texas has held that “a termination for convenience clause allows termination with or without cause and bars a claim for wrongful termination quite simply (the defendants) were allowed

to terminate Roof System contract for convenience – with or without cause.” This ruling is partly consistent with the case of *Marconi*, as we shall see below. But, the Court of Appeal in *Roof Systems* went on to imply that bad faith, if proven, was a limit on the convenience clause. The court said:

**“Roof Systems also points us to
evidence of bad faith without citing any
specific allegation of bad faith After
reviewing the record, we find no evidence
of bad faith. See Blacks Law Dictionary
as 712 (7th Edition 1990 defining bad faith
as dishonesty of belief of purpose.”**

13. In *AJ Temple* above, the Supreme Court of New York held that:

**“A standard termination for convenience
clause in a Government contract provides
the government with broad rights to
terminate a contract whenever the
Government deems that termination is in
its interest Nonetheless, despite
recovery limitations contained in a
termination for convenience clause, a
contractor may recover full breach of
contract damages if it can show that the
Government acted in bad faith or abused**

its discretion in invoking the termination clause Bad faith in the context of a termination for convenience clause has been defined as “malicious ----“ or “Animus” towards the contractor *Kalvar Corp v United States 211 CT CI 191.*”

14. *In 4N International* above, the court states that, “several Texas Courts have previously construed termination for convenience clauses in private contracts as contracts terminable at will allowed termination without cause and barred a claim for wrongful termination.” But the court, consistent with the other authorities cited above, also said:

“Generally, termination for convenience, breaches the contract if a claimant shows bad faith or a clear abuse of discretion.”

15. The claimants, therefore, submitted that there were legal limits on the defendants when acting under the convenience clause; that the clause could not be used willy nilly. The defendants, it was submitted, could not legally terminate the contract under the convenience clause in bad faith, or as an abuse of contracting discretion, or for the purpose of getting a better bargain from another source. The claimant further submitted that the convenience clause was unenforceable, because it

- was unconscionable, in that the contract failed to provide compensation to the claimants for their losses, such as loss of profit.
16. Therefore, it was submitted for the claimants, the court in interpreting the convenience clause, must bear in mind the above legal limitations; and where, the claimants submitted, the court found that the defendant acted in bad faith, unconscionable, abused its contracting discretion or used the convenience clause with the intention of awarding the contract to someone else, the defendants, in either of the above instances, would be in breach of the contract, because the above instances put legal limitations on the use of the convenience clause.
 17. The claimants relied on several authorities to support these submissions. The legal authorities relied on by the parties emanated mainly from the United States, Australia and Canada, because, it was submitted to the court, little attention had been paid in the English common law and English legal literature on the interpretation of convenience clauses.
 18. The first authority cited by the claimants on the question of a limitation on the use of convenience clause is ***G.E.C Marconi Systems PTY Limited v B.H.P. Information Technology PTY Limited 2003 FCA 50***, an authority from Australia. The report available to the court seems to be incomplete. But the facts, as far as I can gather from the report, seem to be that Marconi, the plaintiffs, alleged that B.H.P., the defendant, purported to terminate the plaintiff's contract under a clause of the contract, cl 27(1), which

authorized termination for poor performance. The plaintiff contended that the termination was ineffective and improper.

19. The defendant sought to counter this contention by submitting that, even if the poor performance termination was ineffective, the defendant could still rely, in any event, on another clause of the contract – cl 27.5 – the termination for convenience clause; and that the defendant would seek to justify the termination by relying on the said termination for convenience clause. *Finn J* therefore could then say that “the only issue I need to determine here is whether a party, by relying on one basis for terminating a contract, is for that reason above, precluded from later relying upon a termination for convenience clause justifying the termination.” The judge continued:

“If a contract contains a termination for convenience clause allowing the government to terminate a contract in whole or in part and the contracting officer could have invoked that clause instead of terminating, rescinding, or repudiating the contract on some other invalid basis, the court will constructively invoke the clause to retroactively justify the government’s actions, avoid a breach, and limit liability. Courts apply the doctrine of constructive termination for convenience on government contract

cases when the basis upon which a contract was actually terminated is legally inadequate to justify the action taken.”

20. So *Marconi* mainly dealt with the principles of constructive termination for convenience. But the court had much to say about the termination for convenience clause. The termination for convenience clause in the *Marconi* case was contained in cl. 27.5 of the contract. Cl. 27.5, states that B.H.P. may terminate the contract in whole or in part by notifying the other party in writing that the contract or part of it is terminated by the date specified in the notice. But this is what *Finn J* said in relation to the notice to terminate under cl. 27.5, which was sent to the other party –

“A notice to terminate under cl. 27.5 did not require that it state the ground on which the determination was based considered simply as a termination for convenience, the notice was, I consider, an effective notice.”

21. Under the circumstances of the case before him, *Finn J* rejected Marconi’s claim for wrongful termination of the contract; but in doing so he suggested that it might have been different had there been a breach of good faith or fair dealing. This is what the judge said:

“The circumstances are far removed from those capable of suggesting a breach of the duty of good faith and fair dealing in effecting the termination on cl 27.5 grounds.”

22. The above statement supports the view that the convenience clause is subject to the limitation of good faith and fair dealing. Marconi suggests that a cause for termination need not be stated, but that bad faith is a limitation on the convenience clause.
23. The other authority the claimant relied on with respect to the issue of bad faith as limiting the convenience clause is *Krygoski Construction Company Inc. v The United States No. 214 – 896 (Fedcc March 2, 1993)*. In this case, the U.S. Army Core of engineers, while conducting a survey of missile sites, estimated asbestos contamination in two buildings at the site. The Army Core decided on a demolition project and issued an invitation for bids for the project. The plaintiff *Krygoski* won the contract with a low bid of \$414,696; and on 30th September, 1985 the parties signed the contract.
24. Just ten days after the plaintiff acknowledged receipt of the contract to proceed, additional work on the project was discovered, which would have resulted in an additional cost of about \$320,000 above the contract price. For a change of this magnitude, the Army terminated the contract for convenience of the government. It was found that *Krygoski* had done little work on the project at the time of

termination. The army terminated the contract for convenience on 5th September, 1986. Following the termination, the army resolicited bids for the demolition project. The plaintiff sued for breach of contract. The trial court found the government improperly terminated the contract, and awarded damages to the plaintiff. The government appealed to the Court of Appeal.

25. The Court of Appeal reversed the first instance court, holding that the officer of the army who terminated the contract did not abuse his discretion, or acted arbitrarily or capriciously or in bad faith in terminating the contract for the government's convenience. The Court of Appeal held that the "contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source. When tainted by bad faith or an abuse of contracting discretion, a termination for convenience caused a contract breach." The Court of Appeal here seems to be including under the general umbrella of bad faith, an abuse of contracting discretion or attempts to acquire a better bargain.
26. On the authorities, it is safe to come to the conclusion, that bad faith, unfair dealings, an abuse of contracting discretion, and an attempt to acquire better bargain from another source, are limitations legally placed on the use of the convenience clause. These cases clearly show that although there is a right to terminate a contract with or without cause, under a convenience clause, that right is subject to the rule not to act in bad faith or in abuse of discretion, or in an attempt to get a better bargain from another source.

27. In my judgment, where a termination for convenience clause appears in a contract, whether it is a contract involving private individuals or government, if there is nothing to the contrary in the contract, the termination for convenience clause may be acted upon with or without cause. The right to terminate such a contract with or without cause would, however, amount to breach of contract, by the terminating party, if the termination was done in bad faith or without fair dealing or in an abuse of discretion or in an attempt to get a better bargain from another source. Even though the words of the convenience clause may be clear and unambiguous, any such termination would amount to a breach of contract, unless the contrary appears in the contract.
28. But the parties alleging bad faith have a very weighty burden to discharge and they rarely succeed. This is what the Court of Appeal said in *Krygoski* with respect to the heavy burden of proving bad faith:

“The contractors burden to prove the government acted in bad faith, however, is very weighty. An analysis of a question of governmental bad faith must begin with the presumption that Public Officials act conscientiously in the discharge of their duties.... Due to

**this heavy burden of proof,
contractors have rarely succeeded
in demonstrating the government's
bad faith.”**

Change of Circumstances

29. The claimants also submitted that the government could not invoke the convenience clause for termination, unless some change of circumstances occurred between the time of the award of the contract and the time of termination which justified the termination of the contract. The claimant relied for this principle on another United States decision, *Torncello 681 F 2d at page 772*. The claimants, submitted that there was no such change of circumstances which justified the use of the convenience clause to terminate the contract.

30. As mentioned above, the contract was entered into by the then government in December, 2007. In February 2008 a new government won the general elections and was sworn into office. As we saw above, the stop order letter issued on March 7, 2008 to the claimants, said the “Government of Belize is currently reviewing the construction contract.” Did that amount to a change in circumstances authorizing the use of the convenience clause under the principle case of *Torncello*? It must be noted that in *Krygoski* the Court of Appeal limited the ambit of *Torncello*. *Torncello* had decided that, the government could not invoke the convenience termination clause, unless some change in

circumstances occurred between the time of award of the contract and the time of termination, that justified the termination. In *Krygoski* the Court of Appeal held that *Torncello* applied “only when the Government entered a contract with no intention of fulfilling its promises.” There is no allegation in this case, that when the Government of Belize entered into the contract, it did not intend to fulfill its promises. So in my judgment *Torncello* change of circumstances principle does not apply to this case, because there is no evidence before me that at the time the Government of Belize entered into the contract, it had no intention of fulfilling its promises.

Implied Terms

31. It is accepted that there is no expressed provision in the contract that the parties must not act in bad faith. On the particular facts of this case, should such a term be implied? It was submitted by the claimants that although there was no written term in the contract that required the parties to act in good faith or fair dealing or without abuse of discretion, the court ought to imply in this case such a term in the contract.

32. In support of this submission, reliance was placed on *Marconi* above and the Australian cases of *Kellogg Brown S Port Ltd v Australia Air Space 2007 V.S.C. 200* and *Hughes Aircraft System International v Air Services Australia 1997 F.C.A. 558*. In *Marconi, Finn J*, having concluded, as we saw above, that the defendant was not precluded from relying on a convenience clause, the judge went on to say –

“I am also influenced in my conclusion by

the distinctive nature of a termination for convenience clause. Though I accept that the exercise of such a clause would, as of course, be subject to a duty of good faith and fair dealing.”

33. In *Kellogg* (above) the court was dealing with an application for an interlocutory injunction, and not the trial of the substantive issues between the parties. One of the issues a court determines in an application for an interlocutory injunction is whether there is a serious question to be tried. It was in the context of making that determination, that the court made certain pronouncements on the issue of implying in a contract with a convenience clause, the principle of good faith. The judge, Hansen J. made reference to several cases where an implied term of good faith was recognized. Having also referred to *Marconi* in support of the implied term of good faith, the judge said:

“... The Court of Appeal of this Court rejected an asserted good faith term and emphasized the need to have regard to the terms of the agreement in question before implying a requirement to act in good faith, for the terms of contract may not permit such an implication. Particular caution in subjecting a power to a duty to act in good faith was said to be required

**where the power in question is conferred
to serve only the interest of the party
entrusted with its exercise.”**

34. The learned judge, however, noted that none of the cases he relied on for the above principles concerned a termination for convenience clause. In the end, the judge held that there was a serious question to be tried on the question whether, on the facts before him, there should be implied a term of good faith. The judge granted the injunction, but before doing so he made it clear that it was for the trial judge, not him, to decide whether a term of good faith should be implied in the contract.
35. The other case relied on by the claimants on the implied term of good faith and fair dealing is *Hughes* above. In *Hughes* the court states that there is in “existence in all contracts a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard and anything less is contrary to prevailing community expectations.” The judge continued:

**“As is now well accepted, quite
apart from that form of implication
which is necessary to give business
efficacy to a particular contract, a
term may be implied, as a matter of
law as a legal incident of a
particular class of contract**

There has been enduring uncertainty, if not controversy, as to the test to be applied – if there be a single test in making an implication of law.”

36. His Lordship then referred to three House of Lords decisions namely: *Lister v Romford Inc. and Cold Storage Co. Ltd. 1957 A.C. 555*; *Liverpool City Council v Irwin 1977 AC 239*. *Tena Seally v Southern Health --- Social Services Board 1992 1AC 294*. The central criterion manifest in these decisions for so implying a term is the requirement of “necessity.” In the Australian case of *Byrne v Australian Airlines Ltd. 1995 H.C.A.* the principle of necessity for implying a term of good faith has been emphasized. –

“Many of the terms now said to be implied by law in various categories of case reflect the concern of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined. Hence, the reference in the decisions to ‘necessity’ This notion of “necessity” has been crucial in the modern cases in which the courts have implied for the first time a

new term as a matter of law.”

37. In the Australian case of *Alcoteh Australia ltd. V New South Wales WSHSC 483*, the court made the broad statement that in “every contract there exists an implied term of good faith and fair dealing.”
38. Moving from Australia to Belize, we find the highest court of Belize, the Privy Council, has much to say on whether a term is to be implied. *In Attorney General of Belize v Belize Telecom Privy Council Appeal No. 19 of 2006* Lord Hoffmann said:

19. The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board {1973} 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

“(The) court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the

improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, form part of the contract which the parties made for themselves.”

In *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn said:

“If a term is to be implied, it could only be a term implied from the language of (the instrument) read in its commercial setting.”

39. More than a century before Lord Hoffmann spoke in *Belize Telecom Ltd.* above, Bowen LJ in the celebrated and respected *The Moorcock*, had expressed views of a similar nature on the issue of an implied term or warranty. *Bowen LJ* taught us as follows:

“Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as

both parties must have intended that at all events it should have.”

40. The claimants and the defendants must have intended that a term not to act in bad faith be part of their contract. On the basis of the authorities examined above, I rule in favour of implying in the contract a term of good faith, fair dealing, and not to act in abuse of contractual discretion.

Intention to contract with others

41. The claimant submitted that the defendants terminated the contract because they intended to give the contract to someone else; and therefore acted in bad faith, breach of duty or fair dealing, or in abuse of discretion. In support of this submission, the claimants referred to the advertisements in local newspapers for bids on the project soon after the contract was terminated, and argued that the defendants by this advertisement intended to award the contract to someone else. The claimants relied on the Australian cases of *Carr v JA Berriman Ltd 1953 H.G.A. 31*, *Commissioners o Simplex Floor Finishing Appliance Co. Ltd. V Duranceau 1941 4 DLR 260* in which it was held that clauses in a building contract that authorized an architect to direct additions to, or omissions from, a building as described in a plan, did not authorize the architect to award particular parts of the contract, to persons other than the person who originally contracted to construct the building.

42. The courts came to this conclusion on their particular interpretation of the relevant terms of the contracts, none of which contained convenience clauses, as we are considering in this case. In all those cases cited, parts of the concluded contract were given to some other contractors. In the present case there is no evidence, nor was it contended by the claimants, that the contract for the B.S.C. was given to someone else.
43. The claimants and defendants agreed that bids for the contract were advertised; but the defendants had submitted that the advertisement was directed to all in Belize, including the claimants, who were not prevented by the advertisement to bid once again for the project. So I am not satisfied, from the evidence, on a balance of probability, that the defendants intended to give the contract to someone else, when the advertisement for bids did not exclude the claimants; and when, on the facts, at the present time, the contract has not been given to another contractor. I am therefore not satisfied, on a balance of probability that the defendants terminated the contract because they intended to give it to someone else.

Bad Faith

44. In this case, is there evidence of bad faith on the part of the defendants? Let us return to what is meant by bad faith. *In Associated Provincial Pictures Houses Ltd v Wednesbury Corporation 1948 K.B. 223*, the court held that bad faith meant dishonesty. *In Cannock Chase Council v Kelly 1978 1 W.L.R 6 Megan LJ* said –

“I would stress – for it seems to me that an unfortunate tendency has developed of looseness of language in this respect – that bad faith, or, as it is sometimes put, lack of good faith means dishonesty: not necessarily for a financial motive, but still dishonesty.”

45. As already pointed out above, the Supreme Court of New York in the *AJ Temple* case has held that “Bad faith in respect of a termination for convenience clause has been defined as malicious intent towards the contractor.” In this case, did the defendants act in bad faith as that term is defined in the above authorities:

46. The claimants state that the defendants acted in bad faith because the defendants –
 - (a) **did not provide any justification for terminating the contract although three letters were sent to them seeking clarification of the matter and asking the defendant to reconsider.**
 - (b) **did not attempt to discuss any variation or adjustment to the contract with the claimant.**
 - (c) **did not at no time complained about any aspect or defect of the claimant’s work or**

called upon to remedy any defect in the work.

- (d) Within three months of terminating the contract the defendants advertised for bids for the same contract.**
- (e) intended to award the contract to other persons even though it was validly awarded to the claimants.**
- (f) there is not in evidence any public policy public interest or change of circumstance that could offer some justification for the manner of terminating the contract.**
- (g) If the defendants were acting honestly or in good faith they would have raised a justification.**

47. The claimants' case is that when each or all of the above are taken into consideration, the defendant acted in bad faith and therefore could not shelter under the umbrella of the convenience clause. As pointed out above, when the contract was signed by the parties in December 2007, there was one party in power. In February, 2008, that party lost the general elections and a new party took control of the Government of Belize. The new Government on 7th March, 2008 issued a "Stop Order" to stop the construction works on the project. The reason for the stop order was that the "Government of Belize is currently reviewing the construction contract." There is evidence that, at the time of the stop order, the contract was about

- four months old; and that major structural works on the project had not begun.
48. The claimants state that they commenced work in December 2007, but the defendants stated that work on the contract did not commence until February 2008. But the claimants stated in paragraph 6 of the statement of claim that they did preparatory work, including fencing, preparing the land conducting pile testing and securing personnel. It was therefore submitted that the project was in its “infancy when terminated.”
 49. There was also a clause in the contract referred to above as the Compensation Clause, under which the claimants were entitled to remuneration as contained in that clause. In addition, the defendants pleaded in paragraph 16 of the defence, that on February 25, 2008, the claimants and their legal representative attended a meeting with the defendant, and the Minister of Sports and other representatives, and the claimants were requested to submit a termination claim for expenses and costs under the contract, but no claim was submitted to the defendants.
 50. It was further submitted that the advertisement for bids for the project in the local newspapers after the termination, did not exclude the claimants from making a new bid for the project. The advertisement was to all, it was submitted, and the claimants could have taken the opportunity to bid if they wanted to do so. In

addition, at the present time the construction of the B.S.C. has not been restarted or assigned to anyone else.

51. The claimants burden to prove that the Government acted in bad faith is weighty because of the presumption that public officials act conscientiously in the discharge of their duties. Due to this heavy burden of proof, contractors have rarely succeeded in demonstrating government's bad faith. See *Krygoski* above. Bad faith means "dishonesty" "malicious intent towards the contractor."

52. I fail to see dishonesty or malicious intent towards the claimants on the part of the defendants when the facts of the case are considered. I fail to see how I could properly hold that the allegations of bad faith made by the claimants and enumerated above, amount to dishonesty or malicious intent towards the claimants, especially when one considers the submissions, which have not been contradicted or denied, that the advertisement for bids for the project, made after termination, was made to all, including the claimant, and that there was a meeting on 25th February, 2008, attended by the claimant and others in which the claimants failed to take advantage of submitting a claim for remuneration under the contract. Moreover, *Torncello* principle of changed circumstances does not apply to this case, and as we saw above, a reason was given for the stop order. In my judgment, the claimants have failed to discharge the weighty burden of proving dishonesty or malicious intent on the part of the defendants with respect to termination of the

contract under the convenience clause. I am not satisfied, on a balance of probability, that they have proven bad faith.

Fair dealing and abuse of discretion

53. It is unavoidable under this heading not to repeat some of the facts already examined above. The claimants agreed to the Compensation Clause which provided remuneration to the claimants in the event the contract is terminated for convenience. It was submitted and not denied, that a meeting was called at which the claimants were invited to take advantage of the Compensation Clause, but they refused to do so.

54. The general wording of the Compensation Clause does not specifically exclude a claim for profits up to the time of the termination. The underlined portions of the clause, including the clause “value of work done” are very general and wide; and in my view, did not prevent the claimants from submitting to the defendants at the aforesaid meeting, that they were entitled to the inclusion under the heading “value of work done,” some element of profit up to the date of termination. The claimants may have succeeded; but as shown above, the claimants failed to take this opportunity presented to them at the said meeting.

55. The defendants advertised, as we saw above, for bids for the project, thus affording the claimants the opportunity again to bid for the project, but they did not. Moreover, a new government came to power and wanted to review the project which was at its beginning

stages. On all the facts of this case, including the above, I am not satisfied, on a balance of probability, that the defendants breached the fear dealing term or abused their discretion when they terminated the contract under the Convenience Clause.

Unconscionable Conduct

56. The claimants have submitted that the convenience clause is unenforceable on the ground that it is unconscionable in that it failed to provide compensation for the contractor, including loss of profits where there has been termination under the convenience clause. There is no doubt that a court of equity would set aside a contract or bargain that is unconscionable.
57. *In Alcatraz Australia Ltd. V. Scarcella*, the court held that a party would not be allowed to exercise contractual power where it would be unconscionable, in the circumstances, to do so. The Courts of Equity have laid down principles under which it would set aside a contract as unconscionable. *In Commercial Bank of Australia v Amadio 151 C.L.R. 447* an elderly couple aged 76 and 71 years were fraudulently induced by their son, a businessman, to guarantee a loan to a company in his control, and to provide their home as security. They did what their son requested; but he defaulted in repaying the bank, and he was declared bankrupt. The bank then attempted to sell the home to recoup the amount of the loan.

58. The elderly couple brought an action against the bank, claiming, inter alia, that the guarantee for the loan was unconscionable. The Full Court held in favour of the couple on several grounds. On Appeal, *Gibb CJ* said:

“A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed. The principle of equity applies “whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interest, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.”

59. In *Blomley v Ryan 99 C.L.R. 362* where the court was asked to set aside a contract for the sale and purchase of land at the instance of a party who stated that he was drunk at the time of making the

contract, the court, in refusing to set aside the contract on the ground of unconscionability, said:

“The essence of the ground we have to consider is unconscientiousness on the part of the party seeking to enforce the contract; and unconscientiousness is not made out in this case unless it appears, first, that at the time of entering into the contract the defendant was in such a debilitated condition that there was not what Sir John Stuart called “.... A reasonable degree of equality between the contracting parties.”

60. I do not find any evidence here which shows that the claimants were at any special disadvantage or that the defendants had taken an unfair advantage of the claimants at the time of entering the contract.

The Counterclaim

61. The defendants counterclaimed for the sum of \$1,867,497 against the claimants. The contractual basis for the counterclaim is the Advance Clauses quoted above, and the Compensation Clause also quoted above. In accordance with the Advance Clauses, the defendants paid \$2,000,000 to the claimants. Clause 51.2 of the contract states the use of the advance payments. I repeat the clause:

51.2 “The Contractor is to use the advance payment only to pay for Equipment, Plant, Materials, and Mobilization expenses required specifically for execution of the Contract. The Contractor shall demonstrate that advance payment has been used in this way by supplying copies of invoices or other documents to the Project Consultant.”

62. Javier Berbey a director and shareholder of the first claimant gave a witness statement on behalf of the first and second claimants. In the witness statement, he said that, in pursuance of an order of a judge of the Supreme Court, that he must provide evidence as to how the moneys provided by the defendants under the Advance Clauses were used, he submitted receipts as to how the advance payment was applied. This witness, in the witness statement, said that the advance payment – he called it mobilization money – was used for purposes which he divided into five parts – Parts A to E. He gives the purposes for which the advance payments were used in each part as follows:

(A) “The disbursements are divided into five parts, A through E. Part A of the disbursements made from the mobilization money comprise

items purchased for the mobilization of the project and the preparation of the sight. This includes but is not limited to buildings for site offices, perimeter security fencing, temporary waste disposal system, computers, basic tools and equipment. Receipts for disbursements under this part A are numbered A1 through to A40 and total \$235,996.06.”

(B) “The Part B disbursements made from the mobilization money comprise services rendered. This included but is not limited to architectural fees, bank guarantee & charges, insurance premiums, and other miscellaneous professional and contractual services. Receipts for disbursements under this part B are numbered B1 through to B12 and total \$536,014.93.”

(C) “The Part C disbursements made from the mobilization money comprise other expenses including but not limited to contractor fees, travel expenses, and trucking and electrical services. Receipts

for disbursements under this part C are numbered C1 through to C12 and total \$223,537.13.”

(D) The Part D of the disbursements made from the mobilization money comprises heavy machinery. This includes fixed assets and transportation. Receipts for disbursements under this part are labeled D and total \$1,447,998.02.”

(E) “The Part E of the disbursements made from the mobilization money comprise other miscellaneous items. Receipts for disbursements under this part are labeled E and totals \$9,336.00.”

63. He then stated at paragraph 9 of the witness statement as follows:–

“The total disbursements made in pursuance of the contract totals \$2,452,882.14. It therefore exceeded the mobilization payment to the claimants.”

64. This witness also provided, as exhibits accompanying his witness statement, the receipts to show the purposes for which the advance payments were used. This evidence of the witness, which has not

been denied by the defendants, is that the full advance payments of \$2,000,000, and more, were used for purposes of the project. The defendants made no denial of the receipts or raised any question of their genuineness.

65. On 28th November, 2008, Dwayne Thurton consultant for the project, and in obedience of a court order, swore that on April 28, 2008, he prepared an assessment of the works done, to that date, on the project; and he found that the value of the work done was \$132,500.24. He also assessed a further security cost in the sum of \$28,750. making a total value of works done to be \$161,250.24. When this amount is deducted from the \$2,000,000 advance payment, the balance is \$1,838,749.76, the amount of the counterclaim.

66. The problem with the evidence of Thurton is that his assessment relates to works done; and I take that to mean works done on the project. But the evidence of Berbey referred to above, is that the moneys advanced under the contract, were used on such items as temporary disposal systems, computer, tools, equipment, architectural fees, insurance premiums, professional contractual services, travel expenses, trucking and electrical services, heavy machinery and transportation of fixed assets. Did the witness Thurton in the assessment of works done on the project, include the above items claimed by Berbey for the claimants?

67. The contract states in clause 51.2, as we saw above, the purposes for which the advance payments are to be used; and, it seems to me, that the use of the advance payments as stated by the witness Berbey, is in accordance with clause 51.2 of the contract, and can be included under the wide and general headings under that clause. The certificate of value issued by project manager Thurton states that he found no materials on site when he did his assessment, but I believe by materials, he meant building materials such as sand, stone, cement and so on. I do not take it that he meant items referred to by Berbey in his written statement above.

68. I do not believe that the parties intended, at the time the contract was made, that any advance payments were to be repaid by the contractor, in a situation where the termination clause was used so soon after the contract was made, and the evidence is that all the advance payments were used for the project. I therefore dismiss the counterclaim.

CONCLUSIONS

69. The Convenience Clause is subject to the limitations of acting in good faith, fair dealing or without an abuse of discretion. These terms are implied in the contract. There is a heavy burden on the part of the claimants to prove bad faith, and on the facts, they have failed to satisfy this burden. The claimants have also failed to satisfy the burden of proving abuse of discretion and unfair dealing and an intention to contract with others. Moreover, there is a presumption of good faith. There is no evidence that the defendants, acted

unconscionable as that term is legally defined. And the *Torncello* principle does not apply to this case.

70. The claimants have proven that all the advance payments were used for the project. There is no merit in the counterclaim for a substantial part of the said advance payment.

71. For all the reasons mentioned above, I am not satisfied, on a balance of probability, that the defendants breached the contract when they terminated the contract under the Convenience Clause.

72. I therefore make the following orders:

1. The claims made by the claimants in the statement of claim are dismissed and refused.
2. The counterclaim made by the defendants are dismissed and refused.
3. There is no order as to costs.

OSWELL LEGALL
JUDGE
20th July, 2009

