

**IN THE SUPREME COURT OF BELIZE, A.D. 2018**

**CLAIM NO. 496 of 2014**

**EMY GILHARRY RAMIREZ**

**CLAIMANT**

**AND**

**BELIZE SOCIAL INVESTMENT FUND**

**DEFENDANT**

**BEFORE the Honourable Madam Justice Sonya Young**

Hearings

2018

27<sup>th</sup> February

Written Submissions

Claimant – 13.3.2018

Defendant – 15.3.2018

Decision

1.6.2018

Mr. Darrell Bradley for the Claimant.

Mr. Andrew Marshalleck, SC for the Defendant.

**Keywords: Contract – Collateral Contract – Assignment – Novation –  
Negligent Misstatement – Unjust Enrichment – Damages – Civil Procedure  
Rules (CPR) Rule 8.7(1)**

**JUDGMENT**

1. Belize Social Investment Fund aka Social Investment Fund (BSIF), pursuant to a construction contract (the Contract) made with K&G Construction

Ltd./Kenard Smart (the Contractor) commenced a \$1.3 million project for the refurbishment of the Dangriga Town Market (the Project). The Project was financed by the World Bank and its efficient completion were important to the community. The market users had all been discommoded and relocated indefinitely. However, it appears that the Project became delayed as adequate funds were not available. The arrangement under the Contract was that the Contractor would fund and recover as the Project progressed according to the quantity of works certified as accomplished.

2. Emy Gilharry Ramirez, a businesswoman from Corozal, says that at that point, she then entered into a verbal collateral contract with BSIF. She pleads that she: *“was at all material times the financier engaged by the parties in respect to the completion of the project.”* But she at all times acted through the Contractor. She alleges that this collateral contract contained certain particularized implied and expressed terms. The essence of which were that she would fund the Project to completion and BSIF would make all further payments (of some \$780,632.30 remaining under the project) to her, rather than to the Contractor. A new (extended) completion date was also formalized of 31<sup>st</sup> October, 2014.
3. She claims, further, that she relied on certain statements and assurances given to her by BSIF (through its agent Ernest Raymond, the Project Manager) that her investment would be worthwhile and she would get her money back. Based on the repeated assurances she injected even more money into the Project. She places this total sum at \$507,088.31.
4. She says she has not received any part of her investment back. Rather, in repudiatory breach of the collateral contract, BSIF informed the Contractor

that the Contract had been terminated for certain breaches relating to delay. She was never informed of any intention to terminate or of the termination of either the Contract or the collateral contract. She, however, accepted BSIF's repudiatory breach of her collateral contract which has accordingly caused her significant financial loss.

5. She maintains that BSIF owed her a duty of care. Mr. Raymond possessed specialist skill and knowledge. When she requested information from him about the Project, he must have known that she would rely on his knowledge and advice. He failed to inform her of any problems with the Project or that she would have difficulty making good on her investment. These misstatements have equally caused her to suffer pecuniary loss. She prays declarations and damages for breach of the collateral contract and/or for the negligent misstatements.
6. BSIF vehemently deny having any contract, collateral or otherwise with Ms. Ramirez or making any negligent misstatements to her. They say Ms. Ramirez was financier to the Contractor only. Any contracts she may have must have been with the Contractor. Ergo, any dealings BSIF had with her were simply as the accepted agent for the Contractor and nothing more. They explain that neither Mr. Raymond, nor BSIF was sufficiently qualified to give her any advice regarding financial undertakings or economic ventures. BSIF certainly owed her no duty of care. Her current issues spring solely from her failure to conduct proper due diligence prior to contracting with the Contractor.
7. They add that the Contract was terminated because of fundamental breaches committed by the Contractor. After permissible deductions were made, all

that was owed to the Contractor for the completed works was the sum of \$24,961.23 which they are willing to pay over. Any loss suffered by Ms. Ramirez should be attributed entirely to the Contractor and BSIF cannot be held responsible. Moreover, as the Contractor's financier she ought to have ensured that the Contractor was at all times in full compliance with the Contract. They urge that the claim be dismissed in its entirety.

**Issues:**

8.
  1. Was there a collateral agreement between the parties.
  2. If there was a collateral agreement: (a) was it in the terms alleged by the Claimant (b) was it breached by the Defendant.
  3. Did the Defendant make any negligent misstatements to the Claimant.
  4. Is the Claimant entitled to any damages and in what quantum.

**Was there a collateral agreement between the parties:**

**The Law:**

9. A collateral contract as explained by Lord Denning MR in the case of *Evans & Sons Ltd. v Andrea Merzairo Ltd [1976] 1 WLR 1078* "is when a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, we hold that it is binding."

Simply put, it is a secondary but independent and separate contract which often induces someone to become a party to a principle contract. It can only exist if there is a written main contract and it cannot be substituted for that main contract. A collateral contract must be strictly proved - *Heilbut, Symons & Co. v Buckleton [1913] AC 30*.

**The Evidence:**

10. The burden of proving that a collateral contract exists is on the person alleging same. The Claimant testified that the Contractor contacted her and

requested her assistance. He explained that he had been experiencing certain delays or setbacks, with the result that he suffered from unavailability of finance and the Project had virtually come to a standstill. She then spoke to Mr. Raymond by telephone on the 13<sup>th</sup> June, 2013 and he gave her positive assurances on the safety of her proposed investments. She amplified this by stating that he said it was a viable project. She needed only to release the contractor's debt of \$60,000 with Belize Bank, have \$200 - \$300,000 revolving for purchase of material for the Project and BSIF would pay. He assured her that she would get her money back. She said acting on these assurances she paid outstanding labour costs of \$18,851 and settled the Belize Bank debt of \$64,632.86.

11. On the 20<sup>th</sup> June, 2013, she met with Daniel Cano (the Executive Director), Ernest Raymond (Project manager), Nellie Trench, the Contractor, Gonzalo Ramirez and Chris Ramirez. She asked questions and from Mr. Raymond she received assurances that everything was in order and her investment would be worthwhile. She then presented a letter she had written on the 19<sup>th</sup> June informing BSIF of her *“decision to provide materials and defray labour costs for the Project and indicating that the contractor had agreed to assign all payments”* to her. This arrangement was also confirmed by letter of even date addressed to the Defendant from the contractor. She also submitted a letter from Scotia Bank confirming her suitability as a financier.
12. She and the Contractor soon entered into two written agreements. Her witness statement says three, but one seems to be a duplication of another. The Defendant presents one of these contracts which he marks E.R. 5. It is identical in all regards to the Claimant's E.G.R. 4 (second document) save and except that the contract date on E.G.R. 4 (second document) has been

amended to read 25<sup>th</sup> day of June while E.R. 5 reads unamended 20<sup>th</sup> day of June. Every page, except the last, of both documents bear what seems to be two initials. The amendment itself has only one initial. The court accepts the unamended version as correct since it is uncertain when or how the amendment occurred. Let us consider these contracts.

13. As concisely and precisely stated by counsel for the Defendant in his submissions:

*“16. By the terms of this written contract the parties acknowledged the existence of the contract BMP/WKS005 between K&G and the Defendant for the refurbishment of the Dangriga Town Market. They also acknowledge the payments under that contract had been made to K&G and that the balance payable under the contract was \$780,632.30. It acknowledges that the Claimant had agreed to provide materials and facilitate payment for labour for the completion of the required works and that K&G and Kenard Smart had agreed to assign the balance due under the contract to the Claimant.*

*17. K&G and Kenard Smart assigned all payments due under the contract to the Claimant and agreed to instruct the Defendant to make those payments to the account of the Claimant at Scotia Bank in Corozal. They also agreed to pay the Claimant \$100,000.00 as a fee for the facility the Claimant was providing and authorized deduction of that sum from contract payments.*

*18. K&G committed to the Claimant to provide to the Defendant no later than June 21, 2013, all that was required by them in their letter of 13<sup>th</sup> June, 2013 together with all other documents required by the Defendant and to proceed with due diligence and workmanship to complete the rehabilitation of the market.*

*19. K&G also committed to discharge certain charges held by the Belize bank and to charge the lands to the Claimant instead. K&G further agreed to keep the Claimant informed of all developments in the project and provide copies of all correspondences received from the Defendant to her.*

*20. By separate section captioned “Guarantee” Kennard Smart personally guaranteed the due and faithful performance and observance of the contract BMP/WKS005 to the Claimant and agreed to keep the Claimant fully indemnified against all actions claims demands and costs loss or damage caused to her by any breach of the contract.*

*21. The Claimant on the other hand agreed to make certain payments on behalf of K&G and Kenard Smart to the Belize Bank and to cover outstanding payroll, and to provide the Defendant with the proof they needed of the Claimant’s ability to pay for materials and labour to complete the project.*

*24. The second written contract is again between K&G, Kenard Smart and the Claimant. It is a much shorter agreement and simply acknowledges the contract BMP/WKS005 between K&G and the Defendant; that certain payments had been made thereunder; and that \$780,632.30 was the balance payable thereunder. It recited that the Claimant had agreed to provide materials and facilitate the payment of labour necessary*

*to complete the project and that K&G and Smart had agreed to assign the balance due under the contract to her.*

*25. By the operative part of the agreement K&G and Smart assigned all payments under the contract to the Claimant and agreed to instruct the Defendant to make all payments under the contract to the Claimant at her account at Scotia Bank, Corozal Town. It was agreed that the assignment was irrevocable without the written consent of the Claimant and that K&G and Smart would keep the Claimant informed of all developments in the project.”*

14. Ms. Ramirez says drafts of these agreements were sent to the Defendant for their approval, which was forthcoming and she exhibits emails showing certain attachments but not the attachments themselves. She says that she was later advised by BSIF that certain other financial requirements were needed and she made further contributions to the project. These included risk insurance, arranging a guarantee letter from her bankers and various sums for labour costs, utility bills, materials and others.

15. At some point she even appointed her own site supervisor – Vidal Campos who represented her at meetings with officers and agents of BSIF and conducted Project business on her behalf. On 17<sup>th</sup> July she queried the progress of the Project and Mr. Raymond responded:

*“An engineering consultant representing SIF was recently appointed to manage the works along with SIF Engineer.  
Major improvements in the contractor’s performance are envisaged which will make your investment worthwhile.”*

16. What is concerning is that Ms. Ramirez makes much of the last part of that sentence but she omits to include in that print out her own email which prompted this response. The mere fact that Mr. Raymond speaks of major improvements in the contractor’s performance is telling. Clearly, Ms. Ramirez had her own concerns as she responds”

*“Mr. Raymond,*

*Thanks for the for the (sic) progress report. Only on payroll I covered almost \$60,000 for which production was not there. We are very concerned over our heavy finance injected in this project. We look forward to better.*

*Regards Emy.”*

17. Following a few pages after that exhibit there is a strange email which is not referred to by Ms. Ramirez at all. It is dated July 19<sup>th</sup>, 2013 and is addressed to Ms. Ramirez from Mr. Raymond. There are two documents attached one of which is entitled Dangriga Market Project Time delay analysis pdf. There is no printout of that document so its contents are unknown.

The email itself reads simply:

*“Mrs Ramirez,*

*Further to our meeting of July 18<sup>th</sup> 2013 see attached two of the three documents promised.*

*Regards Ernest”*

18. Ms. Ramirez also sought to rely on a number of other correspondence between the relevant parties. These, she says, prove that there was an agreement between BSIF and her good self. One of these letters dated July 2<sup>nd</sup>, 2013 sent to the Contractor by BSIF reads:

*“The Social Investment Fund hereby accepts an agreement dated June 20, 2013 between K & G Construction and Emy Ramirez on the execution of the abovementioned contract; and a payment agreement dated June 24, 2013 between K & G Construction and Emy Ramirez for execution by the Social Investment Fund.”*

19. There are letters from the Contractors authorizing Ms. Ramirez to negotiate insurance on its behalf and to BSIF informing of Ms. Ramirez’s progress in that regard. Letters to Ms. Ramirez from an architecture technician about bathrooms on site and purchasing of supplies. She is provided with Minutes of Meetings regarding the Project but so too is Mr. Smart. She is written to directly about bills of quantity but this is also copied to Mr. Smart. BSIF



writes to the bank on August 19<sup>th</sup>, 2013 in support of a credit facility for her. Ms. Ramirez is written to directly about a bill totalling over \$400,000. She enquires about the status of payment on 28<sup>th</sup> August, 2013. However, it is Mr. Smart who had submitted the claim.

20. On August 26<sup>th</sup> the Contractor authorizes Ms. Ramirez to make claims to BSIF and authorizes BSIF to give full disclosure of correspondence, claims and payments to her. On 27<sup>th</sup> August there is another letter to BSIF from the Contractor authorizing Ms. Ramirez to submit claims for payment and requesting that the Contractors be notified of details of all claims and payments made under this arrangement. The arrangement is accepted by BSIF.
21. On September 6<sup>th</sup> the Contract is terminated by BSIF for breach. This is done by letter to the Contractor but it is not copied to Ms. Ramirez.

**Discussion:**

22. Although the Claimant pleads an oral collateral contract, the correspondence tells a tale which goes nowhere close to a contract of any sort between BSIF and Ms. Ramirez. Contrary to what the Claimant postures, they show quite clearly that her contract was with, and as a financier to, the Contractor only. That all arrangements made between BSIF and Ms. Ramirez was at the request and with the authorization of the Contractor. Nowhere can it be said definitively that she is regarded or treated as anything other than the Contractor's authorized agent. Ms. Ramirez herself seemed utterly confused as to the nature of her relationship (if any) with BSIF. She pleads at paragraph 13 of her Statement of Claim that it was a "*special relation*." The exact definition of '*special*' in the circumstances remains elusive.

23. In his submissions counsel for the Claimant asked the court to consider Mr. Raymond's admission that he often did not use agency language with Ms. Ramirez. Additionally, he admitted that he knew, Mr. Campos worked for Ms. Ramirez and that Mr. Campos testified that Mr. Raymond called him every day asking about the status of the Project and encouraging him to push to completion.
24. He seemed to overlook the compelling fact that Ms. Ramirez had entered into two written agreements with the Contractor. She was clearly well aware of the importance of the written contract in securing her position and her rights. Why then would she determine to accept an oral contract of any kind from BSIF; particularly where BSIF was the one responsible for paying, thereby ensuring her a return on her investment. It makes no business sense whatsoever. In none of what has been presented can the court find that there was any collateral contract, between BSIF and Ms. Ramirez. Perhaps counsel realizing the futility of this particular claim sought to perform a water into wine miracle in his submission.
25. In his submissions he makes no reference whatsoever to the collateral contract pleaded. Rather, he submits at paragraph 3: "*there was a legally enforceable contract between the Claimant and the Defendant in terms that the original contract between the Claimant and K & G Construction Limited was assigned to the Claimant in actuality or by acquiesce and the Defendant dealt with the Claimant as the Contractor.*"
26. Then at paragraph 12: "*... putting her case at its highest, that there was an assignment of the contract for the completion of the Dangriga Town market project to the Claimant.*"

27. The court can certainly understand why the claim of the pleaded collateral contract seems to have been abandoned. The evidence simply does not support it. For what it's worth, the pleadings do not support the above submission either. Counsel for the Claimant did enter the arena late. He inherited pleadings, which to his credit he endeavoured to finesse but without success.
28. His submissions do not discuss the evidential basis of the existence of the purported contract and its terms. He seems to have accepted this as a fait accompli. If I am to understand the written submissions, (and I could very well be wrong, since with respect, the oral submissions gave me no greater clarity) there appears to be an allegation of a novation of the Contract. I say this because only contractual rights can be assigned at common law. The Contract itself allowed for assignment in writing only, nothing more. Further, a novation could only be done with the consent of both parties to the original contract and both parties to the new contract. The evidence does not support this contention either since even to the very end Mr. Smart is the one entering claims for money expended, sending correspondence and responding.
29. More importantly, although a Claimant could develop his claim through witness statements he must still "*include in the claim form or in the statement of claim a statement of all the facts on which*" he relies (CPR 8.7(1)). These are clear and mandatory words which cannot be circumvented. Nowhere is it pleaded that the Contract had been rescinded and a new one, giving the same rights and obligations to different persons (BSIF and Ms. Ramirez), was substituted therefor. That is the nature of a novation.

30. It was not even pleaded that the Claimant was “*treated as the contractor,*” or that she was in fact the contractor. For allegations of this nature to form any part of the Claimant’s case it ought properly to have been pleaded. Even if a novation could possibly be implied from the circumstances, it was simply not pleaded. The contract which the Claimant pleaded between herself and BSIF had very specific terms. To allow the Claimant to change the entire basis of her claim at this stage is not only unfair to the Defendant, but wholly improper.

**Quantum Meruit:**

31. There was no claim whatsoever for unjust enrichment or quantum meruit. The very cases *Benedetti v Sawiris and other [2013] UK SC 50* and *Darrell Carter v Pleasure Island Ltd. Belize Claim No. 384/2001* on which counsel sought to rely both contained an alternative claim in quantum meruit.

32. Although counsel for the Claimant was of the view that his claim in unjust enrichment could somehow properly be gleaned from the facts before the court. The court is not of that view. While the Claimant need not use the words quantum meruit or unjust enrichment, the cause of action must still be made clear from her Statement of Case. When the Court considers each remedy claimed they all resound in contract or the tort of negligent misstatement.

33. Counsel for the defence helpfully directed the court’s attention to **Goff & Jones The Law of Enrichment 9<sup>th</sup> Ed paragraphs 1-36** onward.

*“1-36 ... Claims to enforce a contractual obligation to pay the reasonable value of services of goods differ from claims in unjust enrichment for restitution of their value, and litigants should make it clear which type of claim they are bringing.”*

*“1-37 When pleading claims in unjust enrichment, all that is required for a claimant to state the nature of the claim and the facts on which he relies, and that can be done*

*without mentioning the old forms of action. When the pleadings clearly state that the claim lies in contract, or unjust enrichment, or both in the alternative, this will clarify the issues for the parties and make it easier for the court to determine whether the ingredients of the claim have been established: it will also make it easier to decide whether there are any defences...*”

*“1-38 It should be made clear in a statement of claim what facts are being relied upon to establish that the defendant was enriched, that his enrichment was gained at the claimant’s expense, and that his enrichment is unjust. The courts have stressed in connection with this last requirement that it will not do for a claimant to plead a generalised claim in unjust enrichment, for the same reason that it will not do for a claimant to plead generalised claim in tort. Nor is it acceptable to assert that the circumstances make the defendant’s enrichment unfair in a broad sense, or in accordance with the claimant’s own idiosyncratic notions of unfairness: specific reasons anchored in the case law must be given to justify the assertion that the defendant’s enrichment is unjust.”*

*“1-41 A claimant must specify the remedy which he seeks. Most commonly, that will be the personal restitutionary remedy of an order for the payment of a sum of money which will have the effect of reversing the defendant’s unjust enrichment.”*

*“1-44 A claim for restitution on the ground of unjust enrichment is not a claim for damages or equitable compensation founded on the commission of a civil wrong, but a claim for a liquidated sum that is treated as a claim in debt for procedural purposes.”*

34. The Court needs to add nothing further here. It finds that there was no claim in unjust enrichment. Consequently, the Defendant has not been afforded an opportunity to mount a defence or to adduce any evidence. It will not be considered further.

**Negligent Misstatement:**

35. The tort of negligent misstatement originated in *Hedley Byrne & Co Ltd v Hedley & Partners Ltd [1964] AC 465*. It allowed for the recovery of damages for pure pecuniary loss occasioned by a negligent misstatement in limited circumstances. Counsel for the Claimant begun his submission by quoting from *Hedley Byrne at paragraph 502-4*:

*“... consider that it follows and that it should now be regarded as settled that if someone possessing special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a*

*duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise. (See Paragraph 502-4 Page 20)."*

36. In her pleadings Ms. Ramirez stated at paragraph 19:

*"On the 13<sup>th</sup> day of June, 2013, at or about 3:00 p.m. the Defendant said to the Claimant in the aforementioned telephone conversation:-*

*"Mr. Smart has indicated that you are minded to be the Financier for the completion of the Dangriga Town Market Project. I understand that you agree to fund the labor cost and to provide construction materials to complete the project. The only thing holding up the project is the Contractor's inability to provide material and labor cost to get the project moving again. I can confirm that this would be a worthy venture for you as there are substantial amount of funds available for the project, as a matter of fact over \$780,000. Your input would be exposed to little or no risk as we are in full control of the disbursement of funds and will ensure that the balance due under the project will be paid directly to you."*

37. He repeated this assurance at a meeting held on June 20<sup>th</sup> and added: *"As long as you agree to provide the finance necessary to complete the project as indicated by Mr. Smart, we are prepared to extend the completion date and assure that it is an investment worth entering into."*

38. These statements contain serious allegations. However, nowhere in her testimony does Ms. Ramirez speak to the specific statements pleaded. Rather, her counsel submitted that when Mr. Raymond told Ms. Ramirez that the investment was worthwhile and she would get her money back she relied on his assurances. She did this because his words and conduct made it appear that that was the true position. When in fact, the project was in trouble. It was encountering problems which he failed to inform her of.

39. He continued that as the project manager, Mr. Raymond, possessed special skills and was intimately involved. He reminded the court that Mr.

Raymond had admitted that the first meeting which Ms. Ramirez held with BSIF, was to discuss financing. Clearly, he urged, as a financier, Ms. Ramirez wanted assurances about her investment from the project manager. Mr. Raymond in turn ought to have known that Ms. Ramirez would rely on his special knowledge of the Contractor, the Project, its progress and, its profit potential which would all enable the financier to recover her investment. Mr. Raymond simply did not present a fair picture of the investment to her.

40. In response counsel for the Respondent submitted that what was actually presented by the Claimant was evidence of vague assurances as to the viability of the contract. These assurances, he proposed, were perhaps fancifully, to have the effect of some guarantee of a profitable investment. This, however, was entirely inconsistent with Mr. Ramirez's own agreements with the Contractor. Those agreements sought to put in place all sorts of securities for Ms. Ramirez's investment. He stated plainly that "*on any reasonable analysis of the evidence the Claimant has simply failed to prove the statement or assurances relied upon to ground her claim for damages for negligent misstatement, whether on the pleadings or otherwise.*"
41. I am minded to agree. While there is no requirement that the Claimant recite verbatim the precise words used, certainly the salient information should be in evidence. At best, what Ms. Ramirez attested to was that she was given assurances that everything was in order and her investment would be worthwhile. This is acceptably far, far removed from what had in fact been pleaded. Realizing this difficulty counsel sought to amplify the witness statement. Even then, it was no clearer what the assurances were or what information precisely had been sought by Ms. Ramirez. For this reason the

Court finds there is no need to consider whether there was a duty of care owed, a breach of this duty or any loss incurred thereby. This claim must fail entirely.

**Determination:**

42. The claim is dismissed with costs to the Defendant in the sum of \$30,000 as agreed.

**SONYA YOUNG  
JUDGE OF THE SUPREME COURT**