IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO. 125 OF 2019

BETWEEN

FREE ZONE FUEL DISTRIBUTION LIMITED	**CLAIMANT**
AND	
SOL BELIZE LIMITED	**DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Decision Date:

24th September, 2021

Appearances:

Mr. Andrew Marshalleck, SC, for the Claimant

Mrs. Ashanti Arthurs Martin for the Defendant

JUDGMENT

1. This case concerns a written dealership contract between the parties (the Agreement) for the supply and sale of the Defendant's branded fuel products at a branded fuel station owned by the Claimant in the Corozal Free Zone in Belize.

2. The Claimant says that in breach of the Agreement, the Defendants began to include in the price buildup, or the Cost of Product, a figure which was more than the Cost Insurance Freight (CIF) provided by the Ministry of Finance (the Ministry).

3. They maintain that the Duty Free Cost of the Products provided for in the Agreement is the duty free Cost of Products which is the CIF value of the products as published by the Ministry. The Profit Margin is the margin to be added to the Duty Free Cost of the Products and the Freight and is not the actual profit realized or calculated by the Defendant.

4. The Claimants laboring under the assumption that the figure presented by the Defendant was identical to that of the Ministry, had mistakenly paid the inflated sum. They now claim reimbursement of $3,400,681.93 either as damages for the breach or monies paid under mistake of fact. In the alternative, they ask for an accounting and the return of any sums found due to the Claimant. They also pray statutory interest and costs.

5. In their defence, the Defendant denies the Claim in its entirety saying the Claimant is clearly mistaken as to any overcharge. The Duty Free Cost always included both the landed cost as well as all the costs incurred to have the fuel released by customs and transported to the Claimant's service station. Since the Defendant’s Profit Margin was set and agreed, there could never have been the intention that it would be eroded through the absorption of the landed cost.

6. While the Defendant admits that it did not provide the price buildup issued by the Ministry as agreed, it denies that the Agreement stipulated that the cost of

product would be limited to the Cost Insurance Freight. Further, the Claimants had never requested the price buildup and the Defendant had at all material times provided a letter which outlined the cost of the product.

7. The Defendant pleaded that its predecessor Shell Belize Ltd had done significant upgrades to the Claimant's service station. They had both also routinely repaired, maintained, and improved the station and often imported items for the station in the Claimant's name in order to benefit from the duty free exemptions which the Claimant was entitled to through conducting business in the Free Zone.

8. They counterclaimed for equipment which they say they purchased and provided to the Claimant, but which remained the Defendant's property under the Agreement. The Defendant says further that the Claimant, in accordance with the Agreement, was to have exercised proper care and skill in the use and custody of the equipment and then deliver the equipment and fixtures to the Defendant upon termination of the Agreement.

9. The Defendant seeks six 15,000 AG tanks, 3 pumps, 1 pipeline and 4 Gilbarco dispensers as well as compensation of $672,079.45 for improvements made to the service station by the construction of a forecourt and canopies.

10. A claim is also made for $141,893.50 being the cost of the clean-up and remediation of an underground leak which the Defendant says was the Claimant's responsibility. But which the Defendant undertook to prevent further damage to the environment and for which they expected to be reimbursed by the Claimant pursuant to clause 13 of the Agreement. Interests and costs are also sought.

11. As to the Counterclaim, the Claimant says the Agreement was never terminated, it simply expired, and no provision exists therein for that particular situation. In any event, no equipment is listed in Appendix III. Moreover, the tanks purchased by the Defendant were returned to and accepted by the Defendant. The below ground tanks, now on site, were purchased by the Defendant for and on behalf of the Claimant and the terms of the Defendant's profit margin were increased by a collateral agreement to offset the cost.

12. The Claimant denies any knowledge of any pumps or pipelines acquired by the Defendant in 2003. They also insist that the two (2) canopies installed were done at its own expense. While the Claimant admits that the Defendant did acquire four dispensers and did invoice the Claimant for them, they are adamant that the Defendant refused to accept payment. The dispensers are not in use and could be collected by the Defendant at any time upon payment of customs duties.

13. Shell Belize Ltd, which changed its name to that of the Defendant, did assist with a number of upgrades to the Claimant's service station pursuant to diverse agreements. By the Dealership Contract the Defendant agreed to repair and maintain all fixtures and equipment supplied. But the Defendant only routinely maintained the pumps and filters it supplied.

14. The underground pipelines which leaked had also been supplied by the Defendant but had remained past their expected ten (10) year usable life,

expiring before they were replaced. This failure to replace the pipeline in a timely manner was a breach of the Agreement.

15. Furthermore, the Claimant was unable to detect the leaking pipeline because of the Defendant's faulty installation of transition sumps and their failure to install monitoring wells or safety monitoring systems to continuously monitor the state of the pipelines or the tanks. In fact, a daily product inventory was only required by the Defendant after the leak had been discovered.

16. The Defendant acknowledged its responsibility for the leak and sought to mitigate its loss and damages through its remediation work. The indemnity provided by clause 13 of the Dealership Agreement covers liability to third parties and not the remediation work undertaken by the Defendant to which there could be no entitlement.

17. In its reply, the Defendant insisted that the Agreement was terminated through the effluxion of time and there had been no collateral agreement to increase the profit margin to offset the cost of the tanks purchased so they remained the Defendant's property on termination. Prior to 2017, the Claimant had never complained about the pipeline and the leak could have been detected earlier had the Claimant implemented procedures for wet stock management. The remediation work was undertaken as the Defendant felt it was covered by the indemnity and was in no way an acknowledgement of its own breach of obligation to maintain the pipeline.

The Issues:

The parties agreed 14 issues in their pre-trial memorandum. The Court has attempted to put them into a more palatable form below:

1. Whether the Defendant overcharged the Claimant for fuel products supplied and delivered to the Claimant over the period 2013 through 2018?

A. Whether the "Duty Free Cost of the Products", within the meaning of the Agreement, is the landed cost of the fuel products (referred to and treated by the Claimant as the CIF value of the products) as stated in the price buildup provided by the Ministry of Finance or the total costs to the Defendant of not only the landed cost of the products but also of all expenses incurred in supplying the products to the Claimant?

B. Whether the Profit Margin as used in the Agreement was a guaranteed profit to the Defendant, after all expenses are deducted?

C. Whether the Claimant was liable to pay freight charges as set out in the contract, or regulated prices prescribed by the Ministry of Finance?

2. If the Claimant was overcharged, whether the Defendant is liable to the Claimant to account for the said overcharge and to reimburse the total value of the overcharges claimed by the Claimant?

A. Whether Clause 14 of the Agreement applies where the Agreement expired at the end of the agreed term as opposed to on termination of the agreement prior to the expiration of the agreed term?

B. Whether the Claimant is obliged to remove the tanks and pipeline installed underground by the Defendants at its service station some 19 years ago and return the same to the Defendant?

I. Whether there was an oral collateral contract between the Claimant and the Defendant by which the increase in profit margin was to offset the cost of underground tanks acquired by the Defendant for the Claimant?

C. Whether the Claimant is obliged to refund to the Defendant the total cost of $672,079.45 as the costs of improvements effected by the Defendant to the Claimant's service station?

D. Whether the Defendant constructed the forecourt and two (2) canopies at the Claimant's service station?

E. Whether the 3 pumps acquired in 2003 at a cost of $16,882.44 are in the Claimant's possession?

3. Whether the Claimant is liable to indemnify or reimburse the Defendant the sum of US$141, 893.50 spent in remediation works following the leak?

A. Whether the Claimant failed to keep proper wet stock inventory?

B. If the answer to 3A. above is in the affirmative, whether the Claimant's failure to keep proper wet stock inventory resulted in failure to detect the leak early?

1. Whether the Defendant overcharged the Claimant for fuel products supplied and delivered to the Claimant over the period 2013 through 2018?

The Pertinent Clause:

"Finance or the total costs to the Defendant of not only the landed cost of the products but also of all expenses incurred in supplying the products to the Claimant?

15. By virtue of the provisions of clause 5 of the contract was agreed that:
'(1) Subject to sub-clause (2) below the Dealer shall pay for Shell products brought by and delivered to him hereunder at the prices invoiced to him by Shell or its agents and shall pay for the same in cash or by cheque at the time of delivery.

(2) The prices at which the fuel shall be sold and delivered to the Dealer shall be calculated in accordance with the following terms;

(3) The price shall be the sum total of the following
(a) The Duty Free Cost of the Products
(b) The Freight
(c) The Profit Margin for Shell

(4) The Freight shall be at the following rates
(a) SUPER: $0.15BZ per American Gallon
(b) REGULAR: $0.15BZ per American Gallon
(c) Diesel: $0.07BZ per American Gallon

(5) The Profit Margin for Shell shall be as follows:
(a) SUPER: $0.20BZ per American Gallon
(b) REGULAR: $0.20BZ per American Gallon
(c) DIESEL: $0.07BZ per American Gallon; and

(6) Any increase or adjustment to the profit margin would only be affected after periodic reviews to ensure that pump prices can be competitive and the business is profitable for both parties. In the event that after negotiation in good faith no agreement can be made on the increase or adjustment then either party may terminate the agreement by providing at least six month written notice of termination and provided that the said option for termination shall only be exercise where Shell is not willing to continue with the existing profit margin.

(7) Price buildup relating to the Cost of Products provided by the Ministry of Finance is to be supplied to Dealer on a monthly basis and immediately whenever there is a fluctuation in costs."

A. Whether the "Duty Free Cost of the Products", within the meaning of the Agreement, is the landed cost of the fuel products (referred to and treated by the Claimant as the CIF value of the products) as stated in the price buildup provided by the Ministry of Finance or the total costs to the Defendant of not only the landed cost of the products but also of all expenses incurred in supplying the products to the Claimant?

Claimant's Submissions:

18. The Claimants submit that contrary to the Agreement the Defendant never supplied the price buildup from the Ministry of Finance. Rather, from January 2013 to date, they were provided with a price buildup generated by the Defendant which included additional costs over and above the CIF (Cost Insurance Freight) value provided in the Ministry's buildup.

19. It is this allegedly inflated sum that had been collected by the Defendants since January 2013. It was based on an entirely unlawful premise and a self-serving interpretation of the Contract; an interpretation which is not only commercially preposterous but does not represent the bargain struck between the parties. A bargain that was intended to secure competitive prices. However, with the Defendant's interpretation, the Claimant was essentially charged twice the value of its expenses and the Defendant realized twice the value of its profits.

20. Senior Counsel for the Claimant informed that because the Agreement was drafted by the Defendant and there is clearly some ambiguity the contra proferentem rule ought to apply to allow for an interpretation which goes against that advocated by the drafter. He drew his discussion of the rule from Halsbury's Laws of England 4th ed reissue Vol 9(1):

"Contra proferentem may refer to the rule that, in the event of any ambiguity, wording in contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his basic obligation, or any common law duty which arises apart from contract. It may also refer to the rule that wording is to be construed against the party who proposed it for inclusion in the contract. The latter is a rule of 'last resort' and can only apply if a document, properly interpreted, 'admits of doubt. There is also a statutory equivalent of the rule which applies to certain consumer contracts."

21. He continued that in construing the Agreement, the Court has to look primarily to the intention of the parties. This requires an objective consideration of what a reasonable person in the parties' positions would have understood the words to mean - ***Investor's Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 ALL ER 98***.

22. He opined that such scrutiny must reveal that the Cost of Product was to be based on the price buildup or CIF value provided by the Ministry of Finance. It is neither expressly stated nor should it be implied that the Defendant was to charge costs over and above the CIF value. There is an obvious rationale to this being that the prices were to be objectively fixed and readily verifiable.

23. To allow the Agreement to be construed otherwise would be to remove this objective basis and impose a price which is determined solely by the Defendant making it impossible for the Claimant to verify whether the Costs of Product was properly calculated or charged. Further, clause 5(6) supports this interpretation as it created a mechanism which enabled a review of the Defendant's Profit Margin.

The Defendant's Submissions:

24. Counsel for the Defendant felt that in determining this dispute as to the meaning of Duty Free Cost of Product, it was for the Court to construe the term. Like Senior Counsel for the Claimant, she invited the Court to begin its deliberation by considering not what the parties may say they intended but what a reasonable person in the parties' positions would have intended. She also relied on ***Investor's Compensation Scheme Ltd (ibid)***.

25. She then asked the Court to give the words their ordinary and natural meaning. This, she explained, is not necessarily a dictionary meaning, it could also be a popular or general meaning - Chitty on Contracts 32nd ed paragraph 13-052. The Court is, however, allowed to depart from this rule where it would lead to absurdity or inconsistency. Chitty (ibid) paragraph 13-056 explains:

"So, the principle that words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity or would create some

inconsistency with the rest of the instrument. It may also not be applied, as Lord Hoffman indicates, where there has been an obvious linguistic mistake or where, if the words were construed in their ordinary sense, they would lead to a very unreasonable result or impose upon the contractor a responsibility which it could not reasonably be supposed he meant to assume."

26. For a commercial contract, as the Agreement is, it must be construed so as to make commercial sense and the Court is allowed to imply terms to give business efficacy - to determine what the document would be reasonably understood to mean having considered the relevant background (***Attorney General of Belize v Belize Telecom Ltd. [2009] 1 WLR 1988***). The Court must be careful not simply to insert terms which seem fair or reasonable or an improvement.

27. What can be implied is a term which *"spells out what the instrument means. It is an exercise in the construction of the instrument as a whole. In the case of all written instruments, this obviously means that the term is there from the outset, ie from the moment the contract was agreed…."* ***Darby Investments Services Inc v Inguetberg S.A. Claim No. BVIHCV [Comm] 32 0f 2012***.

28. The Court is also allowed to imply a term which is so obvious it goes without staying - the officious bystander test. This test often overlaps with the business efficacy test as they both seek to imply terms which express what the contract in fact means (Halsbury's Laws of England (2019) Vol 22 at paragraph 169.

29. Counsel then turned her attention to the Agreement itself and accepted that the term was not defined in the Agreement. She submitted that the Duty Free Cost of the Product means the cost of the product without duty. That was the natural and ordinary meaning as both parties were well aware that the Corozal

Free Zone, where the Claimant's station is located, enjoyed certain duty and tax exemptions (***Section 12 (1) of the Commercial Free Zone Act***).

30. If it was to be defined as the CIF in the Ministry's price buildup only, as the Claimant asserts, then certainly the Agreement would have provided that the first component of the price of fuel was the price set out in the Ministry's price buildup.

31. Instead, the Agreement simply required the sharing of the price buildup relating to the costs of products. As such, the Defendant was to be the one to determine the cost of the products by including all elements of cost save for duties and freight. This, she concluded, was what a reasonable person in the position of the parties would have understood the term to mean.

32. These costs, which are referred to as 'additional costs' include a wholesale margin, social fee being 10% of the CIF, paid to the Customs Department, Admin Fee being 1.5% of CIF, paid to the Customs Department, Warehouse Fee being $0.01 per American Gallon, paid to the Customs Department (only invoiced up to 2014), Brokerage fee and Guard Fee paid to the Customs Department for transport of fuel to the Free Zone.

33. So, if costs beyond the Ministry's price buildup (additional costs) are not part of the Duty Free Cost, *"then the Agreement is silent on the additional costs and it would be for the Court to imply a term to confirm liability for the additional costs"*. (See paragraph 53 of the Defendant's written submissions).

34. Any interpretation which saddles the Defendant with the additional costs would be contrary to Clause 5(6) (ensure profit for both parties) and the true intention of the parties. In order to give business efficacy, it must be given an interpretation which allows both parties to make a profit and this is only possible if the additional costs are properly implied to be part of the Duty Free Cost of the Product.

35. Furthermore, the Claimant by Clause 3(10), of the Agreement, agreed to *"comply with… all rules, regulations or instructions lawfully issued or given by any authority in respect of or affecting the property or business carried on…."* Save for the brokerage fee, the additional costs were all government-imposed costs which must be paid to get the fuel to the Claimant's station.

36. The Claimant is therefore contractually obligated to pay these imposed charges. In fact, the Claimant has cherry picked the charges it would pay, such as the social fee, port dues and Environment Common Fund fee which were imposed after the Agreement had been made.

37. Counsel was of the view that if these cherry-picked charges were being paid as part of the duty free cost, then it was clear that the parties never intended for the price of fuel to only be the Ministry's price buildup. It must necessarily include all costs incurred in supplying the product to the Claimant.

The Court's Consideration:

38. The Court agrees that this is an issue of interpretation as the term "Duty Free Cost of the Products" is not itself defined by the Agreement. The Court is guided by the parties' understanding of the rules of interpretation and need not repeat them here.

39. The Court finds itself in a most peculiar situation where it both agrees and disagrees with both parties to some extent. When we look at Clause 5, it is difficult to accept the Claimant's position wholesale since the Clause seems to be so specific. It states clearly in Clause 5(1) that the Dealer/Claimant shall pay the prices invoiced to him by Shell/ now the Defendant. This indicates that Shell/now the Defendant was always the one to calculate the prices.

40. The prices were to be the sum total of the Duty Free Cost of the Products, the Freight and the Profit Margin. While the Agreement defines freight by subscribing a value as it does for the profit margin, it says nothing about the Duty Free Cost of the Products. It does provide, however, that the price buildup relating to the Cost of Products provided by the Ministry is to be supplied to the dealer on a monthly basis unless there is a fluctuation in cost when it is to be provided immediately.

41. The Ministry's buildup whenever issued is therefore incorporated into the Agreement. The Agreement does not make it clear what part of the Ministry's buildup relates to the Costs of Product and this adds to the confusion.

42. If one scrutinizes this document (a 21st March, 2019 issue presented in evidence while 2019 falls outside the period under scrutiny), one immediately realizes that it deals with pricing for fuel products in Belize City and not only cost of the fuel products.

43. It contemplates different information for areas outside Belize City. At the section for Delivery from Belize City only there is an asterisk which at the

bottom of the document indicates *"Here insert other rates for destinations beyond Belize City."*

44. Neither party made it clear whether different price buildups were in fact available for different areas of Belize and if there was indeed one specific to the Corozal Free Zone.

45. Be that as it may, the document contains the CIF price to which is added Port Dues, Handling and Environmental Common Fund Fee to create what is designated Landed Cost (without markup). This tells the Court that Landed Cost is not CIF and they ought not to be used interchangeably in these proceedings because the Agreement by incorporation of the Ministry's buildup directs otherwise.

46. That section is followed by the wholesaler's margin and the dealer's margin to create the total commercial margin. The next section deals with government charges which are the environmental tax, excise duty and general sales tax (of no concern to this case).

47. All the above listed items combine for a Price before Delivery, not a Cost. Then, delivery was added and the total became the Imputed Pump Price (Belize City) which was the same as the stated GOB's Controlled Pump Price (Belize City).

48. The Claimants case is that of all the information provided on the Ministry's price buildup the only one of any import to The Duty Free Cost of Product stated in the Agreement is the CIF. The Defendants say it is the Landed Cost

plus the wholesaler's margins and any other costs incurred by them for the release and distribution of the products after they have been landed in Belize.

49. The true question for the Court is what really is the relevance of the Ministry's price buildup in calculating The Duty Free Cost of Product? And it is here that I part ways with both parties.

50. It seems to me from the way the Agreement has been worded and structured that the Ministry's buildup was intended to give more than just the CIF sum. It was intended to provide all that was pertinent to the calculation of the Cost of Products.

51. The mere fact that the terms 'The Duty Free Cost of Product' and the 'Costs of Products' are capitalized is very instructive. It tells the reader that these terms have special meaning outside what is ordinary and usual. So that the Defendant's insistence that it should bear its ordinary meaning fails in my estimation. That they are both capitalized and are the only reference to Cost throughout the entire Agreement, also links them together inextricably and to my mind gives them the very same meaning.

52. So, while the cost of a product may ordinarily be the total cost incurred to produce the product which must necessarily include all overheads, this Agreement contemplates a rather different meaning.

53. The parties freely negotiated out of the actual cost of the products by agreeing a figure for the Defendant's profit margin and freight and by including the Ministry's price buildup into the equation. This indicates quite clearly that the

ordinary meaning has been limited in a number of ways by the Agreement itself. It also assures that any wholesaler's profit which the Government placed in its buildup ought not to apply. Likewise, any figure relating to freight (outside CIF) has also been excluded.

54. The inclusion of the Ministry's price buildup also places a limit on the landed cost. So to my mind, any cost associated with landing the products in Belize are capped in accordance with the Ministry's buildup save and except (as stated above) the profit margin and freight allowed. This interpretation goes counter to that advocated by the Claimant that only the CIF was to be considered (although their submissions speak to CIF/Landed Cost).

55. The issue which remains is whether the Duty Free Cost of the Fuel would necessarily include the charges in dispute i.e. the additional charges. Both parties also accept that at the time of the Agreement these charges were nonexistent but they are associated with storage at and delivery from the Port.

56. The Agreement at Clause 4 is clear that delivery of the products is made at the station (Corozal Free Zone) generally, with other products being delivered at the Haulover road depot. So from inception both parties were aware that delivery was not just when the product was landed here in Belize, which is what the Buildup contemplates at Landed Cost.

57. The Agreement also makes it clear that price is different from the Cost of Products. The Cost of Products is only used as a component of their agreed price. The mere fact that the Ministry's price buildup relates in its entirety to calculating a price for the products and not a Cost of Products (which the

parties required) cannot be overlooked. It indicates that the entire Ministry's buildup was not and was never intended to be the Duty Free Cost of the Products.

58. It seems to me that this is why the Agreement did not equate the two. Rather it said the price buildup "relating to the Costs of Products." "Relating to" means "about or concerning" (Longman Dictionary). To my mind, all that was needed to calculate the Costs of Products is to be found in that buildup.

59. The provision of the Ministry's price buildup was specifically mandated for this reason. The Claimant was not to be taken by surprise by changes which Shell/now the Defendant decided to unilaterally make, regardless of the reason.

60. The price buildup has only one (1) section which speaks to cost of any kind. That is the Landed Costs section. The Agreement does not specifically say anything about costs incurred after the product has been landed here except perhaps for freight but we will deal with that issue later. There may have been no need to address this because at the time of the execution of the Agreement there were then no costs after arrival other than perhaps freight to be incurred.

61. The Court considered the evidence for the Defence, especially Mr. Rufino Lin, General Manager of Sol, St. Lucia Limited (BVI). What he presented made good business sense when one considers the additional expenses which the Defendant would have incurred years after the Agreement was entered into.

62. He was sure that if the Agreement was to have been construed as the Claimant asserted then the Shell/now the Defendant would have been operating at a loss. In fact, he said at paragraph 17, *"If Sol (and not the Dealer) is liable for the additional costs, it would erode the profit margin which was specifically agreed in the Dealer Agreement."*

63. But in 1998 when they entered into this Agreement those expenses did not exist. So when Mr. Lin says at paragraph 16 *"To arrive at the agreed profit margin, Sol factors not only the direct cost of the product, but also those operating expenses incurred in the maintenance and general support of the service station including branding fees paid to Shell."*, this Court is well guided. Back in 1998, the amount stated as the Profit Margin may have been sufficient to ensure a guaranteed profit for Shell. But as time went on perhaps this changed.

64. The result, however, was not that the Agreement needed to be interpreted in some way which would allow the Defendant to receive payment for additional expenses along with both an agreed Profit Margin as well as a Wholesaler's Margin contrived by the Government as part of its own pricing mechanism.

65. While I fully believe the Government would have gone through a thorough analysis of relevant data including wholesaler's expenses and a reasonable profit etc. to arrive at an appropriate figure for the Government's purpose, it was not what the parties had agreed.

66. The result need not have been the eroding of the Defendant's Profit Margin either, because the Agreement had its own remedying mechanism built in. This brings us neatly to our next issue.

B. Whether the Profit Margin as used in the Agreement was a guaranteed profit to the Defendant, after all expenses are deducted?

67. The parties had done their own negotiation and they agreed to use their own figure as the Profit Margin. The Agreement, appreciating that there could be changes that could affect, yes even erode, the Profit Margin outlined, provided in Clause 6 a fair process by which expenses such as those described as "additional expenses" here today could be managed.

68. By the very way in which Clause 6 is worded, there was no guaranteed profit; there was a figure from which a profit could be earned and if it was no longer profitable to the wholesaler or became burdensome to the Dealer causing him a loss, then they could renegotiate or terminate if the wholesaler did not wish to continue with the stated Profit Margin. That seems simple enough.

C. Whether the Claimant was liable to pay freight charges as set out in the contract, or regulated prices prescribed by the Ministry of Finance?

69. The Claimant's argument was the same. The term in the Agreement displaced any other charges for freight so that the Claimant was only to pay what had been agreed.

70. The Defendant maintained that since the cost of freight was increased by law (The Hauler's Association Act and a directive signed by the Financial Secretary, Ministry of Finance), the Claimant was bound to comply and pay

the higher freight. They sought footing on Clause 3 (10) of the Agreement (detailed above).

71. The Court's position remains the same. There is no issue of non-compliance with any law in Belize. The Defendant had to make sure of compliance before delivery could have been made at the Free Zone.

72. An increase of this nature could not affect the terms of the Agreement as it related to freight. That could only be changed through the agreement of the parties by putting Clause 6 to its proper use. The Court finds that any amount paid by the Claimant as freight or which was freight related beyond what had been agreed, has been overpaid.

Determination on Issue 1:

73. The upshot of all this leads to the inevitable conclusion that according to the Agreement, the Claimant was to pay the Landed Costs as detailed on the Ministry's price buildup for the relevant period. The Court also finds that the Defendant had been overcharged for what the Defendant terms "additional expenses."

2. If the Claimant was overcharged, whether the Defendant is liable to the Claimant to account for the said overcharge and to reimburse the total value of the overcharges claimed by the Claimant?

74. The Defendant is to account for and reimburse any sums which were charged and over paid as freight or freight related charges above the figure stated in the Agreement and the additional cost, i.e. a wholesale margin, social fee

being 10% of the CIF, paid to the Customs Department, Admin Fee being 1.5% of CIF, paid to the Customs Department, Warehouse Fee being $0.01 per American Gallon, paid to the Customs Department (only invoiced up to 2014), Brokerage fee and Guard Fee paid to the Customs Department for transport of fuel to the Free Zone.

2A. Whether Clause 14 of the Dealership Agreement applies where the Agreement expired at the end of the agreed term as opposed to on termination of the Agreement prior to the expiration of the agreed term?

Pertinent Clauses:

75. Clause 14 of the Dealership Contract states:

"(1) Shell has at its own expense supplies and installed on the property the equipment and fixtures listed in Appendix III hereto and it is hereby agreed that such equipment and fixtures are now and shall at all times remain the property of Shell and that upon the termination of this agreement the Dealer shall deliver to Shell said equipment and fixtures and all such Shell products as shall at the time be in stock in respect of which Shell is owed by the Dealer."

Clause 17 of the Dealership Contract states:

"In the event the Dealer-
a) Fails to comply with any covenant or obligation herein
b) Becomes incapable of operating the station for whatever reason.
c) Commits an act of bankruptcy or insolvency or makes any assignment for the benefit of his creditors for liquidation of his debts composition or otherwise or suffers to be levied on his goods
This agreement shall terminate upon written notice by Shell and Shell may take possession of the station and manage and operate the same or appoint a third party to manage and operate the same until the expiration of the Agreement."

Clause 15 states…

"Shell hereby covenants with the Dealer as follows:
(1) ……
(2) <u>Covenant of Maintain</u>

Subject to Clause 21 below to repair keep and maintain all fixtures and equipment of Shell in good condition and in conformity with item A of Appendix II hereto PROVIDED that this covenant shall not cover any damages caused by the neglect or default of the Dealer or any of his servants, agents, licensees, or invitees."

Claimant's Submissions:

76. The Claimant submits that the Agreement expired in November, 2018 and there is no provision for what is to happen in this situation. He says termination is contemplated differently in the Agreement and points to Clause 17 where if the Agreement is terminated in any of those circumstances Shell/now Defendant could itself, or by the appointment of a third party, manage and operate the station until the expiration of the remaining term.

77. He relied on ***Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 ALL ER 352*** which elucidated the point that where a contract provides in its terms that notice must be given for termination due to a breach of an obligation or a failure to comply then notice must be given precisely. Since there was no written notice in accordance with clause 14, there could not have been a termination.

78. Further, to remove the pipelines etc., which are installed underground, would cause significant destruction of the surface development of the station. In any event, the equipment were all imported in the Claimant's name in order to save cost and were intended to remain with the Claimant once they had been fully exploited commercially for the entire life of the Agreement unless otherwise agreed as for e.g. the pumps were.

Defendant's Submissions:

79. The Defendant asked the Court to interpret *"termination of this agreement"* and whether the obligation to return the fixtures and equipment is limited to those installed and listed in Appendix III.

80. Counsel accepted that the Agreement was either poorly drafted or the Appendix had been lost with time since Appendix III attached to the Agreement is not a list of fixtures and/or equipment. In fact, no such list was presented in evidence at all.

81. Nonetheless, she asked the Court to begin inquiry with the natural and ordinary meaning. She presented definitions from the Black's Law Dictionary, Revised 4th Ed where terminate was defined as *"to put an end to; to make to cease; to end."* Whereas expiration is defined as *"Cessation; termination from mere lapse of time; as the expiration of a lease, statute and the like."*

82. Therefore, given its natural meaning, where an agreement expires it is a termination from mere lapse of time. She submitted, further, that Clause 14 should not be considered in isolation. She directed the Court's attention to Clause 15(2) where the Defendant agreed *"subject to clause 21 below, to repair, keep and maintain all fixtures and equipment of Shell in good condition….."* She concluded that it was, therefore, never the Defendant's intention to give up ownership of any of its fixtures or equipment."

83. So, Clause 14 should not be given a limited or narrow meaning. Rather, it should be interpreted to include the expiration of the Agreement whereupon

the Defendant is entitled to the return of all fixtures and the equipment supplied during the term of the Agreement and specifically since 2017.

"Six 15,000 AG tanks acquired in 2001 at a cost of $263, 859.42; Three pumps acquired in 2003 at a cost of $16,882.44; One pipeline installed in 2001 at a cost of $62,038.58…"

84. The Defendant withdrew its claim for the four (4) Gilbarco dispensers which have already been returned. This, Counsel urged, should be construed as an admission on the part of the Claimant that clause 14 applies and all fixtures and equipment supplied by the Defendant should be returned. Their refusal to comply was wholly unjustified.

Court's Consideration:

85. This Court agrees that termination is ordinarily the end of a contract through any means. This includes expiration through effluxion of time. The Court, however, must now determine whether the language of the Agreement suggests that expiration does not constitute a form of termination.

86. In ***R v Secretary of State for social Services ex parte Khan [1973] 2 ALL ER 104***, the Court considered the arguments on both sides as *"nicely balanced"* as do I here. In that case a staff member was appointed for a two year period renewable subject to confirmation. At the end of the two years he was informed that his appointment was not confirmed. He sought to invoke paragraph 190 which would allow for review for unfair termination. Lord Denning MR stated at **page 106**:

"I think that the word 'terminate' is by itself ambiguous. It can refer to either of two things - either to termination by notice or to termination by effluxion of time. It is often used in that dual sense in landlord and tenant and in master and servant cases. But there are several indications in this para to show that it refers here only to termination by notice. (1) The main healing speaks of 'Notice of Termination'. (2) The cross-heading is 'Representations against dismissal'. (3) The words 'is being unfairly terminate' point to

some positive action on the part of the board by way of termination, such as by giving notice or shutting him out, as distinct altogether from an automatic coming to an end. (4) The words 'the Board's decision to terminate the appointment' are to the same notice, and not by an automatic ending."

Buckley, L.J. concurred and said:

In my judgment the words are not capable of bearing that meaning. As Counsel for the Secretary of State pointed out, the verb 'terminate' can be used either transitively or intransitively. A contract may be said to terminate when it comes to an end by effluxion of time, or it may be said to be terminated when it is determined at notice or otherwise by some act of one of the parties. Here in my judgment the word 'terminated' is used in this passage in para 190 in the transitive sense, and it postulates some act by somebody which is to bring the appointment to an end, and is not applicable to a case in which the appointment comes to an end merely by effluxion of time.``

87. The Court is guided by this decision and will endeavor to find the true meaning of the term terminate from indicators throughout the Agreement.

88. The particular Clause in issue is titled Ownership of fixtures and chattels. That is clear and unambiguous. It states that those equipment and fixtures listed in Appendix III shall now and at all times remain that of Shell. That too seems quite clear. Shell is also mandated to repair, keep and maintain the fixtures and equipment owned by Shell. And on the termination of the Agreement, the fixtures and equipment were to be delivered to Shell by the Dealer. The problem arises with the use of the word termination.

89. Looking at the Agreement as a whole, it speaks to a first term of ten years in Clause one. Clause 19, which is headed 'Renewal', allows the Agreement to automatically continue for a further period of ten (10) years unless written notice is given to the contrary *"at least four months prior to the <u>expiration</u> of the first two year term"* (emphasis mine). The Court assumes this to be a typographical error since there was never a two year term but rather a ten (10) year term.

90. At Clause 5(6) (detailed above) reference is made to termination of the Agreement by either party giving six (6) months written notice where a new profit margin could not be agreed and Shell/now the Defendant was not willing to continue with the existing profit margin.

91. Clause 17 provides for default by dealer and the process by which such default could result in termination i.e. through written notice. As Senior Counsel pointed out that Clause clearly distinguishes termination from expiration since it allows Shell/now the Defendant to take over possession of the station and the management and operation of the business until the Agreement expired.

92. It appears to this Court that during the life of the Agreement, the equipment and fixtures listed in Appendix III remained in the ownership and possession of the wholesaler. So that Clause 15(2) makes good sense where the owner is required to take care of its property. In the event of termination then they were to be handed over by the dealer to Shell who could in some circumstances take over the enterprise until expiration of the Agreement.

93. It is quite instructive that Clause 14 speaks to a list of items which were supplied and installed on the property. Mr. Sanjeev Poornananda says those items have all been replaced. The clause does not contemplate any new items.

94. The very maintenance clause, on which the Defendant relies, speaks to repair, keep and maintain. There is noticeably no clause relating to replacing items, effecting improvements or renovations or updating the list from time to time.

95. There is nothing to indicate that the Clause was to be made applicable to items not then appearing in Appendix III. The fact that Appendix III is non-existent as a list of items is also a strong indicator of its present importance to the interpretation of this Agreement.

96. It is also difficult to perceive the removal of underground tanks and pipes rather than perhaps a provision which required payment for them. This is what would be expected if the section was to be interpreted as the Defendant urged.

97. What has unfolded through the evidence is that the tanks were, at the execution of the Agreement, above ground so their return would have been a rather different affair. This confirms in my mind that the contents of Appendix III is essential to the Agreement.

98. Having considered all this, the Court finds that the termination of the Agreement in Clause 14 is different in meaning from the expiration of the Agreement due to effluxion of time. Clause 14 covers only the event of termination through an act of one of the parties, where the proper notice procedure has been adhered to and it is silent on what ought to obtain where it simply expires.

99. Since the Agreement is specific about termination, then it seems clear to me that only in the circumstances of a termination should the items be returned. This Court is in no position to imply terms which the parties did not care to include particularly where Appendix III is missing entirely and those items have admittedly been replaced.

100. I am strengthened in my view as there is nothing in this Agreement which speaks to a wholesaler's obligation to replace the fixtures and equipment listed in Appendix III, to effect improvements or renovations. One can only assume that these were done pursuant to other arrangements which have not been pleaded or proved, but which certainly form no part of this Agreement.

B. Whether the Claimant is obliged to remove the tanks and pipeline installed underground by the Defendants at its service station some 19 years ago and return the same to the Defendant?

101. No, the Agreement does not support any such obligation.

I. Whether there was an oral collateral contract between the Claimant and the Defendant by which the increase in profit margin was to offset the cost of underground tanks acquired by the Defendant for the Claimant?

102. The Court finds that this was not proven to the requisite standard but with the finding above, this issue falls away.

C. Whether the Claimant is obliged to refund to the Defendant the total cost of $672,079.45 as the costs of improvements effected by the Defendant to the Claimant's service station?

103. No, the Agreement does not support any such obligation and this Claim was grounded only on the Agreement.

D. Whether the Defendant constructed the forecourt and two (2) canopies at the Claimant's service station?

104. The Court finds that the Defendant did not construct the entire forecourt and the canopy and in any event there is no basis on which to reimburse them even if they did, as this Claim was grounded only on the Agreement.

E. Whether the 3 pumps acquired in 2003 at a cost of $16,882.44 are in the Claimant's possession?

105. No, the Court found on a balance of probabilities that the pumps have already been returned to the Defendant.

3. Whether the Claimant is liable to indemnify/reimburse the Defendant the sum of us$141,893.50 spent in remediation works following the leak?

The Pertinent Clause:

106. 13. INDEMNITY

The Dealer shall indemnify Shell against:

"(a) All claims and liabilities for breach or non-compliance with any law governing the operation of the section.
(b) All claims and liabilities on account of personal injury (including death) to employees, servants or agents of the parties hereto and to third parties or damage to any person's (including companies) property arising out of or connected with the use, occupation and running of the station and the station premises whether due to negligence or not on the part of the Dealer and accordingly Shell shall not be liable to pay to the Dealer an indemnity or any sums of money, legal claims, demands or awards payable by the Dealer in respect of any personal injury or damage to property arising as mentioned above."

The Claimant's Submissions:

107. The Claimant was quite brief. He opened with a consideration of the evidence of Mr. Lin which showed that the Defendant originally made monthly visits to the station to reconcile the dipstick readings. Once the Defendant was "de-branded" they stopped doing monthly reconciliations although their obligations to supervise the station after the rebranding had not changed.

108. The Claimant's evidence is that they continued to take the dipstick readings twice per day but the responsibility to reconcile remained with the Defendant. Therefore, any failure to keep proper wet stock inventory stemmed from the Defendant's failure to do the reconciliation as was their obligation.

109. The need for remedial work was not on account of any failure on the Claimant's part but rather the Defendant's failure to properly install equipment and do their reconciliation through verification of the existing records.

110. Furthermore, when the Defendants applied and received environmental clearance they did so as owner of the service station. The responsibility for remediation under the terms of the clearance rest with the owner of the premises which the Defendants represented themselves to be to the Department of the Environment when they secured the clearance for the installation of the tanks and pipelines.

111. When the evidence from the Defence is considered, it concerned only what they thought was supposed to have happened as there was no first-hand knowledge of anything that actually occurred in relation to the wet stock reconciliation.

Defendant's Submissions:

112. The Defendants acknowledge that the leak was caused by *"a break in the connection sump, which was installed by the Defendant, and that the failure to close off the pipelines that ran out of the sump caused the fuel to leak into the soil, the Defendant submits that the Claimant, in breach of its contractual obligations, failed to do tank dips and keep tank dip records as provided in the Agreement, which resulted in its failure to detect the leak earlier. By the time the leak was discovered, over 200 gallons of fuel had to be extracted from the soil under the Claimant's fuel station."*

113. She referred the Court to Clause 10 of the Agreement, where the Claimant agreed to keep *".... Proper fuel volume records… and the said records shall include entries showing the daily opening and closing petroleum stocks in the tanks, shortages and such other material or information as Shell may direct or require from time to time."*

114. Whether they kept a wet stock inventory (Defendant's terminology) or record of tank dip checks (Claimant's terminology), the object of both was to confirm the amount of fuel in the tanks by verifying the starting and ending balance against sale volume which would confirm any fuel loss.

115. She continued that while the station was branded the Defendant did monthly audits of the Claimants reconciliation reports. But after de-branding, the support was reduced, the checks were no longer regular and the Claimant ceased to keep its contractually obligated tank dip records.

116. After the discovery of the leak, despite the Defendant's several requests, no tank dip records were produced by the Claimant. Although they were informed that the Department of the Environment also needed the details of

their tank dips to quantify the amount of spilled fuel, no such record was ever provided.

117. Counsel submitted that if the Claimant really had the tank dip records they would have at least disclosed them to the Court since one of the issues was their failure to keep proper records in breach of the Agreement.

118. Any ignorance of what a wet stock record is, asserted by the Claimant, is feigned since one of its employees was trained by the Defendant in 2014 in the proper method of wet stock inventory/tank dip records.

119. This training and the supporting manual encouraged dealers to report any loss greater than 0.3%. Such a consistent loss over four to five days indicated a leak. So while Mr. Arnold for the Claimants testified that the accepted margin of loss was 1.5%, which would translate to 20 gallons a day, this was unreasonably high and inconsistent with the guidelines shared in 2014. Moreover, at that rate, the tank dip records would be rendered useless at tracking leaks.

120. She continued that Mr. Poornananda testified that Shell conducted quarterly preventative maintenance but once the station was rebranded in 2009, the quarterly maintenance ceased. There was then only limited maintenance of the fixtures and equipment and the Defendant relied on the Claimant to advise of any faults or defects with or to them pursuant to Clause 23 which provides that *"The Dealer hereby acknowledge that Shell makes no warranty as to fitness and condition of any equipment, chattels or fixtures supplied under or in pursuance of the Agreement and that Shell shall rely on the Dealers inspection and monitoring of the*

operations to advise Shell immediately of any faults or defects in the equipment, chattels or fixtures that (the Dealer) shall discover."

121. Since the Claimants were aware, since 2009, that the Defendant's inspections were not as frequent, there was an onus on the Claimants to undertake inspection of those fixtures and equipment in their possession.

122. Moreover, the Claimant had a contractual obligation by Clause 3 (3) of the Agreement to maintain the station, fixtures and equipment to a standard satisfactory to Shell and by Clause 3 (15) to manage and operate the station in a safe and secure manner to avoid or minimize the risk of pollution of the environment. So the Claimants ought to have conducted inspections to ensure that there were no safety hazards. It is improper for them to assert that the leak occurred because the Defendant failed to inspect the sumps.

123. Although the Claimants evidence was that they were prohibited from interfering with the pipe lines, which she asked the Court to reject, they could have requested permission or that the Defendant conduct inspections. There is no evidence that either was done. Since the operation of a station is inherently dangerous the Claimant should have ensured a heightened security.

124. She concluded that *"(w)hile the Claimant may not have caused the leak, it's failure to detect the leak early certainly exacerbated the contamination of the soil. The Claimant must therefore share some responsibility for the damage caused by the leak. The evidence from the Defence is that US$141,893.50 was spent on remediation works required by the Department of the Environment and the legal obligation to undertake these works fell on the Claimant pursuant to the Environmental Guidelines for Service stations published by the Department of the Environment."*

125. Because the Defendant had the expertise and believed the indemnity Clause in the Agreement covered the works, it decided to undertake the task itself. The Defendant urged the Court to find that the indemnity clause in the Agreement was broad enough to cover loss resulting from the fuel leak as it resulted in damage to the Claimant's property *"arising out of or connected with the use, occupation and running of the station."*

126. In the event that the indemnity does not cover the leak, then the monies were paid under a mistaken belief that it would be reimbursed so the Claimant is liable for repayment.

Court's Consideration:

127. This Court finds that the indemnity clause does not cover the expenditure made by the Defendant. The indemnity Clause covers third party claims and even if the Court were to consider the Claimant as being capable of falling into the category of *"any person"* in the Clause, which it obviously cannot, the Claimant had made no claim and no liability was incurred for which the Defendant ought to be reimbursed.

This claim must necessarily fail. So, now to Restitution.

128. This Court can find no basis on which to reimburse this sum. The money had not been paid over to the Claimant (not necessary) and the Claimant has not been proven to have been enriched. The Defendant was for all intents and purposes of the Ministry of the Environment, the owner.

129. There must have been some arrangement between the parties which allowed the Defendant to make applications and receive permits as owner. But by holding themselves out to be the owners they accepted a certain amount of risk and responsibility. To that extent, the Defendant was obligated to remediate. This was not simply an act of kindness.

130. The Defendant wrongly assumed that it would be covered by the Agreement but it was not. It is not the role of restitution to step in and attempt to create contracts for parties who have not made sure that their agreements are properly recorded in formal documents.

131. This is not a breach of contract claim although the Defendants repeatedly submitted that the Claimants had breached certain clauses in the contract and that they, the Defendants were also responsible for the leak. This Court finds that the Defendants were very responsible. To neglect to connect underground pipes at a gas station, a place which their own Counsel admits "is inherently dangerous" is unbelievable.

132. The Court finds it unnecessary, in these circumstances, to give any answers to issues A and B as it would not affect the outcome of this Claim.

133. For the reasons stated above this Claim for restitution must also fail.

DISPOSITION:

[1.] Judgment for the Claimant on the Claim and Counterclaim.

[2.] An account is to be taken of all sums charged to and collected from the Claimant by the Defendant for fuel products sold and delivered by the

Defendant to the Claimant over the period 1st January, 2013 to November 20, 2018 which were invoiced at prices calculated otherwise than in accordance with the agreed prices set forth in a written dealership contract made between the parties dated 1st June, 1998.

[3.] The Defendant is ordered to return to the Claimant any sums due to the Claimant on the taking of the said account.

[4.] Interest is awarded on this sum at the assessed rate of 6% from the date of filing of the Claim herein to the date of judgment. Thereafter interest is awarded at the statutory rate of 6% until payment in full.

[5.] The Counterclaim is dismissed.

[6.] Costs to the Claimant in the agreed sum of $50,000.00.

SONYA YOUNG

SUPREME COURT JUDGE