



The Gibson Dunn-OSCOLA Commercial Law Moot 2020

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

BETWEEN:
TORRESTER MINING GROUP (Appellant)
– and –
GUSEONG C&T (Respondent)

STATEMENT OF AGREED FACTS

Guseong C&T

1. Guseong C&T (“Guseong”) is a South Korean family-owned engineering and construction company that specialises in the maintenance and repair of mining dams. Their work is globally renowned and their advanced dam engineering expertise has allowed them to repair seepages in record time.
2. Guseong is led by its director, the eccentric businessman Kim Yoo-Dong (“Mr Kim”), who often conducts his business affairs alone without the advice of his bankers, accountants, or lawyers. While Mr Kim acknowledges that professional advisors are often able to do a better job at managing parts of his business, he is afraid that they would leak his business secrets to his competitors.

The Rio Paranaíba Iron Mine

3. The Rio Paranaíba Iron Mine is an iron mine straddling the Paranaíba river in the Brazilian state of Minas Gerais, operated by the international mining conglomerate Torrester Mining Group (“Torrester”).
4. The Rio Paranaíba Iron Mine has a tailings dam (“the dam”) to contain toxic waste discharge. The main iron mine is situated between the Paranaíba river and the dam.
5. Torrester sought to conduct maintenance on the dam as it had never been inspected or maintained since its construction in 2005. Three dam engineering companies bid for the project and Torrester selected Guseong for the job. Guseong’s proposal explicitly stated that they were able to conduct maintenance and repair of the dam while enabling the iron mine to operate. Further, Guseong stated that they were able to fix “seepages of any size” within one month.

The Dam Maintenance Contract

6. On 13 April 2020, Torrester entered into a contract with Guseong (the “Contract”). As usual, Guseong was represented by Mr Kim. The relevant clauses of the Contract state:

1. PURPOSE OF CONTRACT

- a. This Contract is for the maintenance of the tailings dam of the Rio Paranaíba Iron Mine.
- b. Parties are to cooperate to ensure that the Rio Paranaíba Iron Mine is able to continue its operations during the maintenance period.
- c. Safety of the mining operations and of the miners is of the utmost importance, and the parties are to work together in good faith to ensure safety in the maintenance and repair of the dam.

2. MAINTENANCE PERIOD

The maintenance period (“maintenance period”) is the period between the date that the maintenance and repair of the dam commences, and the date when both parties sign a certificate certifying the fitness of the dam for operation or the date that this Contract is validly terminated according to the termination clause of this Contract.

3. PAYMENT SCHEDULE

Guseong is to be paid US\$1,500,000 at the end of every working week during the maintenance period. The money is to be wired to Guseong’s account with Damwon Bank (a bank headquartered in South Korea) from Torrester’s account with Belo Horizonte Municipal Bank (a bank headquartered in Brazil).

4. TERMINATION OF CONTRACT

Guseong has the right to terminate this Contract if Guseong fails to receive two consecutive payments pursuant to the payment schedule. Torrester is to be informed in writing if Guseong chooses to exercise this right of termination.

5. GOVERNING LAW AND LITIGATION

This Contract shall be interpreted and enforced in accordance with the law of England and Wales, without regard to principles of conflicts of laws. Any claim arising out of this Contract shall be commenced, prosecuted, and resolved in England.

7. On 20 April 2020, Guseong commenced inspection and maintenance works on the dam. On 24 April 2020, Torrester began regular making weekly payments of US\$1,500,000 to Guseong’s account with Damwon Bank, through a standing order with the Belo Horizonte Municipal Bank that weekly payments should continue every Friday until terminated by Torrester. This was the last recorded communication between Torrester and the Belo Horizonte Municipal Bank. In subsequent weeks, the money was automatically transferred every Friday pursuant to the standing order.

Data Loss in the Belo Horizonte Municipal Bank

8. On 16 June 2020, the Belo Horizonte Municipal Bank was hacked, and lost all its data on standing orders, thereby ceasing all automated payment services. A notice was then posted on the bank's website informing all customers that they would have to re-register their standing orders with the bank if they would like them to continue. No other information was sent out by the Belo Horizonte Municipal Bank.
9. At the same time, Guseong began experiencing cash flow difficulties due to an unforeseen increase in the cost of specialised construction materials.
10. Mr Kim noted on 19 June 2020 that the weekly payment had not been made into Guseong's account. He went onto the website of Belo Horizonte Municipal Bank and saw the notice. He decided not to inform Torrester about the cessation of automated payments or that the weekly payment was not transferred into Guseong's bank account.
11. On 30 June 2020, after two consecutive weeks of not receiving payment, Guseong wrote to Torrester, seeking to terminate the dam maintenance project. It was cited in the letter that the reason for termination was Torrester missing two consecutive weekly payments. It was only then that Torrester checked the website of the Belo Horizonte Municipal Bank and learned of the cessation of automated payments.
12. Torrester wrote back to Guseong on 2 July 2020, offering to backdate two weeks' payment and resume weekly payments through Torrester's other bank accounts. Guseong declined and asserted their right to terminate the Contract. Guseong removed its workers and equipment from the dam site the following day.
13. Torrester and Guseong continued to exchange correspondence over the next month, with Torrester seeking to persuade Guseong to resume works and Guseong remaining firm on their position not to do so.

The Dam Collapse

14. Between 25-27 August 2020, severe thunderstorms in Minas Gerais caused the dam to burst, flooding the iron mine. The toxic waste material flowed into the Paranaíba River, heavily polluting it and wiping out an indigenous settlement in the area. A total of 38 workers and 5 indigenous people were killed, and the damages were estimated at USD\$250 million. Torrester was also fined a further USD\$150 million by environmental regulatory authorities.

The Dispute

15. Torrester immediately filed a suit in the High Court of England and Wales against Guseong. They submitted that by not informing Torrester of the two consecutive non-payments despite their knowledge of the cessation of automated payments and subsequently taking advantage of the situation to terminate the Contract, Guseong had breached their express contractual duty to collaborate with Torrester in good faith to ensure the safety of the operations and the workers. In the alternative, Guseong breached an implied contractual duty to only terminate the Contract in good faith.

16. Mr Justice Dexter Yeao, who was the presiding trial judge, heard the suit. During the trial, expert witnesses for both parties agreed that the dam collapse was caused by a large crack along the dam wall that began forming in early August 2020, which would almost certainly have been discovered and repaired before the collapse had Guseong not terminated the Contract.
17. On 11 October 2020, Mr Justice Dexter Yeao handed down his judgment. His Honour sided with Guseong, holding that Torrester’s claim failed:
 1. “I hold that the good faith clause (Clause 1(c) of the Contract) does not apply to Guseong’s right to terminate the Contract. The good faith clause plainly applies to the process of maintaining and repairing the dam. It is telling that the words “in the maintenance and repair of the dam” were used instead of the “during the maintenance period”. Guseong clearly had an uninhibited right to terminate the Contract under the circumstances.”
 2. “Turning to the issue of an implied term of good faith, I reject Torrester’s submission that there is to be an implied term of good faith founded upon the existence of a ‘relational’ contract. While Leggatt J (as his Lordship then was) held that there is to be an implied term of good faith in *Yam Seng Pte Ltd (a company registered in Singapore) v International Trade Corp Ltd* [2013] EWHC 111 (QB) if there is a ‘relational contract’, the test in *UTB v Sheffield United Limited* [2019] EWHC 2322 (Ch) (“*UTB*”) is to be preferred. In *UTB*, Fancourt J held that the true test is to consider, on a case-by-case basis, whether an obligation of good faith was obviously intended by the parties or whether an obligation of good faith is necessary to the proper working of the contract. The doctrine in *Braganza v BP Shipping Ltd & anr* [2015] UKSC 17 does not apply here either because the payment clause cannot be construed to give the defendant a discretion—Guseong clearly had an unqualified right to terminate the contract.
 3. “I therefore cannot accept Torrester’s submission that an obligation of good faith was obviously intended with regards to the termination of the Contract as there was no indication that this was so. I also cannot accept Torrester’s submission that such an obligation is necessary to the proper working of the Contract. Therefore, I hold that Guseong had no obligation to inform Torrester of the two consecutive non-payments, and had an unimpeded right to terminate.”
18. Torrester has been given leave to appeal to the Court of Appeal on the following grounds:
 1. Mr Justice Dexter Yeao erred in the construction of the good faith clause (Clause 1(c)) of the Contract.
 2. Mr Justice Dexter Yeao erred in holding that a ‘good faith’ term cannot be implied here as there was neither a ‘relational’ contract nor discretion.

Competition Information

Participants should form teams of 2, and should prepare written submissions (skeleton arguments) in font size 12, not exceeding 2 A4 pages and with 2.5cm margins, for EITHER the Appellant or the Respondent, due by 27 November 2020 (MT Week 7 Friday).

Citable cases:

- *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50
- *Arnold v Britton* [2015] AC 1619
- *Wood v Capita Insurance* [2017] UKSC 24
- *Bates v Post Office* [2019] EWHC 606
- *UTB Ltd v Sheffield* [2019] EWHC 2322
- *Taqa Bratani Ltd and Others v RockRose UKCS8 LLC* [2020] EWHC 58 (Comm)

Participants are only allowed to cite the six cases listed above, in addition to any cases that have been cited in the Statement of Agreed Facts. Participants may cite any number of academic authorities or legislation.

The top 8 teams (selected on the basis of their written submissions) will proceed to the preliminary oral rounds in Week 8 of Michaelmas Term. Written submissions will not be used or scored during the oral rounds.

In the preliminary oral rounds, each team shall moot once as the Appellant, and once as the Respondent. The top 4 teams (decided on the basis of number of wins, followed by score differentials) will proceed to the semi-final.

The semi-final and final shall be judged by lawyers from Gibson Dunn. Whether each team moots as the Appellant or the Respondent shall be decided by a coin toss in both the semi-final and the final.

For each oral round, each speaker shall have up to 10 minutes to make their submissions, and there shall be no right of reply or sur-reply. The speaking order shall be: Leading Counsel for the Appellant, Leading Counsel for the Respondent, Junior Counsel for the Appellant, Junior Counsel for the Respondent. For the avoidance of doubt, Leading Counsel should make submissions for the first ground of appeal, while Junior Counsel should make submissions for the second ground of appeal.

The prize for the winning team in the final shall be £200, with £100 for the runner-up.

Registration Information

To register, each team of 2 should send an email to alexander.yean@exeter.ox.ac.uk with the following information:

- The name, college, and contact information (email) of **both** team members
- Their written submissions for **EITHER** the Appellant or the Respondent, not exceeding 2 A4 pages and in accordance with the rules stated above

The deadline for registration is 27 November 2020, 11.59pm GMT. Teams will be informed by 29 November 2020 whether they have progressed to the oral rounds of the competition.