

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Ocean Conversion (BVI) Limited v Attorney General, Attorney General -v- Ocean Conversion (BVI) Limited HCVAP 2009/19 and 2009/20

CONTRACT - BVI APPEALS - CONSTRUCTION OF CONTRACTS - ESTOPPEL - UNJUST ENRICHMENT - TRIAL JUDGE'S PRIMARY FINDINGS OF FACT - FUNCTION OF APPELLATE COURT

The case concerned an agreement between the BVI Government and Ocean Conversion (BVI) Limited ("Ocean") for Ocean to produce potable water up to a maximum quantity for public consumption.

The Government had an option to purchase the plant for an agreed sum at the end of the first seven-year term. If the agreement was renewed for another seven years, at the end of that period the plant would belong to the Government without further payment. At the end of the first seven year term, the Government purported to exercise the option to purchase the plant. Events transpired that led Ocean to believe that the contract had been renewed for a further seven years. Over the course of the first and second seven-year terms and at the request of the Government, Ocean spent an additional US\$4.765 million expanding the plant in order to increase Ocean's capacity to provide more potable water for public consumption. The plant that was eventually turned over to Government, more than seven years after the exercise of the option, was not the original plant subject to the agreement. The old plant for which Government had agreed to pay the sum of US\$1.42 million was entirely replaced. The Government refused to pay the additional sum and claimed it was entitled to possession of the plant without compensation to Ocean. Ocean claimed to be entitled to the additional sum of US\$4.765 million.

The Court dismissed Ocean's challenge to an order of the trial Judge giving immediate possession of the plant and allowed Ocean's appeal against the trial Judge's dismissal of its counterclaim for compensation for the monies spent in replacing the old plant by a new one and directed an inquiry as to the

value of the plant as at the date when the Ocean gave up delivery to Government and further directing that the initial purchase price of US\$1.42 million be offset against that value as found. The Government's appeal against various findings of fact by the Court below was also dismissed.

The Court held that Ocean's expectation for an extended tenure or for an allowance for the expenditure had been created or encouraged by Government and that it could not have been the common intention of the parties that Government could demand immediate possession of the newly expanded plant without compensation. The Court applying *Plimmer and Another -v- The Mayor, Councillors and Citizens of the City of Wellington* [1884] 9 App. Cas. 699 (P.C.) found that it would be inequitable for the Government to expect ownership of the new plant to be transferred to it without compensation.

The Court also found that the construction of a disputed contract was a matter for the Court and does not depend on the understanding of the parties. The test applied by the Court in construing the disputed contract is that set out in *Bahamas International Trust Company Limited and Another -v- Threadgold* [1974] 3 All E.R. 881 and *Investors Compensation Scheme Ltd. -v- West Bromwich Building Society* [1998] 1 All E.R. 98 was applied.

The Court commented on the function of the Appellate Court following *Janice Reynolds-Greene -v- Community First Co-operative Credit Union Antigua and Barbuda* HCVAP 2008/027 (delivered 25 October 2010, unreported), holding that it will not easily interfere with a trial Judge's primary findings of fact,

especially where such findings derived from seeing and hearing the witnesses. However, where a finding was an inference drawn from primary facts and depended on the value to be given to the evidence, the appellate court is as well placed to determine the proper inferences to be drawn.

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