

# OPUS 2

## INTERNATIONAL

GUPC et al. v ACP

Day 1

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Opus 2 International - Official Court Reporters

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1 as part of the record, but that's their view -- it's also  
2 ours -- that the bids were very different. They had very  
3 different designs. And we -- we can provide a detailed  
4 analysis; but they are different. They designed  
5 differently. And that's why the fact that we had the  
6 highest technical score was of import.

7 THE PRESIDENT: Well, thank you. I'm just raising  
8 it. I know that this morning we approach all issues from  
9 let's say a high level point of view. Then, for sure, for  
10 the next four weeks, we will go into quite a lot of detail.  
11 It was just for my understanding at this level, which is a  
12 high level point of view. Thank you very much.

13 So I think we can break. Can we say 15 minutes?  
14 I think that's what was the agreement of the Parties. So we  
15 will resume approximately at 11.30. Thank you very much.  
16 (11.19 am)

(Short Break)

18 (11.35 am)

Opening by MR McMULLAN

20 MR McMULLAN: Thank you. The presentations will  
21 just be handed out, I hope. And I think it will be brought  
22 up on the screen, please.

23 Mr President, Members of the Tribunal, we've been  
24 here before, the Parties, and Dr Gaitskell has too, on at  
25 least one occasion. There have been a number of disputes

65

1 decided between the Parties in international arbitration and  
2 also in many DABs. And on Thursday or Friday we got a  
3 flavour of what the Claimants' approach was going to be,  
4 when they provided us with a video, including new evidence  
5 that had not been provided before, but also making some  
6 allegations and saying some things that are really  
7 irrelevant to the matters in issue.

8 And so when I considered, and when we considered,  
9 as to how we should begin this presentation, we really  
10 wanted to communicate to the Tribunal what the ACP's request  
11 is. And the ACP's request is that you carefully consider  
12 the evidence relevant to the matters in issue and apply the  
13 Contract and apply the Contract according to Panamanian law.

14 And a well known phrase comes to mind, which is  
15 that talk is cheap. You've heard a lot of allegations  
16 today, for example that the ACP had a policy -- a deliberate  
17 policy -- to reject claims because it didn't want to go to  
18 the legislature to get more money. And that's really --  
19 you're going to have to look and see whether there's any  
20 evidence for that, because, in fact, that's absolutely and  
21 utterly wrong.

22 And the Claimants' approach is don't let the facts  
23 get in the way of a good story.

24 This case is about aggregate, faults, concrete  
25 mix, delay and laboratories.

66

1 It is not about whether the ACP is successfully  
2 operating the Third Set of LLocks; whether the Third Set of  
3 LLocks are generating money; and how much the Claimants  
4 say -- and note say -- their overall claims are.

5 There is a theme which runs through the Claimants'  
6 claims: rewrite or ignore the Contract made. Build a case  
7 upon a mis-statement of Panamanian law or invent a  
8 fundamental datum -- previously the causa of the Contract --  
9 or a false misrepresentation, in order to build your case.

10 And you, in fact, have already had a bit of  
11 experience of this, because you will recall that an  
12 emergency application was made to you in order to injunct  
13 the ACP from moving in relation to letters of credit that  
14 secured the advances.

15 And it was said by the Claimants that it was a  
16 fundamental premise of the agreement, the MoUVO, that all  
17 disputes had to be resolved before the advances became  
18 repayable. You rejected that on a prima facie basis; and  
19 the Gabrielle Kaufmann-Kohler Tribunal, in a final award,  
20 rejected that, just a month ago.

21 So the Claimants have form for trying to say that  
22 something is a fundamental datum or part of the causa of the  
23 Contract, and trying to rewrite what was, in fact, the  
24 bargain agreed between the Parties.

25 The ACP asks that you honour that bargain and

67

1 apply that Contract. That's all they ask.

2 Because the Contractor's arguments typically  
3 ignore that the Contract was a design and building Contract;  
4 there was an allocation of responsibility and risk agreed  
5 under that Contract; there were very detailed Contract  
6 terms; the Contractor had a duty to self inform; it ignores  
7 the nature of the ACP's investigations in deciding to  
8 proceed with the project; the huge amount of geotechnical  
9 subsurface information that the ACP provided; and the  
10 Contractor's own specialist expertise and historical  
11 experience on site.

12 And I want to quickly go through the claims to  
13 talk about some of the main issues in them, beginning with  
14 the basalt aggregate claim.

15 The starting point is that the contractual basis  
16 of the Contractor's claim does not exist. And this is  
17 fundamental, of course. There was no contractual  
18 requirement or fundamental datum to use the basalt as  
19 concrete aggregate or for any particular purpose. And  
20 that's going to be the first thing that you have to  
21 determine on the concrete aggregate case: was it a  
22 contractual requirement, as suggested? Or was it what's  
23 called a fundamental datum? I'm not even sure what the  
24 Claimants say, legally, a fundamental datum is.

25 Is a fundamental datum another way of saying a

68

1 term of the Contract? We say when you read the Contract  
2 it's clear that there was no contractual requirement to use  
3 the basalt as concrete aggregate. The Contract instead  
4 expressly provided the Contractor had the option to use the  
5 basalt from the site; but the risk and responsibility for  
6 excavating and processing the rock to be excavated from the  
7 site lay with the Contractor.

8 The risk and responsibility for producing concrete  
9 that met the contractual requirements lay with the  
10 Contractor.

11 And if adverse natural physical conditions were  
12 encountered in the excavated basalt, this was the risk and  
13 responsibility of the Contractor.

14 And, gentlemen, stand back for a moment and think  
15 about what the Claimants' case means. The Claimants' case  
16 is that the ACP told the Contractor: you have to use that  
17 basalt to construct my Locks which I want to last for  
18 100 years.

19 Only the Contractor was going to excavate the  
20 basalt, not the ACP. Only the Contractor was going to  
21 decide where the overburden was, where the soil was, where  
22 the clay was, where the weathered basalt was, where the hard  
23 basalt was, where the altered or sheared basalt was, where  
24 the faulted basalt was. It was going to manage the  
25 materials on site. And yet the Contractor suggests that the

69

1 ACP was, in some way, requiring it to use the basalt for  
2 concrete.

3 How would that work in practice? How would that  
4 work? Would the ACP be over the Contractor's shoulder  
5 saying: you should be using that for concrete aggregate  
6 instead of using it for dams or filters? Instead of using  
7 it for fill? Instead of using it for something else?

8 Not only is the case wrong, on reading the  
9 Contract, it actually makes little sense. That's not how  
10 the Contract was meant to work.

11 And if you look at the Employer's requirements,  
12 section 1.07.D of section 01 50 00 of the ERs, that says:

13 "Aggregate for the Atlantic and Pacific Locks. A  
14 potential source of aggregates for the Atlantic and Pacific  
15 Sites may be the rock coming from the excavation at the  
16 Pacific site and sand that may be manufactured from that  
17 rock. The Employer in no way guarantees that such aggregate  
18 is adequate or meets the requirements for the Contractor's  
19 proposed design or is suitable for the Works. The  
20 Contractor may wish to consider other options; however, the  
21 Contractor should be aware that the areas of the Chagres  
22 river upstream from Gamboa Bridge, cannot be used for supply  
23 of aggregates."

24 Those are the express words in the Employer's  
25 requirements. There is no requirement to use the basalt as

70

1 concrete aggregate; quite the contrary it may be used, but  
2 the Contractor may wish to consider other options.

3 Multiple potential sources of aggregates were  
4 referenced in the Contract, both within and outside the  
5 Contract -- the site, sorry.

6 And, in fact, this question was actually asked by  
7 one of the Contractors during the RFP process:

8 "Does the ACP have any preference regarding the  
9 sources for aggregates?"

10 "ACP has no preference regarding sources for  
11 aggregate."

12 Now, a lot of emphasis was put today on the fact  
13 that there were tenders from other tenderers and that they  
14 all must have understood things in the same way. You're  
15 going to hear some evidence from that, whether it is true or  
16 not, as it was said today.

17 But look what one of the tenderers said: "Does the  
18 ACP have any preference regarding sources for aggregate?"

19 Did that tenderer believe that it was a  
20 fundamental datum to use the aggregate from the excavation?  
21 Did that tenderer believe that it was a contractual  
22 requirement? Clearly not.

23 And look at the ACP's response:

24 " ... no preference regarding sources for  
25 aggregate[s]".

71

1 Ms Lamm is quite right; this case is simple. And  
2 you can determine this case without considering whether  
3 there was contamination or the rather unique degradation  
4 theory because the case doesn't get past the first hurdle.  
5 This was always something for the Contractor.

6 And the reason this case is, in some ways,  
7 complicated is because it's wrong on so many levels. The  
8 Pacific site basalt was suitable for use as concrete  
9 aggregate; and the Contractor used the Pacific site basalt  
10 to make concrete and for multiple other purposes.

11 The Contractor admits that it used both aggregate  
12 from -- basalt from Aguadulce Hill and from the PLE to make  
13 concrete. It used it. So it was suitable. Its complaint  
14 is not actually that it couldn't use it; its complaint is  
15 that it produced more fines and was more expensive to  
16 produce than it had estimated. But that's a different  
17 complaint. That's not saying it wasn't suitable.

18 And while you have to grapple with the question of  
19 whether or not there was contamination or this degradation  
20 theory, in fact you can step back and apply some  
21 commonsense. Basalt is the most commonly used source of  
22 material for concrete aggregate in Panama. The Claimants'  
23 case is there is something wrong with the basalt in  
24 Miraflores that no one knew about -- none of the three  
25 tenderers, not the ACP, not the Americans who had been there

72

1 for over 100 years, but no one knew about and that was the  
2 problem.

3 There is so much evidence that shows the basalt is  
4 absolutely and utterly not subject to degradation.

5 The case on misrepresentation is also extremely  
6 misleading because the Claimants ignore that they assembled  
7 a specialist team, with very specific local knowledge of the  
8 site. C USA, the Panamanian Contractor, who are not  
9 appearing in support of this claim, operated a plant close  
10 by which processed and sold local basalts and worked  
11 extensively in the Canal area, for example carrying out the  
12 PAC 1 Contract.

13 MWH, GUPC's designer, had, for years, assisted the  
14 ACP and even authored many of the documents which GUPC now  
15 complain about. You were told of 80-something documents. A  
16 number of those were actually produced by the Claimants' own  
17 designer. And GUPC made their own site investigations.  
18 And, in doing so, they didn't rely on the ACP's feasibility  
19 and conceptual level studies; they identified the presence  
20 of clay materials, but they still concluded that the basalt  
21 on site was of a high quality. And they verified the  
22 abundant and consistent information that the ACP had  
23 provided.

24 In fact, after the Contract was made, but before  
25 they made their claim, they even said that the basalt was of

73

1 "excellent quality".

2 And so the Tribunal should ask itself how can such  
3 international experts in mega projects, with local basalt  
4 experts, with consulting engineers who had been involved for  
5 years in the planning of the project on the site, had full  
6 access to the site, a huge amount of subsurface information,  
7 how could they possibly have been misled? They weren't.

8 How could the ACP have misled tenderers?

9 And the allegation that the ACP deliberately or  
10 negligently misled tenderers, in circumstances when it  
11 openly provided so much information is preposterous. That's  
12 why the Contractor accepted, during Referral 11 -- this is  
13 what they said:

14 "Objectively, the impracticability in the use of  
15 the Pacific basalt could not have been discovered by either  
16 party until the material was effectively excavated and  
17 aggregate production commenced."

18 That's what they said. But now they say: oh, the  
19 ACP were negligent -- grossly negligent.

20 And a crucial point in your analysis, gentlemen,  
21 in thinking about the misrepresentation case, is to analyse  
22 exactly what the misrepresentation is said to be, because  
23 the ACP -- it's not alleged even that the ACP represented  
24 how much waste would be produced if the Contractor chose to  
25 crush the basalt. Remember, they used this basalt. Their

74

1 complaint is that it produced a lot of waste. But the ACP  
2 didn't say: if you crush it, you're going to get 6% waste.

3 And, in fact, the 2006-13 report on your screen  
4 noted that it was technically feasible to use manufactured  
5 sand or crushed basalt as fine aggregate.

6 "However, industrial tests and economic analysis  
7 are required to determine whether the crushing of material  
8 or rock in the quarry with industrial crushers would be  
9 economically feasible."

10 That's what the report said.

11 "One of the adverse properties of the crushed sand  
12 manufactured is that fine content is very high."

13 This was a report produced and provided to the  
14 Claimants.

15 It was for the Contractor, when bidding, to  
16 determine whether to carry out such tests and whether it was  
17 economically feasible.

18 And, as I mentioned a moment ago, it's important  
19 to bear in mind that the Claimants' theory of rapid  
20 degradation makes little sense. Basalt has been used in  
21 Panama for years and such problems have never been recorded.  
22 And the evidence of the quality of the basalt is ubiquitous.

23 The simplest and most commonsense way for the  
24 Contractor's theory -- for them to prove their theory would  
25 have been to expose for you basalt -- strong, hard basalt --

75

1 on the Pacific site to the elements for weeks or months and  
2 photograph it or video it or provide you evidence of the  
3 degradation.

4 Inexplicably, they failed to carry out those tests  
5 or at least to disclose them; but the ACP has carried out  
6 those tests and has disclosed them to you. And those tests  
7 show the basalt doesn't degrade.

8 And if we can just play the video. You will hear  
9 from Mr Irving. And this is one of the exhibits in the  
10 case. You will hear from Mr Irving, who is a witness. And  
11 we've given videos of him testing the basalt, which shows  
12 its qualities after being exposed.

13 (video played)

14 "They have been exposed to water, rain, air and we  
15 are then going to test to see if any sign of degradation is  
16 visible, first with the hands, then with the knife, and  
17 finally with the hammer."

18 Could you play the other one, please. That's  
19 Mr Irving, an ACP geologist, who you're going to hear from.  
20 And he was showing you basalt which had been exposed for  
21 over a year. But you may feel that even more important from  
22 a proof point of view is the basalt in the field, the basalt  
23 in the riprap, the basalt which is just available naturally  
24 and how it's behaving. And Mr Irving's video will continue  
25 now.

76