

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NO.: 595 of 2001

BETWEEN

NATIONAL INSURANCE CORPORATION

Claimant

and

ROCHAMEL CONSTRUCTION LIMITED
GARVIN FRENCH
GARRY LILYWHITE

Defendants

Appearances

For the Claimant: Ms. A. Cadie-Bruney

For the Defendant: Mr. K. Monplaisir QC and Ms. M. John

2003: February 13th, 14th and 21st

JUDGMENT

[1] **Saunders J:** National Insurance in St. Lucia is regulated by The National Insurance Corporation Act, No. 18 of 2000 ("the Act"). The Act repealed and replaced the National Insurance Act which, inter alia, established the National Insurance Corporation ("the Corporation"). The new Act came into force on 1st January, 2000.

The relevant legislative provisions

[2] This case is taken up with section 80 of the new Act. The section says:

80(1) Notwithstanding any enactment or rule of law to the contrary a Director, Manager, Accountant, Liquidator or Receiver of a body corporate, may be joined as a party to an action for the recovery of contributions and surcharge owed to the Fund by such body corporate and if found to have failed to deduct, retain or become accountable in any way for any amounts due and owing, such person shall be personally liable whether

jointly or severally to pay in whole or in part such amounts owing to the Fund.

- (2) No person shall be liable for a failure under subsection (1) if the Court is satisfied that such person exercised a degree of care, diligence, and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the failure.

The section is quite different from its counterpart in the repealed Act. Section 74 of the old Act stated:

Where an offence under this Act has been committed by a body corporate, firm, society, or other body of persons, any person, who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the body corporate, firm, society, or other body of persons or was purporting to act in such capacity shall, as well as such body corporate, firm, society, or other body of persons be guilty of that offence, unless he proves that the offence was committed without his consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

The factual background

- [3] Rochamel Construction Limited (RCL) is a company that was engaged in a project that had to do with the construction of hotel premises on the Pigeon Island causeway. In 1997 RCL was registered with the Corporation as an employer of 360 workers. As an employer, RCL was obliged, pursuant to the Act, to make deductions from the wages of its employees and, together with the employer's contribution, to pay these sums over to the Corporation.
- [4] RCL failed to pay contributions in respect of the months of February, March, June, July, September, November and December of 1999; and January, April, July, August, September, October, November and December of 2000. The total amount of unpaid contributions runs to \$643,028.28. But that is not all that is owed by RCL. The Act makes provision for the payment of surcharges on unpaid contributions. As of May, 2001, the surcharges on the amounts owed totaled \$877,170.79 and were climbing steadily at the rate of 1.25% per month on the principal figure of \$643,028.28.

- [5] The Corporation instituted this action against RCL on 11th July, 2001 for the amounts owed. Mr. French and Mr. Lilywhite, two directors of RCL, were simultaneously sued as being jointly responsible for the debt. On the 21st September, 2001 a Notice of Change of Directors was filed at the Companies Registry stating that Mr. French had ceased to be a director of RCL from 1st April, 2000. It is also recorded that Mr. Lilywhite ceased to be a director of RCL from the 10th April, 2000.
- [6] A judgment in default was entered for the Corporation against all three defendants on the 5th November, 2001 but this judgment was set aside as against Mr. French and Mr. Lilywhite. The judgment still subsists as against RCL. That company has however ceased its operations and has no assets to cover any part of the judgment debt. The Corporation is therefore anxious to recover personally against Mr. French and Mr. Lilywhite pursuant to section 80 of the new Act.
- [7] Mr. Lilywhite did not file any witness statement in these proceedings and, beyond establishing that he was a director of RCL, the witnesses for the Corporation had little to say about him. Mr. French says that he is not liable because RCL's finances were controlled not by him but by a Mr. Wellington in the UK and that he, Mr. French, exercised due diligence at all material times. Mr. French also points to the fact that he ceased to be a director in April, 2000.
- [8] As seen above, section 80 of the Act has two limbs. In order to render a director liable, the Corporation must first prove that the director has "failed to deduct, retain or become accountable in any way for any amounts due and owing..." It seems to me that in order to establish this it is not sufficient for the Corporation simply to look at the Registry of Companies, see who are the directors and then hold all persons listed as directors jointly responsible for the debt. Positive evidence must be given by the Corporation that the particular director has done at least one of the things spelt out in the sub-section that I have quoted in this paragraph. In my judgment, no such evidence was led in relation to Mr. Lilywhite and I would therefore order that the case against him should be dismissed with costs.

The evidence against Mr. French

[9] The Corporation did provide a tremendous body of largely unchallenged evidence in support of the prima facie liability of Mr. French. The evidence of Ms. Agnes Calixte in particular was devastating. Ms. Calixte was employed with RCL from March 1998 to February, 2001. During her tenure there she was the Office Manager. I think it is important to set out at length portions of her testimony. In her witness statement she testified that:

“...Mr. French was the one who managed all the administrative affairs of the company. He was never addressed as Managing Director but he carried on the business of the company as such. He signed all correspondence as Director.....

Mr. French was the only signatory to [the company's] accounts and did all financial transactions and signed all cheques on behalf of the company. He determined when and to whom cheques were issued and payments were made.....

Mr. French was the person who took the decision on when to pay cheques to the Corporation. During my tenure with the company, regular audits were never carried out, except for one auditor who came in from the UK and prepared a brief report for Mr. French. There were never any local auditors appointed for the company. The company only kept an accountant who prepared wages and forecasts”.

[10] Ms. Calixte gave equally damaging evidence under cross-examination:

“I was the one typing all correspondence for transfers and the one typing requests for draw down.....

He [Mr. French] was the one responsible for financial payments, giving directives. There were several meetings between Mr. French and the Director of [the Corporation] about delinquent payments.....

It is not true that Mr. French got instructions from England as to when to pay and when not to pay. I know Clint Wellington. He was the Chairman of the company. He didn't sign any cheques. When Mr. French was due to go to England for vacation I sent correspondence to the bank instructing them that Mr. Wellington was to sign on the account in Mr. French's absence. I think there were a few times that some monies came from England but these were times when the draw down was late. But after the draw down, the monies would be sent back to England sometimes to a Rochamel account there, sometimes to Mr. Wellington's account in England.....

I know about the monthly creditor's document. I would not prepare that document. It was prepared by Ms. Khodra who prepared it and sent it on to me and then I would take it up to Mr. French. That document indicated who was owed. That document was never sent to England. Mr. French stayed by me, ticked off who was to be paid and I would write the cheques for those people. That document never went to England. Mr. French was not instructed as to who to pay and who not to pay. Mr. French was the boss of that project. He was the one giving the directions on all payments. Mr. Wellington may have given directions over the phone but it was Mr. French who was in charge.....

[11] Ms. Sherry Khodra also gave evidence for the Corporation. She was the in-house accountant referred to by Ms. Calixte. In her witness statement she confirmed that National Insurance deductions were made from the salaries and wages of RCL's employees. She stated that on several occasions "upon Mr. French's instructions I would have to inform Mrs. Joseph [an Inspector of the Corporation] that the computers were out of order and as such payment could not be made".

[12] The sum of Mr. French's response to this body of evidence was that yes, he signed the cheques but that he took all directions from his UK office which would instruct him as to who and what to pay. His responsibilities as a director were to represent the company in St. Lucia, open bank accounts and carry out the company legal registration. He was not the project manager. It was never his intention to deprive the Corporation of the funds due to it but RCL had cash flow problems beyond his control.

Analysis of the evidence

[13] In my judgment, the Corporation satisfied the test set out in section 80(1) of the Act and the onus was thrown on Mr. French to show that he had exercised "a degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the failure".

[14] In seeking to discharge this onus, Mr. French and his witnesses stressed that the real bosses of RCL were Mr. French's associates in the United Kingdom and in particular, Mr. Wellington. Mr. French also pointed to the fact that he personally cooperated with the

Corporation. Even the Corporation's Director, Ms. Emma Hippolyte, acknowledged that he (Mr. French) was always willing to attend meetings to discuss the RCL indebtedness. Fervent promises to pay were made by him on behalf of RCL, and broken. Fresh promises were made and again broken or partially kept all because of the company's alleged cash flow difficulties. Mr. French's diligence was such that he proposed creative solutions to settling the debt. One of these involved the Corporation taking shares in a company registered offshore. The Corporation considered this proposal at Board level but ultimately rejected it as being too risky. In paragraph 30 of his witness statement filed on 29th May, 2002, Mr. French states:

".....I believe that I made every reasonable diligent effort to remit the full amount of contribution to N.I.S. I acted on behalf of the company's financial accountants in the United Kingdom who had advised me at every stage of our meetings with N.I.S. that funds would be available or were to be made available through the various loans that were being taken. I myself had full knowledge of all the various loans and although I was not responsible for their disbursements I could confirm that I was in a position on behalf of the company to agree to the various payment plans".

- [15] This court is not satisfied with all these reasons and justifications offered. I reject the explanation that the real bosses of the company were in the UK. It is not without significance that there is little or no suggestion, or documentation, dated prior to the institution of this action, to support the allegation that Mr. French was a humble subordinate of higher bosses in England. Throughout his meetings with the Corporation for example, nothing was said about or heard from these bosses. This is in sharp contrast to the several letters and documents emanating from the UK and put forward by Mr. French in 2002 to bolster this allegation. Even if the allegation were true, Mr. French is not a cretin. He is an experienced businessman as reflected by the fact that he is a director and incorporator of several companies in St. Lucia. If indeed there were instructing bosses in the United Kingdom, then I think a reasonably prudent person would have resisted entering repeatedly into solemn agreements with the Corporation only to break them. A prudent person ought not to be blindly following directives that could land him/her in the position in which Mr. French now finds himself. If Mr. French were indeed being instructed, then, as the person allegedly receiving those instructions and charged with the responsibility of carrying them out, he must assume the responsibility for their

consequences. Moreover, it is significant that, despite several requests, RCL refused to provide audited statements to the Corporation or make available financial statements to justify the plea that it was experiencing cash flow problems. That failure does not in my view reflect the degree of care and diligence that a reasonably prudent person would exercise. In my judgment Mr. French is liable.

The extent of the liability

[16] The question now arises as to the extent of that liability bearing in mind that the Act came into force on 1st January, 2000 and Mr. French is said to have resigned in April, 2000. There are two matters here for consideration, namely, the contributions owed prior to the commencement of the new Act and secondly, the contributions owed after the supposed resignation. As to the first, Counsel for the Corporation submitted that notwithstanding the date of coming into force of the Act, Mr. French should be adjudged liable for the unpaid contributions of 1999 because they were owed as at 1st January, 2000. I disagree with this submission. I think that to hold in that fashion would amount to giving the section in the new Act retrospective validity and this was not intended by Parliament. The old Act would have governed the 1999 defaults and Mr. French could have been prosecuted in relation to them. It cannot be that simultaneously, the Corporation could be in a position to take advantage of both the old section 74 (by so prosecuting Mr. French) and of section 80 of the new Act (by seeking to make him civilly liable in this action). In my view, in this action Mr. French could only be liable for sums due from 1st January, 2000.

[17] As to the second matter, I think a critical issue here is that the Notice of Change of Directors was only filed at the Companies Registry in September, 2001. Barring any prior direct communication by Mr. French or by RCL of Mr. French's resignation as a director, September 2001 was the earliest time that the Corporation would have been placed on notice that Mr. French had ceased to be a director as from April, 2000. Paradoxically however, as late as November, 2000 the Corporation and Mr. French were exchanging correspondence on the premise that Mr. French was still a director of RCL. On 12th September, 2000 Mr. French signed a letter to the Corporation in his capacity as director of RCL and, in that capacity he was responded to by letter of the Corporation dated 30th

November, 2000. When Mr. French replied again by letter of 5th January, 2001, he carefully omitted to sign the letter as director of RCL but he also failed to point out that he had ceased to be a director.

[18] In all these circumstances I am most reluctant to find that Mr. French's liability ceased in April, 2000. It is all too easy for a person in his position to back-date a cessation of directorship in order to try to avoid liability to the Corporation. I prefer to take the view that by failing to register the Notice of Change of Director until September, 2001 and by continuing, throughout 2000, to hold himself out to the Corporation as a Director of RCL, Mr. French must accept liability for the unpaid contributions of 2000.

[19] If I am wrong in this respect and, as a matter of law, Mr. French must be deemed to have ceased being a director in April, 2000, then I am prepared to find that in all the circumstances of this case, Mr. French was a manager within the meaning of section 80 of the Act. He signed all the documents. He operated the banking accounts and gave directives as to payments to be made. The office manager reported to him. He negotiated with the Corporation, never at any time appearing to have to defer to some higher authority. From all the evidence received I have to agree with the conclusion of Ms. Calixte that, in all but name, he was the effective Managing Director. In my view, whether as a Director or a Manager, he is jointly liable with RCL for the unpaid contributions from 1st January, 2000 and this court so orders. The Corporation shall state that sum in the form of an affidavit served on Mr. French with a view to having the same certified or settled by a Judge in Chambers.

[20] As to costs, RCL will be responsible for the costs of Mr. Lilywhite which the court fixes at \$75,000.00. Mr. French and RCL will be jointly responsible for the costs of the Corporation which I fix at \$150,000.00.

Adrian D. Saunders
High Court Judge