SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SUIT NO.: 758 of 2002

BETWEEN

NATIONAL CONTRACTORS LIMITED

Claimant

and

1. GPEC INTERNATIONAL LIMITED
2. CANADIAN COMMERCIAL CORPORATION

Defendants

Appearances:
Mrs. K. Roheman for the Claimant
Ms. S. Greer for the First Defendant

2003: May 20
May 29
June 2

JUDGMENT

Background

[1] Shanks J: The background to this claim is set out in rulings of Saunders J made in September 2002 and March 2003 and I shall not set it out again. Since the claim was started on 14 August 2002 it has had an involved procedural history which I should outline.

[2] The claim was issued against GPEC, CCC and the St Lucia Solid Waste Management Authority on 14 August 2002. On the same day an injunction was obtained by NCL preventing the Authority paying CCC and CCC paying the GPEC Team more than $200,000 in respect of the Deglos landfill project. On 11 September 2002 the proceedings against the Authority were dismissed. On 12 September the disputes between NCL and GPEC were referred to arbitration pursuant to clause 23 of the Joint Venture Agreement; the injunction against CCC was continued in that it was prevented from making further payments to the GPEC Team and from receiving further payments from the Authority in excess of $500,000 and from deducting liquidated damages from payments to NCL. On 28 March 2003 Saunders J discharged the injunction against CCC. The effect of this was that payments to the GPEC Team and GPEC could have resumed.

[3] NCL immediately applied without notice for an injunction against GPEC and Martin Edge, the contractor's representative; as varied on 4 April 2003 the injunction prevents both GPEC and NCL receiving any further payments in respect of the project (which could in principle amount to $3.54m in the case of GPEC and $2.26m in the case of NCL (see Boriel first affidavit para 16)) and prevents Mr Edge from receiving any money due to CCC in respect of the project. The effect of the injunction is therefore to continue to freeze the proceeds of the project and to prevent GPEC receiving money to which it would otherwise be entitled under the contractual arrangements between the parties.

[4] The issue I must decide is whether the injunction of 4 April 2003 should be continued. This is the first fully argued hearing of that issue. I have been assisted by skeleton arguments and oral submissions from the attorneys for NCL and GPEC and I have read the court file as well as being provided with further affidavits from Mr Boriel and Mr Rajakesari made on 27 May 2003 in response to various points I had raised on 20 May.

The test for the grant of a freezing order

[5] No-one has suggested that the test for deciding this application should differ from that applied in the case of any other freezing order. The circumstances in which the court can grant a freezing order are well established. As Saunders J states at para 8 of his ruling of 12 September 2002 the claimant must show (1) that it has a good arguable claim against the defendant and (2) that there is a real risk that if the order is not granted any judgment (or award) will remain unsatisfied because the defendant has dissipated its assets. The third requirement to be satisfied before the court will grant the order is that it is just and convenient in all the circumstances of the case that the order should be granted. I am not entirely sure why the skeleton argument lodged by NCL's attorney makes reference to the very different guidelines set out in *American Cyanamid v Ethicon* [1975] AC 395 in the context of this application.

Good arguable case

[6] I agree with the view already expressed by Saunders J that NCL appears to have a good arguable claim against GPEC. But it should be remembered that the claim

is disputed by GPEC and that the matter has been referred to arbitration under their Joint Venture Agreement. I also note that the damages claimed in the statement of claim amount to $9.6m. Given that the entire contract was worth some $6.25m to NCL and that they have already received nearly two-thirds of that sum, it seems to me that the damages claimed must be highly inflated.

Dissipation

[7] However, on all the evidence now available to the court I am not satisfied that there is a real risk of an award in favour of NCL going unsatisfied because of dissipation by GPEC of its assets. My reasons are these:

(a) The main point relied on by NCL as against GPEC (as reflected in the notice of application dated 28 March 2003 and Mr Boriel's first affidavit at para 20 and second affidavit at para 2(f)) is that GPEC is a Canadian company; the consequence of this is that money paid to GPEC in respect of the project will leave the jurisdiction of St Lucia and go to Canada, which will make it more difficult for NCL to enforce any judgment of the St Lucian court (because enforcement proceedings would have to be taken in Canada, there being no other assets in St Lucia). I am not sure that this point ever had much validity; after all, NCL knew it was contracting with a Canadian company which would in the ordinary course of events keep its assets in Canada.

(b) However, even if the point had some validity at the outset, it seems to me that as events have turned out, it certainly no longer does. First, the injunction against the Authority was discharged when the claim against it

was struck out on 11 September 2002 and the injunction preventing CCC receiving payments from the Authority or passing them on to the joint venture was also discharged on 28 March 2003: the position now is therefore that there is nothing to stop the Authority paying CCC any sums outstanding in respect of the project; CCC are to be paid in Canada (see clause 6 of the Novation Agreement) so that the money in question will already have left the jurisdiction of this court and NCL's position in relation to enforcement will not be improved by a freezing order against GPEC. Second, the claim against GPEC has been stayed and referred to arbitration; there is no reason to think that an arbitration award against GPEC, as opposed to a judgment of this court, will be more difficult to enforce in Canada than in St Lucia.

(c) GPEC also rely on the fact that GPEC is the Managing Partner under the Joint Venture Agreement (this gives it authority to deal with the client with respect to the execution of the project and payments due under it and gives it responsibility for the distribution of payments between the joint ventures: see article 7.2 and 7.3 of the joint venture agreement) and on the fact that there is a so-called Domestic Contract between CCC and GPEC (see para 9 of Tim O'Farrell's affidavit and TO1). I do not understand NCL's complaints about these matters. Article 7 of the Joint Venture Agreement was part of the contractual arrangements made between GPEC and NCL and was presumably entered into freely by NCL. Under those arrangements it was for GPEC to contract with CCC on behalf of the GPEC Team and CCC are bound to make payments due to

the members of the GPEC Team either to GPEC or in accordance with GPEC's instructions. I can see no evidence in the papers that GPEC have in fact used their position in bad faith: by their letter of 18 July 2002 (exhibit D1) they proposed that the liquidated damages deducted from IPCs 15 and 16 should provisionally be divided in the proportion to the revenue they and NCL would respectively be receiving from the project (which seems a reasonable proposal on the face of it) and they appear to be perfectly willing to participate in an arbitration.

(d) There is nothing in the remainder of the evidence to indicate any likelihood that GPEC will take steps to dissipate its assets in order to prevent enforcement of any award obtained by NCL; on the contrary, it appears to be a perfectly sound, respectable and properly run company although its balance sheet as at 31 January 2002 is not the most impressive document one can imagine.

[8] I should mention one point made by GPEC which seems to me to be a bad one, although given NCL's stance it is understandable that Ms Greer raised it in the course of her able arguments. It is said that any amount due from GPEC to NCL will also be due from CCC and CCC is a quasi-governmental body which is sure to pay any judgment or award made against it. Although NCL have brought a claim against GPEC and CCC jointly I am at a loss at the moment to see what the basis of the claim against CCC is. The only contractual relationship between CCC and NCL arises under the sub-contract between CCC and the GPEC Team under which NCL are responsible with GPEC for carrying out the project in exchange for

payments by CCC, but under which CCC have no responsibility for the work. CCC have effectively guaranteed the Authority that the GPEC Team will carry out their obligations but they have not guaranteed NCL that GPEC will carry out its obligations under the Joint Venture Agreement. Given that the relationships between the various parties are governed by contracts, I cannot see any conceivable basis for bringing a claim in negligence against CCC either.

Just and convenient

[9] Even if I was wrong on the second requirement, it is also necessary that it is just and convenient in all the circumstances to grant the relief sought. GPEC suggests that it would not be just to grant the relief sought because, they say, NCL's application for interim relief is only designed to put undue pressure on GPEC to settle its claims. I have already referred to what appears to be the inflated nature of the claim. Furthermore, NCL had entered into a clear agreement under which they agreed to arbitration and that GPEC should have sole authority to decide how payments should be divided. Notwithstanding this, they started legal proceedings and obtained freezing orders, thereby depriving both themselves and GPEC of any further receipts in respect of the project and inevitably causing difficulties with the completion of what is, I have no doubt, an important if unglamorous project for St Lucia. I do not believe that the steps taken by NCL were deliberately designed to put undue pressure on GPEC but in retrospect they were certainly not a satisfactory way to proceed (and indeed they have led to the procedural tangle to which I have referred). Had I been in doubt as to the level of risk of dissipation

these considerations would have weighed against me exercising my discretion to continue the freezing order against GPEC.

Distribution of payments

[10] Although I do not therefore think this is a case for a traditional freezing order, I can understand the concern of NCL, expressed most forcefully and eloquently by Ms Roheman on their behalf, about the fact that there are payments in the pipeline which GPEC are able to distribute as they see fit, so that they might appropriate funds for themselves which ought properly to go to NCL leaving NCL having to recover them by whatever means were available. I do not think that NCL can legitimately demand the continuation of the order on these grounds for the following reasons:

(1) there is no claim as yet articulated in the statement of claim in respect of this fear save in relation to the proposed deductions in respect of the liquidated damages (see para 14 statement of claim);

(2) NCL freely agreed that GPEC would have the responsibility for distribution of the payments (Art 7.3 of the Joint Venture Agreement);

(3) I have seen no evidence that GPEC are intending to distribute moneys in a way which is inconsistent with Art 16 of that agreement, save possibly for the proposed deductions in respect of the liquidated damages which they have been quite open about;

(4) Although NCL protest that there should be a lot of money still due to them in respect of the project after IPC 17 I am having difficulty seeing how this can be given that they undoubtedly left the site before September (see Mr Boriel's affidavit of 9 September 2002 at p12) notwithstanding their obligations under Art 13.3.

[11] On the other hand, I have power to require an undertaking from GPEC and it may well help matters if undertakings were given by GPEC along the following lines:

(1) to hold in a frozen account the amount which they propose to deduct from NCL's payments in respect of the liquidated damages which have been deducted by the Authority (this will amount as I understand it to about one-third of $500,000) and not to release that amount without NCL's consent or further order of the court;

(2) to distribute the proceeds of any further IPCs strictly in accordance with Art 16.1 of the Joint Venture Agreement or, if they propose to make any deductions from the payments otherwise due to NCL, to give them 14 days notice before giving any final instructions as to distribution between themselves and NCL.

I am not sure that such undertakings could work satisfactorily. Ideally the parties will be able to agree to something along these lines and place an agreed order before the court; if they cannot the matter will have to be listed before me again.

Outcome

[12] Subject to the proposed undertakings I am satisfied that this is not a case where the discretion to grant a freezing order properly arises at all or that it would be a proper case to grant one and I would not propose to continue the injunction. Overall, this seems to me a satisfactory outcome: it will possibly allow the project to be completed as planned, it will release funds to both GPEC and NCL immediately and it will allow the disputes between GPEC and NCL (and those

between the Authority and CCC and CCC and the GPEC Team) to be resolved rapidly without further court proceedings. I will therefore discharge the injunction of 4 April 2003 once the terms of an undertaking are finalized.

Murray Shanks
High Court Judge (Ag.)