SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV2000/1032
BETWEEN:

GENESIS HOLDINGS LIMITED

Claimant

AND

CABLE AND WIRELESS (WEST INDIES) LIMITED

Defendant

Appearances:
Anthony Astaphan SC and Michelle Anthony-Desir for Claimant
Mark Maragh for Defendant

……

2005: July: 4, 5 and 15

……

JUDGMENT

Introduction

[1] The Claimant company was founded in 1993 by William R Ewing to "explore the opportunities that existed in the Eastern Caribbean…for the development and/or improvement in cable television systems" (see his statement at para 3). Mr Ewing had also founded the cable TV provider in St Kitts in 1983 and had acquired considerable expertise in the area. The Defendants own the cable TV system in St Lucia. It is not in dispute I think that there were

problems with that system in 1994 and that Mr Ewing's expertise may have been relevant to helping with them.

[2] In July/August 1995 the Claimants carried out a systems audit on the St Lucian cable TV system for the Defendants. Only US$10,000 was paid for the audit. The Claimants say that this was on the basis that it was agreed that they would also be granted a "business opportunity" by the Defendants in the form of a management contract to manage the system and they claim damages because the Defendants breached the agreement by failing to grant that business opportunity. Alternatively they claim US$275,000 which they say is a reasonable fee for the work done on the audit and other subsequent work done relating to St Lucia at the Defendants' request by way of *quantum meruit*. At trial there was a suggestion that they had also done work relating to other parts of the Caribbean for which they sought payment but, since this was not pleaded, I did not allow them to pursue any such claim.

[3] The only witnesses called by the parties were Mr Ewing and David Morgan, the Defendants' Director of Business Development at the relevant time. The events in question are however reasonably well documented and, as with many commercial cases, the resolution of the factual issues depends on the documents. It is unfortunate therefore that the parties did not produce one properly paginated bundle of contemporaneous documents in date order for the use of the court as is envisaged by CPR 39.1(2). Happily the quality of the advocacy on both sides was sufficient to mollify the court in this respect.

Facts

[4] It is apparent from the documents that the Claimants' interest in the cable TV system in St Lucia went back to April 1994. On 5 April 1994 Mr Ewing wrote to one of their managers in St Kitts stating that they were very interested in negotiating a deal to purchase or manage on a joint ownership basis the St Lucia cable TV system owned by the Defendants. On 19 October 1994 Mr Ewing, his partner Michael Bentley and the Claimant company signed a non-disclosure agreement with the Defendants to facilitate negotiations for joint ventures and mutual projects involving cable TV throughout the Caribbean.

[5] At some stage a meeting was arranged for 21 June 1995 in the Cayman Islands. The Claimants' proposed agenda for that meeting is at p32 of the Claimants' bundle. It says nothing about an audit of the St Lucian cable TV system but it is Mr Ewing's evidence that it was suggested before the meeting by Christine Holgate, the Defendants' Director of Marketing, that the Claimants carry out such an audit and that they suggested a price of $60,050. The meeting was attended by Mr Ewing and Mr Bentley on the Claimants' side and by Ms Holgate, Mr Morgan, Gregory Hugh-Sam (Head of Strategy and Planning), Geoff Wiggin (the CEO) on the Defendants' side. It is not disputed that Mr Morgan, who was the only witness for the Defendants, only attended for a short time. It is Mr Ewing's case that at the meeting of 21 June it was agreed that if Genesis completed a successful audit they would be given a management contract for the cable TV system in St Lucia or that a joint venture would be developed between them and that

the price of the audit would be reduced to $10,000 in exchange for this (see his statement at paras 8 and 9). Whether such an agreement was made is the central factual issue in the case.

[6] The position revealed by the documents is this. On 27 June 1995 Mr Ewing wrote to Ms Holgate in these terms:

> This is further to our discussions in your office last week…
>
> In response to your request we agreed to undertake a system audit of the Cable TV System in St Lucia the following is our proposal in that respect. We hope you find this in order and look forward to receiving your comments and acceptance as soon as possible.
>
> Genesis will undertake, on your behalf, on a fully confidential basis, a "System Audit" of the St Lucia Cable TV System owned by you.
>
> A. Scope of the work…
> B. Methodology and Project Staff…We will be making a presentation to you in Barbados on July 17th or 18th of the highlights of our findings
> C. Budget: The budget is attached as a separate item.
> D. Information from C & W…
>
> We have kept the budget as tight as we can. This is a fairly big project. Certain work may have to carry on by some team members subsequent to our filing our report with you.
>
> Our report will contain our recommendations for the development of a business plan for the future.

> …I would be grateful if you would arrange to forward the first payment of US$25,000 to us as soon as possible. We are already mobilized and working on this project"

The budget attached to the letter gave a global figure of $60,050 and noted that time charges indicated were for completion of the report and did not include work performed beyond the end of the original assignment or time and travel for the formal presentation to the Defendants.

[7] The next letter is a fax from Mr Ewing to Ms Holgate dated 30 June 1995 (p55 of the Claimants' bundle) which refers to a telephone conversation earlier that morning in which she had expressed concerns. The letter went on:

> We are anxious, as you know, to effect a deal with you. As a consequence we have restructured the basis of financing the proposed system audit. In order to facilitate this job [Mr Bentley] and I have resolved to waive our own fees recognizing that there is a really good business opportunity here for us…
>
> What this all boils down to is that we are prepared to undertake the audit for a fixed price of $34,000…

[8] The audit was carried out in St Lucia by a seven man team over a period of a week starting 6 July 1995. A meeting was held in Barbados with Ms Holgate on 17 July at which a draft report was presented. It seems that a further meeting was arranged for 30 August 1995 for the final presentation in the Cayman Islands.

[9] Before that meeting was held Mr Ewing wrote a very important letter to Ms Holgate dated 18 August 1995 which said this:

> I have gotten most of the receipts together as concerns the above referenced audit. The expenses shown on the attached sheet are shown in US Dollar equivalents…
>
> As we discussed, we too looked upon this project as a business opportunity and would like to suggest that you pay any portion of the billing you feel is proper. I have submitted the entire billing for your records. You had originally said you would pay up to US$10,000 but please use your own judgment as to what amount you want to pay as we feel the relationship between Genesis and Cable & Wireless is of the utmost importance and we do not want anything – certainly not a small amount of money – to impinge upon that relationship.
>
> We are most eager to meet with you …on 30 August and present not only the full report but a proposal as to how we see a business deal could be structured as to the future operation by Genesis of the St Lucia Cablevision System…
>
> The attached sheet showed expenses totalling $12,774.

[10] On 24 August 1995 Mr Ewing wrote to Ms Holgate and Geoff Wiggins of the Defendants proposing four "alternatives as possibilities for the operation/ownership of the CATV system", namely a management contract, a joint venture, a lease to the Claimants or a sale to the Claimants (see DM3). The letter concluded by saying that any of the alternatives was negotiable and that any agreement/arrangement needed to be concluded by 1 October 1995 to allow mobilization and planning at the earliest possible date.

[11] The presentation of 30 August 1995 took place in the Cayman Islands and was attended by Mr Ewing and Mr Martin for the Claimants and Ms Holgate and Mr Wiggin for the Defendants. Mr Ewing's evidence at para 14 of his

statement (which was not really challenged) was that at the end of the meeting they were told that they would be given the management of the St Lucia cable TV system, that what remained to be done was the finalization of a management contract and that they would be notified of the Defendants' personnel who would deal with the matter. Shortly afterwards they were told that Mr Morgan and a Paul Savage would represent the Defendants for this purpose. It is also apparent that at the meeting on 30 August Mr Wiggin asked for a "brief analysis of the effect of doing as little as possible to the existing system" and that Mr Ewing responded to this request in his letter to Mr Morgan of 15 September 1995 (see p175 of Claimants' bundle).

[12] Around the same time Mr Ewing became concerned by various things he learned and he wrote to Mr Wiggin on 15 September and Mr Hugh-Sam on 22 September 1995 (see DM4(a) and DM5). In the second of those letters (though not, notably, the first) Mr Ewing stated that he had been told by Mr Wiggin and Ms Holgate that if the Claimants came back with a "good audit", the job (ie the management job) would be theirs. No evidence was given by Mr. Ewing to this effect except for his evidence about the meeting of 21 June 1995 at paras 8 and 9 of his witness statement. The letter of 22 September, 1995 went on to say that if the Claimants were not given the job they should be compensated for all their work on the audit in the sum of $275,000.

[13] Mr Morgan responded to both these letters on 24 October 1995 (see DM6). He stated that Mr Wiggin and Ms Holgate had both confirmed that they did

not say that if the Claimants came back with a good audit the job would be theirs. He went on to say: "The audit is only one small element of the whole process and would not be the basis on which to make any final decisions. What is more important is how the situation is to be improved, whether by a 3rd party or in house' and what the commercial arrangements would be". It was accepted by Mr Ewing that he did not answer that letter. As Mr Ewing says in para 18 of his witness statement the Claimants were paid $10,000 for the audit in October 1995; he also says that in that month the Defendants sent his company a draft management agreement for consideration and approval: that evidence is clearly wrong as was conceded.

[14] Mr Morgan's evidence (which I accept) was that after his 24 October letter he had a good telephone conversation with Mr Ewing and that he then went to St Kitts to have a face to face meeting with him in January 1996. The outcome of that meeting was a letter from Mr Morgan dated 8 February 1996 (see DM7). The letter set out a 12 point framework "under which Cable & Wireless would be prepared entering into a management contract with Genesis". The letter ended by asking for an indication that the Claimants were interested in pursuing the opportunity by the end of February and that they indicate what further information they would require "to enter into detailed negotiations".

[15] Mr Ewing responded on 13 February 1996 (see DM8). He indicated basic agreement with the 12 points but made various comments and "suggestions for discussion and negotiation, which would constitute the next step

forward". Three particular points of difference were raised, namely the term of the contract, the basis for calculating the management fee and the question of the Defendants' contribution to mobilisation costs. Mr Morgan responded with further comments on 6 March 1996 (see DM9). On 2 April 1996 Mr Ewing wrote to Mr Savage suggesting a face to face meeting to progress matters (see DM10) and there was a phone conversation between them that day in which it was agreed that a meeting would be arranged and that in the meantime Mr Ewing would work on heads of agreement setting out his understanding on the issues that would need to be included in a management contract to be entered into between the parties (see DM11).

[16] Mr Ewing sent proposed Heads of Agreement and a proposed management agreement to the Defendants on 3 May 1996 (see DM13). Mr Savage wrote to him on 10 June 1996 confirming a meeting in St Lucia on 18 June and making comments on the draft management agreement (see DM19). The letter also stated that certain points were "not negotiable and acceptance by Genesis of these points will be fundamental to concluding an agreement between us". Mr Ewing felt rebuffed by that letter and he did not pursue the idea of the management contract further with the Defendants. He cancelled the meeting set for 18 June because of a meeting with the Prime Minister of St Kitts (see DM20).

[17] The next meeting appears to have been in Miami with Mr Wiggin in August 1996. At that meeting Mr Wiggin accepted that the Defendants "had not managed the relationship with [the Claimants] very well over the last 12

months" (see p118 of the Claimants' bundle). According to Mr Ewing's letter of 22 April 1997 to Mr Wiggin (see DM22) there was talk of a joint venture arrangement at the meeting but the joint venture idea came to nothing and there was then a proposal by the Claimants to purchase the system in early 1997. The letter of 22 April 1997 stated: "As you will recall, we agreed to accept the job of doing an audit of the St Lucia system as a "business opportunity" and further agreed to bear part of the cost of the audit. We performed on our end of the bargain but all we were ever offered as a business opportunity …is an unacceptable management contract".

[18] In July 1997 Mr Ewing wrote again stating he remained open to any proposal (see letter at DM24 which mentions 100% buy, joint venture, management contract or a combination of these) but on 28 July 1997 he was told in a letter at DM25 that the St Lucian system would remain with Cable & Wireless and continue to be managed by the existing staff. That led to this claim which was started in 2000.

Breach of contract

[19] Taking account of the documents and the surrounding circumstances which I have set out above I am satisfied, even in the absence of any substantive evidence from the Defendants, that Mr Ewing's account of events at paras 8 and 9 of his witness statement is wrong. It is clear, and Mr Astaphan SC for the Claimants conceded as much, that no agreement was made on 21 June 1995: apart from the surrounding correspondence which I have outlined above which is completely inconsistent with this case there is nothing about

such an agreement in the meeting notes which must have been prepared by Mr Martin (see p5 of DM1).

[20] The agreement that the Claimants would carry out the audit for $10,000 or less must have been made between Mr Ewing and Ms Holgate some time between 30 June and 18 August 1995 as is evident from Mr Ewing's letters of those dates. It is clear that at that stage, whatever was said by Ms Holgate (and there is no direct evidence about this), there was no firm intention on either side as to the nature of any agreement that the parties would enter into, let alone the terms of such an agreement (see in particular letter of 24 August 1995 at DM3). In those circumstances any promise made by Ms Holgate in exchange for Mr Ewing's agreement to carry out the audit for only $10,000 or less must have been far too uncertain to be enforceable or to form the basis of a claim for damages: it would amount at best to an agreement to negotiate the terms of an unspecified agreement (see: *Walford v Miles* [1992] 2 WLR 174). I therefore reject the Claimant's primary claim, namely for damages for breach of an agreement made on or about 21 June 1995.

Quantum meruit

[21] I turn to the alternative claim based on *quantum meruit*. Mr Astaphan helpfully referred me to the case of *William Lacey (Hownslow) Ltd v Davis* [1957] 1 WLR 932, a decision of Barry J in the English High Court, and to an article called *Claims Arising Out of Anticipated Contracts Which Do Not Materialize* by Professor Gareth Jones. I deduce the following proposition of

law from the judgment of Barry J at p939 of the *William Lacey* case and a subsequent New South Wales case called *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 which is referred to by Professor Jones at pp 456/7 of his article: if work has been done by a claimant at the request of and for the benefit of the defendant which the parties intended should be paid for out of the proceeds of a contract which they mutually understood would be made between them and that understanding proves to be erroneous the claimant can claim a *quantum meruit* for the work done, provided the contract fails to materialize because of a unilateral decision of the defendant which is not associated with a *bona fide* disagreement as to the terms of the contract to be entered into. These circumstances are to be contrasted with those in which work is done gratuitously merely in the hope that the contract will materialize.

[22] Assuming that the proposition I have set out above accurately reflects the law I am afraid the Claimants must fail on their alternative claim as well as their primary claim for at least two reasons. First, because I am not satisfied that there was any mutual understanding, at the time the audit work was done, that a contract would be made out of whose proceeds the Claimants would be paid. On the facts as I have found them, it was not until the conclusion of the meeting of 30 August 1995, by which time the Claimants had already done all the work (apart from the "brief analysis" which was expressly requested at that meeting and which I think must be *de minimis*), that the Defendants evinced any firm intention to enter into a management (or any other) contract with the Claimants. The letter of 18 August 1995

makes clear that both parties regarded the audit work as a "business opportunity" for the Claimants. Only on 24 August 1995 did they put forward four "possibilities for operation/management of the CATV system", which were themselves of widely differing natures. The Claimants must have understood that there was no certainty at all as to the type of contract that would be made and only a chance that any contract at all would materialize. The circumstances are in sharp contrast to those in the *William Lacey* case where at all times the anticipated contract was known by both parties to be a contract to reconstruct a building in a specific site in accordance with the plans approved by the defendants. In my view the proper inference in this case is that the Claimants agreed to do the audit for a maximum of $10,000 merely in the hope that some business would materialize.

[23] Second, I am not satisfied in any event that the management contract failed to materialize because of a unilateral decision of the Defendant which was not for a reason associated with a bona fide disagreement on the terms of the proposed contract. This is for two reasons. First, the letter from Mr Savage dated 10 June 1996 (DM19) does not on its face break off negotiations on the management contract (although it says various points are not negotiable); it was Mr Ewing's decision not to pursue the matter further. Second, in any event, I have no reason to believe that the stance taken in that letter, even if it amounted to breaking off negotiations, was anything other than an indication of a bona fide disagreement over the terms of the proposed contract. Mr Ewing protested that the terms proposed by Mr Savage would be commercially unviable for the Claimants but I am not in a

position to make a finding to that effect and, even if I was, that would not mean that Mr Savage's position was not bona fide: it is quite possible that the Defendants' commercial interests required it to agree only on the terms proposed by Mr Savage just as the Claimants' commercial interests meant that they could not agree such terms.

[24] If I had been in favour of the Claimants on the *quantum meruit* claim I would have been in difficulty assessing the amount of any award since the Claimants filed no evidence to support their figure of US$275,000 as reasonable remuneration. Mr Astaphan suggested that I should simply adjourn the issue of quantum to be dealt with at a later date. In the absence of an order for a split trial made in advance or some special circumstances I would have been very disinclined to take this step, which simply tends to elongate proceedings and encourage inadequate preparation. I would, however, have been prepared to act on the basis of the budget put forward by Mr Ewing with his letter of 27 June 1995 (DM1), and would have awarded US$60,050 less the $10,000 paid, leaving a sum of US$50,050.

Result

[25] But for all the reasons given I dismiss the Claimants' claims. I will hear the parties on costs.

Murray Shanks

HIGH COURT JUDGE (Ag)