EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

NEVHCV 2012/0078

BETWEEN:

NEVIS ISLAND ADMINISTRATION

Claimant

and

WEST INDIES POWER (NEVIS) LIMITED

Defendant

Before:
Ms. Agnes Actie — Master [Ag.]

Appearances:
Mr. Anthony Gonsalves with him, Mr. Arud Gossai of counsel for the Claimant
Mr. Terrance Byron with him, Mr. Fitzrory Eddy of counsel for the Defendant

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2012: November 5, 8;
2013: January 16.

JUDGMENT

[1] ACTIE M [AG.]: By Claim Form with Statement of Claim filed on 30th May 2012 the claimant claims an order by the Court for a declaration that the defendant is unable to pay its debts as they fall due and that consequently the claimant is entitled to terminate the Geothermal Resources Contract made between the parties dated 28th April 2009.

[2] By Notice of Application with affidavit in support filed on 15th June 2012, the claimant applied for summary judgment in respect of the claim filed on 30th May 2012.

[3] The defendant filed a defence on 26th June 2012 and on 28th June 2012 filed an application for summary judgment or alternatively that the statement of claim filed by the claimant be struck out.

[4] The defendant by notice of application filed on 13th July 2012 applied for a stay of the proceedings on the ground that the dispute between the parties should first be referred to arbitration.

[5] At the hearing the defendant withdrew the applications for summary judgment, striking out and stay of execution.

The Background

[6] On 28th April 2009 the claimant and the defendant entered into a Geothermal Resources Contract pursuant to the Geothermal Resources Ordinance 2008. The contract granted the defendant certain concessions in relation to geothermal energy reconnaissance exploration, drilling and production in Nevis. Article 4 of the contract provides for dispute settlement and clause 4.8.5 provides for the cure period and events permitting termination. Clause 4.8.5(a) provides for termination for cause and (b) provides for termination for bankruptcy. The claimant seeks a declaration by the Court that the defendant is unable to pay its debts as they mature pursuant to clause 4.8.5(b) of the contract and as result the Claimant is entitled to immediately terminate the contract if, *inter alia*, the defendant is unable to pay its debts as they mature. Clause 4.8.5(b) reads as follows:

> "4.8.5
> (b) Termination for bankruptcy:
> The Government may at its option, immediately terminate this Contract if a receiver is appointed for the holder of these authorizations or its property; the holder of these authorizations becomes insolvent or unable to pay its debts as they mature, or makes an assignment for the benefit of its creditors; the holder of these authorizations seeks relief or if proceedings are commenced against the holder of these authorizations or on its behalf under any bankruptcy, insolvency or debtor's relief law, and such proceedings have not been vacated or set aside within (60) days from the date of commencement thereof; or if the holder of these authorizations is liquidated or dissolved."

[7] The claimant submits that by letter dated 8th May 2012 addressed to the defendant's Board of Directors, the claimant brought to the defendant's attention clause 4.8.5(b) of the contract. The said letter also notified the defendant that the claimant had been informed that the defendant is experiencing financial difficulty and is unable to pay its debts as they become due to a number of creditors namely:

(1) Renova Capital Caribbean LLC in the sum of US$944,593.00 plus interest due at 31st December 2011 under the terms of a Note. A sum which was demanded by letter dated 8th January 2012. Renova Capital Caribbean LLC has in fact filed an action for the debts against the Defendant in the United States District Court for the Southern District of New York. A copy of the USA claim is annexed to the statement of claim.

(2) Processes Unlimited in the sum of US$40,069.00 as stated in an email dated 4th May 2012.

(3) CCC Group Limited in the sum of US$2,204,949.00 as evidenced by summary of invoices provided on 12th June 2012 by Jim Wickens, Divisions Manager.

(4) Geothermal Resource Group Inc. in the total sum due at US $122,600.30 with an amount of $110,505.41 past due over 90 days as shown on invoice.

(5) Geothermal Development Associates in the sum of US$6,000.00 as evidenced by statement dated 4th June 2012.

[8] In support of the claim the claimant relies on letter dated 8th May 2009 requesting information on the outstanding debts and its ability to pay these debts and the fact that there has been no response from the defendant to the said letter. The claimant also relies on invoices and information from the other creditors named in the claim. The claimant avers as a result of the foregoing the Defendant is unable

to pay its debts as they fall due or mature. In the circumstances the claimant seeks a declaration that the defendant is unable to pay its debts as they fall due. The claimant avers that it has a legitimate interest in obtaining the requested declaration as the inability of the defendant to pay its debts directly affects the defendant ability to perform under the contract and consequentially the Claimant is entitled to immediately terminate the contract.

[9] The claimant, subsequent to the defendant filing an acknowledgement of Service, filed a notice of application under CPR 15.2(b) for summary judgment on the ground that the defendant is clearly unable to pay its debts as they fall due or mature and has no real prospect of successfully defending the claim.

[10] The defendant filed a defence on 26th June 2012 in which it denies that it is unable to pay its debts as they mature. The defence avers that the defendant does not deny that it is indebted to some creditors but asserts that such indebtedness arose out of mutual agreements between the defendant and creditors engaged in the normal course of business. The defence further avers that the defendant is not indebted to the claimant in any manner, shape or form and states that the Claimant is a stranger to any past or existing contractual arrangements between the creditors and the defendant.

[11] The defence further states that the reference made to the Renova lawsuit is without merit as the suit has not been served on the defendant. It is to be noted that during the hearing the claimant conceded this point and said that it would only rely on the other debts referred to in the statement of claim.

[12] In summary, the defence avers that the claimant has not articulated any breach of contract between itself and the defendant but relies on non-existing facts between the defendant and other entities, of which the claimant is a stranger. The defence avers that the entire claim should be struck out or such paragraphs which do not demonstrate a cause of action but an abuse of the process of the court.

[13] The claimant contends that the filing of the defence presents no difficulty, either procedurally or substantively to the claimant's application. On the contrary the claimant states that the very defence is devoid of substance, defective and that it has the effect of supporting the claimant's application for summary judgment.

The Jurisdiction to grant a Declaration

[14] It is not disputed that the Court has the inherent jurisdiction to grant a declaration. The claimant in support of the application for the declaration claims that the Court has wide latitude to grant a declaration. Section 24 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act Cap 3.11 provides that:

> "No action or proceeding shall be open to objection on the ground that merely declaratory judgment, decree or order is sought thereby and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

[15] The claimant states that the provision does not confer the jurisdiction, but regulates the Court's ability to grant a Declaration and relies on the authority of Re S (hospital patient: court's jurisdiction) [1995] 3 All ER 290 at page 296 letter d where Sir Thomas Bingham MR stated - "The jurisdiction of the court to grant declaratory relief is not conferred, but is regulated by Order 15 r16… has the inherent jurisdiction to grant the Order sought". The applicant in its submissions states that in seeking a declaratory relief it is not necessary for the plaintiff to establish a cause of action. It is only necessary to show that the plaintiff's own legal position will in some way be resolved by granting the declaration. Re S at page 296 letters h to i. This principle was applied in the Barbados case of Archbald v Camacho 1960 3 WIR 40 where Hyatali J stated "But this conclusion does not determine the matter; for the court has power to make a declaration at the instance of a plaintiff even though he could claim no relief against the defendant". Pickford LJ in Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 537 at 562, cited in Re S at page 296 letter h. The party needs to show that he has a "sufficient interest" in the matter to which his application relates.

[16] The Court agrees with the claimant's assertions that the Court has jurisdiction to grant the declaration.

Company inability to pay its debts when they become due

[17] The claimant states that determination of inability to pay debts is a matter of fact and relies on the case of Taylor v Australia and New Zealand Banking Group Ltd. [1988] 6 ACLC 808 where MacGarvie J stated at page 811 that the question of whether a company was able to pay its debts as they fell due was a question of fact to be decided as a matter of commercial reality in light of all the circumstances.

[18] The claimant in the statement of claim relies on the debts due and owing to a number of creditors. The claimant conceded that the Renova Capital claim filed in the USA has not been served on the defendant but states however this does not put an end to the claim as the defendants did not provide any response in relation to the other creditors mentioned in the claim.

[19] The Court notes that the defence and submissions filed by the defendant mostly took issue with the claim filed by Renova Capital and the fact that the claim has not been served on the defendant, an issue which the claimant concedes and is no longer relying on as a ground for seeking the declaration from the Court. However the Court is of the opinion that the defendant has not set out any defence in relation to the other debts owing by the defendant. The defendant by its own admission at paragraph 4 of the defence states "the defendant Company does not deny that it is indebted to some creditors but asserts that such indebtedness arose in the normal course of business".

[20] The defendant further contends that it is not indebted to the claimant in any manner shape or form and at paragraph 9 of the defence states "with respect to the other entities named in paragraph 5(ii), (iii) & (iv) of the statement of claim the claimant is a stranger to any past and or contractual arrangements between them and the defendant company". The defendant further submits that the Defendant is solvent and has sufficient assets to satisfy its debts.

[21] The fact that the defendant is not indebted to the claimant is not an issue in determining the claimant's application as the authorities of Re S and Archbald v Camacho (supra) indicate that the plaintiff only need to show a sufficient interest which it has pursuant to the express terms in clause 4.8.5 of the contract between the parties.

[22] Further, In the matter of the Companies Act CAP 285 et al v In the Matter of RBG Global S.A. BVI Civil Appeal No. 6 of 2003 Alleyne JA (as he then was) stated at para 10 "That was a case in which an alleged creditor was seeking to place into liquidation a manifestly solvent company on the basis of a disputed contract debt. Having expressed the view that a failure to pay an undisputable debt is evidence from which the evidence may be drawn that the debtor is unable to pay, and that if a solvent company is not putting forward any defence in good faith and is merely seeking to take for itself credit which it is not allowed under the contract, a Court would not be inclined to restrain the presentation of a winding up petition, Hoffman J opined that:

> "if it appears that the defence has a real prospect of success and the company is solvent, then…the court should give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Court as an alternative to RSC Ord,14 procedure."

In the case of Re Claybridge Shipping Co. SA Lord Denning MR at page 574 expressed the view that:

> "a person is a 'creditor' for the purposes of the section under consideration so long as he has a good arguable case that a debt of a sufficient amount is owing to him."

He continued:

> "In the companies Court it appears that a rule of practice has been adopted to the effect that the debt should be undisputed and that the petition should not go forward if it is disputed. I do not think that is correct. It certainly is not in regard to the amount of the debt. There is a decision in Plowman J in Re Tweeds Garages Ltd. In that case the amount was not known with any exactness at all. All that was known was that something was due. That was held to be sufficient to justify a petition for winding up."

[23] These authorities indicate a claimant seeking a declaration need not establish that there is a debt outstanding in favour of the claimant. Also, balance sheet solvency does not preclude the Court from declaring a defendant unable to pay its debt. All that is required is evidence to the satisfaction of the court that there is a debt owing and the defendant is unable to pay the debt as it becomes due.

[24] In Cornhill Insurance PLC v Improvement Services Ltd & Others Harman J held:

> "where a company was under an undisputed obligation to pay a specific sum and failed to do so; that, accordingly, the Defendants could properly swear to their belief in the plaintiff company insolvency and present a petition.'… The statutory demand is a red herring, because as it was put to me, in my view rightly, there is equally appositely, 518(1)(e), if it is proved to the satisfaction of a Court that a company is unable to pay its debts."

Harman J continues:

> "in that connection I was referred to an observation of Sir George Jessel MR in In re Global New Patent Iron and Steel Co. (1875) L.R. 20 Eq. 337,338 where he ruled that the company can be wound up whenever it was proved to the satisfaction of the court that the company was unable pay its debts. Upon the facts there he had evidence that the company had not paid its debts and therefore was satisfied that it was unable to do so. He ignored any question of statutory demand – rightly in my respectful view – and said that that is merely another way of establishing the case."

At para B he stated:

> "In my view when the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would as such be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay. So, to persist in non-payment of the debt in such circumstances would itself suggest inability to pay or that the application was an application that the court should give the debtor relief which itself could provide, but would not provide, by paying the debt."

[25] The case of Cornhill Insurance PLC v Improvement Services Ltd & Others negates the defendant's contention that there must first be demand by the creditor followed by the failure to pay. Also, Section 378(1)(c) of the Companies Act of

St. Kitts & Nevis defines a company's deemed inability to pay debts if "it is proved to the satisfaction of the court that the company is unable to pay its debts as they become due".

[26] The claimant is seeking to exercise its right to terminate the contract pursuant to the express term in clause 4.8.4(b). The contract is a contract for services. The contention by the defendant that the claimant has no locus to seek the declaration since the defendant is not indebted to the claimant is immaterial. The express clause in the contract provides that the Government may at its option, immediately terminate the contract if the holder of these authorizations becomes insolvent or unable to pay its debts as they mature (my emphasis). The authorities state that it is immaterial for the application of clause 4.8.4(b) that the debts are owing to third parties and not the claimant. The clause is wide in ambit and is not restricted to only bankruptcy proceedings although the rubric provides for termination for bankruptcy.

[27] The Court is of the view that the defendant has not provided any evidence to deny the claimant's claim. The failure to pay the debts to the parties on the evidence before the court and also the non-response to the letter of 12th May 2012 draw the inference that the defendant is unable to pay the debts to the creditors when the debts became due. It was the duty of the claimant to provide evidence to refute the claimant's assertions which they have failed to do.

[28] In Dominica Agricultural Bank and Industrial Development Bank v Mavis Williams HCVAP 2008/020 Barrow JA under the rubric "failure to deny a fact" states:

> "…counsel submitted that the normal consequence of failing to deny a material fact in a statement of claim is that the court may treat the fact as admitted. For the present purposes I will take that that proposition as correct. Nonetheless, there is a distinction involved in the factual content of a plea of an express term and a plea of an implied term. Pleading an express term is pleading the fact that an event occurred. In the case of a contract that fact is that the parties expressed agreement on a certain term and agreed that such term was to form a part of their bargain. These accords with the general rule that the facts are to be pleaded 6.7(1). The

default position, that a fact that is not denied is deemed to be admitted, operates in a clear way when a fact is pleaded."

[29] The Court is of the view that the defendant is deemed to have admitted the debts stated at paragraphs (a)(ii)-(iv) of the statement of claim. The deemed admission is further buttressed by the failure to respond to the claimant's letter dated 8th May 2012 to the defendant requesting information about its indebtedness to the named entities. Further the claimant produced an invoice from Geothermal Resource Group dated 5/7/2012 outlining debts owing by the defendant dating back from 2011. The invoice shows an outstanding amount of US$122,600.30 with a sum of $110,505.41 over 90 days past due.

[30] The evidence of inability to pay is further confirmed in a letter by the CEO of the defendant dated 21st April 2012 where with reference to arrangements being made with potential financiers he states:

> "We appreciate the concern expressed by the NIA and want to ensure you that WIP is doing all it can to move the Nevis Geothermal project ahead.
>
> "(3) Other creditors – Ram has contacted most of the large creditors and found out that all of them are very excited to find out about Ram's involvement. We are speaking to all of them and will work out a schedule of repayments of any legitimate claims. Moreover, most of all the creditors would like to continue to be involved in the project as they are confident that it would be a success story in which case will be a role model for the whole area. WIPN is currently contacting all of its creditors to get the exact amount of its liabilities to date."

[31] The Court is satisfied that the evidence supports the claimant's assertions that the company is unable to pay its debts as they become due. The issue now remaining is whether summary judgment is to be granted.

Summary Judgment

[32] In The Bank of Bermuda Bank Limited v Pentium (BVI) Limited & Landcleve Limited HCP 14/2003 Saunders CJ [Ag.] as he then was in an appeal dealing with Summary Judgment states at paragraph 15:

> "It seems to me that in this case one has to examine the essence of the claim put forward against the bank on the summary judgment application.

> That claim was quite simple. The companies were alleging that the Bank had acted unlawfully, in breach of the mandate given to it, by paying out the companies' monies on instructions that were not authorised. That the payment instructions were not authorised was established by the evidence of Mr Gibson. He having done that, it now fell to the bank to show that it had a real prospect of successfully defending that claim. Merely pointing to the fact that Mr Gibson's evidence was self-serving or uncorroborated and repeatedly utilising the expression that the companies were being put "to strict proof" to establish the allegations made by them did not, by itself indicate a real prospect of successfully defending the claim. Mr Elkinson complains that the learned Judge did not take into account all the evidence that might be available at a full hearing but any such evidence could only have been let in if the Defence had foreshadowed it, if the Defence had put forward some case that could cast doubt on the allegations put forward by the companies. The point is that if the only defence to the allegation that the mandate was breached was to say to the companies, 'Prove that!', then Mr. Gibson's affidavit evidence does just that. The risk of conducting a mini-trial only arises where there are conflicts to be resolved. Here there were none. No counterargument was put forward by the Bank. The learned Judge had before him evidence that was not contested. For what it was worth, the Bank was entitled to apply to the Court to have Mr. Gibson cross-examined. He was present at the hearing. But the Bank opted not to avail itself of that opportunity.

At paragraph 18:

> "A Judge should not allow a matter to proceed to trial where the Defendant has produced nothing to persuade the Court that there is a realistic prospect that the Defendant will succeed in defeating the claim brought by the Claimant. In response to an application for summary judgment, a Defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the Claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim."

[33] It is a general rule that a claimant may apply for summary judgment either after the defence has filed an acknowledgement of service or a defence. A useful starting point is to examine the provisions and the authorities on summary judgment.

[34] The rule governing Summary Judgment is provided in CPR 2000 Rule 15. CPR 15.2 states that the Court may give summary judgment on a claim or on a particular issue if it considers that the:

(1) claimant has no real prospect of succeeding on the claim or the issue; or

(2) defendant has no real prospect of successfully defending the claim or the issue.

[35] An application for summary judgment is decided applying the test of whether the respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly. Civil Practice 2011 Para 34.10. In Swain v Hillman 2001 1 ALL ER 91 Lord Woolf MR said that the words "no real prospect of succeeding" did not need any amplification as they spoke for themselves. The word "real" directed the Court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. The phrase does not mean "real and substantial prospect of success. Nor does it mean that summary judgment will only be granted if the claim or defence is "bound to be dismissed at trial". Nor does it require compelling evidence, but simply enough evidence to raise a real prospect of a contrary case.

[36] In Bee v Jenson 2006, the Court adopted the approach explained by Potter LJ in E. D. and F Man Liquid Products Ltd. v Pater [2003] EWCA (cil) 472 where he said:

> "I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the Saudi Eagle that a defence sought to be argued must carry some degree of conviction. Both approaches require the Defendant to have a case which is better than merely arguable."

[37] The test for making an Order would be that the Court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue. A party seeking to resist such an order would have to show more than a merely arguable case, it would have to be one which he had a real prospect of winning.

[38] In Saint Lucia Motor & General Insurance Company Co. Ltd v Peterson Modeste SLUHCVAP 2009/008 George-Creque JA as she then was said:

> "Summary Judgment should only be granted in cases where it is clear that a claim on its face cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in Swain v Hillman is that the claim or the defence has no "real" (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the Claimant or the Defendant could establish its case then it is open to the court to enter summary judgment."

[39] The granting of summary judgment is in keeping with the overriding objective of the CPR 2000 to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.

[40] Although Summary Judgment applications should not be allowed to turn into mini trial, where the case turns on an issue of construction of a term in a contract the Court will usually determine the point and give judgment accordingly. (Wootton v telecommunications UK Ltd 2000). The claimant in this claim is seeking to exercise its right under the express term in clause 4.8.4(b) of the contract made between the claimant and the defendant.

[41] Having considered the relevant rule and authorities, such facts as appear from the documents and the submissions of counsel, I have reached the conclusion that the defendant is unable to pay its debts as they become due and summary judgment is granted in favour of the claimant. The granting of the declaration does not by itself terminate the extant contract between the parties. It merely gives the claimant a ground to exercise its option to terminate the contract by further action.

[42] I wish to thank counsel for their submissions in support of the matter before the court.

Order

[43] Summary Judgment is granted in favour of the claimant.

[44] It is declared that the defendant is unable to pay its debts as they fall due.

[45] Costs to be agreed if not to be assessed within 21 days of this order.

Agnes Actie
Master