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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 36/78

BETWEEN SYSTEMS & PROGRAMS (NZ) LIMITED a duly incorporated company having its registered office at Lower Hutt and carrying on business in New Zealand and elsewhere as a Computer Software Company

Appellant

AND P.R.C. PUBLIC MANAGEMENT SERVICES (INC.) a duly incorporated company having its registered office at 7600 Old Springhouse Road, McLean, Virginia, United States of America and carrying on business in the United States of America and in New Zealand as a Computer Software Company and LOGICA LIMITED a duly incorporated company having its registered office at 31-36 Foley Street, London, England and carrying on business in the United Kingdom and in New Zealand as a Computer Software Company

First Respondents

AND PUBLICA a partnership of the Plaintiff and the Defendants having its place of business at Queens Drive, Lower Hutt, sued as a firm

Second Respondents

Coram Woodhouse J.
Richardson J.
Somers J.

Hearing 8 and 9 May 1978

Counsel G.S. Tuohy for Appellant
H.B. Rennie and P.J. Bartlett for First Respondent

Judgment 9th June 1978

JUDGMENT OF THE COURT DELIVERED BY WOODHOUSE J.

On 12 January 1978 O'Regan J. granted ex parte an interim injunction on the motion of the appellant (referred to in his judgment as SPL). It restrained the two first respondents from remitting certain monies overseas. They moved to rescind the order and for other relief and the injunction was discharged by Jeffries J. on 5 April 1978. An injunction was the only remedy sought and the hearing of the application to discharge the ex parte order was treated as the hearing of the action itself. This appeal is from that decision.

The facts are accurately described by Jeffries J. and for present purposes it is sufficient to describe the background and the issues involved in the following way. SPL is a New Zealand company engaged in the computer software business. The first respondents are two foreign companies engaged in the same kind of business. P.R.C. Public Management Services (Inc.) is incorporated in Virginia in the United States while Logica Limited is incorporated in London. Each is registered in New Zealand under the Companies Act 1955 and each has a place of business here. It is convenient to refer to them as PRC/PMS and Logica. In September 1972 they joined with SPL in a joint venture agreement for the purpose of seeking and entering into a contract for the supply of computer software for a computer centre being set up at Wanganui for the New Zealand Government. Pursuant to the agreement they combined to form an entity named Publica which is the second respondent. A New Zealand based company, Sperry Rand New Zealand Limited, obtained the head contract with the Government to set up the centre and

then made a contract with Publica for provision of the necessary software.

In his judgment Jeffries J. has referred to Publica as an organisation controlled by a Board of three persons representing each of the participating companies. PRC/PMS holds shares in both the New Zealand and the English companies but he remarked that the two overseas based companies were much closer to each other than either of them to SPL. Then he described the way in which the funds of the joint venture were to be organised and the profit distributed. He said:

> "The working relationship of the three independent parties to Publica in performance of the latter's contract with Sperry was as follows. Each of the parties performed work for Publica and that work was charged out to Publica at a billing rate which was calculated on staff time allocated to the project, and was charged to the project as an expense. All other project expenses were met as actual expenses incurred and no party directly recovered its contract marketing expenses, or other expenses preliminary to the contract. It was understood the billing rate might include an element of profit for each party. The total amount due under the contract less the total of the billing rate and actual expenses was the project profit, and it was split three ways under the joint venture agreement. For the sake of completeness I record that the contract itself has been described by the parties as entirely satisfactory with costs kept below estimates, and a bonus payment was earned. There were windfalls which, at least, are a partial explanat-

ion of the dispute which has arisen between the parties. At all events, the contract was completed on 15 March 1978, and the dispute between the parties arises out of distribution of the project profit."

It is unnecessary to describe the reasons for the differences that have arisen concerning the distribution of the profit but from the point of view of SPL the immediate problem is that by a majority Publica has adopted a plan which would result in large sums being remitted overseas, that an amount in excess of $500,000 is in dispute and that it would be inconvenient and costly for SPL to collect such part of that sum as may be found to be due to it. Hence its application for an injunction.

At this point it should be mentioned that the dispute that has arisen cannot be decided in the Courts of this country. The three parties to the joint venture agreement have expressly provided by clause 13 that any dispute or difference should be by arbitration of the International Chamber of Commerce in Paris; and clause 15 requires the contract to be interpreted under the State laws of California in the United States.

However, when the application to discharge the ex parte order for an injunction came before Jeffries J. no argument was addressed to him concerning the status of the proceedings (as he put it); nor was he asked to consider whether SPL could demonstrate a right which enabled it, in the face of the joint venture agreement, to seek the remedy of injunction in the New Zealand Courts. In those circumstances he acted on the basis of the principle accepted by the Court of Appeal in England in

Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep. 509, CA. That was a case involving a foreign defendant which was amenable to the jurisdiction of the court quite independently of the claim for an injunction: the jurisdiction extended to the substantive claim to pecuniary relief claimed in the action. And the present case is different. It is true enough that the two foreign companies have a place of business in New Zealand and they have registered under Part XII of the Companies Act. Nevertheless all three parties have agreed to exclude the jurisdiction of the New Zealand courts to deal with any dispute or difference that might arise. Instead the law of their contract is to be the law of California and their tribunal arbitration of the International Chamber of Commerce in Paris. So at least it is clear that the underlying claim which this injunction is intended to protect and support cannot be entertained by the courts here.

In The Siskina [1977] 3 All ER 785, both Bridge L.J. in the Court of Appeal and Lord Diplock in the House of Lords refer to certain jurisdictional considerations which in some circumstances may prevent the grant of an injunction designed to restrain the movement of funds outside the jurisdiction. But it is neither desirable nor necessary to discuss the jurisdiction to grant an injunction in this case. It is not desirable because the point was not argued before Jeffries J. and we have not had the advantage of a full argument upon it in this Court. Nor is it necessary because if jurisdiction be assumed to exist the circumstances do not warrant its exercise.

We will assume therefore and favourably to the appellant but without deciding, first that the jurisdiction involved is available, secondly, that SPL's claim is to a part of the funds held by Publica and, thirdly, that its claim involves a triable issue and is not merely frivolous or meritless. Although the relief sought is not ancillary to proceedings in New Zealand, the application needs to be decided on the same principles that affect the grant of an interlocutory injunction. On that footing the matter is to be determined by asking whether, in all the circumstances, it is fair and reasonable that SPL should have the protection of the order it seeks. That involves the balance of convenience. And we think the conclusion reached by Jeffries J. on that approach was correct.

There are a number of considerations which can be mentioned in the following way. (1) There is no suggestion that either PRC/PMS or Logica are insolvent or are unlikely to be able to meet any award, judgment or order made against them in the arbitration. (2) There is no suggestion that any such award, judgment or order would not be enforceable against them in the United States of America in the case of PRC/PMS or in England in the case of Logica. (3) The Joint Venture Agreement has as its parties, companies in three different jurisdictions and it must have been apparent from the outset that the claim of any one of them against another or others might not only have to be resolved by arbitration in the manner set out in the agreement but also might, and probably would, require enforcement of the consequential award in some jurisdiction in which the successful party was itself not domiciled. The materiality of

that factor is that SPL's claim to an injunction is founded upon the consideration that the enforcement of any award that might be made in its favour may be both troublesome and expensive. And that is in substance the sole ground upon which relief is sought. (4) While no doubt it would be convenient for SPL to have a fund immediately available in New Zealand in case it should be successful in the arbitration, that factor does not justify leaving large sums frozen in this country with resulting obvious and real inconvenience for the respondents if their rights are as they assert them. (5) On the material before us it is not possible to form any view on the merits of the matter even in the tentative way which proceedings for an injunction sometimes require.

Even if it be considered that SPL's claim is to a proprietary interest in the fund, the most favourable view that can be taken, that claim is nevertheless outweighed by the reasons that have been mentioned. They are substantially the reasons expressed in that part of his judgment by Jeffries J.

The appeal must be dismissed and is dismissed accordingly with costs to the respondents $400 together with disbursements to be fixed by the Registrar.

M. Woodhouse J

Solicitors for Appellant	Buddle Anderson Kent & Co Wellington.
Solicitors for First Respondent	Macalister Mazengarb Parkin & Rose, Wellington.