IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

7-4-78
A. 4/78

Special Consideration

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.

Plaintiff

A N D PRC PUBLIC MANAGEMENT SERVICES (INC) a duly incorporated company having it registered office at 7600 Old Springhouse Road, McLean, Virginia, U.S.A. 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 Defendants

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

Second Defendant

Hearing: 21 March 1978
Judgment: 5 April 1978
Counsel: G.S. Tuohy for Plaintiff
H.B. Rennie for First Defendants
The second defendant abides the decision of the Court

JUDGMENT OF JEFFRIES J.

On 12 January 1978 Mr Justice O'Regan granted, ex parte, an interim injunction against the first defendants and the second defendant restraining them from remitting to the first defendants any moneys in the possession of or held to the credit of the second defendant in New Zealand pending further order of this court. The first defendants by notice of motion applied for orders rescinding the interim injunction granted, and for other orders which need not concern us now. The matter came before me for hearing on Tuesday, 21 March 1978 and by consent both

parties' arguments proceeded on the basis of the issue of whether or not the injunction should continue, or be dissolved.

I turn to the facts, and the issues between the parties, which are somewhat complex. I think the first step is to describe the parties. Systems & Programs (NZ) Limited (hereinafter referred to as "SPL") is a New Zealand incorporated and based company carrying on the business in this country, and elsewhere, as a computer software company. PRC Public Management Services (Inc) (hereinafter referred to as "PRC/PMS") is a company incorporated in the United States of America under the laws of the State of Delaware and having its principal office in Virginia, and is engaged in various parts of the world in much the same sort of business as SPL. Logica Limited (hereinafter referred to as "Logica"), the other first defendant, is a company incorporated in England having its principal office in London and engaged in a similar fashion to that of SPL and PRC/PMS. Both the first defendants are registered in New Zealand under the Companies Act 1955. The second defendant, Publica, was established by SPL, PRC/PMS and Logica, being its three constituent members, to conduct a joint venture, which will shortly be described. It is referred to in the documents of SPL as a partnership, but about this there is a difference of opinion.

There has been established in Wanganui an integrated law enforcement information system for the Government of New Zealand. The plaintiff and the first defendants combined for the purpose of seeking and entering into a contract having as its objective the development, design and implementation of the law enforcement system. Simply stated the task, it appears, was to provide the software for the computer system, but it obviously was a complex job which impliedly required the assistance of expert knowledge outside of this country. To this end the plaintiff and first defendants became parties to a joint venture agreement dated 8 September 1972 which was

amended by further agreements dated 17 December 1973 and 5 November 1974, respectively. Pursuant to the joint venture the three parties combined into the entity known as Publica. It was Publica that entered into a contract with Sperry Rand New Zealand Limited (hereinafter referred to as "Sperry") to perform the services in connection with the design and implementation of the system referred to above.

Publica is controlled by a Board of Governors comprising three representatives, being one from each of the individual participants. The Board of Governors met in all on five separate occasions, namely, 15 December 1974, 30 July 1975, 28 April 1976, 8 March 1977 and 15 March 1978. The three participants in Publica were not altogether independent of each other. PRC/PMS has 80% of the shareholding in Logica, but only 20% voting interest. PRC/PMS also has 24.9% shareholding in SPL. It is reasonably clear that the interests of the two overseas based companies, for reasons that need not be spelled out, are much closer to each other than either of them is to SPL.

The first meeting of the Board of Governors appointed a project manager, and the operation got underway. 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 explanation 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 now convenient to mention the practical effect of the interim injunction granted on 12 January 1978. The injunction effectively freezes about $\$\frac{3}{4}$m which have been paid to Publica by Sperry, and simply awaits distribution to the three respective parties. The injunction acts to restrain the distribution of that money, and nothing else.

In anticipation of distributing the project profit, in 1976 the project manager was instructed by the Board of Governors to prepare a first draft of a cash flow projection which became known as the profit distribution and repatriation plan, but will be referred to by me as the plan. This was not a final account between the parties but was intended to enable cash on hand to be distributed in anticipation of a final account. There was a suggestion that objection was made orally to the first draft, but in any event SPL in a letter dated 5 January 1977 addressed to the project manager of Publica, and signed by Mr P.W. Harpham, the general manager of SPL and a member of the Board of Governors on behalf of SPL, acknowledged receipt of the plan prepared and dated 13 December 1977, and said that it contained numbers of errors in principle, and set out some of those errors. At the Board of Governors meeting on 8 March 1977 an amended plan was adopted by the Board on a majority vote of PRS/PMS and Logica with SPL dissenting. Basically the plan provided for 14 monthly distributions of profit on a three way basis which at least PRS/PMS and Logica insist is pursuant to the joint venture agreement. The

real issue between the parties is the validity of that plan. SPL says there are errors in principle which it is now convenient to attempt to identify.

1. Under the agreement between Sperry and Publica the latter is entitled to certain payments to adjust contract instalments for the effects of inflation. The Board of Governors resolved to increase billing rates by the same percentage that the contract instalments were increased. However, after all parties had had the full benefit of this adjustment to billing rates a surplus remained, which it is proposed to treat as a profit element and be divided equally. SPL contends that it should be divided in the same proportion as each party's billing rate total for labour. A statement of claim in an action by the first defendants, which I will describe, sets out a schedule of moneys payable by Publica to the three parties and shows that the manpower billing rate of SPL is markedly higher in proportion to the other two parties, and no doubt that is the foundation of SPL's contention about the manner in which the inflation adjustment should be distributed. I am informed that the sum related to this area of dispute is approximately $223,000.

2. Under the Sperry contract that company is committed to pay an extra sum so that payments due overseas by Publica are protected against changes in exchange rate up to a certain limit. Publica is obliged to pay PRC/PMS all moneys due in the United States. Similarly, it is obliged to pay some moneys due to Logica in the United States, and the balance in the United Kingdom. Publica has claimed the maximum amount under its contract with Sperry as exchange differential and this has been paid. SPL claims that this amount

should be divided again in proportion to the labour billing rate total for each party, in which it holds an advantage, as I have mentioned. The Publica project manager (not surprisingly there are allegations that he is working more in the interests of PRS/PMS and Logica than SPL) has taken the view that these moneys are received for the benefit of the two overseas companies on the basis that they are calculated on and justified by overseas remittance of moneys to those companies and has attributed the full amount received under the exchange differential to them, calculated in proportion to the amounts payable. I am informed the sum involved in the exchange differential is approximately $232,000.

3. There are three other lesser issues concerning management fee, supply of typists, and relocation allowances which are also matters of dispute between SPL and the other two parties.

I turn now to the joint venture agreement which contractually governs the relationship between these three parties. Clause 4 of the agreement deals with representatives of the governing committee, and the decisions of the governing committee (the Board of Governors) are binding on the parties. Clause 13 is an arbitration clause which states that any dispute or difference arising out of or touching or concerning the agreement if not otherwise settled shall be finally settled by the rules of conciliation and arbitration of the International Chamber of Commerce in Paris. Pursuant to this clause SPL has already submitted documents to the International Chamber of Commerce in Paris, and undertaken conciliation proceedings which are a necessary preliminary, but which, I was informed by counsel, will be rejected by the overseas parties. It is the intention of SPL to continue with arbitration and the attitude adopted by the overseas parties is to oppose

it on the grounds that there is nothing to arbitrate. Clause 15 of the joint venture agreement says the contract is to be interpreted under Californian State law and clause 16 specifically states that the agreement relates solely to the performance of the undertaking and does not constitute the parties thereto partners, nor does it impose upon any party any liability except that of performance of the agreement, and does not constitute any party the agent of the other parties. It is on the basis of that clause that the overseas parties state Publica is not a partnership, but I need say nothing more than to nominate that area of dispute.

Since the obtaining by SPL of an interim injunction the overseas parties have issued a writ and statement of claim as first and second plaintiffs naming Publica as first defendant and SPL as second defendant, one purpose being the recovery of moneys held by Publica to their credit, and which are frozen by virtue of the existing injunction. Mr Rennie, on behalf of the overseas parties, stressed that the nature of this action is a debt collecting one and is not to be interpreted as a submission to the courts of this country for settlement of the dispute that has arisen between the parties. There was some doubt about this point during the hearing, and in my view of the action more than debt collecting is involved. No argument was addressed to the Court on the status of these proceedings in the light of the first defendants' stated attitude to the New Zealand courts and clause 15 of the joint venture agreement. SPL has filed a statement of defence and counterclaim on PRC/PMS praying, inter alia, for an order dissolving the partnership, and for the appointment of a receiver/manager, although it was conceded by Mr Tuohy that as the contract is complete a manager need not be appointed.

In summary then the state of affairs between the parties appears to be this:-

1. The task for which the joint venture was undertaken has been completed. There is an exception, but it need not concern us.
2. Publica has by a majority vote adopted a plan for the distribution of profits.
3. SPL objects to that plan as containing errors in principle.
4. Publica has received payment for the contract and, but for the injunction, would distribute the profits in accordance with the plan adopted which means large sums of money would be remitted out of the country almost immediately.
5. PRC/PMS, apart from 24.9% shareholding in SPL valued by it at $90,000, and by SPL at $50,000, has no other assets in this country. Logica apparently has none.
6. The disputes between the parties involve a sum of money in excess of $½m.
7. SPL clearly wishes the money to be retained in New Zealand for the convenience of collection of any moneys it might become entitled to as a result of its viewpoint on the disputes and to concentrate the first defendants' minds on its problems.
8. The two overseas companies plainly wish the money to be made available in their hands for the purpose of their own businesses overseas, and allege inconvenience and prejudice if they are withheld.
9. An affidavit has been filed by Robert Shumate, a director of PRC/PMS in which he has stated that, "...it is quite absurd to suggest that financial obligations would not be honoured." It is worth recording that there is no suggestion of insolvency or inability to meet financial obligations on the part of either of the overseas parties.
10. Conciliation almost certainly will be declined and therefore the issues appear destined to be decided by arbitration, subject to the overseas

parties' views on that issue. It was made clear at the hearing the overseas parties would not submit to the jurisdiction of the courts of New Zealand for the resolution of the disputes.

I turn to the law. The relief which SPL seeks by the continuation of the injunction is what has become known in the last 2 or 3 years as a Mareva injunction (or Mareva procedure) so named after Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Lloyd's Rep. 509 C.A. However, for an understanding of the significance of Mareva two prior cases, one in the last century and one a month before Mareva need to be examined first.

Lister & Co. v. Stubbs (1890) 45 Ch.D followed a line of earlier authorities that a creditor could not attach a debtor's goods before judgment. Cotton C.J. at p.13 stated,

> " I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree. "

Then came Nippon Yusen Kaisha v. Karageorgis and Another [1975] 3 All E.R. 282 which might be described as a hard case which, in appropriate circumstances, has made good law. The plaintiff ship owners applied ex parte for an injunction to prevent moneys in banks in London belonging to George and John Karageorgis from being taken out of the jurisdiction. The latter two had signed charterparties with the plaintiff, and had not paid the hire and could not be traced. Lord Denning M.R. recognised he was departing from the practice of the English courts in allowing assets of a defendant to be seized in advance of judgment. Lord Denning thought the practice should be revised and granted the injunction. There was, of course, a strong prima facie case.

A month later came Mareva (supra) which was again a case of the charterer not paying the hire under a charterparty. The Court of Appeal sitting under Lord Denning M.R. granted an interim injunction ex parte.

Roskill L.J. in a separate judgment at p.511 approved of the departure from previous practice. It was followed by Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners) [1977] 3 All E.R. 324 the facts of which disclose a tangled web of commercial dealing which brought Lord Denning to say at p.335,

> " ...[T]he situation is such that I do not think it would be proper in this case for equity to intervene to assist one side or the other. I am tempted to say: 'A plague on both your houses.' "

That case is of interest for at least two reasons. First, the jurisdiction to make a Mareva order was fully argued and held to exist. Secondly, Lord Denning, in the course of an erudite judgment gave an account of the history of the seizure of assets before trial or judgment. In a recent judgment of the Court of Appeal in Cretanor Maritime Co. Ltd v. Irish Marine Management Ltd (Times Law Report 15 February 1978) Buckley L.J. explaining the nature of Mareva injunctions said,

> " In the Rasu Maritima case Lord Denning appeared to have treated the Mareva injunction procedure as a form of attachment; he did not say that it was capable of operating as a form of attachment but that, applying the principle underlying the old practice of foreign attachment, English courts should today employ the remedy of an interlocutory injunction to achieve a broadly similar result.
>
> It was manifest that a Mareva injunction could not operate as an attachment because attachment meant a seizure of assets under a writ or order with a view to their being sold to meet an established claim or held as security for the discharge of an established claim or one yet to be established, and must fasten upon an asset. A Mareva injunction, even if it related to a particularized asset, was relief in personam and did not effect a seizure of an asset. All that the injunction did was to prohibit an owner from doing certain things in relation to the asset and therefore it was inaccurate to refer to a Mareva injunction as a pre-trial attachment. "

The Court of Appeal in that case dismissed an appeal against an order in the lower court discharging an

injunction made ex parte.

Before me counsel for the first defendants did not attempt to argue that the jurisdiction to grant a Mareva injunction does not exist in New Zealand. It may be that the House of Lords in The Siskina [1977] 3 All E.R. 803 has left itself free to review the jurisdiction at another date in an appropriate case, but I think it is safe to assume right now such an injunction could be granted. Having said that I would not allow the injunction to continue in this case and propose to dissolve it on the terms stated. The reasons for my decision are as follows:-

1. Frequently a court is able to assess the likelihood of success or failure ultimately of the plaintiff's case, and use that conclusion as an ingredient in deciding an application for an interlocutory injunction, or its future if it exists. The material available to me does not allow anything like an adequate identification of the probable issues of law; and the facts, including complicated calculations, do not approach the definition a court must have if it is to reach such a conclusion. In the less specialised areas of interlocutory injunctions the leading case of American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396 decided that all the plaintiff need show is that there is a substantial issue to be tried. This criterion is thought to be out of harmony with the House of Lords' earlier decision in Stratford and Son Limited v. Lindley [1965] A.C. 269 and two decisions of the High Court of Australia in Beecham Group Ltd v. Bristol Laboratory Pty Ltd (1968) 118 C.L.R. 618 and Firth Industries Ltd v. Polyglas Engineering Pty. Ltd (1975) 132 C.L.R. 489. I do not think this particular angle of approach, by which I mean substantial issue against probable success at trial, can assist

greatly in this type of complicated commercial argument. If it is to carry weight it is against a plaintiff seeking an interlocutory injunction when it is a Mareva one. It is clearly distinguishable from an action to recover a debt such as payment of hire under a charterparty of which Nippon Yusen (supra) and Mareva (supra), being the only two cases in which the procedure has been successfully used, are examples. It is more akin to the Rasu case (supra) where it was declined. Annexed to the second affidavit of Mr Harpham are extracts from some of the documents submitted in arbitration by the plaintiff. Mr Shumate in his affidavit says the calculation therein is seriously misleading. The plaintiff's papers afford a glimpse of the merits of the case, and on the exchange differential and the inflation adjustment the points are arguable, but I say no more. I think it can accurately be described as a legitimate commercial disagreement. In those circumstances no party is entitled to a partial remedy before judgment.

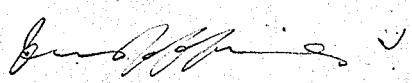
2. Following on from the foregoing the balance of convenience then naturally resolves itself. Of course it would suit the plaintiff to have the money locked up in New Zealand and the first defendants then obliged to concentrate on the plaintiff's viewpoint, but that cannot be achieved by an injunction. It is tolerably clear that the first defendants are distinctly unco-operative about arbitration, but that does not justify the severity of an injunction. The defendants have earned their rewards and no doubt long ago written into their budgets the cash flow. The evidence of inconvenience and hardship can safely be accepted. The balance of convenience, in my view, rests in favour of the first defendants.

3. There is no allegation against the solvency of either of the first defendants or that any judgment or award the plaintiff might obtain would not be met.

4. There is a further point which influences my discretion to dissolve the injunction. From some time in the second half of 1976 the plaintiff has been aware of the plan concerning distribution of profits. The final decision was made at a Board of Governors meeting on 8 March 1977 and the plaintiff took no formal step to challenge that decision until mid December 1977 when the contract was close to completion. From March onwards monthly payments were made by Publica and accepted by SPL. In the circumstances of this case such delay acts to disentitle the plaintiff to the remedy of injunction.

This is a new point concerning the law of injunction in New Zealand, and therefore to give the plaintiff an opportunity to consider its position I order that the injunction remain in force until 1700 hours on Monday, 10 April 1978 after which it is dissolved.

I grant costs to the first defendants in the amount of $300 plus disbursements to be fixed by the registrar.



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