OPINION OF ADVOCATE GENERAL LÉGER

delivered on 31 May 2001 [1]

1. In these proceedings, pursuant to an arbitration clause under Article 181 of the EC Treaty (now Article 238 EC) which is contained in a contract for the provision of financial assistance entered into in 1985 [2] with Nea Energeiaki Technologia EPE, [3] a company governed by Greek law, the Commission of the European Communities [4] claims that the Court should order NET to refund all the financing which it has received, together with contractual and statutory interest. The Commission's claim is based on Article 9 of the Contract and Article 147 of the Greek Civil Code. [5]

2. Does the fact that one party to a contract failed to inform the other party that its financial position at the time when an arrangement for settlement was proposed did not allow it to honour the terms of the settlement amount to deception in Greek law? That is in substance the legal question referred for the Court's determination.

3. As the dispute is of a private nature and its resolution concerns only the two parties referred to above, I shall set out the legal, factual and procedural background and the submissions of the parties only to the extent strictly necessary for my reasoning. For a fuller exposition of these matters, I would invite the parties to refer to the report for the hearing which has been provided to them.

I — Legal context

The Contract

4. Under Article 1 of the Contract and paragraphs 1 and 2 of Annex I(A) thereto NET undertook to carry out the project 'Kea Island', whose objective was:

— the installation of a 300 kW wind energy converter on a Greek island no later than 1 January 1986;

1 — Original language: French.
2 — Hereinafter 'the Contract'.
3 — Hereinafter 'NET' or 'the defendant'.
4 — Otherwise referred to as 'the applicant'.
5 — Hereinafter 'the Civil Code'.

— a two-year demonstration, starting on 1 January 1986, that the system worked;

— the handing over of the system to the users for commercial exploitation at the end of that period, namely on 1 April 1988.

5. Article 3 of the Contract sets the amount of the financial assistance to be provided by the Community at 40% of the actual cost of the project, as verified and accepted by the Commission, subject to a cap of GRD 46 000 000, exclusive of value added tax.

6. Under the first two subparagraphs of paragraph 1(a) of Annex II(I) to the Contract, the Commission undertook to pay NET an advance of GRD 13 800 000, corresponding to 30% of the maximum amount of the financial assistance, within 30 days of the signing of the contract. These provisions also state that the advance and the interest earned are to be used only for the purpose of the project.

7. Article 8 of the Contract provides:

'In the event of non-fulfilment by the Contractor of an obligation under this contract the Commission may serve notice by registered post with acknowledgement of service. If on the expiry of one month following such service the Contractor is still in breach of its obligations, the Commission may terminate the contract without further formality. The contract may also be terminated where, in order to obtain the financial assistance, the Contractor has made false statements and may be held responsible for them. In both cases the Contractor shall immediately repay to the Commission the amount of the financial assistance received by it, plus interest from the end of the period of one month referred to above. The rate of interest shall be the European Investment Bank [6] rate in force on the date of the Commission decision to grant financial assistance to the project.'

8. Article 9 of the Contract provides:

'The present contract may be terminated by either party on giving two months' notice if it would serve no further purpose to continue with the work programme set out in Annex I, for example because a technical or economic failure of the project is to be anticipated, or because the estimated costs of the project have been too far exceeded. In that event, the Commission may request full or partial repayment of the amounts paid as financial assistance, plus interest from the date of termination of the contract, if the programme in so far as it

6 — Hereinafter 'the EIB'.

was implemented has produced results which can be exploited commercially. The rate of interest shall be the [EIB] rate in force on the date of the Commission decision to grant financial assistance to the project. Repayment shall be made in accordance with paragraphs II.1 and II.2 of Annex II.'

9. Article 13 of the Contract states that all disputes concerning the validity, interpretation or application of the Contract are to be referred to the Court of Justice of the European Communities. Article 14 provides for the contract to be governed by Greek law.

Greek Law

10. Article 147 of the Civil Code states:

'Any person who is induced by deception to make a declaration of intent shall be entitled to seek annulment of the act. In the event of a representation made to another person, if the deception is attributable to a third party, annulment may be sought only if the addressee of the representation or any other person directly acquiring rights as a result of that representation knew or should have known of the deception.'

11. According to Article 157 of the Civil Code, '[t]he right to seek annulment shall be extinguished two years after the legal act. If the error, deception or threats have continued after the act, the period of two years shall commence on the day on which that situation ceases. In any event, no action for annulment shall be admissible more than 20 years after the act.'

12. Under Article 249 of the Civil Code, '[t]he limitation period for claims is 20 years, unless otherwise provided'.

13. Article 345 of the Civil Code provides:

'In the case of pecuniary debts, the creditor shall be entitled, after notice of default has been served, to claim default interest as prescribed by law or by the legal act concerned without having to prove loss. A creditor who also proves other actual damage shall also be entitled to claim in respect thereof, save as otherwise provided by law.'

14. Article 346 of the Civil Code states:

'A person from whom a pecuniary debt is due shall, even if not formally placed in default, be liable to pay interest at the

statutory rate as from the date of service of judicial process to enforce payment of the debt due.'

II — Facts

15. In accordance with the terms of the Contract, on 16 July 1985 the Commission paid NET an advance of GRD 13 800 000 in respect of financial assistance which it had undertaken to provide.

16. Having established that none of the phases of the project which were provided for by the Contract had been implemented, the Commission called upon NET on numerous occasions over the period from the date of signature of the Contract until 1988:

— to comply with its obligations:

— to commence the works contemplated in the Contract, and

— to send to it the report on the progress of the works and copies of the authorisations required to carry out the project.

17. In response to these various requests, NET invariably indicated that the works were about to commence. It did not send the documents asked for by the Commission.

18. By letter of 22 February 1989, the Commission advised NET that it had decided to apply Article 8 of the Contract and that NET accordingly had a period of one month in which to fulfil its obligations, failing which the Contract would be terminated.

19. After the expiry of this period, on 17 May 1989 the Commission made out a recovery order. Since the order had no effect, NET was served with formal notice by registered letter of 23 January 1990, requiring the debt to be repaid within 15 days.

20. NET responded to the Commission's letter of 22 February 1989 by letters dated 26 June and 21 September 1989, in which it gave reasons as to why it had not been possible for the project to succeed and stated that it had had to spend substantial amounts in respect of the preparatory work necessary for the realisation of the project.

21. It proposed accordingly that this expenditure should be deducted from its debt. It requested furthermore that it be allowed to repay the sum of GRD 10 000 000 which remained available from the amounts paid by the Commission and that the Contract be terminated in accordance with Article 9.

22. The Commission accepted NET's proposals and on 27 March 1990 [7] it made out a recovery order for GRD 9 257 051, together with GRD 241 500 representing bank interest, amounting in aggregate to GRD 9 498 551. Payment was to be made no later than 15 May 1990.

23. This amount was not paid by NET, notwithstanding numerous demands made by the Commission.

24. On 29 May 1998, NET informed the Commission that it was unable to pay the sums claimed. It furthermore disclosed that it had been in liquidation for a considerable period. It sought further time and proposed that the Commission should accept payment of GRD 4 000 000.

7 — Otherwise referred to as 'the settlement of 27 March 1990'.

III — Forms of order sought

25. In these proceedings, lodged at the Court Registry on 20 November 1998, the Commission claims that the Court should:

'— grant the application in full,

— order the defendant to refund to the Commission the total financial contribution which it received from the Community, on the basis that the settlement which the Commission agreed to is considered to be invalid as achieved by fraudulent means, that is to say the Court should order the defendant to refund the entire amount of the principal debt of GRD 13 800 000, together with interest under the provisions of the Contract amounting to GRD 24 382 218 up until service of this application, namely a total amount of GRD 38 182 218, and additionally default interest payable under Greek legislation from service of this application on the defendant until the full discharge of its debt, or otherwise interest calculated on the basis of the rate set by the [EIB] in respect of the period from the lodging of this application until the defendant has fully discharged the debt;

— in the alternative, order the defendant to refund to the Commission the amount arising under the abovementioned settlement, namely GRD 9 498 551, together with interest owed on the principal amount (GRD 9 257 051), which under the provisions of the Contract amounts to interest of GRD 14 643 006 up until service of this application, that is to say a total amount of GRD 24 141 557, and also the statutory interest provided for by Greek legislation from service of this application until the full discharge of the defendant's debt, or otherwise interest on the basis of the rate set by the [EIB] in respect of the period from the lodging of this application until the defendant has fully discharged the debt;

— order the defendant in each case to pay the Commission's legal costs including the fees of its authorised lawyers.'

26. NET contends that the Court should:

'— dismiss the application in its entirety;

— in the alternative, order it to pay to the applicant the sum of GRD 3 986 545, without interest;

— order the applicant to pay its costs, including lawyers' fees.'

IV — The Commission's principal claim

Arguments of the parties

27. The Commission claims that it accepted NET's proposed settlement as a result of the latter's assertions that it had at its disposal the sum of GRD 10 000 000. This amount represented, according to NET, the balance of the advance of GRD 13 800 000 received by it. The acceptance of the proposal was furthermore subject to the condition subsequent, which although implied was none the less clear and indisputable, that the said sum be actually remitted.

28. The Commission relies on NET's communication of 29 May 1998 in support of its claim. It submits that it follows therefrom that at the time when NET was presenting its proposal for settlement it plainly did not intend to repay part of the advance received but that its sole aim was to deceive the Commission in order to

delay its obligations to make repayment and ultimately to gain a reduction in its debt. As part of this strategy, NET refrained from informing the Commission that it had been put into liquidation.

29. The result of the above is, in the Commission's submission, that its acceptance of NET's settlement proposals and the corresponding reduction in the amount owed to the Community are void. The Commission considers itself to have been the victim of deception on NET's part, within the meaning of Article 147 of the Civil Code. It accordingly requests that the arrangement be declared null and void and that the defendant be ordered to repay to it the whole of the advance paid, namely GRD 13 800 000, together with contractual interest and statutory default interest.

30. NET denies that the agreement was entered into as a result of deception on its part.

31. It argues that its 'willingness to repay' the sum of GRD 10 000 000 expressed in its letter of 26 June 1989 indicated only its wish to comply with the terms of the Contract, as it understood them to apply and as it believed they could be implemented. This money was not available to it and had to be found.[8] It follows that the decision to terminate the Contract under Article 9 is not subject to the condition, implied or otherwise, that the sum in question be paid.

32. NET also submits that, should the Court find that the Commission was induced by deception to accept the proposal set out in its letters of 26 June and 21 September 1989, the right to challenge the agreement on grounds of deception is time-barred. It invokes Article 157 of the Civil Code, which states that the right to seek annulment is extinguished after a period of two years.

Analysis

Greek positive law — Article 147 of the Civil Code

33. For there to be deception within the meaning of Article 147 of the Civil Code, two conditions must be met. First, there must have been action or subterfuges which were dishonest. Secondly, the perpetrator must have acted with specific intent.

8 — Pages 12 and 13 of the defence.

34. As regards the first condition, under the settled case-law of the Greek courts, any conduct liable to create or reinforce an incorrect impression or perception of reality through misrepresentation or the concealment of facts or only partial disclosure of facts constitutes deception. The obligation to disclose certain facts or provide the other party with certain information depends on the type of contract, the requirements of good faith in the relations between the parties, morally sound conduct and bilateral contractual practice. In commercial transactions and particularly where a commercial risk is to be assumed, the obligation to provide information on the financial status of either party is greater than usual.

35. As far as the second condition is concerned, the perpetrator's intention consists of fraudulent intent on his part, that is to say the knowledge or, at least, the awareness that his conduct is misleading, and of acceptance of the consequences of the deception. The concept of deception accordingly excludes negligence, even serious negligence, on the perpetrator's part.

36. In order for a legal act to be annulled by reason of deception, case-law also requires that there be a causal link between the perpetrator's untruth and the subsequent act. The legal act cannot be annulled and the perpetrator of the deception may be released from any responsibility if he shows that the deception did not influence the contractual intent of the victim and that the victim would have entered into the contract even if there had been no fraudulent conduct.

37. Lastly, under Greek law deception is not presumed but must be proved by the party who claims to be a victim of it.

Applicability of Article 147 of the Civil Code to the present proceedings

38. The Commission claims that the settlement of 27 March 1990 is void. It submits that its acceptance was obtained as a result of the defendant's false representation as to its financial situation. NET indicated that it retained GRD 10 000 000 from the amounts advanced by the Community, and accordingly that it was in a position to repay this sum to the Commission. The Commission further contends that NET concealed important facts, such as the winding up proceedings commenced against it.

39. According to the Commission, these facts, which were known to the defendant at the time when it proposed the arrangement, were intentionally concealed. The Commission claims that it would never have accepted the proposal if these facts had been brought to its attention.

40. The defendant accepts that it did not have the sum which it proposed to remit to the applicant available to it at the time when it proposed the settlement. [9]

41. Given the very wide meaning of the concept of deception in Greek positive law, which it should be remembered provides that any conduct liable to create or reinforce an incorrect impression or perception of reality may amount to deception, it is my view that the fact that NET lied about the sums available to it and which it proposed to remit to the applicant means that it may be concluded that the act of deception is present in this case.

42. According to the Commission, the fraudulent nature of NET's conduct may be deduced from the fact that it did not have the sums which it proposed to remit to the Commission available to it at the time when it was attempting to obtain the Commission's agreement to a reduction of its debt. The Commission submits that the misrepresentation of NET's financial position would be enough to prove that NET did not intend to make the repayment agreed to by it.

43. NET categorically denies that it did not intend to honour its debts. On the contrary, its wish to fulfil its obligations may be inferred from the efforts which it made to obtain a reduction in the amount of its indebtedness, as evidenced by the arrangement for settlement that it proposed to the Commission on 26 June 1989. According to NET, there would have been no point in its striving to obtain this reduction in the amount of its indebtedness to the Commission if it had had no intention at all to repay the sums due from it.

44. It must be found that the allegations made by the Commission are not substantiated by any matter or prima facie evidence supporting the conclusion that NET found itself in a financial position which made the repayment that it proposed in its letter of 26 June 1989 completely illusory or impossible. No information is given as to the date on which NET suspended payments. Nor has the Commission produced any accounting documents which would prove that, for example, at the time when the proposal for settlement was made, NET did not have any debts which it could recover from a third party or any credit facility.

45. It follows from the above that the Commission has not proved that NET acted with fraudulent intent. Article 147 of the Civil Code is therefore inapplicable.

9 — Ibid.

V — The Commission's alternative claim

Arguments of the parties

46. In the alternative, should the Court hold that the acceptance by the Commission of the settlement of 27 March 1990 is valid and binding on the Community, the Commission claims that NET is bound to repay the amount which this arrangement requires, namely GRD 9 498 551, together with interest under Article 9 of the Contract and statutory default interest.

47. The Commission submits that, as provided in the settlement of 27 March 1990, the contract to provide financial assistance entered into by the parties was terminated under Article 9 of the Contract. This clause expressly provides that the Commission may request full or partial repayment of the amounts paid as financial assistance, together with interest from the date when the Contract is terminated. The clause also states that the rate of interest is the EIB rate in force on the date of the Commission decision to grant financial assistance to the project.

48. The Commission further claims that NET must be ordered to pay statutory default interest on the whole of its debt in accordance with Article 346 of the Civil Code from the date of service of the application until it has fully discharged the debt, or otherwise to pay default interest at the EIB rate in respect of the period from the lodging of the application until it has fully discharged the debt.

49. NET accepts that it is indebted to the Commission and the validity of the settlement of 27 March 1990, but submits that the amount of the expenditure incurred in connection with the contract for financial assistance is greater than the figure declared by it to the Commission in its letters of 26 June and 21 September 1989. It explains that the expenditure declared and subsequently approved by the Commission, in connection with the settlement of 27 March 1990, corresponded to the figures set out in its tax returns but not to the contractual position. It states, however, that it is unable to furnish proof of the additional expenditure to which it refers.

50. NET also submits that, if the Court were to grant one of the Commission's claims, the rate of interest should be that of the EIB. It challenges the Commission's claim for statutory default interest. According to NET, as default interest was not provided for by the parties, it cannot be ordered to pay such interest on the basis of Article 346 of the Civil Code.

Analysis

51. Under the settlement of 27 March 1990 the parties agreed both on the principle that NET owed a pecuniary debt and the amount owed by NET and the interest payable.

52. Since NET's claim seeking amendment of the sum payable by it is without justification it should be rejected.

53. It follows that the settlement of 27 March 1990 must be held to be valid and must be applied.

54. I therefore propose that the Court should order the defendant to pay the Commission the amount owing under the settlement of 27 March 1990, namely GRD 9 498 551.

55. As regards the claim for payment of contractual and statutory default interest on the whole amount owing, Article 9 of the Contract expressly provides that the Commission may request full or partial repayment of the amounts paid as financial assistance, together with default interest from the date of termination of the contract. This article also provides that the rate of interest is the EIB rate in force on the date of the Commission decision to grant financial assistance to the project.

56. In judgment 272/1994 [10] the Areios Pagos (Greek Supreme Court of Cassation) held that the statutory rate of interest under Article 346 of the Civil Code is a secondary one, arising only when the parties have not agreed on a rate of interest under the contract. On the other hand, where the parties have agreed on a contractual rate, the judgment provides that that rate is to prevail over the statutory rate in all cases, including where the contractual rate is lower than the statutory one.

57. The provisions of the contract expressly state the rate of default interest which applies in the present case.

58. Accordingly, the Commission's claim based on the provisions of the contract must be allowed and NET ordered to pay default interest as provided for in the Contract.

59. I accordingly propose that the Court should order NET to pay the sum of GRD

10 — NoB 1995, p. 57, NOMOS database.

9 498 551, together with interest calculated by reference to the EIB rate in force on the date of the Commission decision to provide financial assistance to the 'Kea Island' project, for the period from the date of termination of the Contract until the defendant has fully discharged the debt.

60. Under Article 69(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for such an order against NET and the latter is unsuccessful, it should be ordered to pay the costs.

Conclusion

61. For the reasons set out above, I propose that the Court should order Nea Energeiaki Technologia EPE, a company governed by Greek law, to:

— pay the Commission of the European Communities the amount resulting from the settlement of 27 March 1990, namely GRD 9 498 551, together with interest calculated by reference to the European Investment Bank rate in force on the date of the Commission decision to provide financial assistance to the Kea Island project, for the period from the date of termination of the Contract until the defendant has fully discharged the debt;

— bear the costs.