JUDGMENT OF THE COURT (Third Chamber)
25 February 1999 *

In Case C-65/97,

Commission of the European Communities, represented by Paolo Stancanelli, of its Legal Service, and Jean-Francis Pasquier, a national civil servant on secondment to that service, acting as Agents, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, acting as Agent,

applicant,

v

Cascina Laura Sas di Arch. Aldo Delbò e C., in arrangement with its creditors, whose registered office is at Casaleggio Novara (Italy), in the person of its provisional legal representative,

and

Gariboldi Engineering Company Srl, in liquidation, whose registered office is in Milan (Italy), in the person of its liquidator, Ester Dallarosa, represented by Alberto Croze, Rodolfo Radice and Cristina Ravelli, of the Milan Bar,

defendants,

* Language of the case: Italian.

APPLICATION under Article 181 of the EC Treaty for reimbursement of monies paid under Contract No BM 5/89 IT, terminated by the applicant for non-performance by the defendants,

THE COURT (Third Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, J. C. Moitinho de Almeida and C. Gulmann, Judges,

Advocate General: A. Saggio,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 October 1998,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1998,

gives the following

Judgment

1 On 14 February 1997 the Commission of the European Communities applied to the Court under an arbitration clause, in accordance with Article 181 of the EC Treaty, claiming that Cascina Laura Sas di Arch. Aldo Delbò e C. (hereinafter 'Cascina Laura'), whose registered office is at Casaleggio Novara (Italy), and Gariboldi Engineering Company Srl (hereinafter 'Gariboldi'), whose registered office is

in Milan (Italy), should be ordered to (i) reimburse the two advance payments, totalling ECU 479 134, made by the Commission to Cascina Laura for the completion of a project to produce electricity and heat from biomass consisting of rice production residue (straw and husks), together with interest in the amount of ECU 1 742 to be paid monthly from 31 July 1990 until the date of final settlement, plus interest in the amount of ECU 2 464 to be paid monthly from 20 April 1991 until the date of final settlement; and (ii) to pay to the Commission the sum of ECU 100 000 by way of compensation for the damage suffered.

2 By document registered at the Court Registry on 23 April 1998, the Commission withdrew its application with respect to Cascina Laura, which had been declared bankrupt by judgment of 23 June 1997, while maintaining the entirety of its claims against Gariboldi, and requesting that the Court order Cascina Laura to pay the costs attributable to it.

3 On 1 June 1990 the European Economic Community, represented by the Commission, entered into a contract (No BM 5/89 IT; 'the contract') with Cascina Laura, Gariboldi and Servizi Agroalimentare ed Ambiente Srl ('SAA'), acting jointly and severally ('the contractor'), on the basis of Council Regulation (EEC) No 3640/85 of 20 December 1985 on the promotion, by financial support, of demonstration projects and industrial pilot projects in the energy field (OJ 1985 L 350, p. 29). In return for financial assistance from the European Economic Community, the contractor undertook under the terms of the contract to carry out a work programme, described in an annex to the contract, between December 1989 and July 1991.

4 Under Clause 4.3 of the contract, the contractor was required — initially, within three months of signature of the contract, and thereafter every six months — to prepare interim progress reports containing statements of expenditure.

5 Clause 8 provided: 'the Commission may unilaterally terminate the contract in the event of the contractor's non-performance of any of its obligations thereunder, in particular if it fails to comply with the stipulations made in Clause 4.3 thereof; termination shall take effect on expiry of a period of one month after notice has been served by registered letter with acknowledgment of receipt, where non-performance persists'. Clause 8 further provided that, in such circumstances, 'the contractor shall immediately repay to the Commission any amounts advanced by way of financial assistance, together with interest payable from the date of receipt of such funding ...'. 'Interest shall be payable at the rate set by the European Monetary Cooperation Fund for its transactions in ecus, which is published on the first working day of each month.'

6 Under Clause 13 of the contract, the contracting parties agreed 'to refer to the Court of Justice of the European Communities all disputes concerning the validity, interpretation or application of the contract'. Clause 14 provided that the contract was to be governed by Italian law.

7 On 5 July 1990 and 20 February 1991 the Commission made payments of ECU 204 031 and ECU 275 103, respectively, into an account which had been opened in the name of Cascina Laura at the Banca Popolare di Intra (Novara Branch). Those were part-payments in advance of the Community contribution to the project.

8 As was disclosed by an on-the-spot inspection conducted by the Commission on 21 and 22 June 1993, the project has not been carried out satisfactorily, notwithstanding the installation by Gariboldi of special technical equipment, not sufficient alone to enable the plant to operate.

9 On 26 November 1993, in accordance with Clause 8 of the contract, the Commission sent Cascina Laura and Gariboldi a letter of formal notice initiating the termination procedure.

10 In response, Gariboldi — the only one to reply — maintained that it had discharged its contractual obligations in full.

11 On 18 January 1994 SAA was declared bankrupt.

12 By letter of 27 April 1994 addressed to Cascina Laura and to Gariboldi, the Commission confirmed termination of the contract and demanded reimbursement of the amounts advanced, together with interest. Despite several reminders, the money has not been repaid.

Reimbursement of the amounts advanced

13 In its application as it now stands, the Commission claims that Gariboldi alone should be ordered to reimburse the amounts advanced, together with the interest contractually agreed: since the three companies have assumed joint and several liability — and, according to the terms of the contract, constitute one and the same contractor — it may approach any one of them in order to seek performance of the contract or, failing that, to demand reimbursement of the amounts advanced. The object of the relationship mutually agreed by those companies in assuming joint and several liability was to safeguard the rights of the creditor against any challenge arising by reason of a situation internal to the defaulting contractor.

14 Gariboldi does not deny non-performance of the contract, but maintains that it was not at fault since it had delivered the equipment as arranged. Non-performance is attributable solely to the conduct of Cascina Laura's representative, and Gariboldi, in complaining of that conduct on several occasions to the Commission (albeit to no avail), has fully discharged its obligations.

15 Furthermore, Gariboldi denies the existence of any liability on its part to reimburse the amounts paid to Cascina Laura, since Gariboldi itself never received any funds from the Commission and the latter never notified it of any such payment to Cascina Laura; moreover, Cascina Laura was not empowered, whether under the contract or otherwise, to represent Gariboldi or to act in that company's name.

16 In Gariboldi's submission, its signature on the contract cannot therefore signify anything other than a pledge of surety given to Cascina Laura in its contractual relations with the Community. However, in that context, the obligation to act as guarantor for Cascina Laura was extinguished by the creditor's failure to fulfil its legal obligation to monitor the use of the funds paid, which made it impossible to bring proceedings against Cascina Laura for recovery.

17 It should be noted, first, that pursuant to paragraph 1(a) of Annex II to the contract, an advance of ECU 204 031 was to be paid, within 60 days of the signing of the contract, into a bank account opened for that purpose by the contractor.

18 As related in paragraph 7 above, that payment was made to a bank account which had been opened in the name of Cascina Laura at the Banca Popolare di Intra.

19 As Gariboldi acknowledges in its defence, it raised no objection to Mr Delbò, the legal representative of Cascina Laura and SAA, being the Commission's sole interlocutor at that point. Furthermore, after Cascina Laura had received from the Commission the advance of ECU 204 031 (equivalent to LIT 309 012 068), it transferred the sum of LIT 297 038 483 to Gariboldi, who accepted it unconditionally. Lastly, Gariboldi delivered and installed the equipment needed for completion of the project contracted for.

20 It follows that Gariboldi may, in any event, be deemed to have accepted *de facto* that the Commission's payment of the sums due under the contract could be effected via the bank account opened in the name of Cascina Laura.

21 It must also be recognised that the joint and several liability assumed by several companies collectively constituting a single contractor in an agreement entered into with the Community is a legal relationship of a different order from a simple relationship of guarantorship between separate legal persons.

22 Each of the companies which collectively constitute the single contractor is, by reason of the relationship of joint and several liability mutually agreed between them, individually bound to perform all the obligations stipulated by the contract in the event of failure to perform on the part of any of the other companies involved. Any extra-contractual division of responsibilities, which the companies constituting the contractor may have agreed between themselves, cannot legitimately be relied upon by any one of those companies as against the creditor in order to escape liability for the reimbursement of funds paid, in the event of non-performance of the contract. For the same reasons, the company whose contractual liability is at issue cannot rely on the fact that, individually, it is in no way to blame for such non-performance.

23 That being so, the making of advance payments to one of the companies constituting the single contractor creates in each of those companies an obligation to reimburse the monies advanced in the event that the obligations for which those payments constitute the consideration are not fulfilled.

24 Accordingly, without there being any need to speculate as to whether there is any fault on the part of the creditor — which would not in any event relieve Gariboldi of its contractual liability — the Commission's claim that Gariboldi should be ordered to reimburse the amounts paid, together with the interest contractually agreed, is well founded.

25 The advance payments amount in total to ECU 479 134, a sum which has not been contested.

The interest

26 Under Clause 8 of the contract, interest is payable from the date of receipt of the advance payments and at the rate set by the European Monetary Cooperation Fund for its transactions in ecus, published on the first working day of each month.

27 Consequently, the Commission maintains that interest is payable from 31 July 1990 at the rate of 10.25% per annum on the sum of ECU 204 031 and from 20 April 1991 at the rate of 10.75% per annum on the sum of ECU 275 103. Thus the interest due is ECU 1 742 per month with effect from 31 July 1990, to be increased by ECU 2 464 per month with effect from 20 April 1991 until the date of final settlement.

28 In the absence of any challenge on this point on the part of Gariboldi, and since the documents before the Court disclose no factor capable of casting doubt on the merits, the Commission's claim for payment of interest in the amount specified must be upheld.

Compensation for damage

29 Relying on Article 1453 of the Italian Civil Code, the Commission also claims that the defendant should be ordered to pay ECU 100 000 by way of compensation for

the damage which the Commission has suffered on account of the non-performance of the contract, consisting in the unjustified immobilisation of Community funds which could have been used for other projects, waste of human resources and damage to its credibility.

30 In order to determine the merits of that claim, a distinction must be drawn between the period prior to termination of the contract and the period subsequent thereto.

31 So far as concerns the first period, it was open to the Commission under the combined provisions of Clauses 4.3 and 8 of the contract to make the proper inferences in good time as to the consequences of the contractor's failure to honour its contractual obligations and to terminate, early and unilaterally, the contractual relationship. That being so, the Commission cannot expect the defendant to assume responsibility for damage which is the result of the Commission's own decisions or inaction.

32 So far as concerns the period following termination of the contract, the situation is different by reason of the fact that the contractor was at fault in refusing to accede to the claims for reimbursement. However, as regards, first, the unwarranted immobilisation of Community funds, it should be noted that the default interest due from the defendant must have the effect of reversing any financial damage suffered by the Commission on account of the delay in payment; so far as concerns the loss of funding suffered by other prospective contractors, the Commission cannot be allowed to rely on damage potentially suffered by third parties.

33 As regards the alleged misuse of Commission staff during the judicial stage of the dispute, it should be noted that the expenses incurred by the parties for the purpose of these proceedings are not, in any event, of such a nature that they may be regarded as constituting damage distinct from the burden of costs.

34 Lastly, as regards the other damage alleged, the Commission has failed to establish satisfactorily or with the requisite precision that such damage was in fact caused.

35 The Commission's claim for compensation must therefore be dismissed.

Costs

36 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has been unsuccessful in its pleadings, it must be ordered to pay the costs.

37 So far as concerns Cascina Laura, it must be noted that, under Article 69(5), first subparagraph, first sentence, of the Rules of Procedure, the party who withdraws is to be ordered to pay the costs if they have been applied for by the other party in its observations on the withdrawal. However, upon application by the party who withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

38 In the present case, Cascina Laura did not submit observations on the withdrawal; furthermore, the Commission's application and its subsequent partial withdrawal were a result of the conduct of Cascina Laura. The latter must therefore be ordered to pay the costs jointly and severally with Gariboldi.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Takes formal note that the Commission of the European Communities has withdrawn its claims against Cascina Laura Sas di Arch. Aldo Delbò e C.;**

2. **Orders Gariboldi Engineering Company Srl to pay to the applicant the sum of ECU 479 134, together with interest in the amount of ECU 1 742 per month from 31 July 1990 until the date of final settlement, plus ECU 2 464 per month from 20 April 1991 until the date of final settlement;**

3. **Dismisses the remainder of the application;**

4. **Orders Gariboldi Engineering Company Srl and Cascina Laura Sas di Arch. Aldo Delbò e C. jointly and severally to pay the costs.**

Puissochet Moitinho de Almeida Gulmann

Delivered in open court in Luxembourg on 25 February 1999.

R. Grass J.-P. Puissochet

Registrar President of the Third Chamber