NMLS

IN THE SUPEME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 2003/2433

BETWEEN	**KINGSTON TELECOM LIMITED**	**CLAIMANT**
A N D	**ZION DAHARI**	**1ST DEFENDANT**
A N D	**RAHUL SINGH**	**2ND DEFENDANT**
A N D	**COMMONWEALTH COMMUNICATIONS**	**3RD DEFENDANT**
A N D	**OCEAN PETROLEUM INC.**	**3RD INTERVENER**

Arthur Williams instructed by Messrs. Brady & Co. for claimant.

Winston Spaulding instructed by Jean Barnes for 2nd and 3rd defendants and 3rd party intervener.

Hilary Phillips, Q.C. and Andrea Bickhoff-Benjamin instructed by Grant Stewart Phillips & Co. for 4th party intervener.

Conrad George watching proceedings for National Commercial Bank.

Richard Linhart present, representing himself and the 2nd and 3rd defendant and 3rd party intervener.

Marc Diamond and Errol Taylor, Directors of the claimants present.

Heard: 13th April, 11th and 28th July 2005 and 17th May 2006

Campbell, J.

Background

(1) Kingston Telecom (the claimant) commenced by Writ an action for breach of contract against the defendants in December 2003. The claimant is a limited liability company incorporated in or about May, 2002 for the purposes of establishing and operating a full services telecommunications network in Jamaica. On the 17th December, Mr. Justice Marsh granted a

freezing order on the ex parte application of the claimant restraining the defendants, whether by themselves, their servants or agents from disposing of and/or dealing with their assets wheresoever situate up to a limit of US1,800,000.00 for a period of 28 days. This Order was varied on the 14th January 2004 to permit the access of such funds by the defendants that would be required for normal living expenses and legal fees. On the 27th July 2004, the Court extended the freezing order to the time of trial. The defendants have appealed this Order. The parties have since pursued and completed arbitral hearings in Florida. On 17th February 2005 judgment in default of defence was entered for the claimant. On the 7th March 2005, the defendants applied to set aside the default judgment.

(2) Before the Court are three applications:

An application by the 2nd and 3rd defendants, seeking the following Orders:

(a) That the judgment **in default of defence** entered on the 17th day of February 2005 be set aside.

(b) That there be a stay of execution of any process arising from the said default judgment.

(c) That there be a stay of proceedings pending further order of this Honourable Court.

(d) That the defendant be granted such further and other relief which the Court considers just and appropriate including leave to file a defence if the Court deems it necessary.

At this hearing two further Orders were sought:

(a) that the freezing order be discharged;

(b) that the claim be struck out.

I agree with the submissions of Mr. Williams that these further applications were not in compliance with Rule 11. 7. 2, which requires the filing of the application three (3)

days before the hearing. He submitted that the applicant is also obliged to comply with the provisions of Rule 11 13, which provides:

> "An applicant may not ask at any hearing for an order which was not sought in the application unless the court gives permission."

(3) **An application by Cable and Wireless**, for the following orders:

(i) That the applicant be joined as 4th party intervener.

(ii) That the defendants, heir, servants and/or agents be restrained from dealing with any assets whether located within the jurisdiction or not.

(iii) That the costs occasioned by this application be paid by the 2nd defendant and or the intervener/third party.

(4) **An application by Ocean Petroleum USA, Inc.,** for a stay of execution pending the appeal of the Order of the Court dated 16th January 2005.

Mr. Williams took preliminary objection to the Ocean Petroleum application on the ground that they had previously made application for release of the funds. The Court had refused the application and had ordered that costs of the application be paid to the claimant. These costs were still outstanding.

Setting aside judgment in default of defence

(5) The 2nd and 3rd defendants' application to set aside the default judgment relies on the following grounds:

(a) That the default judgment is patently irregular on the face of it having regards to the Particulars of Claim.

(b) The claimant did not make disclosure to the Court of matters which ought to have been disclosed, thereby abusing the process of the Court and inducing a default judgment by material non-disclosure and misleading the Court.

Submission

(6) Mr. Spaulding submitted that the Court had a duty to preserve its process from abuse, and that the claimants' abuse was patent, flagrant and continuing and is contemptuous of the Court's process. He contended that at the time of the request for judgment, the underlying argument was that there were twenty T1s. This number provided the basis for the sum claimed. However, before the arbitrators in Florida, evidence was given on behalf of claimant that the number of T1 was five (5). This is false and contradictory, and the claimant and their Attorneys-at- Law are so aware. The claim is therefore irregular and constitutes fraudulent conduct which is an abuse of the process of the Court; the Court has an inherent jurisdiction to prevent abuse of its process.

Counsel also relied on Rule 11. 12. 1, which provides that;

> "The Court may exercise any power which it might exercise at a case management conference."

Amongst the Court's case management powers was the power to strike out particulars of claim that were untenable.

Irregular Claim

(7) To ground the claim of irregularity the applicant relies on the affidavit of Jean Barnes dated 7th March 2005. The irregularity noted in the affidavit of Jean Barnes is that the claimant disobeyed the Rules in not providing an equivalent claim in Jamaican dollars to the US dollar amount for which judgment was entered. Additionally, there was no claim for interest as provided by the Rules. That the particulars of claim contradicts itself between paragraph 1 and 2. That the damages claim, both general and special, fall into the category of "unliquidated" damages as such, the claimant request for default judgment did not comply with Rule 16.2 of the Civil Procedure Rules 2002. That the claimant has

deliberately misled the Court in the application for default judgment, knowing that "the claim was contradicted by the evidence before the Arbitrator in Florida, evidenced by George Blutstein testimony that there were not 20 T1 connections, as alleged in the claim.

(8) The setting aside of wrongly or irregularly obtained judgments are dealt with at Rule 13.2 of C.P.R.

Rule 13.2 (1) provides that;

The Court must set aside a judgment entered under Part 12 if judgment was wrongly entered because: -

(a) In the case of a failure to file an acknowledgement of service, any of the conditions in rule 12.4 was not satisfied.

(b) In the case of **judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied, or**

(c) the whole of the claim was satisfied before judgment was entered.

Rule 13.2 (1) (b) deals with judgments in default of defence, irregularly obtained through non-compliance with Rule 12.5. The duty placed on the Court to set aside such judgment is mandatory: the **Court must set aside**. This accords with the pre CPR principles, which allowed no judicial discretion where the judgment was irregularly obtained. In **Anlaby v Praetorious,** 20 Q.B.D. 764, the Court held that where a judgment is obtained irregularly the defendant is entitled ex ***debito justitiae*** to have it set aside. The irregularity complained of had to be specified in the summons or notice of motion. The accompanying affidavits would also be required to state the basis for the allegation of irregularity.

Irregularity - due to non-compliance with Rule 12.5

(9) The Civil Procedure Rules mandates the Court to set aside any judgment that was obtained as a result of non-compliance with any one condition enumerated in Rule 12.5

Rule 12.5 - Conditions to be satisfied - judgment for failure to defend

The registry must enter judgment at the request of the claimant against a defendant for failure to defend if:

(a) the claimant proves service of the claim form and particulars of claim on that defendant; or

(b) an acknowledgment of service has been filed by the defendant against whom judgment is sought, and

(c) the period for filing a defence and any extension agreed by the parties or ordered by the Court has expired;

(d) that defendant has not:

(i) filed a defence to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6):

(ii) where the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it: or

(iii) satisfied the claim on which the claimant seeks judgment: and

(e) (where necessary) the claimant has the permission of the court to enter judgment.

(10) **Rule** 12.5 enumerates the conditions of which the claimant is obliged to satisfy the registry of in order to obtain a judgment in default of defence. The application to set aside a judgment so obtained need only prove that **any one** of these conditions was not satisfied. The claimant is asserting that the default entered was regular, because the defendants were served. In addition, the 2nd and 3rd defendants acknowledged service of the claim form, in accordance with Rule 12.5 (b). The claimant contends that no defence was filed within

the 42 days allowed from the date of service of the claim form, that is, 30th day of December 2003, further, no extension of time was sought within which to do so, as required by Rule 12.5(c). Additionally, none of the actions required in accordance with Rule 12.5 (d) to be done by the defendants, which would have the effect of making impermissible a default judgment being entered against them, have been done.

Rule 12.5 (d) prevents the entry of a default judgment if the defendant filed a defence to the claim or any part of it or had their defence struck out; (ii) filed an admission to pay all of the claim together with a request for time to pay; (iii) satisfied the claim on which the claimant seeks judgment. The defendant through his attorneys-at-law has not admitted the whole or any part of the claim. **(See Form 3)**.

The claimant's request for default judgment, answers the requirements raised in Rule 12.5 (d) by the claimant's certification that;

(a) the time for the defendants to file and serve their defence has expired: and

(b) that no defence or counterclaim has been served on us: and

(c) that the defendants have not paid any monies in settlement of the claim.

It is clear that the claimant has satisfied the requirements of Rule 12.5, that the default was regular. However, all three defendants did complain that they were not served. Their complaints were unsustainable in light of the clear evidence, which we shall now examine, that was amassed against them on this point.

Were the defendants served?

(11) The affidavits in support of the application to set aside the default judgment allege that the 2nd and 3rd defendants were not served with the claim form. The 2nd and 3rd defendants and 3rd party intervener are all parties resident out of the jurisdiction. The 2nd

defendant is a "member" of the 3rd defendant. The 2nd defendant asserts at paragraph 4 of his affidavit dated 3rd March 2005:

> "that neither the 3rd defendant nor I was served with any claim or particulars of claim by the claimant in this claim."

The affidavit of Jean Barnes, attorney for the defendants, also asserts without more that the 2nd and 3rd defendants were not served. The 2nd defendant, nonetheless, admits that "after the filing of the claim in 2003, the issue of the proper jurisdiction for any determination of the dispute was a continuing and live issue between me and the claimant" This admission was not surprising, in light of the fact John Graham, who had acknowledged service of claim form and particulars on behalf of the 2nd and 3rd defendants had appeared for both defendants who had applied to discharge an injunction granted on the 17th December, 2003.

(12) On the 17th December 2003, an Order was made allowing service of all three defendants, by leaving sealed copies at stated address in Florida. One, Arlene Khan has sworn an affidavit that the three defendants were served in compliance with that Order. The claimant also exhibited an Acknowledgment of Service of Claim Form (Form 3) duly signed, 9th January 2004 by John Graham, Attorney–at-Law, for and on behalf of the second and third defendants. In this Form, the Attorney admitted receipt of the Claim Form and the Particulars of Claim. To the question, appearing on Form 3, "Do you intend to defend the claim?" The answer was in the affirmative. The 1st defendant retained Counsel to watch proceedings on his behalf.

(13) Although Rule 12.5 allows the claimant to prove either Rule 12.5 (a) or 12.5 (b), the claimant has adduced evidence with a view of proving both limbs in response to the question of service of the Claim and Particulars. In any event, Rule 5 (6) (1) provides;

(1) Where an attorney-at-law:

(a) is authorized to accept service of the claim form on behalf of a party; and

(c) has notified the claimant in writing that he or she is so authorized, the claim form must be served on that attorney-at-law and personal service is not required.

(2) Where a claim form sent to a party's attorney-at-law who certifies:

that he or she accepts service on behalf of the defendant, the claim is **deemed** to have been served on the date on which the attorney-at-law certifies that he or she accepts service.

The records of the Court reveal John Grahams' letter dated 9th January 2004 to the then counsel for the claimant, in which he wrote, "We act on behalf of Rahul Singh and Commonwealth Communications LLC.....We have received instructions to apply to discharge the Freezing Order and ask that you send us copies of all the documents which are to be served on our client." There is no refutation of the actions of John Graham, by the defendants.

It seems to me that the defendant cannot say they had no notification of the hearings when as early as 9th January 2004 they were issuing instructions based on the claim form served on them. Rule 5.6 (2) creates a presumption that the defendants at this hearing have been unable to rebut. I find that all three defendants were duly served and I so rule. All of the conditions referred to in 13.2 (1) (b), having been satisfactorily complied with, the defendant is therefore not entitled to have the default judgment set aside on the basis that it was wrongly or irregularly entered.

Setting Aside a Default Judgment regularly obtained - Reasoning

(14) The claimants had contended that the judgment was regularly obtained. The applicable Rule in those circumstances is **Rule 13.3 (1).**

This Rule was recently the subject of a procedural appeal in the **SCCA 48/2004 - Caribbean Depot Ltd. v International Seasoning & Spice Ltd**, heard on the 7th June 2004, where the Court allowed an appeal from Mr. Justice McIntosh, who had set aside a judgment on "humanitarian ground." As in the instant case, there had been no challenge raised that the application to set aside had been made as soon as reasonably practicable after the entry of the default judgment.

The Court found that the issues before McIntosh, J. were:

(a) Did the defendant give any good explanation for the failure to file an Acknowledgement of Service?

(b) Has the defendant a real prospect of successfully defending the claim?

Smith J.A. said at paragraph 13.

> "If the answer to either of these is in the negative, the judge would be obliged to dismiss the application to set aside, **only if** the answers to both are in the affirmative, would the court have a discretion to exercise any power under Rule 13.3."

The three limbs of the rules are to be read conjunctively. All three have to be satisfied or the applicant fails.

(15) **Three issues of Rule 13.3**

Firstly, Rule 3.3 (1) (a)

The default judgment was entered on the 17th February 2004; the Notice for Court Orders was filed on 7th March 2005. As already indicated, no challenge was raised as to whether the defendants had responded to the entry of the default judgment as soon as practicable.

Secondly, in accordance with Rule 13 .3 (1) (b)

Has the defendant offered a good explanation for the failure to file a defence? The claimant has alleged that the evidence before the Court discloses that the 1st defendant has ignored these proceedings and that the 2nd and 3rd defendants have made no effort, for fourteen (14) months, to file defence.

The defendants have not provided this Court with any reasonable excuse for the inordinate delay in filing a defence to the Claim. They claim they had no duty to provide a defence until the irregularity is cured.

(a) The defendants have filed several affidavits in support of their application to set aside the default judgment. None of these condescend to specify an explanation for the failure to file a defence. Rahul Singh's affidavit is to the effect that he and the 2nd defendant have not been served. That his intervention in the matter was necessary to secure the release of the money frozen by ex parte order of the Court. He alleges that since the filing of the Claim, the issue of the proper jurisdiction for the determination of the dispute has been a continuing and live issue between himself and the claimant. He complains that the basis of the Claim has been eroded by the testimony, on behalf of the claimants and the Arbitral hearings in Florida. He further complained that the claimant was in breach of all the duties of disclosure, honesty and good faith owed to the Court by seeking to request a default judgment on a basis clearly known not to be valid at the time of such request. Singh said he had a reasonable expectation that the claimants who had requested that they discontinue their arbitral proceedings in Florida in exchange for the release of the frozen sums would not have pursued the default judgment.

(b) Jean Barnes' affidavit did not condescend to detail any explanation for the delay; she testifies that the defendants were estopped from pursuing the Claim due to the Arbitral proceedings in Florida. According to her, those hearing also produced evidence from the mouth of the defendants' witnesses that would contradict the pleadings in the Claim. She further stated that another source of the irregularity was that the sum pleaded was unliquidated and there were contradictions in the amount claimed on the face of the Particulars of Claim. There was no claim for interest. Paragraph 24 of Jean Barnes' affidavit; states:

> **The Defendants should not be required to enter a defence unless the irregularities in and bad faith associated with the claim are cured, and the Claimant has established that there has been no deceit or abuse of process of the court.**

This clearly negatives any intention on the part of the defendants to file a defence; to the contrary, they are proposing that the next step in the proceedings were not for them, as the claim is an abuse of the Court. No authority, precept, precedent or source was cited to support this unusual submission.

(c) The affidavit of Marc Diamond filed in opposition to the applications, denied that there was any agreement to stay of proceedings and denied that there was any authorization by the claimant to anyone to conduct on its behalf discussions with a view to the voluntary resolution of the matter.

For the delay which amounts to fourteen months in respect of the defendants' allegation that the involvement in the arbitral proceedings and discussions estopped the claimants from proceedings with the matter, the defendants were clearly more concerned with dealing with the matters raised in the claimant's application for injunctive relief. Even

if there were on-going negotiations for a settlement, that would not constitute a bar to their filing a defence. Neither would arbitral hearings, particularly when conducted against a background of the "proper jurisdiction for the determination of issues," be a bar to the filing of a defence. There was no good explanation for the delay of fourteen months and I so rule. Having so found, there is no need to consider whether the defendants had a real prospect of successfully defending the claim. The application by the 2nd and 3rd defendants to set aside the default judgment therefore fails.

The Court was invited to use its inherent jurisdiction to strike out the claim. The Court can exercise its inherent jurisdiction in cases which are obviously an abuse of its process. Judicial discretion must be exercised with great circumspection and only where it is perfectly clear that the claimant cannot succeed. This is not such a case.

(16) **An application by 3rd party intervener Ocean Petroleum USA Inc. to vary Order of Court pursuant to Rule 42.12**

The Applicant sought the following Orders;

(a) That there be a Stay of Execution of any process to execute any judgment of the court which could access the money, which was the subject of the appeal.

(b) That the Order of the Court of the 27th July 2004, freezing the sum of $630,000.00 in the account of Rahul Singh is to continue, pending the appeal.

The grounds of the Application were:

(i) That the applicant has appealed the Order of the Court that the relevant sum of $630.000.00 in the account of Rahul Singh and Rohit Singh is not the property of the Applicant.

(ii) That the default judgment taken out against the 2nd and 3rd defendants could result in steps being taken to access the said amount frozen in the account of Rahul Singh and Rohit Singh in the National Commercial Bank.

(iii) The applicant may be deprived of the money in issue, before it has had the appeal determined at the Court of Appeal, which action would make the result in that appeal nugatory.

(17) It was submitted on behalf of the applicant that the funds involved are not connected with the claimant's business or claim. It was urged that the funds belong to Ocean Petroleum, as set out specifically in the Affidavit of Rohit Singh. Because of the funds frozen, Ocean Petroleum has suffered loss and damage which are continuing. It has had to be taking steps to sell it office building in Florida. The appeal does not act as a stay of the proceedings.

Reasoning

(18) The 3rd party intervener had applied on the 14th of December 2004 for the funds to be released. This application was refused by the Court on the 11th January 2005.

It is well settled that in order for the applicant to succeed in discharging the injunction, the 3rd party intervener had to satisfy the Court that there had been a significant change in circumstances, and those circumstances did not include the provision of new arguments or evidence that could have been placed before the court at the earlier hearing. The issue as to the number of T1s was a live issue before Justice Rattray and continues to be an issue now The Arbitration findings are unhelpful on certain areas of the evidence which was before him. Nonetheless, the defendants have argued before me that that evidence discloses contradictions in the claimant's case. The arbitrator makes no specific finding as to the number of T1s, at page 18 of his judgment Rattray, J says:

> "I am of the view that the contention over the number of circuits leased from Cable and Wireless Limited and available to Kingston Telecom is one of the several disputes which exist between the parties to this action, the issue of whether the number of circuits is 5 or 20 and the question of the revenue generating capacity of

> Kingston Telecom based on its capacity to convey voice traffic per month are all matters on which the parties are at odds. A judge at trial must be left to determine these issues.
>
> There is nothing before me to indicate material non-disclosure on the part of the Claimant in the application for the freezing order."

I find that there were no new issues raised before me that were not available to the 3rd party intervener at the previous hearing. The application is refused.

(19) **Cable and Wireless application**

Rule 19.2 (3) provides as follows:

The Court may add a new party to proceedings without an application, if:-

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings, or

(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

(20) The applicant claims to have a vested interest in this case as it is owed a judgment in the amount of J$11,789,645.51 with interest at the rate of 22.75% from 22nd March to date of payment by Ranjet Communications Ltd. (thereinafter called Ranjet), of which the 2nd defendant is a shareholder. Ranjet had provided the applicant a guarantee pursuant to an Interconnection Agreement. Ranjet represented that they wished to transfer the funds from one financial institution to another. When the funds were released to accommodate the transfer, Ranjet failed to replace the said Guarantee. The funds that were used to secure the guarantee were subsequently removed for the latter institution.

Rohit Singh, and his brother the 2nd defendant, are both shareholders in Ranjet. Rohit Singh, in an affidavit filed in support of the 3rd party interveners application for

variation of order state that Ranjet Communication Ltd. has nothing whatsoever to do with Kingston Telecom Ltd. The 3rd party intervener has similarly disclaimed any privity of relationship with Ranjet, except insofar as it provided the funds which were to be held in trust by Rahul Singh and Rohit Singh, to guarantee payment on behalf of Ranjet to Cable and Wireless Limited. Rahul Singh and Rohit Singh were at the material times two of the shareholders of the 3rd party intervener.

(21) **ANALYSIS**

There are issues of Ranjet's relationship with Kingston Telecom which may shed light on the important question of the Revenue capacity of Kingston Telecom. Kingston Telecoms' licence was procured on the 16th day of July 2002 to provide, inter alia; international voice service provider, domestic voice service provider, they also obtained a licence dated 25th March 2003 to provide international (voice/data/transit). However, on 27th day of June 2003, Ranjet was incorporated. On the 17th day of September 2003 Ranjet secured an international voice/data carrier licence. Marc Diamond, in his purported capacity as shareholder and Director of Kingston Telecom in an affidavit dated December 2003, said:

> "In the wrongful exercise of the powers .... 1st respondent (Zion Dahari) caused the Applicant (Kingston Telecom) to enter into an exclusive Carrier Services Agreement with a company owned and operated by himself and the 2nd respondent and also to enter an agreement with the 2nd respondent under which equipment was supplied to the applicant on terms which entitled the 1st and 2nd defendants."

Adding Cable and Wireless should allow the Court to better examine the operation of these closely aligned companies.

(22) I make the following orders:

The 2nd 3rd defendants' application

(a) the application to set aside judgment in default entered on the 17th day of February 2005 is refused.

(b) The application for a Stay of Execution of any process arising from the Default Judgment is refused.

(c) Application for a stay pending further order is refused.

(d) Application for the discharge of freezing order and striking out of claim refused.

Application by Cable and Wireless Ltd.

(1) Cable and Wireless be joined as a 4th party /intervener to this suit.

(2) That the defendants, heir, servants and/or agents be restrained from dealing with any assets whether located within the jurisdiction or not.

Application by Ocean Petroleum

(1) That the application for a Stay of Execution of any process to execute any judgment of the Court which could access the money is refused.

(2) That the Order of the Court of the 27th July 2004, freezing the sum of $630,000.00 in the account of Rahul Singh and Rohit Singh, "until trial" has been determined by the default judgment.