IN THE SUPREME COURT OF JUDICATURE OF JAMACA
CLAIM NO. 2005 HCV 00515

BETWEEN	PARIO SOLUTIONS LIMITED (Formerly The Lewis Group)	CLAIMANT
AND	GOTEL COMMUNICATIONS LTD.	DEFENDANT

IN CHAMBERS

Mr. Christopher Samuda instructed by Samuda and Johnson for the claimant
Miss Gillian Mullings instructed by Patrick Bailey and Company for the defendant

April 19 and May 2, 2007

APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT OF DEFENCE

SYKES J.

1. This is an application by Gotel Communications Ltd. ("Gotel") to set aside a judgment. It relies on two affidavits of Mr. George Neil who describes himself as responsible for all administrative and legal matters concerning Gotel. The application was dismissed and these are my reasons.

2. It all began on March 1, 2005, when the claimant, Pario Solutions Limited ("Pario") claimed the sum of US$1,219,938.49 and interest of US$207,389.54 by way of claim form on the same date. Pario alleged that it was owed this money as at July 31, 2003, in respect of telecommunications equipment and related services provided to the defendant.

3. On June 7, 2005, the defendant filed an acknowledgment of service. It said in the acknowledgment that it was served on May 23, 2005. On August 2, 2005, Pario requested a judgment in default of defence. No issue has been taken regarding the regularity of the judgment. Judgment was entered in the sum of US$1,513,922.80. On September 19, 2005, the defendant secured an order for seizure and sale of goods. Apparently, the bailiff attempted to execute the order. Gotel finally stirred.

4. On October 12, 2005, Gotel filed an application

   a. to set aside the default judgment;
   b. to stay execution of the judgment;
   c. permission to file and serve defence within seven days of setting aside the judgment.

5. The grounds for the application were that:
   a. the defendant has a reasonable prospect of successfully defending the claim;
   b. the defendant had a good reason for judgment being entered in default.

6. The relevant rule is rule 13.3 of the Civil Procedure Rules ("CPR") which reads:

> *Where rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant -*
>
> *(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;*
>
> *(b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and*
>
> *(c) has a real prospect of successfully defending the claim.*

7. I shall examine the grounds put forward beginning with the second ground first. The second ground of the application is an attempt to satisfy rule 13.3 (2) (b). Mr. Neil stated in his affidavit of October 12, 2005, that he did not instruct his attorneys because he was involved in a serious accident while on a business trip in Central America and found himself unable to manage the affairs of Gotel. He alleged that he hired a management team to oversee Gotel's affairs but they (the hired management team) were hampered by a financial crisis which had overtaken the company and were unable to attend to this matter. He said that he only recently recovered.

8. The affidavit is outstanding for its vagueness. He does not say where in Central America he was injured, the nature of his injuries and how these injuries incapacitated him. He did not explain how it was that he was able to give instructions to his attorneys sufficient to enable them to complete an acknowledgment of service but insufficient to enable them to file a defence.

9. When the proposed defence is examined, there is nothing complex about it. The defence, simply put, is that Pario did not perform properly under the contract and so Gotel did not owe them any money.

10. When a claimant properly obtains a judgment, he obtains a thing of great value, particularly here where trial dates are still, on average thirty six to forty eight

months from filing the claim. Delays are still quite common in our litigation process. Take this very application. Whatever the reasons are, the application was filed on October 12, 2005, and is just being heard on April 19, 2007.

11. I would have thought that if a defendant is seeking to have a regularly obtained judgment set aside, he would lay bare all material facts so that the court can make an informed decision. Here the defendant has not been as open with the court as he needs to be. He can choose how he responds but he takes the risk that a court may find that his affidavit is deficient. I conclude that Gotel has not advanced a good explanation for the failure to file a defence. Hiding behind vague statements is not good enough.

12. I now go to the first reason. The defence admits that there was a contract between the parties and that the agreement was that the solution would cost US$500,000.00. The solution encompassed the provision of telecommunications equipment and services. Gotel said that Pario did not provide an effective solution which caused Gotel to seek the services elsewhere. From this, Gotel stated that it did not owe Pario any money at all.

13. I believe that Gotel is under a misapprehension here. Where parties enter into a contract and there is a breach, then the contract is not at an end. The breach presents the innocent party with a number of choices. The innocent party may affirm the contract and sue for damages. He may affirm the contract and not sue for damages or he may sue for damages and bring the contract to an end. A breach therefore does not mean, unless there are terms to that effect, that the innocent party is not liable to the party in breach for such services or goods as may have been supplied under the contract where the contract is one for provision of goods and services.

14. I do not see that the proposed defence has any prospect of success. It has not denied the express claim of Pario that the value of the goods and services provided amounted to US$1,219,938.49 as of July 31, 2003. To say that the parties agreed that the solution would cost US$500,000.00 is not an effective refutation since it is well known that even if the parties agreed on a price initially, that may change once the contract is being performed. At best, Gotel had a counter claim for breach of contract but that has not been pleaded. Finally, the only basis on which Gotel could say that it owed no money to Pario is by alleging that Pario did not supply any goods or services at all but to say that Pario's performance was poor, without more, cannot lead to the conclusion that Pario is not owed any money.

Conclusion

15. Application to set aside judgment is dismissed with costs to the defendant to be agreed or taxed.