IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
HCV 02006 OF 2006

BETWEEN	**GOTEL COMMUNICATIONS LIMITED**	**FIRST CLAIMANT**
AND	**INDEX COMMUNICATIONS NETWORK LIMITED**	**SECOND CLAIMANT**
AND	**CABLE AND WIRELESS (JAMAICA) LIMITED**	**DEFENDANT**

IN CHAMBERS

Miss Gillian Mullings instructed by Patrick Bailey and Company for both claimants

Miss Hilary Phillips Q.C. and Mrs Denise Kitson instructed by Grant, Stewart, Phillips & Company for the defendant

JUNE 20 and June 30, 2006

APPLICATION TO DISCHARGE EX PARTE INJUNCTION

SYKES J

1. On an ex parte application Straw J. on June 7, 2006, granted the claimants, Index Communications Network Limited and Gotel Communications Limited (collectively referred to as Gotel) an injunction against the defendant, Cable and Wireless (Jamaica) Limited ("C&W") in the following terms:

- **a.** The defendant, its servants and/or agents is prohibited from blocking any and/or all calls originating from the Claimants' telephone network until the 30th June 2006.
- **b.** This matter is set for the 30th day of June at 11:30 a.m., or as soon thereafter as Counsel may be heard, for further consideration.
- **c.** The claimant gives the usual undertaking as to damages.

2. C & W sought to set aside the injunction, also by an ex parte application on Friday, June 16, 2006. C & W alleged that there were very serious and material omissions. I set the matter down for an inter partes hearing on June 20, 2006, with directions that the claimants

should be served with C & W's application and affidavit in support. At this hearing Miss Gillian Mullings applied for an adjournment on the basis that she was served with the affidavit and notice on Friday, June 16, 2006, after 4:00 p.m. and needed time to receive instructions to reply to the affidavit. In the normal course of things this would not necessarily be an unreasonable request and ordinarily would have been granted. I refused the adjournment, discharged the injunction and ordered an enquiry into whether the defendant has suffered any damage because the injunction was granted.

Non-disclosure

3. The defendant alleged that there were very material non-disclosures committed by the claimants on their application before Straw J. I now set out briefly the affidavit of George Neil who deponed on behalf of the claimants. He outlines the history of the contractual arrangements between the claimants and the defendant. He next states that the relationship was "volatile" (his word) (see para. 9). He mentioned that there was a suit between Gotel and C & W. This was Suit number HCV 00244 of 2004. He ends by saying that the defendant is preventing the claimant from effectively operating its service. The tone of the affidavit paints C & W as an abusive monopolist which is seeking to eliminate the claimants from the market. When presented in this way Straw J. was persuaded to grant the injunction.

4. At the hearing before me it was admitted by Miss Mullings and Mr. Undel Williams, Chief Operations Officer for both claimants that Straw J. was not told that:

- **a.** the claimants admitted that they were using the circuits in breach of the contract between themselves and C & W;
- **b.** the claimant admitted the breach of contract and consequently entered into an agreement with C & W to pay for use;
- **c.** the claimants did not honour the agreement to pay C & W and this led C & W to file Suit No. HCV 00244 of 2004, which ended with judgment being entered against Gotel on May 26, 2004 in the sum of JA$48,306,193.39 and US$494,383.56;
- **d.** the judgment was served on Gotel by registered post in July 2004;
- **e.** C & W applied for and received on or around August 25, 2004, an order for Seizure and Sale of Gotel's goods;

f. Gotel created a mortgage over its property on September 16, 2004, in favour of Capital Solutions Limited in the sum of $60,000,000.00;

g. the bailiff could not execute the writ of seizure and sale because of the charge created over Gotel's property;

h. on June 16, 2005, Brooks J. ordered Gotel to pay C & W US$50,000;

i. a cheque in the sum of US$50,000 paid to C & W was returned for insufficient funds but a subsequent cheque was honoured;

j. the judgment has not been satisfied;

k. on July 21, 2005, Gotel applied to have the default judgment set aside and that application has been adjourned to January 8, 2007;

l. C & W petitioned to wind up Gotel and this application was adjourned to February 23, 2007 (see Claim No. HCV 1802 of 2005).

5. On March 16, 2005, the attorneys for Gotel wrote to C & W's attorneys in the following terms regarding the judgment debt:

> *We refer to Judgment [i.e. Claim No HCV 00244 of 2004] herein in favour of your client Cable and Wireless Jamaica Limited.*
>
> *Please note that the Defendants (sic) are experiencing an enormous cash flow challenge at the moment.*
>
> *Nonetheless, due to the resolve of the Director to have the Companies rebound, assiduous efforts are being made to inject new capital in the Defendant Companies.*
>
> *Both companies are determined to honour their indebtedness to your client (**and others).*** (My emphasis)
>
> *In fact, our clients have instructed us to offer a monthly payment of $200,000.00, in the first instance, towards the liquidation of the subject indebtedness.*
>
> *It is expected that in or around October 2005 the monthly payment will be increased substantially.*
>
> *Please be good enough to seek instructions, as our clients desire to make the first payment under its proposal, **immediately.*** (Same as original)

6. Gotel did not honour the agreement. C & W was forced to file suit and obtained a judgment in the sums indicated. These sums are still outstanding. The March 16, 2005, letter admitted the judgment debt as well as other debts. The letter admitted that the

claimants were experiencing an "enormous cash flow challenge." Until the judgment is set aside C & W is entitled to take steps to enforce it which they did and would have but for the charge executed **after** the claimants were served with the judgment. The claimants took no steps to set aside the judgment until one year after it was entered. All this information was known to the claimants' legal advisors before the application was made to Straw J. This is not a case in which the client withheld information from his attorney. The attorneys knew that Gotel had applied to set aside the judgment which they agreed to satisfy. The attorneys knew that C & W had applied to wind up Gotel. This shows that the attorneys failed in their duty as officers of the court to bring to the attention of Straw J. facts that they must have and did know. The attorneys contributed to the misleading picture presented to Straw J. on the ex parte application.

7. Mr. Undel Williams before me stated that one of the grounds on which Gotel wished to set aside the judgment is that the agreement which they signed accepting that there was a use of C & W's facilities in breach of the agreement was signed under duress.

8. The matters listed in paragraphs 4 and 5 are not capable of dispute. The facts regarding the Claim No. HCV 00244 of 2004 are matters of record.

9. In light of Gotel's admitted indebtedness and their inability to satisfy the judgment debt of what value was their undertaking as to damages?

The Law

10. The law in this area was stated recently by the Court of Appeal in ***Sans Souci Limited v VRL Services Ltd*** SCCA No.108 of 2004 (delivered November 18, 2005). In that case the Court restated the very strict obligation imposed on applicants for orders at an ex parte hearing. That case was an application to enforce an arbitration award. At the time of the application the applicants were told that the losers at the arbitration had filed an action challenging the award. This fact was not disclosed to Reid J. and he granted permission to enforce the award. When the matter came before Sykes J. he declined to set aside the order on the basis that the award of the arbitrators was not likely to be set aside and in the final analysis the non-disclosure was not significant. The Court of Appeal held that that was a wrong approach and reaffirmed the strict position. The issue is not whether the beneficiary of the ex parte order would or is likely to prevail at the substantive hearing but whether there was non-disclosure.

11. As I said there is no doubt that there were material non-disclosures. The prejudice to C & W is that it would be compelled to continue service to Gotel when that company is under a judgment debt of at least US$450,000 which has not been satisfied.

12. All the facts not disclosed to Straw J. were known to the claimants at the time of the application. This is not the case where these facts were only discoverable on reasonable enquiry. It is difficult to resist the conclusion that Straw J. was deliberately mislead. This is not a case on innocent non-disclosure. How can companies that are either unable or unwilling to satisfy a two year old judgment be regarded as capable of honouring an undertaking as to damages without a guarantee from a reputable financial institution?

13. Miss Mullings seemed to be labouring under the impression that if she considers that facts are not material then that is the end of the matter and a judge should only discharge the ex parte injunction only if the non-disclosed facts go to an issue in the substantive claim. That is not so. As Dillon L.J. said in ***Lloyds Bowmaker v Brittania Arrow Holdings Plc*** [1988] 1 W.L.R. 1337, 1348:

> *The judge seems to have thought that non-disclosure is only material as a basis for discharging the injunction if it affects some point which it is necessary for the applicant for the injunction to establish if he is to succeed in his claim. Therefore he said that the failure to disclose that the defendants knew about the company was not material, because it would have been no defence for the third party to say in answer to the charge of fraud: "It was not I, it was my tame company who did it."*
>
> *With all respect, I do not agree with the judge that the duty of disclosure is so limited. The applicant owes a duty of fullest and frankest disclosure: if he puts in matters of prejudice he must put them in as fully as is necessary to be fair. He cannot pile on the prejudice and then when it is pointed out that he has told only half of the story and has left out matters which give a quite different complexion, say "Oh, well, it is not material. It is only prejudice, and so, on a strict analysis of the pleadings, does not have to be regarded."*

14. In the case of ***Jamculture Limited v Black River Upper Morass Development Co. Ltd and Agricultural Development Corporation*** (1989) 26 J.L.R. 244 the Court of Appeal of Jamaica, speaking through Wright J.A., in an appeal against the decision of Rowe C.J. (Ag) (as he was at the time) to dissolve an injunction, said that the Court of Appeal can "examine the manner in which [the] injunction was obtained in the light of what is required to be done when applying for an injunction, the emphasis here being on the question whether uberrima fides has been shown."(see page 247 E). I see no reason why this principle should not be applied here where the application is to discharge the injunction.

15. Wright J.A. continued by citing approvingly the passage in Lord Cozens-Hardy M.R. in ***R v The General Commissioners for the purposes of Income Tax*** [1917] 1 K.B. 486 and then added at page 249 H:

> *It is important, therefore, to determine whether the appellant had made a full and frank disclosure of all material facts or whether any deceptions was practised on the Court such as disentitled the appellant to the relief which he sought by way of injunction.*

16. Wright J.A. examined the evidence and concluded that there was material non-disclosure. This led counsel in that case to submit that an injunction would not necessarily be discharged or if discharged a new order on terms could be made. Counsel relied on the principle of innocent non-disclosure. His Lordship stated at page 251 E:

> *But in order to claim protection under the cover of innocence, the non-disclosure must have been inadvertently done; there must not be any intention to deceive or mislead the Court.*

17. The Justice of Appeal concluded at 251 F:

> *Accordingly, what at first blush paraded itself as a confused approach to the issue was really a calculated deception of the Court which disentitles the applicant to the relief sought and which if granted should not, in the light of the relevant authorities, be allowed to stand.*

18. There is the case of ***Clarendon Alumina Productions Limited v Alcoa Minerals of Jamaica*** (1988) 25 J.L.R. 114 in which the Court of Appeal held that the test as to whether an order made ex parte ought to be set aside for non-disclosure of material facts is whether the party who obtained the order (a) withheld the material in order to deceive the court or (b) deliberately misstated the facts with the intention of deceiving the court. This test seems quite stringent and at variance with ***Brinks Mat Ltd v Elcombe*** [1988] 1 W.L.R. 1350 which was approved and cited extensively in the ***Jamculture Ltd*** case. ***Brinks Mat*** was cited in the Court of Appeal's judgment in ***San Souci*** but there was nothing in ***San Souci*** to indicate that the principles in ***Brinks Mat*** were modified by the Court in any way. This would suggest that in so far are as the test in ***Clarendon Alumina Productions*** is at variance with ***Brinks Mat*** than the latter is to be preferred. Although ***Brinks Mat*** was decided on June 12, 1987, it was not cited by or apparently cited to the court in ***Clarendon Alumina Productions*** which was not cited to or by the court in ***Jamculture***.

19. In examining ***Brinks Mat*** there is no suggestion that an injunction obtained ex parte cannot be set aside for non-disclosure unless there is evidence that the non-disclosure was

deliberate or with the intent of deceiving the court. On the contrary the ***Brinks Mat*** court held that even where the non-disclosure was innocent that fact was not decisive in favour of maintaining the injunction because "the duty on the applicant [is] to make all proper inquiries and to give careful consideration to the case being presented" (see page 1357).

20. One possible way of reconciling ***Clarendon Alumina Productions Ltd*** and ***Jamculture*** is to say that in the former case there was innocent non-disclosure which would have permitted the court to continue the injunction had it considered the ***Brinks Mat*** principles whereas in the latter case the court made a clear finding of an intention to deceive the court. However this way of harmonising the decisions only go as far as the actual facts in the cases but not to the applicable principles. In ***San Souci*** the Court of Appeal made no finding of an intention to deceive but still discharged the ex parte order. The ***San Souci*** Court did not cite ***Clarendon Alumina Productions Ltd*** case and there is no evidence that it was brought to the Court's attention. Despite this in light of ***Jamculture*** and ***San Souci*** it is now appropriate to say that an intention to deceive or mislead the court is not a necessary finding in order for a court to discharge an ex parte injunction or order.

21. The propositions arising from this review of the authorities are:

- **a.** an applicant is compelled to make full and frank disclosure in ex parte applications;
- **b.** the applicant /or and his legal advisors are not the judges of whether the fact is material; that is a matter for the court;
- **c.** if an applicant does not make the fullest possible disclosure in an ex parte application this may lead inevitably to the setting aside of the order;
- **d.** the duty of full disclosure means that the applicant must make appropriate inquiries before the application is made because he must disclose not only facts known to him but also facts which would have been known had the inquiries been made;
- **e.** the person seeking to set aside the order needs to establish that he has suffered substantial injustice as a result of the non-disclosure (per Harrison J.A. in ***San Souci***);
- **f.** the applicant to set aside the order does not have to prove that a different order would necessarily have been made;

g. if the non-disclosure is innocent the court may consider whether the order should be continued or discharged and then immediately reimposed with terms;

h. if there was innocent non-disclosure and on the whole facts before the court an injunction could be properly granted had the facts been disclosed then the court may consider continuing the injunction;

i. innocent non-disclosure at least means facts not known to the applicant or if known their significance was not readily apparent;

j. where there is evidence that the court was deliberately mislead or there was conduct calculated to deceive the court this amounts to a flagrant abuse of the court's process and the ex parte order should be discharged immediately;

k. the materiality of any non-disclosed fact sufficient to demand an immediate discharge of the ex parte order is determined by looking at the non-disclosed fact in the context of the particular case.

22. With regard to principle (e) I must confess that it seems very stringent and does not appear to be consistent with many of the cases cited. It is not easy to see why the person against whom an ex parte order has been obtained should show that he has "suffered substantial injustice" before it can be set aside. It does not appear that this stringent test was endorsed by the other two members of the court.

23. The proper approach on an application to discharge an ex parte order on the grounds of non-disclosure is to determine first, whether there has in fact been non-disclosure, second, whether the non-disclosure is material, third, whether it was innocent. A finding of innocent non-disclosure gives rise to considering whether the injunction or order should be continued and on what terms. A finding that the non-disclosure was deliberate and calculated to mislead the court extinguishes any possibility of considering whether the ex parte order should be continued. The basis of the Court acting in this manner is founded on the idea that the party in breach should be punished for his non-disclosure and should be deprived of the benefit of the order. This in turn rests on the core principle of abuse of process, something that every superior court of record has an inherent power to prevent.

24. The evidence before me and the admissions made by Miss Mullings and Mr. Williams make it too plain that the withholding of the information from Straw J. was not innocent or accidental or the product of inadvertence. The vital facts omitted were known to the claimants and their legal advisors.

Application for adjournment

25. Miss Mulling applied for an adjournment to file an affidavit in response to that filed by C & W in support of its application to discharge the injunction. In light of the unchallengeable evidence of material non-disclosure there would be no point in granting an adjournment. Miss Mullings submitted, quite boldly I might add, that the matters not disclosed to Straw J. were not material. Miss Mullings attempted to refer to some decision by the Office of Utilities Regulation that would give a different complexion to the non-disclosures and so she needed time to get this information. This does not provide a sufficient answer to the nature and extent of the non-disclosure. Given this stance I do not see what purpose would be served by an adjournment. In light of the established material facts that were not disclosed it would not be effective management of the case to grant an adjournment.

Conclusion

26. The defendant acted appropriately in bringing before the court as soon as possible the extent of the non-disclosures and to seek to discharge the order even before the June 30, 2005, when the matter was scheduled to be further considered.

27. The order of the court is:

- **a.** Application for adjournment refused;
- **b.** Injunction granted by Straw J. on June 7, 2006, discharged;
- **c.** Enquiry to be conducted as to whether any damage has been suffered by Cable and Wireless (Jamaica) Limited as a result of the injunction granted by Straw J.
- **d.** Costs to the defendant;
- **e.** Leave to appeal refused.