



[2016] JMCC COMM 32

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. 2015CD00099**

<b>BETWEEN</b>	<b>SEAWIND KEY INVESTMENTS LIMITED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>COPIA COMMUNICATIONS LLC</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Emile Leiba and Jonathan Morgan instructed by DunnCox on the claimant

Roderick Gordon and Kereene Smith instructed by Gordon McGrath for the defendant

October 25, November 14 and 21, 2016

**CIVIL PROCEDURE – APPLICATION FOR LEAVE TO FILE DEFENCE OUT OF TIME  
– DEFENDANT FAILING TO FILE DEFENCE WITH TIME SET BY RULES –  
DEFENDANT FAILING TO FILE DEFENCE IN TIME SET BY COURT ORDER –  
DEFENDANT IN BREACH OF COURT ORDER**

**SYKES J**

**Deliberate breach or blameless inadvertence?**

- [1] In June 2009 Seawind Key Investments Limited ('Seawind') agreed to purchase from Copia Communications LLC ('Copia') wireless and wired internet services. The contract made provision for termination. Seawind asserts that it terminated

the contract in accordance with the provisions. The reasons for the termination are not relevant to the application before the court.

- [2] In order to confirm its legal position, Seawind had a fixed date claim form supported by affidavit issued on July 17, 2015. The affidavit of Mr Emilio Huhn supports the fixed date claim form. Seawind asked for remedies including a declaration that the contract was properly terminated and also a declaration that no monies are owed to the defendant.
- [3] The affidavit of Shadion Jadene Owens indicated that service was effected by registered post as permitted by the rules.
- [4] Copia has not filed any affidavit in response and has now made this application for an extension of time within which to do so. Seawind opposes this application on the ground that the defendant effectively made a decision to ignore the proceedings in Jamaica and pursue its remedies in the United States of America.
- [5] The affidavit in support of the application for extension of time comes from Miss Kereene Smith attorney at law. She states that Copia has not filed an affidavit in time because it had initiated a suit in the Massachusetts court. Counsel indicated that the Massachusetts court declined to exercise its jurisdiction in favour of Copia. Copia having failed in Massachusetts has set off to another state, Pennsylvania, seeking redress for the very issues before the Jamaican courts.
- [6] Miss Smith has filed a second affidavit to say that Copia took its case to Pennsylvania and not Ohio as previously stated in the first affidavit. No further relevant information was contained in the second affidavit and nothing more will be said about it.
- [7] Miss Smith states, in the first affidavit, that '[d]ue to inadvertence, particularly owing to its preoccupation with the ongoing litigation in the United States, the Company did not provide us with full and timely instructions in order for [us] to prepare the defendant's evidence in response to the claim.' The affidavit added

that the defence is meritorious and has a real prospect of success. It was also stated that 'it would therefore be in the best interest of justice that all of the relevant information is before the court so that it may effectively adjudicate the matter.'

[8] Mr Jonathan Morgan, attorney at law, provided two affidavits on behalf of Seawind opposing the application for an extension of time. He provides some detail which must be recounted. He states:

- i) the claim was commenced by fixed date claim form filed on July 17, 2015;
- ii) it was sent to the defendant by registered post on August 4, 2015;
- iii) the claim came on for first hearing before Carol Edwards J on October 2, 2015 and on that date the defendant's attorney at law produced and filed an acknowledgment of service on the same date;
- iv) the first hearing was adjourned to December 3, 2015. On December 3, 2015 her Ladyship made the following orders:
  - (a) the defendant to file and serve affidavit on or before 23<sup>rd</sup> December 2015;
  - (b) the claimant permitted to file an affidavit on or before 18<sup>th</sup> January 2016;
  - (c) trial fixed for April 11 to 13, 2016 in open court;
  - (d) all affiants to attend for cross examination;
  - (e) costs to be costs in the claim;
  - (f) claimant's attorneys at law to prepare, file and serve the orders herein.
- v) the sealed formal order was served on the defendant on January 28, 2016. The defendant, despite being represented by counsel on December 3, 2015

and being served with the formal order, failed to comply with the order to file and serve his affidavit.

vi) the matter did not go on in April. It was adjourned to September 2016. The September dates have been vacated and the matter now set down for December 12 – 14, 2016.

[9] It should be observed that that is the second extension of time the defendant is seeking. In December 2015, Copia received a de facto extension of time since the 42 days within which it ought to have responded to fixed date claim form had passed by the time Edwards J conducted the first hearing in December.

[10] Mr Morgan exhibited the decision of the United States Court of Appeals for the First Circuit in **Copia Communications Ltd v A M Resorts L.P. and Seawind Key Investments Ltd** No 15 – 1330 (delivered January 13, 2016). It is a decision of Kayatta J, Circuit Judge, who wrote on behalf of the entire three-member court. The court dismissed Copia's appeal against the District Court's decision to decline jurisdiction over Seawind. The inescapable inference from this decision is that Copia made the deliberate decision to ignore the Jamaican court proceedings and pursue litigation in the United States of America. A remarkable decision in the face of clause 17 of the contract which reads:

*This agreement shall be governed by and construed in all respects in accordance with the laws of Jamaica, W.I. and each party hereby submits to the non-exclusive jurisdiction of the Court of Jamaica W.I.*

[11] Mr Morgan's second affidavit exhibited more documents from the litigation in Massachusetts court. In Copia's appellate brief there is this assertion by Copia:

*Third, the appellant has a substantial interest in obtaining convenient and effective relief in the Commonwealth. The record below demonstrates that Copia previously been involved in the judicial system of Jamaica, which has effectively denied justice to the Appellant. ... The Jamaican courts are riddled with*

*corruption and inefficiencies, and standard business disputes take a decade or more to be resolved. Id The judicial system is tipped against foreigners and has a significant lack of transparency.* (emphasis added)

- [12] It is appropriate to point out that Copia began litigation in the United States before this claim was filed but what is undeniable is that Copia took the view that Jamaican court system was corrupt. This may well explain its decision to pay scant regard to the order of Edwards J requiring it to submit affidavits by a certain date. This attitude may well explain why it took no active part in the litigation until it filed, rather belatedly, two affidavits from a Mr Darryl Wehmeyer who says that he is the Chief Executive Officer of Copia. These affidavits are not properly before the court and will be excluded from consideration.
- [13] This court does not accept the explanation advanced by Copia, through its attorneys, that it did not file the affidavit in the specified time because of inadvertence due to preoccupation with the Massachusetts litigation. This court accepts that the real reason was that Copia took the misguided view that the Jamaican court system was corrupt and consequently sought solace in the United States. Had Copia filed its affidavits in time the matter could have been heard in April 2016 and but for its attorneys the matter would have been heard in September 2016.
- [14] In support of the application Mr Gordon has cited the Court of Appeal's decision in **The Attorney General of Jamaica and another v Rashaka Brooks Jnr (A Minor)** [2013] JMCA Civ 16. In that case Brooks JA established that when considering the exercise of a discretion under the Civil Procedure Rules, in the absence of any mandatory bars to the exercise of the discretion, the decision maker should not adopt an inflexible position but take all the circumstances into account. In that case the learned Master was held to have erred when she concluded that the absence of defence filed by the defendant automatically precluded her from granting the extension of time. It must be pointed out that the learned Justice of Appeal was not saying that there was no basis for refusing the

extension of time. The problem was that the learned Master approached the matter in this way: absence of defence means no extension of time. This court is duty bound to apply this decision.

- [15] Mr Emile Leiba emphasised that the reasons advanced by the defendant for not complying with the Civil Procedure Rules and the order of Edwards J do not bear scrutiny. The court agrees but that is not the end of the matter.
- [16] The factors to be taken into account in this case are as follows:
- i) Copia began litigation in the United States before this claim was filed;
  - ii) Copia was represented by counsel at the October and December 2015 hearings;
  - iii) orders were made by Edwards J at the December hearing;
  - iv) Copia received a de facto extension of time from Edwards J at the December 2015 hearing;
  - v) Copia made the deliberate choice to ignore the orders of Edwards J despite the fact that a trial date was set for April 2016;
  - vi) Copia seems to be seeking to safeguard its position in Jamaica having been rebuffed twice by the Massachusetts courts;
  - vii) the trial dates in this matter can still be met if Copia complies with the court orders to be made;
  - viii) the court has sufficient tools to manage these circumstances and the exercise of the court management powers are sufficient to ensure consequences follow for further breaches by Copia of the procedural rules and court orders;

ix) the court has to take care that it does not encourage litigants domestic or foreign in the view that they can safely ignore procedural rules and judicial orders and get back in the litigation at their whim.

## **Resolution**

[17] Taking all matters into consideration the court grants an extension of time to Copia. The orders are as follows:

- i) extension of time granted;
- ii) defendant to file and serve affidavits not later than November 28, 2013 failing which it cannot rely on any evidence during the trial of the claim;
- iii) claimant, if so advised, permitted to file and serve affidavits in response not later than December 7, 2016;
- iv) affiants for defendant must turn up in person for cross examination at trial failing which any affidavits filed are struck out and defendant cannot adduce any evidence at trial;
- v) trial dates of December 12 – 14, 2016 are confirmed but in the event that they are vacated the trial is adjourned until January 19 – 20, 2017;
- vi) leave to appeal granted to claimant;
- vii) costs to the claimant on an indemnity basis;
- viii) costs to be taxed immediately;
- ix) claimant's attorneys at law to prepare file and serve order.

[18] The court is also of the view that costs should be on an indemnity basis in light of the fact that Copia made a deliberate decision not to conform to the rules of litigation and to ignore the order of Edwards J. The decision was borne out of a

complete lack of regard for court orders and was bordering in being contumelious.