COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2014/CLE/gen/00872

BETWEEN

THE BAHAMAS COMMUNICATIONS AND PUBLIC OFFICERS UNION PENSION PLAN & TRUST FUND

(By AVERIL CLARKE and BARRY WILMOTT in their capacity as Trustees)

Plaintiff

AND

THE BAHAMAS COMMUNICATIONS AND PUBLIC OFFICERS UNION (BCPOU)

(By SHARAZARD PICKSTOCK, MARTIN CLARK AND HILBERT COLLIE as Trustees)

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Kahlil Parker and Ms. Roberta Quant for the Plaintiff
Mr. Thomas Desmond Bannister for the Defendant

Hearing Date: 09 November 2016

CATCHWORDS:

Practice and Procedure – Ex parte Injunction granted – Inter partes hearing of application to continue the injunction based on Undertaking – Was there an undertaking - Final Judgment – Is Undertaking still subsisting – Is there an extant cause of action - interlocutory relief is merely ancillary and incidental to a pre-existing cause of action.

The Plaintiff Pension Fund applied to the Supreme Court for an injunction to restrain the Defendant Union, its servants and/or agents from interfering with the operation of the Plaintiff. The application was made in an action filed in 2014 in which the sole relief that

was claimed was an injunction in similar terms pending the conclusion of another action that was filed in 2012 between the Plaintiff and several of its former Trustees.

The 2012 action came to an end shortly after the commencement of the 2014 action, with a Final monetary Judgment being entered by consent by the Plaintiff against the former trustees. At the time of the application the Plaintiff claimed that it was currently in the process of enforcing the Judgment, and that the trustees had applied to have it set aside.

In its application, the Plaintiff claimed that it had restrained itself from approaching the court sooner because of an undertaking given by Counsel for the Defendant in the 2014 action, which their Attorney had relied upon. They alleged that the Defendant was now in the process of dishonouring the undertaking. The Defendant queried whether an undertaking had in fact been given and also queried whether the Plaintiff had met the requisite criteria for the issuance of an injunction.

HELD:

1. On the facts, an undertaking had in fact been given. However, that undertaking could not have been intended to continue after the entry of the Final Judgment in the 2012 action.

2. The enforcement of a Judgment is an entirely different matter, and in this case involved different considerations that were extraneous to the pleadings in the 2014 action. Accordingly, since the relief sought in the 2014 action depended entirely upon the 2012 action, the entry of the Final Judgment in the 2012 action effectively terminated the cause of action in the 2014 action. Accordingly, there was no extant cause of action for an injunction to attach itself to.

3. A right to obtain an interlocutory injunction is not a cause of action. It cannot stand by itself. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court: see **Siskina (Cargo Owners) v Distos Compania Naviera S.A.** [1979] A.C. 210 at page 256; **Meespierson (Bahamas) Ltd v Grupo Torras S.A.** (No. 41 of 1998) and **Bimini Blue Coalition Limited v Rt. Hon. Perry Christie Prime Minister et al** (SCCivApp No. 35 of 2014) - per Adderley J.A.

JUDGMENT

Introductory

[1] **Charles J:** Pursuant to Order 29 Rule 1 of the Rules of the Supreme Court ("RSC") and/or under the inherent jurisdiction of the Court, on 4 October 2016, the Plaintiff Pension Fund ("the Plaintiff") filed a Summons seeking to restrain the

Defendant Union ("the Defendant") by its servants and/or agents from interfering in any way with the operation and management of the Plaintiff until further or final order of the Court. The Summons was supported by the second affidavit of the Chairman of the Plaintiff, Averil Clarke. ("Mr. Clarke").

Background facts

[2] There are serious allegations of misconduct and mistrust concerning the operation and management of the Plaintiff which is seized of millions of dollars' worth of assets. Mr. Clarke is the Chairman of the Plaintiff. Sharazard Pickstock, Martin Clark and Hilbert Collie are Trustees of the Defendant and are the nominal Defendants. They have provided a joint affidavit to the Court filed on 07 November 2016.

[3] Sherry Benjamin is the Secretary General of the Defendant. She is also a Trustee of the Plaintiff. Mr. Bernard Evans ("Mr. Evans") is the President of the Defendant. They also have provided affidavits in this matter.

[4] Most of the allegations are directed at Mr. Evans who also happens to be a judgment debtor of the Plaintiff to the tune of $1,350,000.00. It is the allegation of the Plaintiff that Mr. Evans is interfering with the operation and management of the Plaintiff for his own gratification. The Court is not called upon to make any factual findings on this matter but merely to determine whether the Ex parte Injunction granted on 19 October 2016 ought to continue based on an undertaking allegedly given by the Defendant to the Plaintiff on 7 August 2014.

[5] By Writ of Summons filed on 25 June 2014, the Plaintiff sought an injunction to prohibit the Defendant from interfering with the operation and management of the Plaintiff pending the conclusion of Supreme Court Action 2012/CLE/gen/00573 ("the 2012 action").

[6] On 26 June 2014, the Plaintiff filed an Ex parte Summons for an Order that the Defendant by its servants and/or agents be restrained from interfering in any way

with the operation and management of the Plaintiff until further or final order of the Court. The Ex parte Summons was supported by an affidavit of Mr. Clarke filed on 27 June 2014.

[7] For present purposes, it is helpful to emphasize certain paragraphs of that affidavit. At paragraph 3, Mr. Clarke alleged that "*the Executive Board of the Defendant has, since the Plaintiff determined to, and did, remove Mr. Bernard Evans ("Mr. Evans") from his position as trustee of the Plaintiff, attempted to pass a resolution dissolving the Plaintiff's board."* Mr. Clarke further averred that he believed that *"Mr. Evans, in his capacity as President of the Defendant, is seeking to disable the Plaintiff from prosecuting its claim against him in the 2012 Action which concerns the Plaintiff's claim against Mr. Evans and others stemming from the unlawful and negligent disbursement of $1,350,000.00 of the Plaintiff's funds*."

[8] At paragraph 4, Mr. Clarke asserted that "*the Plaintiff determined to remove Mr. Evans from his position as a trustee as his continued presence on the Plaintiff's Board represented a conflict of interest and compromised our ability as trustees to effectively prosecute the Action, having one of the defendants in the Action present during our deliberations and privy to our preparations and discussions with Counsel for the Plaintiff*."

[9] At paragraph 5, Mr. Clarke deposed:

> **"The Defendant's threat and attempt to interfere with the Plaintiff's operation and management has necessitated this action. It is my honest belief that without the intervention of the Honourable Court the Defendant will continue its attempts to disable the board from preparing for trial in the Action which is scheduled for October this year. As Chairman of the Plaintiff I am concerned that the Defendant will act to extinguish any chance the Plaintiff has of recouping its losses in the Action."**

[10] Paragraph 6 of Mr. Clarke's affidavit provided an undertaking as to damages.

[11] A Certificate of Urgency was also filed on 27 June 2014 and accompanied the

Summons.

[12] On 16 July 2014, the firm of Messrs. McKinney, Turner & Co. entered an appearance on behalf of the Defendant.

[13] Following discussions between the parties, on 7 August 2014, Messrs. McKinney, Turner & Co. wrote to Counsel for the Plaintiff, Mr. Parker to advise him that the Defendant is willing to offer an undertaking that they "*will not interfere with the operation and the management of the Plaintiff until the conclusion of Supreme Court Action CLE/gen/00573 of 2012*."

[14] As a result of further discussions between the parties, the Plaintiff accepted the Defendant's undertaking, and in reliance thereupon, did not prosecute the present action ("the 2014 action") or the Ex parte Summons.

[15] On 7 October 2014, judgment by consent was entered in favour of the Plaintiff against Mr. Evans and four other defendants in the 2012 action. It reads as follows:

> **"THIS COURT DOTH ORDER AND DECLARE BY CONSENT THAT:**
>
> **(1) Judgment be and is hereby granted to the Plaintiffs as against the 2nd Defendants in the amount of $1,350,000.00.**
>
> **(2) The 2nd Defendants are to pay the Plaintiffs' costs of and occasioned by this action to be taxed if not agreed."**

[16] There was an almost two-year hiatus and according to the Plaintiff, the undertaking was observed. Then on 4 October 2016, the Plaintiff filed another Summons which mirrors the initial Summons filed on 26 June 2014. It sought identical injunctive relief namely to restrain the Defendant by its servants, agents, officers, or otherwise howsoever from interfering with the operation and management of the Plaintiff until further or final order of the Court. It was supported by a second affidavit of Mr. Clarke.

[17] At paragraph 3 of this affidavit, Mr. Clarke asserted that "[*W]hile the parties had*

previously resolved the issues raised by this action and application by way of the Defendant's undertaking, given by Counsel on its behalf by letter dated the 7th day of August A.D. 2014, the Defendant has, by a purported resolution on the 30th day of September A.D. 2016, sought to violate that undertaking and has purported to dissolve the Plaintiff's Board. Not only does the Defendant have no such power to dissolve the Plaintiff's Board as threatened, but also their undertaking prohibits such conduct on their part." No doubt, this may have precipitated the present application.

[18] On 19 October 2016, this Court granted an Ex parte interim injunction maintaining the status quo pursuant to the undertaking of 7 August 2014. The Inter partes hearing was adjourned for Friday, 21 October 2016 at 3.00 p.m.

[19] On 21 October 2016, Learned Counsel Mr. Wells of Messrs. McKinney, Turner & Co. appeared but requested that his firm withdraw from the record as Counsel for the Defendant as there appeared to be a potential conflict of interest. The Court granted him leave to withdraw.

[20] On 21 October 2016, the Court ordered that the status quo be maintained pending the Inter partes hearing on 9 November 2016.

[21] In the interim, a flurry of affidavits was filed by both parties; each casting aspersions at the other for dishonourable conduct and misleading the court with incredulous accounts. Without the benefit of cross-examination, the task of determining the candidness of the affiants of those affidavits remains largely undecided. That being said, in my opinion, the key issue before the Court is of a legal nature and thus, the need to resolve factual issues is obliterated.

[22] The Defendant opposed the application for injunctive relief on three principal grounds namely

1. The entry of the Final Judgment in the 2012 action effectively concluded the 2014 action. Enforcement of the judgment in that action is an entirely

different matter that involves considerations that are extraneous to the pleadings in the 2014 action;

2. Full and frank disclosure has not been forthcoming from Mr. Clarke, as is evidenced by the Affidavit of Sherry Benjamin. Mr. Clarke did not produce the governing rules that govern his tenure as a trustee. He has also failed to advise the Court of his purported dismissal of the Secretary General and Plan Administrator as Trustees. Nor has he indicated to the Court that the Board is improperly constituted; and

3. There is no serious issue to be tried. Indeed, there is no extant cause of action.

Discussion

The Undertaking

[23] The primary contention advanced by the Plaintiff is that the Defendant proffered an undertaking on 7 August 2014 that they will not interfere with the operation and the management of the Plaintiff until the conclusion of the 2012 action and the Plaintiff, in reliance upon the said undertaking, did not prosecute this action or the application for injunctive relief as it would have otherwise done.

[24] Mr. Parker submitted that the Defendant having agreed to be bound by the undertaking ought not to be allowed to callously and dishonourably disregard it to the Plaintiff's prejudice. He submitted that the Defendant has, by a purported resolution on 30 September 2016 to dissolve the Plaintiff's Board, interfered with the operation and management of the Plaintiff.

[25] Learned Counsel relied on **In re A Solicitor Ex parte Hales** [1907] 2 K.B. 539. At page 543, Darling J had this to say when discussing the reliance placed on litigants on undertakings proffered by Counsel for the other side:

> **"On the faith of the undertaking contained in that letter, the appellant did not take steps to enforce the prompt due carriage of the order for taxation, and did not take proceedings against Fournet as he would otherwise have**

done."

[26] Darling J further stated at pages 544 - 545:

> **"He has altered his position, and thus brought himself within the rule under which he is entitled to invoke the disciplinary jurisdiction of the Court because his confidence has been abused by an officer of the Court…**
>
> **I think that the appellant, although not a client of the respondent's, has the right to come to this Court and ask us to prevent this dishonorable conduct on the part of a solicitor, that dishonorable conduct being the commission of a breach of trust against the appellant, who has altered his legal rights in consequence of the declaration of trust."** [Emphasis added]

[27] Mr. Parker submitted that the Plaintiff has approached the Court to seek to prevent dishonorable conduct on the part of the Defendant, namely the breach of the undertaking. Counsel submitted that the Defendant ought to be estopped from seeking to go behind its own proposed settlement and compromise.

[28] Mr. Parker quoted from the judgment of A.T. Lawrence J in **Ex Parte Hales**. At page 546, the learned judge stated:

> **"The dishonorable conduct in such cases in order to give the Court jurisdiction must be dishonorable conduct to the applicant in the course of legal proceedings, and if the applicant can shew that there has been dishonorable conduct to him, prejudicing his position, it is then that he can come to the Court and say, 'I ask for the interposition of the Court by way of this summary remedy."**

[29] Learned Counsel also relied on the English Court of Appeal authority of **Colchester Borough Council v. Smith et al** [1991] Ch. D. 421. In that case, the Court, held, dismissing the appeal, that:

> **"It was clear from the correspondence leading up to the making of the agreement of November 1983 that that agreement represented a bona fide compromise whose purpose was to resolve the dispute between the council and T., who had the advice of his solicitors, and to prevent court proceedings; and that in those circumstances T. was bound by the agreement and was estopped from going behind clause 4 and asserting that he had freehold title to the land by adverse possession."**

[30] According to Mr. Parker, a bona fide agreement was arrived at between the parties, who, with the advice of Counsel, resolved the dispute between them to avoid further court proceedings. The parties having arrived at the said bona fide settlement agreement in 2014, which prevented further litigation, the Defendant is now estopped from going behind the terms of the said agreement and seeking to interfere with the operation and management of the Plaintiff. As was noted by Dame Butler-Sloss L.J. in **Colchester** at page 435**:**

> **"Where parties to a dispute reach a compromise which brings that dispute to an end and avoids the need for litigation or further litigation, such a compromise is a valuable part of the resolution of disputes within the machinery of the administration of justice. The compromise has to be genuine, entered into freely by all parties to it without concealment of essential information or undue advantage taken by one party of another party, and preferably with the assistance of lawyers. Consequently, an agreement to compromise an action or a dispute which may lead to litigation is binding and is enforceable against the party seeking subsequently to repudiate it. As Roskill L.J. said in *Binder v. Alachouzos [1972] 2 Q.B. 151, 160,* 'Any other course would cause very great difficulty in the administration of justice.'**
>
> **In my view the courts have an interest in upholding agreements to compromise disputes."** [Emphasis added]

[31] Mr. Parker emphasized that, in reliance upon the principle in **Colchester**, the Plaintiff has approached the Court to enforce the terms of the parties' agreement to compromise this action, which agreement, having been entered into freely by both parties who were both represented by Counsel, is binding upon and enforceable against the Defendant.

[32] Learned Counsel Mr. Parker maintained that the facts and evidence before the Court clearly demonstrate that the parties entered into a compromise agreement with respect to the present action whereby the Defendant agreed to and undertook to refrain from interfering **'with the operation and the management of the Plaintiff pending the conclusion of Supreme Court Action CLE/GEN/00573 of 2012'.** The facts and evidence before the Court clearly demonstrate that the Defendant, by way of its purported, unreasonable and unlawful resolution to dissolve the Plaintiff's board, has attempted to interfere

with the operation and management of the Plaintiff in breach of the said agreement. He urged the Court to enforce the undertaking.

[33] On the other hand, learned Counsel Mr. Bannister submitted that the Defendant denied authorizing their former Counsel to give an undertaking.

Findings on Undertaking

[34] On 7 August 2014, Counsel for the Defendant, Messrs. McKinney, Turner & Co. wrote to Counsel for the Plaintiff, Mr. Parker in the following terms:

> **"We have had an opportunity to review your proposed Consent Order and to seek instructions from our client. We are instructed to advise that our client is willing at this time to offer a [sic] undertaking to your client that they will not interfere with the operation and the management of your client until the conclusion of Supreme Court Action CLE/gen/00573 of 2012. They are of the opinion that no further litigation is needed between the parties and a [sic] undertaking should suffice.** (Emphasis added)
>
> **Further, my client is still open to a meeting between all parties to discuss this matter and reach a settlement."**

[35] In my considered opinion, the letter is clear. The Defendant gave an undertaking to the Plaintiff. For the Defendant to now turn around and suggest that they were unaware of the undertaking is insincere particularly in light of what Mr. Wells said to the Court on 19 October 2016 before he was granted leave to withdraw as Counsel for the Defendant. The exchange proceeded this way:

Mr. Wells: Well, we were able to mediate this matter up until this present moment. And as I indicate, we have a relationship with all of the parties.

The Court: So, at what stage did you communicate with them that you may become conflicted in the absence of an amicable resolution?

Mr. Wells: It was communicated that if it was to proceed to court, then we will withdraw and as such, it has proceeded to court….

The Court: When did you speak with the Defendant and told them that you intend to withdraw?

Mr. Wells: We told them this yesterday once we became aware of the date.

Is there an existing cause of action?

[36] A critical question which falls to be determined is whether the 2012 action has been concluded. The Plaintiff says that it is extant. The Defendant says that it is concluded.

[37] Mr. Parker submitted that even though a Final Judgment was entered, the 2012 action is still ongoing before the Supreme Court. In that regard, the Plaintiff exhibited two Summonses filed on 3 and 10 December 2014 respectively, which Summonses are still pending before the Supreme Court in the 2012 action: see a copy of a Summons filed on 15 April 2016 by Mr. Evans in which he is seeking, among other things, to have the Final Judgment entered against the Plaintiff set aside. That application is pending before the Supreme Court.

[38] Mr. Bannister submitted that the undertaking could only have been intended to bind the Defendant until the issue of liability had been determined. The issue of liability was determined two years ago. The undertaking did not state nor could it have been intended to exist in perpetuity so that the Defendant would be prohibited from carrying out their constitutional duties in accordance with the provision of the governing rules.

Findings on 2012 action

[39] On 7 October 2014, judgment by consent was entered in favour of the Plaintiff against Mr. Evans and four other defendants in the amount of $1,350,000.00 with costs in the 2012 action. The Plaintiff conceded that this is a Final Judgment. Entry of the Final Judgment in the 2012 action effectively concluded the 2014 action. Any Summons, particularly the Summons to set aside the judgment by consent filed almost two years later seems to be nothing more than a delaying

tactic. Enforcement of the judgment in that action is an entirely different matter that involves considerations that are extraneous to the pleadings in the 2014 action.

[40] I agree with Mr. Bannister that the undertaking did not state nor could it have been intended to exist in perpetuity so as to prohibit the Defendant from carrying out their constitutional duties in accordance with the provision of the governing rules.

[41] On these discrete issues alone, the present Summons for injunctive relief cannot succeed because there is no extant cause of action.

[42] It is a well-established principle that the right to obtain interlocutory relief is merely ancillary and incidental to a pre-existing cause of action. In the classic speech of Lord Diplock in **Siskina (Cargo Owners) v Distos Compania Naviera S.A. ("The Siskina")** [1979] A.C. 210 (with whom the other members of the House of Lords agreed), he explained (at 254) that section 45(1) presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. He enunciated the basic understanding of an interlocutory injunction more generally at 256:

> **"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.**
>
> **Since the transfer of the Supreme Court of Judicature of all the jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was**

> **first laid down in the judgment of Cotton LJ in *North London Railway Co. v Great Northern Railway Co (1883) 11 Q.B.D. 30 at 39-40* which has been consistently followed ever since."** (Emphasis added)

[43] Lord Diplock's approach has been consistently followed by the English Courts and remains intact notwithstanding that the House of Lords casts some doubt on other aspects of **The Siskina** in **Channel Tunnel Group Ltd and Another v Balfour Beatty Construction Ltd and Others** [1993] 1 All ER 664. The qualification formulated in **Channel Tunnel** relates to cases where the court has jurisdiction but declines to exercise it. In **Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co. Ltd.** [1986] 2 Lloyd's Rep. 439, the Court held that, in a case in which the only existing cause of action was for a declaration, it could not grant a Mareva injunction. In **Veracruz Transportation Inc. v VC Shipping Co Inc. (the "Veracruz")** (1992) 1 Lloyd's Rep 353 at 358-359, the Court cited with approval the statement of Bingham J. in **Siporex Trade SA v Comdel Commodities Ltd** [1986] 2 Lloyd's Rep 428 at 436:

> **"I take it to be clear law, both on principle and authority, that a Mareva injunction will not be granted to an applicant who has no cause of action against the defendant at the time of the application."**

[44] The approach of Lord Diplock in **The Siskina** has also been followed in The Bahamas. In **Meespierson (Bahamas) Ltd v Grupo Torras S.A.** (No. 41 of 1998), Counsel for the plaintiffs fought hard to persuade the court to grant the plaintiffs a free-standing *Mareva* injunction where there was no substantive cause of action against the defendants in The Bahamas. Indeed, the plaintiffs had no claim against the defendants anywhere in the world – not even a tracing claim – but alleged that it was in aid of foreign proceedings in the Commercial Court of London. The six defendants who were impleaded in The Bahamas for Mareva relief were locally incorporated trust companies but were not among the defendants in the English proceedings.

[45] At the hearing in the court below, the court ruled that "*as the court had territorial jurisdiction over the defendants and as it was arguable whether the court also had the power to grant a Mareva injunction in support of foreign proceedings even where, as here, there is no cause of action, the court would entertain the application which it granted with ancillary discovery.*"

[46] On appeal to the Court of Appeal, much was made of Lord Diplock's approach in **The Siskina** and Lord Nicholls in his minority opinion in **Mercedes Benz v Leiduck** (1996) A.C. 284. In his judgment, Gonsalves-Sabola P. said

> **"…For this court to apply a rule of law that is inconsistent with the Siskina without the authority of legislation to that end, is an impermissible aberration from the judicial function."**

[47] The learned President took issue (at page 635) with Lord Nicholls' dissenting judgment in **Mercedes-Benz** which criticized Lord Diplock's basing of the right to obtain an interlocutory injunction of a pre-existing cause of action and asserts its inconsistency with the analysis of a Mareva injunction as ancillary merely to a prospective right of enforcement.

[48] In June 2014, a differently constituted Court of Appeal, in the case of **Bimini Blue Coalition Limited v Rt. Hon. Perry Christie Prime Minister et al** (SCCivApp No. 35 of 2014, the Court of Appeal, per Adderley JA stated *obiter* at para 29 of the judgment:

> **"The learned judge also correctly made the observation in accordance with jurisprudence in The Bahamas that a free standing injunction should not be granted, and if granted should not be allowed to stand."**

[49] It ought to be emphasized that an injunction is not just a procedural facility to maintain the status quo. Its fundamental purpose is to protect private rights in particular, a plaintiff's right not to be deprived of the fruits of his judgment.

[50] Applying the well-established principle derived from **The Siskina** which was followed in later decisions, a right to obtain an interlocutory injunction is not a

cause of action. It cannot stand by itself. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction. In the present case, this is the fundamental hurdle which the Plaintiff is unable to circumvent. It is not sufficient for the Plaintiff to argue that (i) there is a serious issue to be tried or (ii) damages are not an adequate remedy or (iii) and the balance of convenience lies in favour of granting the injunction.

[51] The ineluctable conclusion that I must come to is that this Court has no power to grant an injunction where there is no pre-existing cause of action since the 2012 action has come to an end. Accordingly, I will decline to do so.

Full and frank disclosure

[52] Learned Counsel for the Defendant Mr. Bannister submitted that full and frank disclosure has not been forthcoming from Mr. Clarke, as is evidenced by the Affidavit of Sherry Benjamin. Mr. Clarke did not produce the governing rules that govern his tenure as a trustee. He has also failed to advise the Court of his purported dismissal of the Secretary General and Plan Administrator as trustees. Nor has he indicated to the Court that the Board is improperly constituted. According to Mr. Bannister, the Rules do not permit the Defendant to dissolve the Plaintiff's Board; hence the application has been made on a false premise. However, they can and are entitled to remove trustees for cause. Indeed, the Court will note that Mr. Clarke became a trustee after the 2012 action had been filed. There is no magic to him being a trustee.

[53] The Defendant also submitted that in bringing the action, making this application, and even giving the undertaking, Mr. Clarke has acted ultra vires the governing rules by not consulting with or advising the other mandated trustees, and has in fact deliberated with a group that does not qualify to constitute the Board of Trustees or even a quorum of that Board.

[54] Mr. Bannister emphasized that the Plaintiff did not approach the Court with clean hands and as such, he does not deserve consideration for the equitable remedy that he seeks.

[55] As I iterated earlier, I make no factual findings as to who has or has not made full and frank disclosure to the Court. In fact, any further discussion of this issue is tantamount to embarking on a legal excursion.

Conclusion

[56] For all of the reasons stated, which owe much to Mr. Bannister's formidable arguments, the application to continue the interim injunction which was granted on 19 October 2016 is dismissed. The Plaintiff will pay the Defendant's costs to be taxed if not agreed.

[57] I observed that Mr. Bannister has requested of this Court to personally condemn Mr. Clarke in costs. He submitted that Mr. Clarke was not authorized to give an undertaking on behalf of the Plaintiff. I cannot do so without detailed submissions.

[58] Finally, it would be remiss of me if I do not acknowledge the sterling presentation made by learned Counsel Mr. Parker. He fought very hard.

Postscript

[59] I feel impelled to say this. The fact that the 2012 action has concluded does not bring to an end the issues of mistrust and concerns between the parties. Unless these parties resolve their issues amicably once and for all, I envisage that there may be further litigation.

Dated this 24th day of November A.D. 2016

Indra H. Charles
Justice