COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2020/CLE/gen/00611

BETWEEN:

DYPHANY MORTIER
DENTRY MORTIMER
BARBARA CAREY
KEVIN MAJOR SR.
KEVIN MAJOR JR.
NKOSI KWEKU SYMONETTE
JEFFREY MONCUR
KENDRIA FERGUSON
ROBIE ISAACS
CHANELLE SANDS
BRAZIL HAMILTON
SHANNON FRANCIS
JULIO VALDEZ
RASHEED CAREY
KEVAUGHN FERGUSON

Plaintiffs

AND

DARNETTE WEIR (President of the Bahamas Lawn Tennis Association)
CERON ROLLE (1st Vice President)
TIMOTHY DAMES (Asst. Treasurer)
CHILEAN BURROWS (Secretary)
NADINE MUNROE (Asst. Secretary)
WESLEY ROLLE (Council Member)
PHILIP MAJOR JR. (Council Member)
MARVIN ROLLE (Council Member)
BRENT JOHNSON (Council Member)
PERRY NEWTON (Council Member)
(The Council of the Bahamas Lawn Tennis Association)

Defendants

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Mr. Wayne Munroe QC, with Donovan Gibson for the Plaintiffs Ms. Christina Galanos for the Defendants
Hearing date(s):	4 July 2020

RULING

KLEIN J

Unincorporated association – Bahamas Lawn Tennis Association – Challenge to holding of Annual General Meeting and general elections – Resolution passed at Extraordinary General Meeting for conduct of AGM and Elections to be held when Covid-19 restrictions relaxed – Emergency Powers (Covid-19 Pandemic) Order, S.I. No. 102 of 2020 – Interlocutory Injunction – American Cyanamid Principles – Balance of Convenience – Discretionary factors – Delay – Acquiescence – Duty to disclose material facts to court

Practice – Ex parte applications for injunction – Requirement of notice – Notice should be given in all cases unless it would frustrate the purpose of the injunction – Affidavit in support of motion for injunction – Need for precise factual evidence to satisfy the court of a real prospect of succeeding in a claim for a permanent injunction at trial.

INTRODUCTION

[1] Few facets of life have been left untouched by the Covid-19 pandemic. The fallout has even found its way into the governance of sporting bodies, in this case the Bahamas Lawn Tennis Association ("BLTA" or "the Association").

[2] The issue arises in this way. By a Resolution passed on 28 May 2020, the Association stipulated that its 2020 Annual General Meeting (AGM) and general elections were to be held on a date not later than a month after restrictions imposed by emergency orders issued by the Government prohibiting large gatherings and imposing physical distancing requirements were relaxed. These measures were taken by the Government under constitutional powers enabling it to make extraordinary laws to protect the public welfare during the state of emergency declared in response to the Coronavirus (Covid-19) in March 2020.

[3] No point is being taken here with the constitutionality or lawfulness of any of those regulations or orders. The plaintiffs, who are members of the Association, contend that as the restrictions on large gatherings and physical distancing requirements had not been legislatively relaxed by the date on which the AGM and elections were slated to be held (4 July 2020), convening the AGM and elections on that date was in breach of the Resolution and the Association's rules.

[4] They therefore applied for an injunction to restrain the defendants, who represent the Council of the BLTA, from conducting the AGM and general elections. The AGM and elections were scheduled to be held at 3:00 p.m. on Saturday 4 July 2020. I heard the parties at short notice on the morning of Saturday, 4 July 2020, and with just over an hour or so to spare before the scheduled time for the events, refused the injunction. I now provide my reasons for doing so.

The action

[5] This action was commenced by Originating Summons filed 3 July 2020, seeking in the main the following relief:

> **"1. A Declaration that the Annual General Meeting for 2020 cannot be held until after the Government imposed restrictions have been relaxed to host large gatherings and also when restrictions have been relaxed as it relates to "physical distancing".**
> **2. A Declaration that the Government has not in fact relaxed the restrictions as it relates to "physical distancing".**
> **3. A Declaration that on the true construction of Article 8 of the Constitution of the BLTA a member only ceases to be a member of**

the Association for non-payment of the annual subscription when notification in writing has been received by the member of the subscription and the amount remains unpaid for one month.

4. **A Declaration that the Membership at large especially a potential Candidate/Nominee who intends to participate in an Election is entitled to a list of the members eligible to vote in that Election.**
5. **An Order in terms of an interlocutory injunction that the Defendants (and each of them) may be restrained by their servants or agents or howsoever otherwise from conducting an Annual General meeting on the 4th July 2020 at 3:00 p.m.**
6. **An Order in terms of a final injunction that the Defendants be restrained by their servants or agents or howsoever otherwise from conducting an Annual General meeting at any point before the restrictions as it relates to physical distancing have been relaxed.**
7. **An Order that the Defendants (and each of them) whether by their servants or agents or howsoever otherwise be compelled to provide the Membership at large with a list of the members eligible to participate in the election."**

[6] The plaintiffs are largely a rival leadership faction of the Association. As it turned out, the first plaintiff, Ms. Dyphany Mortier, was contesting the presidency of the BLTA in the upcoming elections and as many as 10 of the named plaintiffs were running on her slate as part of her leadership team. I say "as it turned out" because this fact was not disclosed in any of the material filed in support of the *ex parte* application and only came to light in the affidavit of Darnette Weir, the first-named defendant and out-going president of the Association, filed for the purposes of the *inter-partes* hearing. More will be said of this later.

[7] The defendants are the officers and council members of the Association and are sued collectively as the body's governing Council. The BLTA is an unincorporated association. It is the governing body for lawn tennis in The Bahamas and its primary object is advancing the interest of the game of tennis in The Bahamas. Its membership includes both individual and club members and its activities and relationship with its members are governed by the terms of the Association's Constitution ("the Constitution" or "Rules").

[8] The Constitution of the Association is not a complex or overly technical document. It provides for the conduct of the Association's affairs in 27 articles, which provide, *inter alia*, for the following matters: the name and objects of the association (1-2); membership (3-8); accounts (9); general meetings (10-11); notice of general meetings and resolutions (12-13); representation (14-20); resignation (21-23); powers of council (24); property (25); enforcement of laws (26); alteration in rules and laws (27).

The without-notice application

[9] The matter came before me late in the afternoon of Friday 3 July 2020 as the Duty Judge (civil division) by way of an *ex parte* summons filed that very day, supported by a certificate of urgency, seeking an interim interlocutory injunction in the terms indicated at paragraph 5 of the Originating Summons. I drew to the attention of counsel for the plaintiffs (at that time Mr. Donovan Gibson) the salutary reminder of the Privy Council in **National Commercial Bank of Jamaica v. Olint Corpn. Ltd.** [2009] UKPC 16 ("the **NCJB** case')

that "a judge should not entertain an application [for an injunction] of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) or there has literally been no time to give notice before the injunction is required to prevent the threatened wrongful act" [13].

[10] As the AGM and elections were not scheduled to take place until 3 p.m. the following day (a Saturday), I directed that the papers be served on the defendants and indicated that I would hear the parties at 10:00 a.m. on Saturday.

[11] Before turning to look at the issues raised in these proceedings, I wish to underscore the guidance by the Privy Council in the **NCBJ** case (on appeal from Jamaica) with respect to the desirability of giving notice in the majority of injunction applications. The last minute *ex-parte* applications which were said to have become commonplace in Jamaica and which their Lordships deprecated have also unfortunately become a routine part of practice in this jurisdiction. As highlighted in that case, it is only a handful of cases that truly justify a departure from the fundamental requirement of justice to hear the other side (often stated as the *audi alteram partem* rule). Parties and their counsel should endeavour in all other cases to give notice, no matter how short and even if by telephone: "Any notice is better than none." (para. 13). The court ought jealously to scrutinize all *ex parte* applications and its tolerance for entertaining such applications is rightly on the wane.

The Court's jurisdiction to grant injunctive relief

[12] The jurisdiction of the Supreme Court to grant injunctions is codified in section 21 of the Supreme Court Act, which provides for the Court to grant an interlocutory or final injunction "in all cases in which it appears just and convenient to do so." Order 29 of the Rules of the Supreme Court (R.S.C.) 1978 sets out the procedural provisions governing the grant of the relief.

Justiciability of claims against sports governing bodies

[13] Although it was not raised before me, it is important to recall the basis on which the courts will intervene in the affairs of private sporting bodies and like associations. It is now reasonably settled that claims involving private associations or sporting bodies and their members *inter se* are justiciable based on the existence of a contractual relationship between those bodies and those voluntarily agreeing to be bound by their rules (see, for example, **Baker v Jones** [1954] 2 Q.B.D. 553; **Law v National Greyhound Racing Club** [1983 1 W.L.R. 1302; and **R v. Jockey Club, Ex p. Aga Khan** [1983] 1 W.L.R. 909 (at 933) (applied by the Bahamas Court of Appeal in ***Culmer et. al. v. Eugene Nair*** [SCCivApp. No.135 of 2014]).

[14] As was said by Lynskey J. in **Baker v. Jones** (558H—559A):

> **"BALWA [British Amateur Weightlifters' Association] is an unincorporated association. It has no legal entity. The relationship between its members is contractual. That contract is contained in, or to be implied from, the rules.**

> **The courts must consider such a contract as they would consider any other contract. Although parties to a contract may, in general, make any contract they like, there are certain limitations imposed by public policy, and one of those limitations may be that the parties, cannot, by contract, oust the ordinary courts from their jurisdiction (*Scott v Avery*). […] The interpretation of the rules is a question of law which the courts will examine."**

[15] Even so, it has been said that the courts will adopt something of a light touch when intervening in the affairs of these bodies. In **Re GKN Bolts & Nuts Ltd.** [1982] 1 WLR 774, Megarry V-C said (776):

> **"As is common in club cases, there are many obscurities and uncertainties, and some difficulty in the law. In such cases, the court usually has to take a broad sword to the problems, and eschew an unduly meticulous examination of the rules and resolutions. I am not, of course, saying that these should be ignored; but usually there is a considerable degree of informality in the conduct of the affairs of clubs, and I think that the courts have to be ready to allow general concepts of reasonableness, fairness and common sense to be given more than their usual weight when confronted by claims to the contrary which appear to be based on any strict interpretation and rigid application of the letter of the rules. In other words, allowance must be made for some play in the joints."**

THE LAW

The applicable principles for the grant of an interlocutory injunction

[16] As is made clear by the phrase "just and convenient", the grant of an interlocutory injunction is a matter of discretion. But as is the case with all forms of judicial discretion, it is to be exercised on the basis of judicial principles, the most important of which are those set out in **American Cyanamid Co. Ltd. v Ethicon** [1975] AC 396 by Lord Diplock. They are often explicated by way of a structured four-part test as follows:

(i) whether there is a serious issue to be tried;
(ii) whether damages would be an adequate remedy for any loss sustained by either party pending the outcome of the trial;
(iii) whether the 'balance of convenience' favours the plaintiff or defendant if there is any doubt as to the adequacy of the respective remedies available in damages;
(iv) whether there are any special factors that might affect the court's consideration of the matter.

[17] However, while **American Cyanamid** remains the most authoritative statement of the law on interlocutory injunctions, there are no fixed rules or principles which can be ticked off in every case. In the **NCBJ** case, the Privy Council said [para. 16]:

> **"It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedoms of action will have consequences, for him and for others, which a court has to take into**

account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or witholding an injunction is more likely to produce a just result."

And at para. 17:

"[T]he underlying principle is the same, namely, the court should take whichever course of action seems likely to cause the least irremediable prejudice to one party or the other."

The background to this Application

[18] As noted, to some extent this claim has its genesis in the emergence of the novel Coronavirus (Covid-19), declared to be a global pandemic by the World Health Organization on 11 March 2020. The Government of The Bahamas responded to the public health challenge by declaring a state of public emergency on 17 March 2020 (extended on several occasions), and implementing a series of Emergency Regulations and Orders, pursuant to the *Emergency Powers Act* (Cap. 34), containing a miscellany of public health measures to mitigate the spread of the disease. Among the measures adopted were stay-at-home or shelter in place orders, closure of all but the most essential public services and businesses, restricted operating hours for various businesses and professions, curfews, restrictions on large gatherings, and physical distancing requirements for social and business interaction. These legislative measures were applied at various periods following the initial proclamation of emergency, depending on the perceived threat to public health, and were extended or modified as necessary.

[19] The restrictions on crowd size and physical distancing requirements are the most significant for the purposes of this application. For example, *The Emergency Powers (Covid 19 Pandemic) Order*, SI No. 102 of 2020, which came into force on 30 June 2020, provided as follows:

Para. 3(1): "Every person shall practice physical distancing between themselves and others who are not of the same household of no less than six feet whenever he is away from his residence.

Para. 4(1) "Every person who leaves his residence shall, while away from his residence, wear a face mask, which fits securely to his face, covering his nose and mouth."

[20] Paragraph 15 of that Order provided in part for other social control measures as follows:

"Social gatherings in homes and private facilities"

(1) Subject to paragraphs (3) and (4), no person shall host or attend—

[….]

(d) a meeting of a fraternal society, private or social club or civic association or organization.

(2) Subject to paragraph (4), a wedding, funeral or graduation ceremony which hosts—

(a) a total of ten persons inclusive of any officiants shall be permitted;

(b) eleven to thirty persons inclusive of any officiants in attendance shall be permitted upon the written approval of the Competent Authority.

(3) Effective Wednesday the 1st day of July, 2020, a person may host or attend a social gathering of not more than twenty persons at a private residence or facility.

(4) Paragraphs (1) and (2) shall expire at 12:00 a.m. on Wednesday the 1st day of July, 2020."

[21] The 30 June Order was preceded by the *Emergency Powers (Covid 19) (No.4) Order*, 2020, which came into effect 28 May 2020. As originally enacted, that Order contained the same physical distancing requirements as in the 30 June Order, but prohibited social gatherings and limited attendance at weddings and funerals to a maximum of 10 persons. It was amended on 2 June 2020 by the *Emergency Powers (Covid 19) (No. 4) (Amendment) Order*, 2020, to provide for groups of 11-30 persons to attend events such as wedding, funerals or graduations with the approval of the Competent Authority (para. 3 of the Order).

[22] It is, I understand, common ground between the parties that the state of emergency and Emergency Orders promulgated thereunder prevented the AGM and elections being held when they would have normally taken place, which under art. 10 of the Association's Constitution were required to be held no later than the 30 April in each year.

Plaintiffs' evidence

[23] The chronology of the main events leading up to the planning of the AGM and the dispute is set out in the affidavit of Dyphany Mortier, filed 3 July 2020 ("the Mortier affidavit"), in support of the plaintiffs' *ex-parte* summons. Things began to be set in motion when the BLTA sent out a Requisition pursuant to art. 11 of its Constitution for an Extraordinary Meeting ("EGM") dated 14 May 2020 to pass a resolution in respect of the AGM and general elections. It is useful to set out some of the main pieces of correspondence between the parties to provide the backdrop to the proceedings before the court.

[24] The requisition for the EGM is set out in full below.

REQUISITION FOR AN EXTRAORDINARY MEETING
of the Bahamas Law Tennis Association

Dated: May 14, 2020

WHEREAS due to the novel Coronavirus pandemic being experienced worldwide, the nation of The Bahamas felt its crippling effects during the months of March, April and May with Government instituted lockdowns and curfews which resulted in the inability of the Bahamas Lawn Tennis Association to hold its 2020 Annual General Meeting, which was set to be held April 30, 2020;

WHEREAS due to these extenuating and unprecedented circumstances, the Government of the Commonwealth of The Bahamas also executed an Emergency Order for a 24-hour curfew until May 30, 2020, which includes adherence to "physical distancing" and hosting of events with small gatherings of no more than 10 persons;

AND WHEREAS in accordance with No. 11 of the Constitution of the Bahamas Laws Tennis Association which allows for an Extraordinary Meeting to be called at any time and the submission of a requisition in writing by five individual members of the Association, for an Extraordinary General Meeting to be called. This Requisition hereby calls for an Extraordinary General Meeting of the Association to be held within 14 days of receipt by the Secretary. This Requisition hereby states the sole business for which this meeting is to be called, which is: **to pass a resolution for the 2020 Annual General Meeting of the Bahamas Lawn Tennis Association, to be held on a date not later than a month after Government imposed restrictions have been relaxed to host large gatherings and also when restrictions have been relaxed as it relates to "physical distancing".** [Emphasis in the original.]

Timothy Dames Ceron Rolle
Brent Johnson Mickey Williams
Darnette Weir

[25] I note in passing that the actual Resolution was not produced in evidence, but the parties accepted that it followed the same form as the language in the Requisition.

[26] By email dated the 16 June 2020, the Secretary (Ms. Chilean Burrows) notified the members that the EGM had been held on the 28 May 2020, where a Resolution was passed for a new date to hold the AGM, which was set for 4 July 2020. The terms of that email were as follows:

"Dear All:

As you are aware, Elections should have been held April 30, 2020 and the current Administration's tenure would have ended, but due to Covid-19, we were awaiting the country to re-open. An Extraordinary Meeting was held on May 28, 2020 where a Resolution was passed for a new date.

The Competent Authority has approved gatherings of up to 30 persons and as such we can accommodate our elections where 30 persons are allowed in at a time to vote with social distancing being adhered to.

This is to further advise that the Bahamas Lawn Tennis Association's Annual General Meeting (AGM) is set for Saturday, July 4, 2020 from 3:00 p.m. -6:00 p.m. at the National Tennis Centre, Q.E. Sports Centre. At this time, the Election of Officers for the Bahamas Lawn Tennis Association for 2020-2022 and the election of the two Board Directors of the National Tennis Centre will be conducted.

The Nomination Forms and procedures/protocol for the upcoming Elections are forthcoming.

Regards,
Chilean Burrows,
BLTA Secretary."

[27] By an email dated the 27 June 2020, the Secretary reminded members of the AGM set for 4 July 2020 at 3:00 p.m. and indicated that only financial members would be allowed to vote.

> "Dear All,
>
> This is a gentle reminder that only current financial members of the Bahamas Lawn Tennis Association (BLTA) will be allowed to participate at the upcoming Annual General Meeting of the BLTA on July 4th, 2020, at 3:00 p.m.
>
> Article 8 of the Constitution states:
>
> "Any Member whose first subscription remains unpaid for one calendar month after the receipt of notice of affiliation or whose annual subscription remains unpaid for one calendar month after notification in writing, shall cease to be a member of the Association unless the Council shall otherwise determine. Any such member shall be eligible for re-election on the payment of a penalty of $5.00 in addition to the regular fees."
>
> Please note that all current registered members will be allowed to bring their account up-to-date at that time.
>
> If you have any questions on the status of your membership kindly communicate via return email.
>
> Regards,
> BLTA Secretary."

[28] On 29 June 2020, Ms. Mortier responded to that letter by email outlining concerns about complying with the Emergency Orders, art. 8 of the Constitution, and raising issues as to the provision of membership confirmation and the format for voting as follows:

> "Dear Ms. Burrows/Ms.Weir:
>
> The contents of your email are noted. Please be advised that as the BLTA has not sent notification as required by Article 8 or at all we are advised that the consequences set out in Article 8 cannot apply. On that premise please confirm that there is no assertion that the membership of any member is in suspension. Further please provide the details of the BLTA's bank account to facilitate online payment of dues to all members. We require notification of the bank, branch and account number together with the account name to facilitate online payments.
>
> We have expressed concerns at the ability for the AGM to be held in compliance with Covid 19 Emergency Orders relative to a maximum numbers for gatherings. We have received no confirmation from you and as a result we will be making inquiries directly with the office of the Competent Authority to ensure that we do not reckless (*sic*) break the law.

> We must ask that you provide the membership confirmation and banking information requested by close of business tomorrow Tuesday the 30th June, 2020. Should we not receive a favourable response we shall instruct Counsel to take steps to ensure that there are no breaches of the Constitution of the BTLA or the laws of the Commonwealth of The Bahamas.
>
> We further request by close of business tomorrow, Tuesday the 30th June, 2020 a full and detailed framework on the format of voting for all members. There are voting members out of country who also wish to participate and because of the constraints of this pandemic are unable to travel. Kindly advise how voting electronically and/or by proxy will be administered and who will serve as the independent administrator of the election.
>
> Regards,
> Dyphany Mortier."

[29] The Secretary responded to this email by an email dated the 1 July 2020, stating that members would be able to bring their accounts up to date on election day. What followed on the 2 July 2020 was a letter-before-action from lead counsel for the plaintiffs (Mr. Wayne Munroe, QC) to the Council "advising them to cancel the Annual General Meeting as it was in breach of the Resolution." The plaintiffs note that there was no response to this letter (which is hardly surprisingly, since proceedings were filed the next day), but Ms. Mortier says that she formed the view that the Council intended to carry on with the elections. She concludes by saying that "*the Competent Authority in his Order issued and gazetted the 30th June 2020 has not yet relaxed its restrictions regarding social distancing and thus holding the Annual General Meeting on the 4th July 2020 would be in breach of the Resolution passed*."

The Defendants' Affidavit

[30] At short notice and overnight on the 3 July 2020, the defendants produced the Affidavit of Darnette Weir ("the Weir affidavit") in response to the Mortier affidavit, which was emailed to me at about 2 a.m. on the morning of the 4 July 2020. That affidavit provided some details about the meeting of 28 May 2020. It disclosed that the EGM was held by Zoom™, which was attended by 27 persons, 22 of whom voted in favour of the resolution, and 5 of whom abstained. It confirmed that the Secretary of the BLTA notified the members on 16 June 2020 by email that the date set at that meeting for the AGM and elections was 4 July 2020.

[31] The defendants sought approvals both from the Ministry of Health ("MOH") and the Commissioner of Police ("COP"). It is instructive to set out the main paragraphs of the letter to the Ministry of Health.

> "Due to the Covid-19 environment, the best safety and precautionary measures are at the forefront of the Executive Board of the Bahamas Lawn Tennis Association (BLTA) when making decisions. Initially, the Board limited its voting process for the upcoming Annual General Meeting to indoors, allowing no more than 30 persons to vote at a time. With this arrangement, it will not be practical for members to vote from the floor. Thus an advance nomination process was

> adopted. The Board has now considered another option, to have its election outdoors on the grounds of the National Tennis Centre with the appropriate physical distancing strictly adhered to, that is, no less than 6ft apart. As such, we will now allow for all nominations on the day of election.
>
> To provide for a smooth flow of the AGM in line with safety protocols and guidelines in the Covid-19 era, persons must wear a mask upon entry on NTC's grounds. Adequate general and security presence will also be on hand to reinforce protocols. In addition, it will be mandatory for all attendees to sanitize hands upon entry at the meeting."

[32] The MOH replied indicating that their approval was not necessary to host an event, although it was expected that all organizations would "adhere to the guidelines outlined in the Emergency Orders". They also commended the BLTA for "providing safe and precautionary measures in light of COVID-19", and wished the Association a "smooth process in your upcoming Annual General Meeting."

[33] The Association also applied to the Commissioner of Police, by letter dated 26 June 2020. That letter indicated in material part that "the event will be held outdoors with the proper social distancing rules, which have been provided to the Ministry of Health". It continued that "We are expecting a large gathering and wish for two (2) Royal Bahamas Police Force officers to be in attendance from 2:00 p.m. -6:30 p.m." The reply from the COP is not in evidence, but Ms. Weir stated that approval was granted (and this was not contested) and in fact they paid for two police officers to be present.

[34] Ms. Weir goes on to say that she was blindsided by the legal demands from counsel for the plaintiffs two days before the event, having regard to the fact that the first plaintiff had been actively campaigning for the presidency of the BLTA and had not raised any concerns until the 11th hour. At paragraph 10, she states:

> "Frankly, I was rather shocked when on 2nd July, 2020, I received a letter from Mr. Wayne Munroe, QC, counsel for the First Plaintiff, wherein he demanded that we cancel the scheduled AGM, as we have not complied with the said resolution. Indeed, the First Plaintiff has been actively campaigning during the entire period since the announcement of the date on 16th June, 2020. On or about 26 June, 2020, she sent out her campaign platform and her team via Whatsapp to various Whatsapp groups in the tennis community. On or about 29 June 2020, she was also interviewed by The Tribune, during which time she spoke about her candidacy and her team. On or about the 29th June 2020, she was also interviewed by The Guardian, where she once again discussed her candidacy and her plans, should she become President of the BLTA. On or about 30th June, 2020, another article was printed in the Tribune discussing her entire candidacy and her team. On or about 3rd July 2020, she appeared on ZNS television promoting her candidacy. Again, at no time before we received her Attorney's letter on 2nd July 2020, did the First Plaintiff ever state that she had a problem with the AGM being held on 4th July 2020."

ANALYSIS AND DISCUSSION

American Cyanamid

(i) Whether there is a serious issue to be tried.

[35] As mentioned, the threshold consideration in the *American Cyanamid* test is the requirement for there to be a serious issue or issues to be tried. In his now famous speech in that case, Lord Diplock equated a serious issue to be tried with the court being satisfied that "the claim is not frivolous or vexatious". In other words, all that is required is that there be some triable claim, and this is a lower standard than the *prima facie* case rule that pertained in the pre-*Cyanamid* cases.

The Parties' arguments on the claims

[36] While the urgency with which this matter came on for hearing did not provide time for the parties to prepare written submissions, counsel for both parties made helpful and succinct oral submissions during the hearing, for which the Court was grateful.

[37] The plaintiffs' case is that the facts clearly establish a serious issue to be tried. Mr. Munroe submitted that this was a case about governance of the Association, and that the plaintiffs moved the court for relief as it was evident that "a meeting at this time would not be in accordance with the Rules" and the terms of the Resolution. He contended that the Resolution passed on the 28 May 2020 contained two conditions precedent for the holding of the AGM and elections: they were to be held within a month (i) after restrictions were relaxed on large gatherings; and (ii) after physical distancing requirements were relaxed. He referred to SI No. 102, para. 3 (which I have set out above) which imposed a 6-foot distancing rule, which he indicated remained in effect at the time the meeting was proposed to be held, as well as restrictions on crowd sizes. In fact, he pointed out that physical distancing requirements had not been relaxed since the first state of emergency was declared.

[38] Mr. Munroe argued further that the EGM of 28 May 2020 at which the Resolution was taken was invalid, because the requisite 14 days' notice was not given. There is some dispute over whether the first plaintiff received the notice of the EGM in advance by email on 15 May or on 18 May 2020, when it appeared the email was sent to the general body, but in any case Mr. Munroe submitted this would not matter, as there was not the requisite 14 days' notice even if the earlier date was chosen. He also queried whether the Constitution allowed for a meeting to be held by Zoom, and for the method of voting adopted (by show of hands rather than a voting app that allowed for secret ballots), but he stated that he was not pursuing this point before the court in the application for the injunction.

[39] Thus, the main cause of action underpinning the claim for the injunction is the allegation of the breach of the Rules and Resolution of 28 May 2020, which the plaintiffs seek to vindicate by the declarations sought at paragraphs 1 and 2 of the Originating Summons. The plaintiffs also seek a declaration (at para. 3) as to when a member ceases to be a member for non-payment of the annual subscription fee under art. 8 of the Rules, and a

declaration (para. 4) that the members generally and candidates/nominees are entitled to a list of members eligible to vote in the elections.

[40] For the defendants, Ms. Galanos stated bluntly that in her view there was no serious issue to be tried. Firstly, she argued that the issue of notice in respect of the meeting of the 28 May 2020 was not properly before the Court, as it is was not raised in the Originating Summons, and neither is there any reference or complaint in the plaintiffs' affidavit. Secondly, she contended that the plaintiffs were advancing too narrow and literal a construction of the Resolution, which clearly contemplated that the meeting and elections would be held as soon as it was practical and safe to do so. The defendants' position was that there had clearly been a relaxation of the restrictions on gatherings at this point under the 30 June Order (as compared to the preceding Orders), and the physical distancing requirements, if not relaxed, were in any event intended to be complied with.

[41] In fact, it was noted that para. (1) and (2) of the 30 June 2020 Order, which prohibited the holding of meetings by private or social clubs and imposed restrictions on crowd size for certain social events, sunset on 1 July 2020 (somewhat adventitiously for the plaintiffs).

The court's observations on the parties' claims

[42] It is not my place to speculate as to how the plaintiffs' claims will fare at a full trial of these issues. But under the **American Cyanamid** guidelines, the court is entitled to form a view of whether serious issues are raised and the relative strength and weaknesses of the parties' case in assessing where the balance of convenience lies.

Lack of notice

[43] As to the notice point, I accept the force of Ms. Galanos' submissions that there is in fact no complaint of lack of notice of the 28 May 2020 meeting in the originating summons or the affidavit, and it could not properly be raised by dint of oral submissions on the hearing of the application for the injunction. I therefore agreed with Ms. Galanos that on the current state of the facts no triable issue arises on the notice point.

[44] In any event, I have some difficulty accepting Mr. Munroe's assertion that 14 clear days' prior notice was required in the case of an EGM. It is clearly the case that 14 days' notice is required by art. 12 for the holding of the AGM and ordinary General Meetings, and Mr. Munroe conceded that the requisite notice was complied with in respect of the AGM. An EGM, however, comes within the remit of art. 11, and such a meeting may be called "*at any time* at the discretion of the Council, and shall be called *within* fourteen days after the receipt of a requisition in writing to that effect". The requisition was dated the 14 May 2020, and therefore the meeting had to have been called *no later* than the 28 of May to be in compliance with art. 11 (which apparently it was). But if I am wrong in that, I return to the point that the issue of the notice was not raised in the pleadings

Claim as to breach of Resolution

[45] On the central claim that the holding of the AGM and elections would breach the rules, which include any validly made resolution pursuant to the rules, I was satisfied that this

raised a serious issue to be tried. The court at trial would be required to construe the Resolution and the Association's Rules, borrowing by analogy from the modern principles which inform contractual interpretation, to determine whether in the circumstances as they turned out there was compliance with the Resolution and, if not, what would be the effect of any non-compliance. The modern approach is to objectively construe provisions of a contract in their documentary, factual and commercial context, to arrive at a decision that is based on commercial commonsense and to give effect to the parties' intentions (see **Rainy Sky v Kookmin Bank** [2011] 1 WLR 2900; **Arnold v Britton and ors.** [2015] UKSC 36.) Further, as already noted, it is not every breach of the rules that would invalidate the various actions taken by a club (**Re GKN Bolts & Nuts Ltd.,** *supra.*).

[46] I hasten to add, however, that although arguable, I do not think it is a very strong case. It seems to me that the intention of the Council in the Resolution was to hold the AGM and elections as soon as it could be done safely and in compliance with Emergency orders. In any event, the Council is given very wide powers (art. 24) to "do all such things as may be exercised or done by the Association", including the following:

> **"(f) To decide all doubtful and disputed points in connection with the game and the laws thereof, and the rules and regulations of the Association and any decision of the Council shall be final; subject however to the right to appeal to the International Tennis Federation.**
>
> **(g) To do all such things in the interest of the game and the Association as it may deem expedient."**

As already noted (**Baker v. Jones**, *supra*, para. 14), a provision such as (f) does not oust the Court's jurisdiction to ensure observance of the association's rules, but these provisions illustrate the plenitude of powers and flexibility given to the Council by the Constitution to determine the affairs of the Association.

Declaration as to membership status

[47] As to the claim for a declaration as to when a member ceases to be a member for non-payment of subscription dues under art. 8, I have some difficulty in discerning the factual basis for this claim. The email of 27 June 2020 reminded members that "only current financial members" would be allowed to vote, quoted the text of cl. 8, and indicated that all registered members would be allowed to bring their accounts current at the time. In fact, Ms. Mortier's reply of the 29 June asked for confirmation that "there was no assertion that the membership of any member is in suspension". As I read it, the email of 27 June does not assert that anyone's membership had been suspended, and specifically made provision for accounts to be brought up to date. In the absence of any facts grounding a claim for this declaration, I was not satisfied that any serious issue arose for trial in respect of this claim. It is trite that the court does not make academic declarations.

Entitlement to list of voters by general body and potential candidates/nominees

[48] On the issue of the entitlement to a list of eligible voters, Ms. Galanos says that there is no requirement for this in the Constitution, and that in any event this was an unreasonable request to make three days before the meeting. Mr. Munroe's argument seemed to be

suggest that the production of a list of eligible voters might be implied as a requirement of fairness in respect of the conduct of the election, and that such a term should be implied in the Constitution. Even if conceptually such an argument could be made at trial, again it did not arise on the papers before the court in the injunction claim, and therefore I do not find any serious issue to be tried in this regard.

[49] Challenged by Ms. Galanos on the failure of the plaintiffs to plead several of the matters raised in oral arguments in support of the claim for the injunction, Mr. Munroe contended that these claims might be teased out of the interstices of the Originating Summons and could be fully developed at trial. Obviously, this is not the trial of the action, but applicants for interlocutory relief should be reminded of the need to put the necessary facts before the court in support of their claim to an injunction. The point was neatly put by Slade J. in *Re Lord Cable deceased* [1976] 3 All ER 417 (at 431), where he said:

> **"*American Cyanamid Co. v. Ethicon* may have led prospective plaintiffs to the belief, partially justified, that it is not necessary for them to adduce affidavit evidence in support of a motion for an interlocutory injunction of such a precise and compelling nature as might have been required before that decision. Nevertheless, in my judgment it is still necessary for any Plaintiff who is seeking interlocutory relief to adduce sufficient precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for a permanent injunction at trial. If the facts adduced by him in support of his motion do not by themselves satisfy the court of this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact on which he might have a real prospect of success."**

(ii) ***Whether damages an adequate remedy***

The plaintiffs

[50] I now turn to consider whether the plaintiffs could be adequately compensated in damages if the defendants were permitted to continue with the AGM and elections but the plaintiffs were to succeed at trial. As indicated, the plaintiffs' claim is essentially that the Association has failed to follow its Rules, which constitutes a breach of the mutual rights and obligations of the associating persons and clubs. It is akin to a breach of contract, although not in the conventional sense. As the plaintiffs are not likely to be able to assert a claim for monetary damages if they were to succeed at trial, it is logical to assume that damages would not be an adequate remedy for them.

The defendants

[51] What then of the position of the defendants as to the adequacy of damages under the cross-undertaking if the injunction were granted and the plaintiffs fail to establish an entitlement at trial? The affidavit of Ms. Weir speaks to the expenses incurred by the Association in hosting the event, including renting chairs and tents, paying for police presence, hiring set-up staff, and the fact that several members flew in from Abaco and Freeport and incurred travel, accommodation and transportation expenses to attend the event.

[52] Mr. Munroe argued that all of these losses were quantifiable and compensable. I agree that they may be, but I queried whether the financial losses were the only losses or hardship that would be sustained by the defendants if an injunction were granted. In this regard, Ms. Galanos indicated that the Constitution mandated elections by 30 April 2020, and that in fact the members of the executive wished to relinquish their office and move on—a sentiment which was visibly approbated by Ms. Weir, who attended the proceedings.

[53] Mr. Munroe's comeback was that any member of the current executive who felt that way was free to resign. I note that art. 21 does provide generally for "any member" of the Association to "retire" (although the rubric says "Resignation from Association"). However, cl. 15 requires officers to hold office until after the conclusion of the AGM at which their successors were to be selected. Article 19 also provides for the Council to appoint members to fill vacancies among the officers or councilors pending the holding of the next AGM.

[54] Ms. Galanos was astute to point out that, even assuming that the administrative expenses of the election were compensable in damages, the plaintiffs had not indicated any willingness to offer an undertaking. She contended further that the losses that would result from hosting the meeting do not tell the whole story. The members of the executive were in an unenviable position: they were forced to continue to carry on the burden of managing the Association's affairs well beyond their constitutional terms, and the Association also had an interest in complying with its Constitution. I therefore harboured reservations as to the adequacy of damages on either side and went on to consider the balance of convenience.

(iii) Balance of convenience

[55] The balance of convenience is a protean phrase, and as Lord Diplock reminded us in the **American Cyanamid** case [408]:

> **"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration, let alone to suggest the relative weight which is to be attached to them."**

[56] In the **NCBJ** case, the Privy Council stated that often what the balance comes down to is deciding "whichever course seems likely to cause the least irremediable damage to one party or the other". More recently, Butcher J., discussing the balancing process the court has to undertake in cases involving the grant of interim relief, said:

> **"Whether that exercise is properly called the 'balance of convenience' may not matter greatly; it is necessary to consider what degree of prejudice the grant or refusal of the interim remedy would impose upon each side, bearing in mind that, being interim, any remedy granted may turn out to have been wrongly granted." [BALPA v British Airways Cityflyer Ltd. [2018] EWHC 1888 (QB)].**

[57] Mr. Munroe contended that the balance was in favour of the plaintiffs, as the grant of an injunction would not prevent the defendants calling an election at a later date, and there

would be no lapse in the executive, who would continue in office until then. He indicated that while the meeting expenses were compensable, there would be irremediable prejudice caused by the possible "exclusion of members", as it was not even known how many were in the jurisdiction.

[58] Ms. Galanos countered that the greatest prejudice would be caused to the defendants, on behalf of the Association, who had been planning the AGM and elections for nearly two months, only to now be faced with this last-minute challenge on grounds that were less than cogent. It was also her position that the Association was fully complying with the Emergency Orders, and that the current executive would be forced to hold-over for what could be an unknown and possibly protracted period if the AGM and elections were deferred.

[59] I must confess to having some difficulty with Mr. Munroe's assertion as to the possible exclusion of members from the elections, or persons being denied the right to vote. This seems to be based on the general assertion in the email of the 29 June 2020 that voting members were abroad and unable to travel because of the pandemic, and therefore would have been excluded from the meeting and the elections. It is well possible that members entitled to vote might have been abroad, and unable to return, but this was not the doing or the fault of the Association. No election, whether one for officers to manage the affairs of a private club or for a general election to select a country's government, can ensure 100% voter participation.

[60] Mr. Munroe also reminded me of Lord Diplock's aphorism in **American Cyanamid** that "Where other factors appear to be evenly balanced, it was a counsel of prudence to take such measures as are calculated to preserve the status quo."

[61] I am also not persuaded, in the exercise of my discretion, that this is a case where if other factors were evenly balanced (and for reasons given below I do not find them so to be) that the status *quo ante* should be maintained. True it is that the state of affairs immediately preceding the issue of proceedings (see **Garden Cottage Foods Ltd. v. Milk Marketing Board** [1984] A.C. 130) was that elections had not taken place, but to preserve that position would be to turn a blind eye to the true position. The true position was this. The defendants had embarked upon the course of planning the AGM and general elections for well over a month, a fact known to all the members from 16 June 2020, and they had put all the arrangements in place. It was not until just a day before the events were to take place that the plaintiffs filed proceedings to halt these events, catching everyone unawares, as all along the majority of the plaintiffs were offering themselves as candidates for and campaigning for the election.

[62] I very much doubt that this was the kind of scenario Lord Diplock had in mind when he referred to maintaining the status *quo ante* as a counsel of prudence. This was not a new event which the defendants were purporting to undertake; it was the constitutionally required process under the BLTA's constitution (albeit delayed) in which the plaintiffs themselves had an interest in seeing fulfilled.

Court's observations on balance of convenience

[63] I was therefore not prepared to hold that the balance of convenience favoured the plaintiffs, or that they would suffer the most irremediable damage if the injunction were refused. I came to this conclusion based on the following:

(i) the grant of an injunction would force a further (and unknown period) of delay in the ability of the Association to comply with the constitutional requirements for the holding of the AGM and elections;
(ii) the current executive would be required to continue in office and carry out the burden of executive functions and the responsibilities of office during that period;
(iii) the plaintiffs' case alleging breach of the Resolution and rules, although a triable issue, does not appear to be a strong claim;
(iv) the plaintiffs were not able to point to any real prejudice they would suffer if the AGM and elections were allowed to proceed, or that they would suffer any unfairness in the conduct of the elections;
(v) the defendants indicated every intention of complying with the physical distancing and mask-wearing requirements of the emergency orders and sought approvals of relevant Government entities, so no issues of safety were raised; and
(vi) the plaintiffs' affidavit does not provide sufficient evidence to support a conclusion as to whether a permanent injunction was likely to be granted at trial.

Discretionary Factors

[64] Ms. Galanos also argued that there were discretionary factors which militated against the grant of the injunction. Namely, that the plaintiffs breached their duty to apply promptly for interlocutory relief and that the plaintiffs (at least those contesting the elections) may have acquiesced in the planning and conduct of the AGM and elections.

Delay

[65] On the point of delay, it is not disputed that the plaintiffs knew from about 16 June 2020 that the elections were to be held on 4 July 2020. However, Mr. Munroe contends that the allegation of delay is robbed of any efficacy, as the plaintiffs could not have known in advance what would have been the status of the Emergency Orders with respect to restrictions on crowd sizes and physical distancing requirements.

[66] It is undoubtedly the case that an applicant for interlocutory relief and especially for *ex parte* relief, should apply promptly, if at all, and Ms. Galanos referred to the leading Caribbean case of **Adanac Industries Ltd. v Black (1962) 5 WIR 233,** containing the observations of Wooding CJ in that regard. In the circumstances of this case, and having regard to the fact that the plaintiffs' main complaint was based on a contingent event—which they could not have known in advance of the promulgation of the new orders—I agree with Mr. Munroe that nothing much can be made of the delay point.

Acquiescence

[67] On the point of acquiescence, I asked Mr. Munroe whether the conduct of Ms. Mortier and her team might not have shown acquiescence in the process for the upcoming election, especially bearing in mind that no complaint or objection was made until the 29 June 2020.

Mr. Munroe rightly pointed out that the defendants do not allege acquiescence in their affidavit. But the modern cases make it clear that the court no longer adopts the formulaic approach to establishing acquiescence and/or estoppel by conduct, and this may be inferred from the evidence. As was said in **Greasly v Cooker** [1980] 1 WLR 1306 (per Lord Denning at p. 1307) on the point of estoppel by conduct, which encompasses the notion of acquiescence:

> **"…estoppel by conduct has been a field of law in which there has been considerable expansion over the years and it appears to me that is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable to that he should be entitled to succeed in the proceeding."**

[68] However, it is not necessary for me to decide the acquiescence point, having come to the conclusion I have on the balance of convenience.

Non-disclosure

[69] It struck me as being of some significance that the plaintiffs never disclosed that the majority of them were candidates in the upcoming elections. In fact, when the Court queried why this matter was not revealed in the plaintiffs' affidavit, Mr. Munroe parried with the contention that the material in the defendants' affidavit, which consisted of several newspaper articles on the first plaintiff and the members of her team, amounted to hearsay evidence. That was not a satisfactory answer. It also does not need to be stated that in any event hearsay can be referred to in an interlocutory application, as long as the sources are identified.

[70] It admits of no argument that an *ex parte* application requires full and frank disclosure of all material facts and legal issues, a point so trite as to hardly require the recitation of any authority (but see **Brink's Mat v Elcombe** [1988] 1 WLR 1350.) Although the duty of full and frank disclosure does not apply at the *inter partes* stage, there is a separate and coincident duty on counsel arising at all times not to mislead the court. As was said in **Brinks Mat** [at para. 37]:

> **"Even more axiomatically, there is a separate duty arising at all times not to mislead the Court and, should the Court have been inadvertently misled, to correct that as soon as possible. These duties are prominent in the Solicitor's Code of Conduct."**

[71] I do not wish for a moment to suggest that there was any intention on the part of the plaintiffs to mislead the court. However, it must have been plainly obvious that the fact that the majority of the plaintiffs were contesting the election which they were attempting to enjoin was a material fact of which the court ought to have been made aware, separate and apart from the duty of disclosure arising on an *ex parte* hearing. The grant of an interlocutory injunction is discretionary, and the plaintiffs' position as candidates in the election raised relevant matters such as acquiescence or possible motives for seeking injunctive relief, all of which may have affected the court's exercise of its discretion.

[72] The omission by the plaintiffs to disclose these facts had no impact on this application. But it must be remarked that there is an obligation on a party and their counsel, whether it arises under the duty of full and frank disclosure on an *ex parte* application or under the broader duty of fidelity to the court, to disclose facts that are material to the court's understanding of the issues and any decision it has to make. The plaintiffs did not do that in this case.

CONCLUSION AND DISPOSITION OF APPLICATION

[73] In all the circumstances of this case and for the reasons given above, I found that the balance of convenience did not favour the grant of the injunction and I therefore dismissed the application for injunctive relief, with costs to the defendants, to be taxed if not agreed.

11 December 2020

Klein, J.